

Non-State Actors in the Middle East: A Challenge for Rationalist Legal Theory

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Introduction

For decades, international legal theory made its home in law schools, while international relations (IR) theory made its home in political science departments. The two academic fields address the same subject matter, but until recently they rarely took notice of one another.¹ Both interna-

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1. See, e.g., OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS iii (2005) ("Until recently, international law and international politics have been two disciplines divided by a common subject matter."); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 337 (1989) (noting that with few exceptions, "scholars in these two fields have long proceeded on separate tracks"); *id.* at 337-38 (observing that international legal scholars, until recently, had no interest in dialogue with IR realists); Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 93 (2000). After a 1982 conference, Krasner concluded that international legal scholars were doing something different from what political scientists and economists were doing, although those differences were hard to define. Krasner sug-
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tional legal theory² and IR theory focused on states as the actors relevant to their explanatory models. However, while IR theory was dominated by realism, which assumed states to be unitary, rational actors seeking to achieve self-interested goals,³ international legal theory asserted that states were subject to an external system of laws that exercised a normative pull on states in the conduct of their foreign relations.⁴

Recently, the two disparate traditions have come together to a degree.⁵ International legal theorists have begun to recognize that IR's embrace of regime theory moved that discipline closer to the orbit of international law.⁶ International legal scholars have also come to value the theoretical

gests that the divide between the two disciplines became much wider beginning in 1979 as IR began to develop its neo-realist research agenda. *Id.* at 94-95.

2. The major exception to this generalization regarding international legal theory is the New Haven School. For overviews of the New Haven approach, see, for example, 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* (1992) (introducing the policy-oriented approach of the New Haven school, but predating the use of the term); W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* (1987).

3. Abbott dates the advent of realism to the writings of Thucydides and describes realism as having dominated IR theory for over two thousand years. Abbott, *supra* note 1, at 337 n.12. For classic statements of the realist position, see generally E.H. CARR, *THE TWENTY YEARS' CRISIS, 1919-1939* (2001) (detailing the rise of realist thought in sixteenth-century Europe); HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS* (6th ed. 1985) (describing six principles of realist theory). Leading IR theorists assert that realist orthodoxy remains relevant even though it has been subject to numerous criticisms. See, e.g., Stephen M. Walt, *The Enduring Relevance of the Realist Tradition*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 197, 197* (Ira Katznelson & Helen V. Milner eds., 2002) (stating that "[r]ealist theories are still widely criticized, but the realist tradition has yet to be supplanted . . ."); Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 *INT'L SECURITY* 5 (1999). For the most part, those associated with the neorealist school have succeeded classical realists as the bearers of the banner of realism. See, e.g., *NEOREALISM AND ITS CRITICS 15-16* (Robert O. Keohane ed., 1986); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

4. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 3* (1995) (noting instances where international law has restrained the exercise of national sovereignty); LOUIS HENKIN, *HOW NATIONS BEHAVE 4* (2d ed. 1979) ("[L]aw is a major force in international affairs; nations rely on it, invoke it, observe and are influenced by it in every aspect of their foreign relations."); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY 1-33* (1995). See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (arguing that the perceived legitimacy of international laws compels states to comply with them).

5. See Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 *AM. J. INT'L L.* 47, 48 (2012) (acknowledging prominent collaborations in which political scientists and international legal scholars have shared research methods and insights, but also remarking that "the two fields are still notable for their distance"); see also Krasner, *supra* note 1, at 96-97 (arguing that neo-liberal institutionalist and constructivist trends have brought IR and international legal theory closer together). See generally Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *AM. J. INT'L L.* 367 (1998) (describing the recent overlap between IR theory and international legal scholarship).

6. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *AM. J. INT'L L.* 205, 206 (1993) (noting that international lawyers quickly realized that regime theory was a recasting of international law in IR terms).

insights that IR theory has generated.⁷ Many international legal scholars now draw on a rationalist approach indebted to game theory and share many assumptions with IR realists.⁸

At the same time, IR theorists are incorporating normative theory into their models for explaining the international system⁹ and are increasing their awareness of how international legal institutions function.¹⁰ In addition, liberal IR theory has expanded the focus of its inquiry to include non-state actors.¹¹ IR theorists and international legal theorists alike now recognize and appreciate the importance of non-state actors in shaping international norms and international law.¹² Such “transnational legal theory”

7. See Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869, 870 (2011) (observing that game theory has played a central role in IR theory for decades, but has only recently gained traction in international legal theory); see also Slaughter Burley, *supra* note 6, at 226-38 (building on insights from IR institutionalism to set out a research agenda for a “liberal” international legal theory). See generally Abbott, *supra* note 1, at 342-404 (detailing key theoretical innovations in modern IR theory and describing how insights derived from IR theory might benefit international legal scholarship).

8. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1405 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) (observing that a rationalist, interest-based perspective has largely been absent from international legal scholarship but “has long been dominant in political science”). See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008). Goldsmith and Posner claim that a “major generational change is underway,” as international legal scholars reject the normative approaches associated with the “traditional international law scholarship of their elders.” Jack Goldsmith & Eric A. Posner, Response, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463, 465 (2006). Given that rationalist theory is so similar to traditional international relations realist theory, it is not surprising that political scientists find the arguments of international legal theory rationalists to add little to political science scholarship. *Id.* at 483 n.58.

9. See, e.g., Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19, 20-21 (2000) (observing that constructivism, a theoretical framework emerging in response to the rationalism dominant during the Cold War, focuses on “the role that culture, institutions and norms play in shaping identity and influencing behavior”). Major constructivist works include the following: MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992).

10. Hafner-Burton et al., *supra* note 5, at 49; see ADRIANA SINCLAIR, *INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW I* (2010) (arguing that IR theorists need to understand law because “legalism percolates through every level of our society”).

11. See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 516-17 (1997) (asserting that one of liberal theory’s “core assumptions” is the idea that individuals and private groups are “the fundamental actors in international politics”).

