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Bridging the Gap between International Law and Foreign Policymaking

Keywords

International Law: History, Law and Society, Education Law, International Relations

BRIDGING THE GAP BETWEEN INTERNATIONAL LAW AND FOREIGN POLICYMAKING

DANIEL H. JOYNER*

"Lawyer and diplomat. . .are not even attempting to talk to each other, turning away in silent disregard. Yet both purport to be looking at the same world from the vantage point of important disciplines. It seems unfortunate, indeed destructive, that they should not, at the least, hear each other."

The above statement was made by renowned international lawyer and former state department official Louis Henkin in 1979.¹ Professor Henkin was bemoaning what he saw as a significant and disturbing gap in communication between the international legal community and the foreign policy community.² That such a gap did exist and does exist today is an easily discernible fact. One need only read accounts of an international lawyer's and a State Department or Foreign Ministry policymaker's thoughts on any given subject of international affairs to see that the two are not even speaking the same language, let alone following the same analytical process when examining the issues. While one talks of norms, precedent and international order, the other's rhetoric is replete with references to national interest and practical exigencies. While one looks to the codicils of the UN Charter and a seemingly never-ending supply of rules contained in international conventions and the customs of nations for guidance, the other looks to the latest administration position paper.

From the perspective of the State Department/Foreign Ministry policymaker, it is completely natural that this should be the case. Why, after all, should she

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1. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 4 (1979) [hereinafter *HOW NATIONS BEHAVE*].

2. In this paper, the terms "international legal community" and "international lawyers" make reference to those legal scholars and practitioners who are primarily concerned with issues of public, not private, international law, and in particular those in the academic community. The "foreign policy community" or "foreign policymakers" referred to in this paper are those government officials in a variety of agencies within national governments, but particularly within the primary foreign policymaking organ, at a variety of levels whose responsibilities include significant foreign policymaking or policy execution roles.

devote hours to studying legal opinions, when even the international lawyers can't all seem to come up with the same answer to the simple question "is this legal?" And even if they could, she has a lot more to worry about than some abstract principles of pseudo-law that she knows very well can be broken with near impunity – she knows because she's seen it done a thousand times by her government and others. She knows what her job is – to forward the interests of her state client.³

As for the lawyer, he is by now used to being ignored and his ideas scoffed at as being hopelessly idealistic and out of touch with reality. Eventually, he came to accept that his was a discipline which is at the very fringe of consideration by most policymakers, and he is content to theorize and write law review articles about how *opinio juris sive necessitatis* is at the heart of custom. He stopped trying to have meaningful conversations with the people in government years ago. Frankly, he got tired of his ideas being marginalized and being made to feel like an ivory tower utopianist. The best he can hope for is to get his book published and make tenure early.

As Henkin observed, this is a highly inefficient and truly harmful state of affairs, for both parties.⁴ Yet it continues, the officials formulating positions and trying to get a head in the big game, basing their foreign policy assumptions on institutional wisdom and the odd consultation with an outside area specialist; the lawyer writing to and attending conferences with other lawyers; while all the time both communities are looking at the same sets of facts and trying to grapple with the most important issues of state behavior, the relationships of states to each other, and the best ways to promote effective and advantageous interaction between nations.

This is not to say that their perspectives on these and other issues are not quite different. This indeed is at the very core of the communications gap that has always existed between the two communities. However, the process of globalization continues to effect an ever-increasing phenomenon of legalization of international relations, as witnessed by the modern multiplication of international institutions and regimes and high frequency of front-page issues of international politics in which international law and institutions play a significant role.⁵ Nowhere is this more apparent than in the debate on international security issues. This fact leads to the urgent understanding that the international legal community and the foreign policy community have a strong mutual interest in overcoming the gaps in communication and culture which have long separated them.

This brief essay will attempt to identify some of the causes of this lack of communication and cooperation between international lawyers and foreign policymakers and will propose pragmatic means by which this sizeable gap may be

3. Generalizations of attitudes used in this paper, such as those of an average foreign policymaker, can of course be criticized as overly stereotypical and refuted on a case by case basis. However, throughout I have attempted to capture the core sentiments and assumptions of most policymakers and international lawyers respectively as they bear on the issues addressed.

4. HOW NATIONS BEHAVE, *supra* note 2.

5. See *Legalization and World Politics*, 54 INT'L ORG. 385 (2000).

narrowed. It will offer some prescriptions for both communities for improving their accessibility and acceptability to the other, since as with most instances of miscommunication, no one party is solely to blame. The paper will begin by offering a review of some relevant literature in both the fields of international law and international relations, and will assert that the specific gap between the international legal community and the foreign policymaking community has gone largely unaddressed in academic literature in a targeted, systematic fashion.⁶ It will proceed to provide such an analysis, and will conclude with a practical application of the analysis and normative prescriptions based thereon to current issues regarding the Missile Technology Control Regime, a multilateral nonproliferation body.

I. LITERATURE REVIEW

In recent years there has been a wealth of scholarship on the evolving relationship between the academic disciplines of international relations and international law and the substantive role of norms in international politics. Regime theorists such as Abram and Antonia Chayes and Oran Young have written extensively on the relationship between power and rules and procedures in international politics.⁷ Institutionalists such as Robert Keohane have focused on the role of formal and informal institutional arrangements between states and the role of rules within those arrangements in coordinating behavior and shaping the expectation of actors.⁸ English School political science scholars as well have pointed to the inherent connection between the concept of an international community of states and the binding force of international law.⁹ As Hedley Bull has written:

A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.¹⁰

6. There has of course been significant work done on the general issue of the role of international law in foreign policy. See FRANCIS A. BOYLE, *THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY* (1989); THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers, ed. 2000) [hereinafter *THE ROLE OF LAW*].

7. Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATIONAL RESOURCES AND THE ENVIRONMENT* (1989) [hereinafter *INTERNATIONAL COOPERATION*]; Oran R. Young, *International Law and International Relations Theory: Building Bridges*, 86 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 172 (1992).

8. See Robert O. Keohane, *International Institutions: Two Approaches*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 187 (Robert J. Beck, Anthony Clark Arend & Robert D. Vander Lugt, eds., 1996); Robert O. Keohane and Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INTERNATIONAL SECURITY 39 (Summer 1995) [hereinafter *CUSTOM, POWER*].

9. MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 31 (1999).

10. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 13

International lawyers as well have devoted a great deal of energy to harmonizing the work of the two disciplines and forging analytical as well as rhetorical links between them. Leading legal scholars in this field include Anne-Marie Slaughter, Kenneth Abbott and Michael Byers. These scholars, while asserting the normative independence and value of international law, have made great strides in opening up the field to analysis in international relations (IR) theory terms, and in examining the role of international law in world politics.¹¹ As Slaughter has commented:

Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another. . . If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior. . . From the political science side, if law – whether international, transnational or purely domestic – does push the behavior of States toward outcomes other than those predicted by power and the pursuit of national interest, then political scientists must revise their models to take account of legal variables.¹²

There has also in the field of international relations, particularly since the 1993 publication of the book *Bridging the Gap* by Alexander George,¹³ evolved a body of scholarly writing addressing the perceived disconnect between the international relations academic community and the foreign policymaking community.¹⁴ This work proceeds from the realization that the two communities, while nominally focusing their energies on the same sets of facts relative to cross border political interaction, have almost entirely insulated and independent cultures.¹⁵ Several works in this field have attempted to identify the underlying disparities in analytical approach, questions asked and results desired by the two communities, and have fashioned recommendations to both concerning how the widening gap in communication and cooperation might be narrowed.¹⁶

Despite the long history of disciplinary independence of international law and its primary ownership by students of law as opposed to political theory, there seems yet to be a residual impression within some non-legal sectors of the

(1977); See C. A. W. MANNING, *THE NATURE OF INTERNATIONAL SOCIETY* (1962).

11. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361 (1999); CUSTOM, POWER, *supra* note 10; THE ROLE OF LAW, *supra* note 7.

12. See Burley, *supra* note 12.

13. ALEXANDER L. GEORGE, *BRIDGING THE GAP: THEORY AND PRACTICE IN FOREIGN POLICY* (1993).

14. See MIROSLAV NINCIC AND JOSEPH LEPGOLD, *BEYOND THE IVORY TOWER* (2002); *BEING USEFUL: POLICY RELEVANCE AND INTERNATIONAL RELATIONS THEORY* (Nincic & Lepgold eds., 2000) [hereinafter *BEING USEFUL*]; Bruce W. Jentleson, *The Need for Praxis: Bringing Policy Relevance Back In*, 26 INTERNATIONAL SECURITY 169 (2002).

15. See GEORGE, *supra* note 14, at 3.

16. See *BEING USEFUL*, *supra* note 15.

academy that international law as an academic exercise is largely subsumed within, and categorizeable as a sub-discipline under, the overarching subject matter heading of international relations theory. Indeed, international law is thus listed in many political science department registers, highlighting the oft-perceived substantive and procedural softness of international law and the tenuous nature of its existence as a true system of law comparable to domestic legal systems.¹⁷ Thus to develop an analytical treatment of the divergences in form and substance between the academic study of international relations and the practical field of foreign policymaking must to the minds of many within the academy, particularly in secondarily related fields but also to some within the IR community, include scholarship in the field of international law underneath its conceptual umbrella.¹⁸ However, this is a thoroughly misconceived view of the classical relationship between international law and international political theory.

While its intellectual roots stretch back to Thucydides and beyond, international relations theory as a distinct academic discipline is, after all, a relative newcomer to the academic scene, having been developed in the 1930's and 40's by such scholars as Edward Carr and Hans Morgenthau and their followers.¹⁹ International law, by contrast, has been a distinct academic discipline in legal circles since the writings of Grotius in the early seventeenth century and is today a rich and highly developed scholarly field in its own right.²⁰ Largely due to these genealogical facts, the attributes, assumptions, and analytical processes of international legal scholarship are quite different from traditional international relations theory, as witnessed by modern attempts at reconciliation between the two disciplines.²¹ And while the work of George and others in bridging the gap between IR theorists and foreign policymakers is generally useful in many of its points by analogy, in specifics there is yet much to be said concerning the very distinct gap in understanding and communication as between international lawyers and foreign policymakers.

II. THE GAP

This gap can be identified through similar analytical means as those employed by George and his followers, but upon divination it turns out to be in substance quite uniquely constituted. A primary step in isolating the causes of the cooperative disconnect between international lawyers and policymakers is to identify the supply and demand dynamics present.

A. Demand

If we consider policymakers to be the consumers and international lawyers to

17. See BULL, *supra* note 11.

18. See generally CUSTOM, POWER, *supra* note 10, at 21-34.

19. EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS, 1919-1939* (2nd ed. 1946); HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (3rd ed. 1960).

20. See generally CUSTOM, POWER, *supra* note 10, at 3-46.

21. See *id.*

be the providers in this scenario, it is useful to begin by examining what the demand factor is, i.e. what do policymakers need and want. As an introduction to their world, it is preliminarily important to note that foreign policymaking goes on at many levels and by many different officials in government, and not just by the foreign minister or secretary of state and their top aides.²² Often there are relatively few centralized or top-down sources to guide officials in the day to day making and execution of policy between states, and they are left to interact with their counterparts in foreign governments and with private actors with little but their own internally generated resources and individual experience and judgement to guide them.²³ This phenomenon of decentralized interaction at all levels of national government has only increased as the number of regulatory and issue areas with international aspects, from the environment to securities law to human rights, has multiplied.²⁴

Added to this fact is the non-ideal reality that most government officials live in a world in which they are, especially at the policy execution level, constantly devoting large amounts of their time to putting out fires.²⁵ Their responsibilities are often varied and decisions on discrete issues must often be made with precious little time to deliberate on the ramifications of their action or inaction on international norms.²⁶ And while they possess a great deal of information and receive counsel from experts both within and without of government, they see their decisions as being made as a result of judgment and common sense in furtherance of the interests of their state as opposed to theory or norm-based decisions made for greater and more abstract goods, such as to benefit global humanity or the international system in general.²⁷ This is not to assert categorically that such causes may not receive important secondary consideration, but simply that a realistic understanding of the value structure of most foreign policymakers, and most government officials for that matter, must place national interests as unchallenged primary objectives.²⁸ What they need from outside sources, therefore, is topical and specific information and recommendations, communicated briefly and in understandable language, and laid out in logical and convincing fashion based on their underlying goal – making sound decisions that forward the state interest.

Policymakers often additionally hold latent assumptions which have contributed to the existence of the gap between themselves and members of the

22. See ROBERT O. KEOHANE AND JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 25 (1977).

23. *Id.* at 25-26.

24. See Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 177, 177-78 (Michael Byers, ed. 2000).

25. See generally George, *supra* note 14.

26. *Id.*

27. *Id.*; See also Condoleezza Rice, *Promoting the National Interest*, *FOREIGN AFF.*, Jan.-Feb., 2000, at 45, 47, 62.

28. See Rice, *supra* note 28, at 47.

international law community.²⁹ The most widespread and invidious of these are that international law is largely idealistic and impractical, that it is generally ineffectual in carrying out its own prescriptions, and that it should seldom if ever be deferred to when there is a real and pressing issue of national interest, and particularly national security at stake.³⁰ Policymakers therefore need both these assumptions addressed, as well as their substantive information needs met before they will give greater consideration to international legal concerns and make them a more important part of their overall policymaking calculus.