12. For examples of works by legal scholars who no longer focus exclusively or primarily on state action, see generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)). For examples of works by IR theorists who now look beyond state actors to focus on domestic and transnational non-governmental organizations, see generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998); SIDNEY TARROW, *THE NEW TRANSNA-*

problematizes the assumption underlying both realism and neo-realism that states can be treated as rational actors able to identify, and seek to maximize, their interests.¹³

This Article targets rationalism as articulated in the works of Jack Goldsmith and Eric Posner. It focuses on Goldsmith and Posner for two reasons. First, Goldsmith and Posner represent the purest (or most extreme) version of rationalism in that they view international law as entirely the product of states pursuing their own self-interest. Second, although rationalism is a theory, its significance is not purely theoretical. Goldsmith and Posner's scholarship is extremely influential both in the academy and in political spheres. Within the academy, Goldsmith and Posner see themselves as leading a generational revolt against received orthodoxies concerned with the law's normative pull.¹⁴ In the political realm, Jack Goldsmith served as the head of the Office of Legal Counsel during the George W. Bush administration.¹⁵ In that position, he led a team, which included others sympathetic to his take on international law, that helped shape U.S. foreign policy and the administration's approach to issues of compliance with international law.¹⁶

Because this Article focuses on the works of Goldsmith and Posner, it fails to do justice to other forms of rationalist theory that are more complex and more favorably oriented towards the possibility that international law actually can shape the behavior of states.¹⁷ Still, for the purposes of an assessment of rationalism's applicability to the Middle East, Goldsmith and Posner are representative in that rationalist legal theory, in all its diversity, posits states as the relevant actors on the international stage.

This Article uses recent events in the Middle East to highlight the difficulties that the rationalist model faces in properly accounting for the transformations of international law and politics in the contemporary Middle East wrought by numerous, diverse non-state actors. Part I introduces the basic elements of the rationalist model as well as leading criticisms of the

TIONAL ACTIVISM (2005); Andrew Moravcsik, *The New Liberalism*, in THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 234 (Christian Reus-Smit & Duncan Snidal eds., 2008).

13. Proponents of the new rationalist account of international law occasionally note that their model's assumption that states are rational, self-interested actors is not always justified. See GOLDSMITH & POSNER, *supra* note 8, at 4 (Goldsmith and Posner note that their assumptions based on rational choice are all open to question); GUZMAN, *supra* note 8, at 17 (in his book, Guzman assumes that states are "rational, self-interested, and able to identify and pursue their interests"); *id.* at 22 (Guzman starts with a set of assumptions underpinning liberal and constructivist theories rather than a set of observations). They nonetheless proceed with this assumption.

14. See Goldsmith & Posner, *supra* note 8, at 465 (noting a generational change in which young international law scholars reject "the traditional international law scholarship of their elders").

15. See JACK GOLDSMITH, THE TERROR PRESIDENCY 9, 11 (2007) (detailing Goldsmith's experiences as head of the Office of Legal Counsel).

16. *Id.* at 20-21.

17. See Ohlin, *supra* note 7, at 881-91 (illustrating how game theory shows that compliance with international law can be simultaneously motivated by norms and self-interest).

model that are more fully developed in the next two sections. Part II tests rationalist assumptions in the contexts of the Israeli incursion into Gaza and the Libyan revolt against Colonel Ghaddafi's government. In a brief concluding section, the Article explores the usefulness of normative models as descriptive tools for understanding the relevance of international law in the decision-making processes of both state and non-state actors. While the Article concedes that such normative models are imperfect predictors of conduct, such models can usefully supplement rationalist approaches by supplying richer descriptions of the role of international law in shaping the conduct of actors on the international stage.

I. Rationalist International Legal Theory and Its Critics

This Part highlights the three main theoretical assumptions of rationalist theory and then proceeds to outline the problems that arise from those assumptions. The great advantage of the rationalist approach to international law is its parsimony.¹⁸ The rationalist model has very few working parts; it takes into account only a few variables and thus transforms international legal theory from a descriptive into an explanatory and predictive model.¹⁹ As Goldsmith and Posner put it, "international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."²⁰ While critics of rationalism point out the dangers of a predictive model based on assumptions that may not completely reflect the complexities and subtleties of international relations, those same critics acknowledge that their own, more complex models do not so readily generate testable hypotheses and therefore lack predictive force.²¹

A. Components of Rationalist Theory

Rationalist theory treats states and only states as the relevant actors

18. See GUZMAN, *supra* note 8, at 21 (justifying assumptions based on rational choice because, among other things, it presents the most parsimonious theory).

19. See Hathaway & Lavinbuk, *supra* note 8, at 1424 ("For a theory to be useful, it must make particularized predictions about specific events.").

20. GOLDSMITH & POSNER, *supra* note 8, at 3; see also GUZMAN, *supra* note 8, at 17 (assuming for the purposes of the operative theory that states are rational, self-interested actors); Goldsmith & Posner, *supra* note 8, at 463. Note that up to this point, rationalism does not differ from modern IR theory, which also assumes that states are rational, egoistic, unitary actors. Abbott, *supra* note 1, at 349–51.

21. See John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 883 (1998) (arguing that constructivism "lacks rigor and specification . . . [and] remains relatively poor at specifying . . . the contexts within which its explanatory features can be expected to take effect"). But see Robert Hockett, *The Limits of Their World*, 90 MINN. L. REV. 1720, 1738 n.83 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) (contending that, when trying to account for dynamic rather than static state systems, traditional international legal theory is "more parsimonious and intuitively satisfying" than Goldsmith and Posner's rationalism).

for the purpose of understanding international law.²² While rationalists acknowledge that non-state actors play a role in international affairs, they do not consider the role of non-state actors as essential to explaining and predicting the course of international law. Goldsmith and Posner explain that “international law addresses itself to states and, for the most part, not to individuals or other entities,” and so they have little to say about sub-state units, multinational corporations, and transnational NGOs.²³

Rationalists are generally committed to treating states as unitary actors.²⁴ Rationalist theory associates the preferences of states with those of a state’s “leadership,”²⁵ which usually means the leaders of the state’s executive branch of government, since that branch has the dominant role in formulating foreign policy. Rationalist theory thus downplays the importance of competing factions within the executive branch and does not devote much attention to legislative input into international law-making or foreign policy decision-making. Rationalists assume that domestic courts can and should play no role in shaping international legal rules or compliance with such rules.²⁶

Finally, and not surprisingly, rationalism assumes rationality. As Andrew Guzman puts it, “States are assumed to be rational, self-interested, and able to identify and pursue their interests.”²⁷ “Rationality” here means that states are guided by their perceived self-interest and not by legal norms, which rationalists treat as a product of state interests.²⁸ While some versions of rationalism characterize international law as the result of

22. See GOLDSMITH & POSNER, *supra* note 8, at 4-5 (explaining their reasons for “giv[ing] the state the starring role in our drama”); see also GUZMAN, *supra* note 8, at 8-9 (stating that his book endeavors to explain “how international law is able to affect state behavior”).