B. Supply

International lawyers, particularly in the academic setting, are in an entirely different business. They primarily traffic in ideas about the rules that do, and should hold the international system of state relations together.³¹ Their work is mainly in discerning what the rules are, their meaning, scope of application and effect.³² The stock in trade among international lawyers in academia is basically the same as among international relations scholars. It is publications in books and scholarly journals, conferences among leading experts, and teaching the next generation of scholars.³³ And like the IR academic community, the culture of the international legal community of scholars is marked by insularity, perpetuated by shared language, educational background and international system-centric perspective.³⁴ However, a number of fundamental distinctions may be made between international lawyers and international relations theorists. Unlike IR theoretical work, the substance of international law - the norms themselves - are meant to be part of the workings of the international system, i.e. they are meant to be used by policymakers.³⁵ Without actual application and recognition by policymakers and policy executors, international law can be said to have even less intrinsic value than analytical IR theory. IR scholars seek to generate theories explaining the actual behavior of states and identifying motivating factors and causal connections between social and administrative variables, an understanding of which has value in and of itself and great potential for policy application in unforeseeable future scenarios of foreign affairs concern even if it is not presently utilized.³⁶ International law, on the other hand, is a collection of normative prescriptions and standards which, if not put to use merely take up room on library shelves.³⁷ Thus at face value there would seem to be ample incentive for international lawyers to bridge whatever cultural and communications gaps exist between themselves and the policymaking community, if for no other reason than

29. See George, *supra* note 14.

30. In support of these assumptions, policymakers can find no short supply of arguments drawn from IR literature, particularly within the classical and neo-realist schools of thought.

31. CUSTOM, POWER, *supra* note 10, at 47-48.

32. See *id.*

33. GEORGE, *supra* note 14, at 4.

34. GEORGE, *supra* note 14.

35. See CUSTOM, POWER, *supra* note 10, at 15; BULL, *supra* note 11, at 141.

36. See CUSTOM, POWER, *supra* note 10, at 21.

37. *Id.* at 21, 48.

to preserve their relevance and value as a discipline. However, international lawyers face obstacles in this regard that IR scholars do not.

As previously noted, IR theory essentially provides analytical frameworks for explaining and in some cases predicting actual phenomena.³⁸ International law by contrast is a system of norms, largely contrived by lawyers, which purport to regulate significant areas of international relations, but which are currently at an evolutionary stage in which they are in large measure not supported by institutions capable of effectively adjudicating and enforcing their prescriptions.³⁹ This recognition of the evolutionary stage of the international legal system, while very valuable for lawyers in understanding the continuing importance of supporting the development of international institutions and norms, does little to persuade foreign policymakers to comply with international law in cases where doing so is seemingly at odds with the short-term interests of their state clients. Government officials in fact often view international law as merely a strategic tool, useful for justifying their actions in harmony with its precepts and for condemning incongruous acts by adversaries, but easily unmentioned when the action of their state lies contrary to its dictates.⁴⁰ And international lawyers, it must be said, have done little to usefully change this perception and the resultant lack of serious consideration of international law by policymakers.⁴¹ This is due in part to many international lawyers' apparent fear that greater engagement and cooperation with policymakers on a substantive level might effect a degree of watering down of the objective theoretical integrity of international law, which has developed largely in seclusion for centuries, and which has been the almost exclusive province of academic thinking and writing by lawyers.⁴² As in other areas of the law, lawyers are generally suspicious of outside influence in the substance and procedures of their profession, which like the other classical professions has as a general rule been allowed to be self-regulatory.⁴³

International lawyers are especially suspicious of the intentions of foreign policymakers, whom they know are largely unconcerned with many of the theoretical underpinnings of international law, such as the maintenance of a logically and theoretically consistent international legal regime founded on norm-based conceptions of principled international interaction, and whose focus is rather on immediate problem-solving and national interest with a general conceptual grounding in realist notions of the influence of power and self-interest in all aspects of international politics.⁴⁴ It is also likely a manifestation of the reluctance of many international lawyers to be viewed as hired guns for any government, including their own, in its designs to show the world its compliance and other nations' non-compliance with international norms, and thereby be robbed of their

38. *Id.*

39. CUSTOM, POWER, *supra* note 10.

40. See HOW NATIONS BEHAVE, *supra* note 2.

41. *Id.* at Introduction.

42. *Id.*

43. *Id.*

44. *Id.*

perceived objectivity and intellectual integrity.⁴⁵

III. BRIDGING

Having established some of the divergences of culture and perspective as between international lawyers and foreign policymakers, it remains to be considered how those divergences may be addressed so as to foster an increased level of cooperation between the two communities. This paper will attempt to accomplish this in two separate sections, containing recommendations specific to each group.

A. International Lawyers

As will be clarified herein, it is upon international lawyers that the heaviest onus of responsibility for bridging the gap with policymakers should fall. This is due to two particular considerations. Firstly, as between the two sides, international lawyers are possessed with the greatest opportunity to take upon themselves this burden.⁴⁶ While the demands of their traditionally valued activities will remain, it will surely be conceded that the capacity exists for international lawyers, particularly those in the academic setting, to re-prioritize those activities and to place increased cooperation with government officials nearer the top of the list.⁴⁷ This is decidedly more true for international lawyers than it is for policymakers.

Which brings us to the second consideration. It is proposed that the motivation for bridging the lawyer/policymaker gap also should rest most particularly in the court of the international lawyer.⁴⁸ This is caused by two distinct factors. First, as previously stated, the very continuing existence of the discipline of international law depends on its use and consideration by foreign policymakers.⁴⁹ Without that relevance, international legal scholarship will become increasingly moot and will very possibly decline in importance and, eventually, find little place in the world of academia.

Second, under a correct conceptualization of their business, international lawyers should be motivated to place greater emphasis on increased engagement with government officials in order to bring about their core interests.⁵⁰ The heart of what proponents of international law have always wanted, and the foundation upon which the concept of international law is based, is that a rule of law and not of power should obtain in international politics.⁵¹ This is the theoretical underpinning of the entire exercise of international normative thinking.⁵² It is

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. See Jentleson, *supra* note 15.

51. See HOW NATIONS BEHAVE, *supra* note 2, at introduction.

52. *Id.*

clear, however, that the traditional scholarly and detached activities of international lawyers will be insufficient to bring this change about, if it is to be brought about at all. To in fact achieve such change, the proponents of an international rule of law must work within the existing power structures of national governments to a degree as yet unrealized, and make their wealth of wisdom and experience in normative construction and institutionalization accessible to and usable by those in power, who are in the end the only ones who can actually bring about fundamental change to the existing international order. Policymakers have to want to be a part of the international law system or it will fail.