23. GOLDSMITH & POSNER, *supra* note 8, at 5; see GUZMAN, *supra* note 8 at 21 (describing liberal and constructivist IR theories, which focus on non-state actors, as useful in helping to understand how states’ preferences come into being).

24. GUZMAN, *supra* note 8, at 19 (faulting liberal international legal theory for its complexity and noting that his own book, in order to provide a predictive model, largely “retains the assumption of a unitary state”). IR realists and institutionalists likewise “assume that states are undifferentiated unitary actors.” Hathaway & Lavinbuk, *supra* note 8, at 1432. Hathaway and Lavinbuk consider Anne-Marie Slaughter’s liberal theory to be a form of rationalism that does not subscribe to the theory of the state as unitary actor. *Id.* at 1432-33.

25. GOLDSMITH & POSNER, *supra* note 8, at 6 (identifying a link between state interests and the interests of the state’s leadership); Goldsmith & Posner, *supra* note 8, at 472 (“[W]e generally identify the state interest with the interest (preferences) of its leadership . . .”).

26. This is not true of all forms of rationalism, but it is true of its chief practitioners. See Hathaway & Lavinbuk, *supra* note 8, at 1406-07 (arguing that many of Goldsmith and Posner’s negative views regarding the limits of international law derive not from acknowledged rationalist assumptions but from unacknowledged revisionist tendencies, including the view that the political branches, and not courts, should determine how, and the extent to which, the United States abides by its international obligations).

27. GUZMAN, *supra* note 8, at 17.

28. See GOLDSMITH & POSNER, *supra* note 8, at 13 (observing that international law could not be a check on state self-interest because it is a product of state self-interest).

states acting in their self-interest,²⁹ other versions acknowledge the possibility that international law can affect state preferences and thus can shape states' conceptions of their own self-interest.³⁰

Rationalism conceives itself to have advanced beyond classical realist theory in that, like neo-realism, it abandons the dual realist assumptions that states' core concern is security and that states aim for relative rather than absolute benefits.³¹ These two core assumptions rendered international cooperation difficult to explain in realist terms.³² Rationalism deploys game-theoretic models (mostly cooperation and coordination games) to explain state behavior within the international system.³³ This Article will not take up the game-theoretic aspects of rationalism in any detail. Rather, it calls into question the assumptions that inform the model. Detailed discussion of the flaws of rationalism's use of game theory is superfluous if the game-theoretic models on which rationalism relies draw on faulty assumptions.³⁴

B. The Limits of Rationalist Theory

IR theory has produced an extensive literature evaluating rationalist theory.³⁵ This literature focuses on three aspects of rationalist theory: its assumption that states are sufficiently unified to identify and act on their perceived self-interest; its assumption of rationality and implicit rejection of the notion that legal norms drive compliance with international law; and its focus on states as the only relevant actors in international relations, law,

29. See *id.* at 225 (concluding that states comply with international law not because law is an independent force that influences state behavior but because compliance accords with self-interest); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1266 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) (criticizing Goldsmith and Posner for "deploy[ing] the simplifying assumptions of rational choice theory in an attempt to demonstrate that international law has no independent valence whatsoever").

30. See, e.g., GUZMAN, *supra* note 8, at 211–13 (concluding that international law can affect state behavior because states are concerned that violations of international law may affect their reputations, lead to reciprocal violations, or cause retaliation); Kal Raustiala, *Refining The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423, 434–35 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) (noting that some forms of rationalism recognize the importance of international law and observing that even though "international agreements are the deliberate product of state design . . . [that] does not vitiate the claim that they shape state behavior").

31. Hathaway & Lavinbuk, *supra* note 8, at 1429–30.

32. GUZMAN, *supra* note 8, at 18. *But see* Hathaway & Lavinbuk, *supra* note 8, at 1429–32 (arguing that Goldsmith and Posner's views on whether states seek absolute or relative benefits are unclear).

33. See GOLDSMITH & POSNER, *supra* note 8, at 11–13 (proposing four models of strategic behavior: coincidence of interests, coordination, cooperation, and coercion); GUZMAN, *supra* note 8, at 25–32 (introducing a game-theoretic model for testing the relevance of international law).

34. See Berman, *supra* note 29, at 1272 (finding "nothing particularly 'rigorous' or 'empirical' about using game theory to speculate about how states act").

35. See Slaughter et al., *supra* note 5, at 394–97 (providing a bibliography of publications in IR theory, several of which analyze contemporary realism and related controversies).

and politics. While this Section will briefly summarize the first two sets of criticisms, for the purposes of this Article the critique of rationalist theory's focus on states is the most pertinent.³⁶

1. Critique of the Unified Rational State

Rationalists set out to improve the discipline of international legal scholarship through attention to methodological and empirical standards.³⁷ Rationalism has clear scientific—or at least scientific—ambitions. It aspires to “fram[e] claims as testable hypotheses.”³⁸ In order to do so, it self-consciously simplifies the world of international relations and international law.³⁹ It sweeps aside suggestions that considerations other than self-interest might motivate states; in doing so, rationalism obscures the perhaps more significant challenges of applying theory to the complex processes whereby states identify and pursue their interests in the first place.

a) Focus on Unity

Rationalists renounce all assumptions as to the interests that drive state conduct and acknowledge that “generalization is hazardous.”⁴⁰ Sometimes states are driven by pursuit of security; sometimes by pursuit of prosperity. Rationalist theory cannot tell us when one interest will prevail over another nor if we can even know what interest is driving foreign policy at any given time.⁴¹ As a result, rationalists run into difficulties because they are no better at identifying states' interests than are international legal

36. Rationalism encompasses a wide range of approaches. This Article focuses on the work of Goldsmith and Posner both because it represents a rather pure form of rationalism and because their approach has been widely influential in the academy and in government (the latter influence stemming from Jack Goldsmith's position as director of the Office of Legal Counsel in the Department of Justice under the Bush administration). More flexible rationalist legal scholars have articulated elaborate critiques of Goldsmith and Posner from within the rationalist paradigm. See generally, e.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2003); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2003); Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002).

37. Goldsmith & Posner, *supra* note 8, at 466.

38. *Id.* at 466; see *id.* at 482 (claiming that the new wave of international legal scholarship frames “positive claims . . . as hypotheses that can, in principle, be tested”).

39. See Hockett, *supra* note 21, at 1724 (discussing how all theories must simplify the real world to an extent, but noting the tension between elegance and oversimplification in theoretical models).

40. Goldsmith & Posner, *supra* note 8, at 475.

41. In addition, Goldsmith and Posner speak of both state interest and state power without analyzing how these two supposedly independent variables relate or differ. See Hockett, *supra* note 21, at 1729–30.

scholars who adopt normative theories. Even when rationalists focus on particular case studies, they can offer only “reasonable conjectures” about state interests.⁴²

But their critics observe that Goldsmith and Posner cannot even offer reasonable conjectures if they refuse to engage in the difficult work of identifying the relevant domestic forces that contribute to the processes whereby states identify their preferences.⁴³ Such criticisms can come from the perspective of liberal IR theory, which calls for greater attention to the impact of civil society on state decision-making processes.⁴⁴ They may also come from the perspective of what, in international legal theory, is known as the “managerial model,” which regards the “interpretation, elaboration, application, and . . . enforcement of international rules [as] accomplished through . . . interchange among the interested parties.”⁴⁵ Those interested parties are not unitary states, but executive departments with authority over foreign affairs as well as “bureaucratic or legislative bodies with responsibility for the implementation” of international legal norms.⁴⁶ According to the managerial theory, bureaucracies are often motivated by a commitment to such norms, especially if the people within that bureaucracy, who may be career diplomats or negotiators, had a hand in shaping instruments of international law.⁴⁷ From the perspective of the managerial model, the non-unitary character of the state also creates an opening through which international legal norms can introduce themselves into state decision-making processes.⁴⁸

b) Focus on Rationality

Rationalists generally cite their model’s superior ability to predict state behavior with respect to international law as one of the advantages rationalism holds vis-à-vis other theoretical models.⁴⁹ In practice, however,

42. Goldsmith & Posner, *supra* note 8, at 475. For a rationalist critique of Goldsmith and Posner on this point, see Hathaway & Lavinbuk, *supra* note 8, at 1406 (noting that Goldsmith and Posner cannot explain “which state interests matter, how they are formed, or how we are to discover them”).

43. See Hathaway & Lavinbuk, *supra* note 8, at 1425-26 (faulting Goldsmith and Posner for being unable to predict rates of compliance with international law because their theory does not enable them to identify the relative values that states attach to their interests); Raustiala, *supra* note 30, 436-43 (illustrating ways in which a rationalism that ignores domestic politics cannot explain, for example, why a state would choose to join a binding treaty regime rather than a non-binding soft law regime).

44. See SLAUGHTER, *supra* note 12, at 32 (calling the notion of the unitary state a “useful fiction,” but one that has outlived its usefulness and now “hides as much as it helps”).

45. CHAYES & CHAYES, *supra* note 4, at 118.

46. *Id.* at 274.

47. See *id.* at 4-5 (outlining the factors that motivate state bureaucracies to promote compliance with international obligations).

48. See *id.* at 8-9 (illustrating the ways in which state actors express their sense that they are bound by international obligations).

49. See Hathaway & Lavinbuk, *supra* note 8, at 1424 (“For a theory to be useful, it must make particularized predictions about specific events.”); see also Goldsmith & Posner, *supra* note 8, at 473 (commenting that a comprehensive theory of international law

rationalism has not established itself as a useful predictive tool, in part because the rationalist model often simply assumes, rather than establishes, that states are self-interested, rational actors.⁵⁰ As Kal Raustiala has pointed out, rationalist models cannot explain the extraordinary growth in the number of international agreements since World War II, nor can it account for states' overwhelming compliance with their international obligations.⁵¹

One aspect of the imminent critique of rationalism has been the introduction of insights from behavioral economics to suggest that, to the extent that rationalism relies on models derived from economic theory, it ought to take into account the advances within that field. Behavioral economics illustrates how, because even unitary individuals are limited in their ability to identify their preferences, individuals are unable to maximize self-interest efficiently. For one thing, individuals often have to act based on imperfect information.⁵² Even with perfect information, individuals exhibit an "endowment effect," refusing to give up entitlements they possess even though they would not have paid to acquire the entitlements in the first place.⁵³ In addition, individuals exercise only "bounded rationality, bounded willpower and bounded self-interest."⁵⁴ Rationality is "bounded" because various judgment errors arise due to biases and heuristics.⁵⁵ As Christine Jolls explains, the concept of bounded willpower is familiar to anyone who has foregone the gym for an evening in front of the television or has chosen to skip salad to save room for dessert.⁵⁶ With respect to bounded self-interest, recent research suggests "that many people care about both giving and receiving fair treatment."⁵⁷ As complicated as the picture becomes when behavioral economics is applied to individuals, it is still more complicated when applied to complex entities such as states.

based on domestic politics "would be too complicated . . . to yield general insights or predictions").

50. See Berman, *supra* note 29, at 1271 (crediting Goldsmith and Posner for stating their assumptions but faulting them for providing "only the thinnest of justifications for employing [those assumptions]"); Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 537 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) (criticizing Goldsmith and Posner for relying on assumptions to argue that a rational choice model to international legal theory is appropriate).

51. See Raustiala, *supra* note 30, at 429 (noting that, while rationalist theory would predict that enforcement problems should render states less willing to enter into international agreements, states frequently endeavor to negotiate international instruments and maintain international organizations).