How then is this to be accomplished by the international law community? Through an emphasis on education and through increased and more effective communication, international lawyers must make a concerted effort to address the concerns and needs of policymakers as outlined herein. Firstly, there must be an organized initiative with the goal of educating policymakers on the origins and salient characteristics of the international legal system and international law in general. There is a palpable lack of understanding of international law among foreign policymakers, particularly in the United States but also among government officials generally.⁵³ This ignorance breeds confusion and misunderstanding of the nature and application of international law, which too often leads simply to dismissal of the importance and relevance of norms in foreign policy decision-making. A proper education in international law must include both theoretical and practical perspectives on the current evolutionary state of the international legal system and on principles of state compliance with international norms.⁵⁴

This is perhaps the most difficult task facing international lawyers, as a better education for the policymaking community is easy enough to point out as a desirable end, but decidedly more difficult to actually achieve. However, in recent years, there have been great strides in educational programs for judicial officers in the foundational elements of international law through such means as the American Society of International Law (ASIL) Judicial Outreach service and others, through which judges from around the world are given a crash course in international law specifically as it bears upon cases most often heard in their courts.⁵⁵ Such programs are constructed to accommodate the busy lives of government officials, and are extremely useful for establishing an elementary understanding of the existence and proper application of international law norms in specific areas of concern.⁵⁶ Such courses in the foreign policy context could easily be designed and administered by Universities and other interested non-governmental organizations like the ASIL and would constitute a very useful step toward addressing the pervasively held assumptions of the policymaking

53. *Id.*

54. See the excellent treatment of various forms of normative regulation and their relevance to specific issue-area governance in Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

55. The American Society of International Law, *2001 Annual Report: Building for the Future* 2-3 (2001), available at <http://www.asil.org/annual.pdf> (last visited Feb. 12, 2003).

56. The American Society of International Law, *Newsletter*: October/December 2002, available at <http://www.asil.org/newsletter/news.pdf> (last visited Feb. 12, 2003).

community relevant to international law, which form a formidable obstacle to their more substantive and beneficial engagement with international lawyers.

Second, international lawyers must take to heart the recommendations of several writers in the international relations disciplinary context who have observed that communication with government officials is not effectively achieved through the writing of academic journal articles.⁵⁷ In the international law context this is no less true. And while it is certainly not proposed that all writing efforts be devoted to the task of bridging the international law/policymaking gap, much could be accomplished through the publication by eminent international law experts of articles in excellent foreign policy periodicals such as *Foreign Affairs*, as well as in more mainstream news media outlets. Even if these publications are little more than boiled down summaries of more expanded arguments made in leading legal journals, in view of the readership constituency of these publications, such efforts will be much more likely to reach the desks of foreign policy makers, partially due to the brevity and clearness of language which those formats demand.

This is not of course to say that direct communication between international lawyers and foreign policymakers should not be attempted. Indeed, this is surely the most effective means of increasing cooperation between the two communities to the extent it can be effectuated. Volunteering to draft brief memoranda on specific issues, and making oneself available for consultation on demand, are efforts by international lawyers sure to be appreciated by officials who often seek to supplement their in-house research and institutional wisdom with outside advice.

When such advice is given, or memoranda drafted, and even in articles targeted to reach the eyes of policymakers, close attention should be paid to the use of vocabulary and identification of motivating dynamics which government officials will both understand and value. This prescription does not merely refer to the use of "legalese" in lawyer-official communications. Rather, it refers additionally to the types of arguments made to motivate action or inaction on the part of the policymakers when persuasive arguments are warranted (recognizing that in many instances such arguments will not be appropriate, and that the product sought by officials will simply be a run down of relevant norms, cost and benefit analysis). International lawyers must take to heart the identification of foreign policymakers' interests as described herein. Thus an argument based on "the best interests of the international community" or "the normative soundness of the international legal regime" is likely to hold much less sway in the mind of a government official than arguments which may well be in support of action or inaction for the good of humanity, but which may also legitimately be based on important perceived national interests, including reputational and strategic interests, which it is the job of the international lawyer to point out can be seriously

57. See JOSEPH LEPGOLD & MIROSLAV NINCIC, BEYOND THE IVORY TOWER: INTERNATIONAL RELATIONS THEORY AND THE ISSUE OF RELEVANCE 2-3 (2001); Arthur A. Stein, *Counselors, Kings, and International Relations: From Revelation to Reason, and Still No Policy-Relevant Theory*, in BEING USEFUL: POLICY RELEVANCE AND INTERNATIONAL RELATIONS THEORY 51 (Miroslav Nincic & Joseph Lepgold eds., 2000); Jentleson, *supra* note 15.

affected by breaches of international norms. In short, lawyers must do a better job of "writing to their audience" than they have done in the past.

There will of course be situations in which casting international legal compliance in national interest terms will be more difficult than in others. In such circumstances some attempt can be made to equate national interests with international interests, and these arguments will likely be persuasive to a good many in foreign policymaking circles, particularly as the process of globalization and international institutional enmeshment makes the interdependency of nations in an array of issue areas increasingly manifest.⁵⁸ However, in extreme cases of the divergence of international and national immediate benefit, the lawyer faces an advisory dilemma which his or her personal ideologies must dictate, but in which there should be awareness of the fact that as one's advice generally is given greater credence through the recognized presence of both substantive knowledge and realistic understanding of national policymaking exigencies, so one's advocacy of systemic and overarching international long-term interests at the expense of short-term national interests will be heard with an increasingly friendly ear by government officials.⁵⁹

These efforts by lawyers at the procedural level are very likely to significantly narrow the gap between international lawyers and policymakers. However, it is this paper's assertion that at the substantive norm creation and maintenance level as well, efforts may be made to increase international law's acceptability, and thereby usefulness, to rational-minded policymakers. There has, in recent decades, been a movement within some circles to introduce elements of expanded constitutionalism into the international legal system to a degree never before attempted.⁶⁰ This movement aims to make of the international legal and institutional system a regime which in both breadth and depth of regulatory coverage, particularly into relationships traditionally considered to be within the exclusive cognizance of domestic law, is unprecedented, and wholly revolutionary in the history of international normative thinking.⁶¹ This change is most poignant in the modern development of the areas of international human rights law and international criminal law, which seek not only to govern relations between states in their capacity as world citizens, but also the relationships between states and their citizens and of individuals to each other.⁶² And while this extension of international legal coverage is satisfying to many on grounds of protecting universal human dignity, it pushes the limits of international law's inherent

58. Woodrow Wilson said in 1916, "We are participants, whether we would or not, in the life of the world. The interests of all nations are our own also. We are partners with the rest. What affects mankind is inevitably our affair as well as the affair of the nations of Europe and of Asia." *THE POLITICS OF WOODROW WILSON: SELECTIONS FROM HIS SPEECHES AND WRITINGS* 258 (August Heckscher ed., 1956).

59. See *HOW NATIONS BEHAVE*, *supra* note 2 at introduction.

60. See Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31 (1995/1996) [hereinafter *Human Rights*]; *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* (Gene M. Lyons & Michael Mastanduno eds., 1995).