52. See Hathaway & Lavinbuk, *supra* note 8, at 1436 (noting that game theorists have "recognized that incomplete information can undermine the emergence of cooperative equilibria").

53. See Christine Jolls, *Behavioral Law and Economics*, YALE L. SCH. 3 (Apr. 16, 2010), http://www.law.yale.edu/documents/pdf/Faculty/Jolls_BehavioralLawandEconomics.pdf.

54. *Id.* at 6 (emphasis omitted).

55. See *id.* at 7-9 (discussing racial or group-based biases as well as biases associated with optimism, our self-serving natures, and hindsight).

56. *Id.* at 10.

57. *Id.* at 11.

2. Critique of Rationalism's Focus on State Actors

Jordan Paust has forcefully rebutted the rationalist assumption that states are the only relevant actors in international affairs. He details the range of international agreements, as well as international and domestic adjudications, to which non-state entities have been parties.⁵⁸ Paust further notes that customary international law, including customary human rights and humanitarian law, can bind private actors such as corporations.⁵⁹ More generally, Paust invokes the New Haven School in highlighting the role that individuals play in the “formation, reaffirmation, and termination of international law.”⁶⁰ Paust concludes that “it is irrefutable that traditional international law, even through the early twentieth century, recognized roles, rights, and duties of nations, tribes, peoples, belligerents, and other entities and communities in addition to the state”⁶¹

In its quest for parsimony, rationalism can simplify the world of international relations and international law beyond recognition.⁶² Robert Hockett characterizes the dangers of rationalism as leaving us with the following:

[A] world of fetishized, black-boxy Scrooge-states, incomprehensibly seeking in large part to eat one another, calculating and gaming with those and with cognate objectives in view, constrained by no more than the weapons that others possess all while “empt[il]y, happ[il]y” or mendaciously speaking as if the routines and mere memoranda of understanding that emerge from this contest were law.⁶³

Rationalists justify their focus on states on the ground that doing so in no way hinders them from developing testable theses that can help predict conduct in the realm of international affairs.⁶⁴ However, rationalism has yet to make any testable predictions, and its critics maintain that it is incapable of doing so in its present form.⁶⁵ In addition to emphasizing the important role of individuals and groups in shaping international law, institutionalists point out the tendency of international regimes to outlive

58. Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 978-85 (2011).

59. *Id.* at 987.

60. *Id.* at 1001.

61. *Id.* at 994; see also Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445, 447 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) (“NGOs and corporations are now independently consequential actors in the dynamic of international law, as an empirical matter, and so international law models must move to take account of them.”).

62. See Raustiala, *supra* note 30, at 424 (arguing that an unwavering rationalist approach can be “clarifying,” but it also can be simplistic and therefore “fail[] to explain much of the texture of international cooperation”).

63. Hockett, *supra* note 21, at 1722 (quoting GOLDSMITH & POSNER, *supra* note 8, at 180).

64. See David Gray, *Rule-Skepticism, “Strategy,” and the Limits of International Law*, 46 VA. J. INT'L L. 563, 567-69 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

65. See Hathaway & Lavinbuk, *supra* note 8, at 1425 (finding Goldsmith and Posner’s rationalist theory’s predictive power “indeterminate because rationality can be made to explain almost any outcome in the international system”).

their original purposes, suggesting that inertia is a major force in IR that can shape and channel state interests.⁶⁶

With these criticisms in mind, we proceed to a consideration of two recent conflicts in the Middle East with an eye to testing the explanatory force of rationalist theory. In this context, as in most, a rationalist lens can generate some insights about state conduct. In fact, the economic model upon which rationalism relies can be usefully adapted to help explain the conduct of non-state actors as well. However, the complexity of domestic and transnational politics that informs decision-makers in the Middle East limits the utility of rationalist models in either describing or predicting the role of international legal norms in Middle Eastern politics.

II. Two Applications of Rationalist Theory

One might expect that the chief challenge in applying rationalist theory to the Middle East would be the irrationality of the Middle East—the ideological blinders of states like Israel and Iran as well as non-state actors' willingness to resort to random terror attacks. This Part argues to the contrary. Rationalist theory can quite easily accommodate both rogue states (if there are any such entities in the contemporary Middle East) and terror groups, as demonstrated by the relatively rich literature on the self-interested conduct of individual terrorists and terror organizations.⁶⁷ The bigger challenge to rationalist theory in the Middle East is the multiplicity of state and non-state actors that undermines the parsimony that is rationalism's chief theoretical advantage. Nonetheless, this Part endeavors to imagine what a rationalist approach has to offer with respect to the contemporary Middle East.

A. Rationalism and the Libyan Conflict

A rationalist approach to the Libyan conflict has very little difficulty dealing with the Ghaddafi regime. In a dictatorship, the rationalist assumption that states can identify and act to maximize their preferences is more likely to hold. There is little room for doubt that Libya's foreign policy was designed to maximize Ghaddafi's self-interest, and one key element of that self-interest was Ghaddafi's continued control of the Libyan govern-

66. See Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SECURITY 39, 40 (1995) (noting that while realists predicted the demise of NATO and the European Union at the end of the Cold War, institutionalism accurately predicted their survival and evolution).

67. See generally, e.g., WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* (2006) (elaborating a rational choice model of terrorism); Stephen J. Morse, *The Jurisprudence of Craziness*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 225, 256-58 (Francesco Parisi & Vernon L. Smith eds., 2005) (considering the distinction between irrational and rational terrorists); N. Gregory Mankiw, *Macroeconomics in Disarray*, 29 SOCIETY 19 (1992) (arguing that governments should not negotiate with terrorists because a rational terrorist will not take hostages knowing that doing so will be futile).

ment.⁶⁸ As became clear in Spring 2011, there were undercurrents of opposition to Ghaddafi's leadership, but rationalism would treat these non-state actors as irrelevant for the purposes of its analysis. Because of its determined focus on states as the only entities that matter in international law and international relations, rationalists would regard the pre-Arab Spring thoughts and actions of Libyan insurgents as irrelevant.