61. See *Human Rights*, *supra* note 61, at 34.

62. *Id.* at 39.

limitations in institutional competence and enforcement difficulties, and thereby its overall credibility. It has additionally constituted an increasing source of discomfort to many in government circles due to the potential implications for principles of national sovereignty which such developments bear.⁶³

This paper therefore takes the currently unpopular but theoretically compelling position that international lawyers should reexamine the fundamental aims of international law and should strive through their influence to limit its substantive coverage to those areas of international interaction most suited for its regulatory purview. In doing so, they will not only preserve the theoretical integrity of the enterprise of international law, but will make its precepts eminently more palatable to foreign policymakers, who will be impressed more by logic and practical necessity of substantive lawmaking than by idealistic and unnecessary extensions of international law's coverage into areas of international and domestic interaction perceived as traditionally and importantly the province of national governments.⁶⁴

B. Foreign Policymakers

For their part, foreign policymakers must try to overcome the conceptual barriers into which they and their predecessors seem to have boxed themselves by their underlying assumptions of structural realism, power politics and the supremacy of self-centered national interest.⁶⁵ These indeed are partially valid and practical foundational understandings, but can be taken altogether too far to the exclusion of other valid conceptualizations of the international system of state interaction. Indeed, within the field of international relations theory, significant challenges to a strict realist understanding of world politics have been mounted in recent decades, notably in this context by the branches of liberal institutionalism and constructivism. These theoretical advancements should encourage a

63. See John R. Bolton, *The United States and the International Criminal Court: The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROB. 167, 169 (2001).

64. For more on this matter of the substantive content of international law see J. SHAND WATSON, THEORY & REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 203 (1999); Curtis A. Bradley and Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 369 (1997); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396 (1998); Daniel H. Joyner, *International Human Rights Law: A System Perspective*, FORTHCOMING.

65. See Alexander Wendt, *Anarchy is What States Make of It: the Social Construction of Power Politics*, 46 INT'L ORG. 391, 410 (1992) ("By denying or bracketing states' collective authorship of their identities and interests. . . the realist-rationalist alliance denies of brackets the fact that competitive power politics help create the very 'problem of order' they are supposed to solve – that realism is a self-fulfilling prophecy.") [hereinafter *Anarchy*]. There is growing literature within international relations theory challenging rationalism as the conclusive explanatory paradigm of individual and collective decisionmaking, particularly among behavioral decision theorists, constructivists, and prospect theorists. See Stephen Walt, *Rigor or Rigor Mortis?*, 23 INTERNATIONAL SECURITY 4 (1999); Herbert Simon, *Human Nature in Politics: The Dialogue of Psychology with Political Science*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY (Hogarth & Redereds 1986); Daniel Kahneman and Amos Tversky, *The Psychology of Preferences*, 246 SCI. AM. 1 (1982).

reconceptualization of foreign policy priorities and the value structures and policy calculations of policymakers.⁶⁶ Institutionalism has in very persuasive terms called attention to the role of formal and informal regimes, which have been multiplying exponentially in recent decades and increasing both in scope and in depth, in reducing the effects of multipolar anarchy at the heart of realist thought, by promoting cooperation, information transfer, and trust among member states.⁶⁷ Constructivism, one of the most influential theories of the past decade, has focused on the changing nature of the identities and interests of states, and has assaulted the traditional realist dogma that both of these attributes are static and the cause of an inherently conflictual international structure.⁶⁸ Rather, say constructivists, the state of international anarchy is "what states make of it," pliable to the formative acts and intentions of states.⁶⁹ Institutionalism and constructivism, among other modern explanatory theories, illuminate the additional roles of community perception, international norms and institutional cooperation in affecting state behavior. This understanding lends legitimacy to the proposition that international law is a viable motivating and regulating dynamic in the international community of states, and should therefore be taken seriously as an integral element in foreign policy considerations.

It is undeniable that in the modern era and going forward international norms and institutions have and will increasingly have an important role to play in international politics. And although a thorough treatment of the causes and dynamics of this phenomenon is not possible in the context of this essay, it will suffice to recognize that in a majority of nations, governments give deference to international legal prescriptions and do not lightly breach them.⁷⁰ As the process of globalization continues, so by necessity will the process of legalization of international relations, as countries increasingly look to rules to order their relations in areas such as trade, environmental protection, collective security, maritime movement and space rights.⁷¹ Enmeshment in international regimes and world engagement will make understanding and working with international law norms of increasing importance to foreign policymakers.⁷² This should provide the

66. See, e.g., INTERNATIONAL COOPERATION, *supra* note 8; Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385 (1994) [hereinafter *Collective Identity*].

67. See ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY I (1989); INTERNATIONAL COOPERATION, *supra* note 8; M.A. Levy et al. *The Study of International Regimes*, EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 1/3:267-330 (1995).

68. *Collective Identity*, *supra* note 67, at 384.

69. See *Anarchy*, *supra* note 66; Wendt, *supra* note 68, at 388.

70. As Louis Henkin famously commented "Violations of law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*" HOW NATIONS BEHAVE, *supra* note 2.

71. See the excellent special issue entitled *Legalization and World Politics*, 54 INT'L ORG. 3 (2000).

72. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS I (1995); ROBERT O. KEOHANE, AFTER

necessary motivation for policymakers to step out of their conceptual limitations and seek to foster real and meaningful cooperative links with international lawyers, who as outlined above have complimentary motivations, and who should be happy to meet policymakers halfway in attempts at broader and more effective communication between the two communities.

The term "halfway" is used purposefully here, because of the impression held by many in the international law community that policymakers have not made satisfactory efforts to engage international lawyers, despite the foregoing list of perhaps as yet unperceived motivations, and that they are in a sense waiting for the international lawyers to present a finished product of normative structures which they can both accept and understand *in toto* before giving international norms greater consideration in policy formation.⁷³ In so doing, of course, policymakers are not sufficiently mindful of their own necessary role, through communication and cooperation with international lawyers in the formative process of international norms itself, in creating just such a product. It is, after all, states that make international law and not international lawyers.⁷⁴

Policymakers should therefore be open to education programs in international law as discussed above, and should actively seek advice from international lawyers both inside and outside of government on specific issues facing them in policy formation and execution. They should make a point to educate themselves through reading the short and hopefully issue-specific articles recommended above to be written by international lawyers in publications already widely circulated among policy officials. These are reasonable steps which can easily be harmonized with the many demands on policymakers, and which are indeed incumbent upon them as a means of better preparing themselves to fulfill the duties of their position and most effectively serve their nations' interests.

IV. CASE STUDY: THE MTCR

Since hortatory exercises such as the above are always clarified by concrete example, this paper will proceed to consider a case study involving a discrete issue area in international politics in order to show how the foregoing prescriptions may be put to use in the real world.

The Missile Technology Control Regime (MTCR) is an informal, non-treaty political arrangement, currently consisting of 33 state members and founded in 1987 for the purpose of controlling the proliferation of rocket and unmanned air vehicle systems capable of delivering weapons of mass destruction (WMD) and their associated materials and technology.⁷⁵ It is one of a number of informal

HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

73. See HOW NATIONS BEHAVE, *supra* note 2, at introduction.

74. While traditionally the writings of eminent legal scholars were considered to have weight in the creation of international norms, the use of this pseudo-source of law in the judgments of the International Court of Justice has declined markedly in recent decades. *Id.*

75. See generally Aaron Karp, *The Spread of Ballistic Missiles and the Transformation of Global Security*, 7 THE NONPROLIFERATION REVIEW 106, 116 (2000); Kenneth Weiss, *The Limits of Missile*

multilateral regimes in the WMD proliferation area, but is distinct in that unlike other multilateral nonproliferation regimes the MTCR is not closely associated with a multilateral treaty regulating development of subject technologies and materials.⁷⁶ It is rather a *sui generis* nonproliferation supply-side regime, comprised of the owner/supplier states of missile-related technologies.⁷⁷ Due to this fact, it has been likened to a cartel of supplier states, determined to keep missile technologies within their circle of knowledge and possession, thus creating a continual and enforced haves and have-nots reality.⁷⁸ There has been growing consensus, however, that the supply-side approach to regulating WMD proliferation in this area, which the MTCR represents, has been largely ineffective in curbing the proliferation of missile technologies. This perception became acute in the 1990's as four non-regime states, the DPRK, Iran, Pakistan, and India were in active pursuit of long-range ballistic missile capabilities and with the contemporaneous emergence of a willing supplier's group consisting of Russia, China and the DPRK, all of which were either wholly outside the MTCR's framework or had been sanctioned by MTCR members for failing to control exports of sensitive missile technologies.⁷⁹

As one commentator has noted, the single most invidious problem the MTCR faced was its inability to establish norms applicable to its subject matter.⁸⁰ As previously stated the MTCR is a voluntary organization of states, devoid of institutional rulemaking or adjudicatory powers.⁸¹ And while the state delegates to MTCR plenaries do by consent agree on "guidelines" for export control and other nonproliferation efforts, compliance with these guidelines is, again, purely voluntary with only reputational cost to deter non-compliance.⁸² In this way the MTCR is little different from other multilateral nonproliferation regimes such as

Diplomacy: Missile Proliferation, Diplomacy, and Defense, WORLD AFFAIRS, Vol. 163, Issue 3 (2001).

76. Such as the Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, 32 I.L.M. 800. See David S. Gualtieri, *The System of Non-proliferation Export Controls*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 467, 477-78 (Dinah Shelton ed., 2000); Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755, 820 (1994).

77. Mark Smith, *On Thin Ice: First Steps for the Ballistic Missile Code of Conduct*, ARMS CONTROL TODAY (July/August 2002), available at http://www.armscontrol.org/act/2002_07-08/smithjul_aug02.asp (last visited Feb. 5, 2003) [hereinafter *On Thin Ice*].

78. Mark Smith, *Rules for the Road? The International Code of Conduct Against Ballistic Missile Proliferation*, DISARMAMENT DIPLOMACY Issue No. 63 (March - April 2002), available at <http://www.acronym.org.uk/dd/dd63/63op3.htm> (last visited Feb. 5, 2003) [hereinafter *Rules for the Road*].

79. See Richard Speier, *How Effective is the Missile Technology Control Regime?* NONPROLIFERATION BRIEF 4 (7), Carnegie Endowment for International Peace (2001); Dinshaw Mistry, *Ballistic Missile Proliferation and the MTCR: A Ten-Year Review*, CONTEMPORARY SECURITY POLICY, Issue 18, Vol. 3 (1998).

80. *Rules for the Road*, *supra* note 80.

81. Barry Kellman, *supra* note 78, at 822.

82. See Anastasia A. Angelova, *Compelling Compliance with International Regimes: China and the Missile Technology Control Regime*, 38 COLUM. J. TRANSNAT'L L. 419 (1999).

the Wassenaar Arrangement⁸³ and the Nuclear Supplier's Group,⁸⁴ but as previously noted the subject technologies these regimes seek to control are addressed in binding multilateral treaties, which are legally enforceable against non-compliant states.

With this disparity in mind, in the late 1990's MTCR member countries began to consider ways to introduce norms into the area of missile technology proliferation, and began to develop the idea of a code of conduct to supplement, or under some interpretations replace, the role of the MTCR in the area.⁸⁵ At the 15th plenary meeting of MTCR member states in October 2000, a draft International Code of Conduct (ICoC) generating demand-side norms was circulated and discussed, and in November of 2002, 92 countries agreed to adopt the ICoC at a meeting at The Hague.⁸⁶ The adopted version of the ICoC contains a recitation of agreed-upon principles, commitments, incentives for compliance, and confidence building measures.⁸⁷ And while the commitments are carefully worded so as to avoid the attachment of legal obligation to their terms, they do include commitments by signatory states to ratify a number of international treaties on space exploration, to undertake measures to prevent the proliferation of WMD-capable missiles, to reduce national holdings of the same, to exercise vigilance in the consideration of assistance to space launch vehicle programs in other countries (a notorious front for military-use missile and WMD delivery system programs), and not to support ballistic missile programs in countries which "might be developing or acquiring weapons of mass destruction in a way incompatible with the norms established by the disarmament and non-proliferation treaties."⁸⁸ The ICoC seeks to ground the missile proliferation regime in universally applicable commitments and principles and thus to introduce markedly increased levels of normative foundation to the regime.⁸⁹

However, the ICoC has met with a mixed reaction from important states both within and without of the MTCR. Criticisms have ranged from fears of inadvertent legitimization of some missile programs due to the minimalist approach of the ICoC, to some rankling of nationalistic feathers and the expression of concern that attempts through the ICoC to regulate missile programs, many of which are being conducted for ostensibly civilian space-development purposes, impinge upon national prerogatives in important and wholly legitimate areas of technological

83. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, adopted July 11-12, 1996, available at <http://www.wassenaar.org/docs/IE96.html> (last visited Feb. 8, 2003).

84. See Gualtieri, *supra* note 78, at 473.

85. *On Thin Ice*, *supra* note 79.

86. *Preventing Missile Proliferation*, DISARMAMENT DIPLOMACY (May 2001), at <http://www.acronym.org.uk/dd/dd57/57note.htm> (last visited Feb 5, 2003); *MTCR Plenary Meeting*, DISARMAMENT DIPLOMACY (October-November 2002), at <http://www.acronym.org.uk/dd/dd67/67nr10.htm> (last visited Feb 12, 2003).

87. *Rules for the Road*, *supra* note 80.

88. See *Preventing Missile Proliferation*, *supra* note 88.

89. *On Thin Ice*, *supra* note 79.

innovation.⁹⁰

It is not the purpose of the current examination to vet the various significant policy considerations surrounding adoption of the ICoC. However, when viewed on a regime-institutional level, the case of the MTCR does present fertile ground for analysis of possible cooperative interactions between international lawyers and foreign policymakers within the issue area.