Although NATO's intervention in Libya is a little more troublesome from the perspective of rationalist theory, it is not particularly difficult to tweak the rationalist model so as to accommodate a supranational entity such as NATO. Rationalist theory can treat NATO as a new unitary actor whose behavior can be predicted by using the traditional assumptions derived from rational choice theory. In fact, because only representatives of the executive branches of NATO states make decisions for the body,⁶⁹ NATO is a less complex entity compared to states, which must contend with multiple, mutually checking branches of government and which are accountable to a voting public.⁷⁰

But any actor—state, non-state, multi-state—would have to consider quite a few variables in determining whether or not to intervene in a situation such as Libya's. Consider, for example, the question of whether NATO should intervene in Syria as it did in Libya.⁷¹ As Amos Guiora puts it:

In both Libya and Syria a brutal regime was deliberately torturing, imprisoning and killing its own citizens. In both cases, thousands of citizens were forced to flee their homes with the understanding that the regime would brook no dissent, giving open fire orders that enabled indiscriminate shooting by its army into crowds of individuals. In other words, both regimes were engaged in massacring their citizens.⁷²

In deciding whether or not to intervene, NATO leaders would certainly take into account at least the following considerations: 1) natural resources, the exploitation of which might be jeopardized by either continued conflict or by intervention;⁷³ 2) the threat that intervention might lead

68. See Craig R. Black, *Muammar Qaddafi and Libya's Strategic Culture*, in *KNOW THY ENEMY: PROFILES OF ADVERSARY LEADERS AND THEIR STRATEGIC CULTURES* 247, 250–51 (Barry R. Schneider & Jerrold M. Post eds., 2003), available at http://www.au.af.mil/AU/AWC/AWCGATE/cpc-pubs/know_thy_enemy/black.pdf (describing Ghaddafi's single-handed domination of Libya's policies beginning in 1969).

69. See North Atlantic Treaty art. 9, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (describing the Council that is NATO's decision-making body).

70. See Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 274 (2011) (observing that NATO's principal decision-making body, the North Atlantic Council, consists of representatives from each member state). The U.S. representative is appointed by the President and has ambassador status. See *Ambassador Ivo Daalder*, UNITED STATES MISSION TO NATO, <http://nato.usmission.gov/mission/ambassador.html> (last visited Apr. 14, 2013).

71. See Amos N. Guiora, *Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration*, 44 *CASE W. INT'L L.J.* 251, 263–71 (2012) (contrasting the Obama administration's "low profile" with respect to Syria with its active participation in NATO's intervention in Libya).

72. *Id.* at 267.

73. See *id.* at 264–65 (noting the extent of European dependence on oil imports from Libya).

to a refugee crisis that could cause instability or unrest in neighboring states; 3) whether or not the U.N. Security Council would authorize intervention and the danger that Russia or China might take countermeasures in the absence of such authorization;⁷⁴ 4) the expected cost of an intervention that could succeed;⁷⁵ 5) the danger of casualties to NATO forces⁷⁶ and escalation of the conflict to neighboring states; and 6) the existence of pro-democracy, Western-oriented groups among the opposition who would be likely to establish a stable, democratically-accountable government in the wake of a successful NATO intervention.⁷⁷ Because rationalist theory is ill-equipped to explore how NATO's member states would weigh these factors, it provides little guidance to those trying to predict how NATO will behave in a hard case.

However, the Libyan opposition is the real wildcard that makes the reality of the Libyan conflict a bit more unruly than rationalism's parsimonious assumptions can easily accommodate. Major Libyan opposition groups include the National Transitional Council, the National Liberation Army, the Libyan Islamic Movement, the Libyan Youth Movement, the Committee for Libyan National Action in Europe, the Libyan Freedom and Democracy Campaign, and the National Conference for the Libyan Opposition. How these groups will interact in the post-Ghaddafi era is impossible to predict with rationalist methodology, and thus rationalism cannot tell us how the newly emerging Libyan state will go about identifying and seeking to realize its preferences. It seems safe to predict that a certain amount of dissent and violence will occur, as it did in Iraq after the United States removed Saddam Hussein from power, and as is occurring now in post-Mubarak Egypt.⁷⁸ Such generalizations are easy, but predicting the specific dynamics of an emerging democracy requires a familiarity with the multiplicity of actors in civil society and their sources of external support that rationalist theory chooses, for the most part, to ignore.⁷⁹

74. Anne Gearan, *U.S. Syria Policy a Nod to Assad's Firm Grip*, YAHOO! NEWS (Apr. 19, 2012), <http://news.yahoo.com/us-syria-policy-tacit-nod-assads-firm-grip-062614065.html> (describing the key differences between intervention in Libya and a possible intervention in Syria).

75. See Guiora, *supra* note 71, at 268 (noting that by the end of August 2011, the U.S. had flown more than 5,300 sorties over Libya, was providing 70% of the intelligence capabilities and refueling assets, and had spent nearly \$900 million on the NATO intervention).

76. See Gearan, *supra* note 74 (noting that Syrian air defenses are significantly more sophisticated than those of Libya).

77. See Guiora, *supra* note 71, at 269 (characterizing the Syrian opposition as disorganized and poorly armed compared with the Libyan opposition); Yochi J. Dreazen, *The Pentagon's (Preliminary, Shaky, and Hypothetical) War Plan for Syria*, THE ATLANTIC (Mar. 8, 2012), <http://www.theatlantic.com/international/archive/2012/03/the-pentagons-preliminary-shaky-and-hypothetical-war-plan-for-syria/254153/> (suggesting that hesitations about the wisdom of intervention in Syria are linked to uncertainty associated with the rebel groups and fears that they might have ties to Islamic terror organizations).

78. See David D. Kirkpatrick, *As Violence Continues, Egyptian General Blames Protesters*, N.Y. TIMES (Dec. 19, 2011), <http://www.nytimes.com/2011/12/20/world/middle-east/as-violence-continues-egypt-news-media-clash-over-its-cause.html?pagewanted=all> (describing four days of street fighting in which thirteen people were killed).

79. See *supra* text accompanying note 23.

Jordan Paust, in his keynote address for this Symposium, points out a key consideration that escapes the notice of rationalist theorists. International law recognizes a human right of self-determination.⁸⁰ This right, Paust reminds us, is vested not in states but in the people.⁸¹ Clearly, the fact that this right has been reiterated in so many international instruments and recognized by numerous international bodies, human rights organizations, and adjudicatory bodies contributes to the mindset of the Libyan opposition forces.

B. Rationalism and Israel's Operation "Cast Lead"

Certain structural elements of Israeli politics, society, and culture make it a strong candidate to be an ideal unitary state actor for the purposes of rationalist theory.⁸² Its parliamentary model, with a single legislative body subject to guidance by the governing party or parties, should enable its political branches to speak with one voice. The Israeli military, which is enormous in relation to Israel's population,⁸³ answers to the Israeli Defense Minister, who usually possesses a great deal of military expertise⁸⁴ and sits in the Israeli cabinet. The Defense Minister is usually seen as the second most powerful member of the cabinet after the Prime Minister.⁸⁵ Israel has become so habituated to international condemnation that it would be easy to believe that Israel's decision-makers feel themselves relatively unencumbered by the threat of international opprobrium.⁸⁶

On the other hand, since the end of the Labor Party's dominance of Israeli electoral politics in the 1970s, Israel has been governed by fragile

80. See Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT'L L.J. 1, 5 (2013) (citing various international instruments recognizing the rights of peoples freely to determine their political status).

81. *Id.*

82. See COLIN SHINDLER, *A HISTORY OF MODERN ISRAEL* 77 (2008) (describing the success of Israel's first Prime Minister, David Ben-Gurion, in building a coalition with weaker parties while excluding serious rivals so that his Mapai Party could carry out its program of state building without serious parliamentary resistance).

83. The Israeli Defense Forces have 176,500 regular troops and 445,000 reserves. INST. FOR NAT'L SECURITY STUDIES, ISRAEL (May 8, 2012), at 11, available at [http://www.inss.org.il/upload/\(FILE\)1336472780.pdf](http://www.inss.org.il/upload/(FILE)1336472780.pdf).

84. Most Israeli Defense Ministers, including Moshe Dayan, Ezer Weizman, Ariel Sharon, Yitzchak Rabin, Yitzchak Mordechai, Ehud Barak, Binyamin Ben-Eliezer, and Shaul Mofaz, had extensive military careers before they entered politics. See SHINDLER, *supra* note 82, at 3 (observing that the majority of Israeli chiefs of staff since 1967 have subsequently gone into politics).

85. Many Israeli Defense Ministers served simultaneously as Prime Ministers. The list includes David Ben-Gurion, Levi Eshkol, Menachem Begin, Yitzchak Rabin, Shimon Peres, and Ehud Barak. See *id.* (noting that "military men" were in power in Israel for ten out of fourteen years between 1992 and 2006).

86. For example, Israeli Prime Minister Menachem Begin dismissed criticisms of the Israeli military for having stood by while Lebanese Christian militias perpetrated massacres of Palestinian civilians at the Sabra and Shatilla refugee camps in 1981, complaining that non-Jews had killed non-Jews "and the whole world [was] trying to hang the Jews for the crime." *Id.* at 179.

coalition governments.⁸⁷ Coalition partners have aligned and realigned through political vote trading related to Israel's policies, particularly its foreign policy and the sensitive issues surrounding the country's relationship with its Arab neighbors and Israel's treatment of its domestic non-Jewish populations.⁸⁸ To take just one example, the Labor Party's one-time leader, Ehud Barak, was named Israel's Defense Minister in a recent government coalition, despite the fact that his party garnered less than 10% of the vote in Israel's most recent national elections.⁸⁹ Barak wields power disproportionate to his electoral strength because the government would fall if his party left the governing coalition. His power in this regard is checked by the willingness of other small parties to join the governing coalition on terms of their own choosing⁹⁰ and by the prospect that if no new coalition could be formed there would be new elections, which may not improve Barak's prospects.

In addition, Israel's government is checked by a robust system of judicial review, with a Supreme Court that is not afraid to rule on issues relevant to national security,⁹¹ and by a well-informed and well-organized citizenry whose commitment to the international rule of law is often informed by its citizens' collective histories. The Israeli courts have also been avenues through which international legal norms have come to inform Israel's political culture.⁹² Amichai Cohen has argued that the Israeli army itself has become a venue for the internalization of international humanitarian legal norms through its International Law

87. *Parliamentary Groups in Governments*, THE KNESSET, http://www.knesset.gov.il/faction/eng/FactionGovernment_eng.asp (last visited, Apr. 14, 2013).

88. JONG S. JUN, *RETHINKING ADMINISTRATIVE THEORY: THE CHALLENGE OF THE NEW CENTURY* 223 (2002).

89. Rory McCarthy, *We're Nobody's Fig-Leaf, Insists Ehud Barak as Labour Joins Israel's Far Right in Coalition with Binyamin Netanyahu*, *GUARDIAN* (Mar. 24, 2009), <http://www.guardian.co.uk/world/2009/mar/25/israel-ehud-barak-binyamin-netanyahu>.

90. In May 2012, Prime Minister Netanyahu announced the formation of a new "mega-coalition" including 94 members of the 120 seat Knesset. The Labor Party is not a part of the new coalition government, but Barak, who left the Labor party in 2011, is now part of a new Independence Party and has retained his position as Defense Minister. See Jodi Rudoren, *Master Tactician in Israel Adds Power in a Coalition Deal*, *N.Y. TIMES* (May 8, 2012), http://www.nytimes.com/2012/05/09/world/middleeast/shaul-mofaz-agrees-to-join-benjamin-netanyahus-coalition.html?_r=1&ref=israel.

91. See Samia Chouchane, *The Judicialization of Israeli Military Ethics: A Political Analysis of the Supreme Court's Role in the Israeli-Palestinian Conflict*, 20 *BULLETIN DU CENTRE DE RECHERCHE FRANÇAISE À JÉRUSALEM* 1, 1 (2009) (Isr.), translated in <http://bcfrj.revues.org/6207?&id=6207> (noting that the Israeli Supreme Court is now considered "the final authority" on what the Israeli military may do in warfare). See generally Yuval Shany, *National Courts as International Actors: Jurisdictional Implications*, *FEDERAL-ISM.IT* (July 29, 2009), <http://www.effective-intl-adjudication.org/admin/Reports/2af9e4d4a026e581437876dd1b73b87Yuval.pdf> (contending that some courts are now de facto international actors).