To an international lawyer, the current state of the area of missile and WMD proliferation represents an issue area perfectly suited for international regulation by means of soft, as opposed to hard, international law.⁹¹ Some elaboration on the meaning and use of these terms is due. International law classically recognized two sources of binding normative development. The first is treaties, which are written agreements between two or more parties, the obligations of which apply solely to those executing the treaty.⁹² Treaties are binding upon signatories and subject to adjudication in international judicial fora.⁹³ The second is customary international law, which develops through the acts of states accompanied with sufficient *opinio juris*, or expressed sense of legal obligation, of state officials.⁹⁴ Custom may form parallel to or wholly independent from treaties and may bind not only those who participate in its creation, but potentially also other states who do not successfully obtain persistent objector status while the customary norm is in creation.⁹⁵ While not without theoretical and practical weaknesses as a true system of law, these two sources have traditionally been held to produce binding obligations, or "hard" international law, enforceable to the extent any international norm is enforceable upon subject state parties.⁹⁶

The concept of "soft" international law, by contrast, is relatively new. It is a scholarly movement to attempt to recognize the value of some written instruments as having many of the characteristics of international law, and thus contributing to normative development, while remaining non-binding in a strictly legal sense.⁹⁷ Speaking of the proponents of this movement, one commentator has written:

they stress that these instruments fulfill at least some, if not a great number, of the criteria required for rules to be considered rules of international law and cannot therefore be simply put aside as non-law. In other words, they acknowledge that there exists a considerable 'grey area' of 'soft-law' between the white space of law and the black territory of non-law. Simultaneously, they make the salient point that the 'grey area' may greatly affect the white one and explain, sometimes

90. *Id.*

91. See HOW NATIONS BEHAVE, *supra* note 2, at introduction.

92. AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW [Hereinafter AKEHURST'S] (7th ed., Peter Malanczuk ed., 1997). See also Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, also available at <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Feb. 12, 2003).

93. See AKEHURST'S, *supra* note 94.

94. See UN CHARTER, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38 (listing the sources of international law).

95. See AKEHURST'S, *supra* note 94.

96. See generally AKEHURST'S, *supra* note 94, at Chapter 3.

97. G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW (1983).

in considerable detail, in what ways 'soft law' can have legal effects.⁹⁸

A number of scholarly treatments have been done on the sources and uses of soft law in the modern international legal and political system. One of the best of these is by Kenneth Abbot and Duncan Snidal, entitled "Hard and Soft Law in International Governance," which appeared in the summer of 2000 in *International Organization*. Abbot and Snidal develop therein a methodology for determining issue areas best regulated by soft and hard international law respectively.⁹⁹ They conclude that hard law is best utilized in areas of international interaction in which the value placed on making credible commitments is high, reduction of long-term transactions costs from continual re-negotiation is important, political strategies may be supplemented by adjudicative or otherwise legalistic international regimes, and where delegation of authority to international fora is an attractive means for remedying inherent problems of incomplete contracting.¹⁰⁰ They conclude that soft law, by contrast, is most attractive in issue areas in which a premium is placed on low initial contracting costs, where the use of hard law would present unacceptable sovereignty costs (which are highest when proposed international legalization purports to regulate the relationships between a state and its citizens or touches upon important issues of national security), and where the novelty and complexity of the issue area create a high degree of uncertainty and possibility for positional change which make hard law enshrinement of norms unattractive.¹⁰¹ Abbott and Snidal also recognize soft law as being an efficient means of compromise between antagonistic positions between states, particularly in the early stages of normative consideration of the subject area.¹⁰²

The distinction of hard and soft law and the recognition of soft law instruments has met with disapproval by some in the international legal community, however. As expressed by Sztucki:

Primo, the term is inadequate and misleading. There are no two levels or "species" of law – something is law or is not law. *Secundo*, the concept is counterproductive or even dangerous. On the one hand, it creates illusory expectations of (perhaps even insistence on) compliance with what no one is obliged to comply; and on the other hand, it exposes binding legal norms for risks of neglect, and international law as a whole for risks of erosion, by blurring the threshold between what is legally binding and what is not.¹⁰³

However, as D.J. Harris has responded:

While it may be paradoxical and confusing to call something "law" when it is *not*

98. *Id.* at 187-8; See generally COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000).

99. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

100. *Id.* at 428-9.

101. *Id.* at 434.

102. *Id.* at 444.

103. Jerzy Sztucki, in *Festkrift Hjermer* 550-551 (1990).

law, the concept is nonetheless useful to describe instruments that clearly have an impact on international relations and that may later harden into custom or become the basis of a treaty.¹⁰⁴

If an international lawyer were to maintain Harris' position, therefore, and view the proliferation of missile and related technologies area as an almost paradigmatically well suited issue area for soft law coverage, based on the Abbot and Snidal methodology, he or she might conclude that the evolution of the normative structure in this area would be well served by the primitive use of soft law mechanisms, and that in so doing the states involved would contribute not only to the normative progression and coherence of the subject area, but would also make a significant contribution to the theoretical understanding of the use of soft law mechanisms in international relations, which is a cutting edge and highly intriguing area for study and further publication.

However, despite the appeal of this form of analysis and these policy recommendations to an international legal scholar, little if anything contained in the foregoing analysis of hard and soft law would appeal to a foreign policymaker, or tempt such an official to invest much time in considering them. Again, such policy professionals are chiefly concerned with effectiveness of policy in achieving the goals which are in the best interest of their states, and they have very little time to devote to or interest in considering the possible large-picture effects of their policy on international legal system development or on the processes and theories of international law. Thus an examination by an international lawyer along the above lines will be of little assistance to them and will likely be ignored. But it is crucial to point out once again that in being irrelevant to policymakers, such analyses, although profitable in their element as progressions in theoretical understanding of international law, fail the ultimate aims of most international lawyers – to have norms and a rule of law govern international relations and not a rule of power and self-interest.

Drawing from the lessons learned from the examinations of supply and demand previously noted therefore, a more useful paradigm for international lawyer/policymaker cooperation in this area, and by analogy in others, can be sketched out. Instead of long-winded examination and in this context useless theorizing, in the case of the MTCR as in other cases international lawyers could be most helpful to policymakers by focusing on the particular facts of the issue area and the problems at hand, and attempt to communicate briefly and effectively the international legal issues involved and specific policy-relevant recommendations.

In the MTCR case, such an analysis might proceed as follows. First to the underlying threat. There is a clear link between effective methods of nonproliferation of missile systems capable of delivering weapons of mass destruction and their resultant non-use by dangerous regimes and the national security of virtually every state in the world. It is further clear that the missile

104. D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 65 (5th ed. 1998).

technology proliferation regime as it currently exists is lacking in normative foundation. The first question therefore is whether or not greater normativization in this area is desirable. Effective analysis in this regard could look to analogous issue areas, such as the other weapons nonproliferation regimes to view the effect greater normativization has had on the underlying threat. It could be briefly and clearly shown that nonproliferation regimes in these areas, when closely associated with binding international agreements, have aided in decreasing the threat of proliferation and use of weapons of mass destruction by formalizing underlying normative principles and making them openly recognized as obligatory, thus increasingly drastically the reputational costs of openly flouting the norms.¹⁰⁵ However, in the missile technology area, the exact technologies involved create a situation that includes not only threats of sovereignty impingement, but also significant and uniquely difficult issues for normative coverage, principally due to the dual-use nature of many such technologies. As mentioned previously, missiles, unlike nuclear weapons themselves, have many legitimate civilian uses quite apart from their military uses, many of which are themselves considered legitimate.¹⁰⁶ These include, most importantly, use in peaceful space exploration and development.¹⁰⁷ To add to the difficulty, there is virtually no means available to distinguish between a civilian space missile program and a military missile program up until the very late stages of its development. Thus normative progression in this area has been stalled over difficulties in addressing the specific technologies involved.

However, effective international legal analysis can be offered by going outside of the weapons proliferation regime area and examining cases of normative development in other areas in which the substantive issue area has been especially sensitive and complex. One such illustrative example is the area of international trade. Trade between nations has historically been among the most sensitive of areas to regulate because of the potential far-reaching effect of such regulation on perceived domestic prerogatives and the importance of successful international trade to national economies.¹⁰⁸ After the Second World War, the largest economic powers concluded on a relatively loose association to preliminarily cover the area of international trade, established by the General Agreement on Tariffs and Trade (GATT).¹⁰⁹ The GATT was technically a binding international agreements, but it was in actuality quite soft in a number of ways. It was adopted only "provisionally," its commitments were not subject to effective adjudicatory

105. Although this area presents the familiar logical conundrum wherein proving effectiveness practically equates to proving the negative (i.e. effectiveness of regimes is best shown by the non-occurrence of regulated activities), there is a general consensus, which could be supported by data, that multilateral export control regimes have been effective in at least facilitating national export control policies, which are an important and demonstrably effective tool in stopping, or at least slowing, the proliferation of WMD.

106. See *Preventing Missile Proliferation*, *supra* note 88.

107. *Id.*

108. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* (2nd ed. 1998).

109. General Agreement on Tariffs and Trade [Hereinafter GATT] available at <http://www.ciesin.org/TG/PI/TRADE/gatt.html> (last visited Feb. 12, 2003).

institutions, and it contained a relatively lenient withdrawal clause.¹¹⁰ The GATT however served to introduce some normativization to the field of international trade, and in doing so illustrated in a fairly non-threatening way to its signatories the advantages of mutual cooperation based on norms in the area.¹¹¹ The GATT signatories learned this lesson so well, in fact, that in 1995 they collectively agreed to establish a much harder regime in the cross-border trade area, that of the World Trade Organization, which provided a much more binding institutional framework for the GATT with authoritative adjudication of disputes and a number of additional substantive area agreements.¹¹²

There are a great number of examples of variations on this same theme which can be pointed to for illustrative purposes. One such example is Agenda 21, the Forest Principles, adopted at the 1992 Rio Convention on Environment and development, in which the instrument adopted was fairly precise, but not legally binding.¹¹³ Another is the corollary case of the original Vienna Ozone Convention in which states were legally bound, but in imprecise ways.¹¹⁴ Perhaps most analogous in form to the missile technology nonproliferation area is the joint Food and Agriculture Organization-UN Environment Program (FAO-UNEP) regime which was established to institutionally monitor the informed consent of states to international transfers of hazardous chemicals and pesticides.¹¹⁵ The FAO adopted a "code of conduct" to address distribution and use of pesticides in 1985 and the UNEP established "guidelines" for exchange of information regarding internationally traded chemicals in 1987.¹¹⁶ In 1989 the two organizations jointly amended their respective soft law instruments to add a requirement for prior informed consent of states to hazardous chemical and pesticide transfers and established a procedure for handling the verification of such consents.¹¹⁷ The two organizations sponsored extensive consultation with outside experts on the issues and provided technical assistance.¹¹⁸ By the late 1990's the member states of both organizations had authorized formal treaty negotiations and in 1998 a convention was formally adopted which closely followed the FAO-UNEP system.¹¹⁹

110. JACKSON, *supra* note 108, at 40.

111. *Id.* at 41.

112. *See id.*

113. Report of the United Nations Conference on Environment and Development [Hereinafter Forest Principles] A/CONF.151/26 (Vol. III) (1992), *also available at* <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm> (last visited Feb. 10, 2003).

114. Vienna Convention for the Protection of the Ozone Layer entered into force Sept. 22, 1985.

115. *See* United Nations Environment Programme *available at* <http://www.unep.org/themes/chemicals/> (last visited Feb. 12, 2003).

116. Food and Agriculture Organization of the United Nations [Hereinafter FAO], *Guidelines on Efficacy Data for the Registration of Pesticides for Plant Protection* (March 1985); London Guidelines for the Exchange of Information on Chemicals in International Trade [Hereinafter London Guidelines], DB No. 051138 (1987) *available at* <http://www.ilo.org/public/english/protection/safework/cis/legosh/uno/lx051138.htm> (last visited Feb. 12, 2003).

117. London Guidelines for the Exchange of Information on Chemicals in International Trade Amended 1989 (Decision 15/30 of the Governing Council of UNEP, May 25, 1989) *available at* <http://irptc.unep.ch/ethics/english/longuien.htm> (last visited Feb. 12, 2003).

118. *Id.*

119. *See* a narrative and links to these documents *available at* <http://www.pic.int/> (last visited Feb.

These differing structures provide flexibility to meet the needs of the underlying substantive issue area, while providing for some preliminary normativization in the area, which allows states to see the rules in practice and learn from actual application rather than engage solely in negotiated speculation.¹²⁰ These examples show better than detached theory that normativization through soft law means has decided advantages of providing a process for learning and evolution of understanding of the possibilities for normative coverage in a variety of areas, with very many such primitive soft law instruments evolving over time into harder, more binding and formalized instruments and institutions. Thus, there is a sound basis in logic and observed analogous phenomena to conclude that the further normativization of the area of missile technology nonproliferation will be beneficial to states involved in that process, and that soft law means such as an international code of conduct with obligations limited either by imprecision or non-binding character (both in fact being present in the adopted version of the ICoC) can have an important role to play in the normative evolution of the regime.

Such analytical devices as analogy and briefly expressed logical and situationally-specific argument are much more likely than the previous generalized theoretical observations to be appealing to foreign policymakers, and therefore effective in illustrating the advantages of normativization and in influencing policy choice in a discrete area. These therefore should be the analytical modes of choice in communications between international lawyers and foreign policymakers, whether made through solicited briefs, personal consultation or in journal and other publications whose audience is likely to include policymakers.

CONCLUSION

This essay has attempted to ascertain and provide a brief practical examination of the certain separations, both in communication and cooperation, which currently subsist between members of the international law and foreign policymaking communities. Upon divination, this gap can be seen to be pervasively based in ideology, professional culture, value structure and shared suspicion. The prescriptions for change in method and in substance of communication and engagement between international lawyers and foreign policymakers and in their respective underlying professions and cultures provided herein will be novel to some on both sides of the proposed exchange, and will not be actualized without much difficulty and soul searching by all concerned. However, as the gap between the two communities was not created overnight, so its narrowing will not be accomplished without a substantial re-direction of the efforts and mindsets of both groups. It is submitted that through this process, both sides will reap rewards of increased communication and cooperation, which will inevitably inure to the benefit of both communities, the professions of which are of such timely importance to international society in the modern era, and the synergies among which have scarcely begun to be realized.

12, 2003).

120. See HOW NATIONS BEHAVE, *supra* note 2, at introduction.