92. See Yaël Ronen, *Silent Enim Leges Inter Arma—but Beware of Background Noises: Domestic Courts as Agents of Development of the Laws of Armed Conflict* 22-23 (Int'l Law Forum of the Hebrew Univ. of Jerusalem Law Faculty, Research Paper No. 07-11, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953172 (describing the role of Israeli courts in developing international criminal law); *id.* at 23-25 (describing the role of Israeli courts in developing the law of occupation).

Department.⁹³

And then there is the Israeli public sphere, which is lively and diverse. During Operation Cast Lead, an estimated 10,000 people gathered to protest the operation in Tel Aviv.⁹⁴ To give just one example of the significance of such non-state actors within Israel, one of the most reliable sources of information about Israeli conduct during Operation Cast Lead was the Israeli human rights organization B'Tselem. B'Tselem describes its mission as ensuring that the Israeli government protects the human rights of residents in the Israeli-occupied territories and “complies with its obligations under international law.”⁹⁵ All of this suggests that the rationalist model faces challenges in trying to depict Israel as a unitary state that can identify and act on its preferences. Moreover, to the extent that rationalist theory treats international law as impotent to shape state conduct, the realities of the Israeli polity call rationalist assumptions into question.

The picture in the West Bank and Gaza is more complex still. Despite the recent movement towards recognition of Palestine as a state,⁹⁶ the West Bank and Gaza remain only semi-autonomous and lack the vital ability to maintain their own security.⁹⁷ In Gaza, Hamas provides political leadership, but Israel regards Hamas as a terrorist organization and disregards Hamas' attempts to distinguish between its civil and administrative functions and its military activities aimed at resisting Israeli authority.⁹⁸

The legislature of the Palestinian Authority is the Palestinian Legisla-

93. See Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 *CONN. J. INT'L L.* 367, 370 (2011) (advocating for recognition of the role of the International Law Department in promoting the internalization of international law within the Israeli military); see also ISRAEL MINISTRY OF FOREIGN AFFAIRS, *GAZA OPERATIONS INVESTIGATIONS: AN UPDATE 3-8* (2010), <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf> (outlining the processes within the Israeli military for investigation and prosecution of Israeli soldiers accused of war crimes).

94. Rachel Shabi, *West Bank Despair over Gaza Assault*, *AL JAZEERA* (Jan. 7, 2009), http://www.aljazeera.com/focus/war_on_gaza/2009/01/200916123826263533.html.

95. *About B'Tselem*, B'TSELEM, http://www.btselem.org/about_btselem (last visited Feb. 3, 2012).

96. In October 2011, the United Nations Educational, Scientific and Cultural Organization (UNESCO) voted to admit Palestine as a full member of the organization. John Irish, *UNESCO Grants Palestinians Full Membership*, *REUTERS* (Oct. 31, 2011), <http://www.reuters.com/article/2011/10/31/us-palestinians-unesco-idUSTRE79U1ZY20111031>. The Palestinian Liberation Organization's bid for Palestine's full membership in the UN has been blocked in the UN Security Council by the threat of a U.S. veto. Roxanne Horesh, *Debating the UN Bid for Palestinian Statehood*, *AL JAZEERA* (Sept. 19, 2011), <http://www.aljazeera.com/indepth/features/2011/09/201191910126371759.html>.

97. See George E. Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38 *DENV. J. INT'L L. & POL'Y* 41, 46 (2009) (“There is no dispute that the Gaza Strip is not a sovereign state.”).

98. See Laurie Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, in *THE GOLDSTONE REPORT “RECONSIDERED” A CRITICAL ANALYSIS* 203, 214 (Gerald M. Steinberg & Anne Herzberg eds., 2011) (quoting an Israeli report on Operation Cast Lead which characterizes Hamas as “a terrorist organization”).

tive Council.⁹⁹ It has been unable to operate since June 2006 because the Israeli armed forces arrested twenty-six of its members, along with eight ministers in the Palestinian government.¹⁰⁰ Political differences between the Fatah-led Palestinian Authority in the West Bank and the Hamas-led administration in Gaza have further undermined the legitimacy of the Palestinian Authority.¹⁰¹ In 2007, the Palestinian Authority instructed judicial officers to leave their jobs.¹⁰² In violation of Palestinian law, the Gaza authorities appointed “judges and prosecutors generally lacking experience and independence.”¹⁰³ Palestinian political parties have their own armed wings or armed groups with which they are affiliated.¹⁰⁴ Tellingly, the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (the Goldstone Report) assesses the conduct of the Israeli armed forces and “Palestinian armed groups,”¹⁰⁵ since there is no group of armed forces that can claim to represent a Palestinian state.

Even if rationalist theory could satisfactorily account for the conduct of states and/or state actors, in the age of social media an adequate theory must now also account for the fact that states have to respond to popular movements that can communicate and organize with the speed of the Internet.¹⁰⁶ Not long after social media websites such Facebook and Twitter became widely available, activists discovered that they could be used to organize protest movements with an alacrity that could outpace states’ abilities to respond.¹⁰⁷

Electronic social networks, including Twitter and Facebook, played an important role in the coordination of peaceful demonstrations during the Arab Spring.¹⁰⁸ These social networks allowed protestors to communicate with one another, as well as with the rest of the world, more readily than they could otherwise do. As Kurt Anderson put it in *Time* magazine:

99. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶ 210, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009) [hereinafter Goldstone Report].

100. *Id.*

101. JIM ZANOTTI, CONG. RESEARCH SERV., RL34074, THE PALESTINIANS: BACKGROUND AND U.S. RELATIONS 8, 25–28 (2012); see also Bisharat et al., *supra* note 97, at 57–58.

102. Goldstone Report, *supra* note 99, ¶ 212

103. *Id.* ¶ 212.

104. *Id.*

105. *Id.* ¶ 439.

106. See John Pollock, *Streetbook: How Egyptian and Tunisian Youth Hacked the Arab Spring*, MIT TECH. REV. (Aug. 23, 2011), <http://www.technologyreview.com/web/38379/> (reporting that a Tunisian virtual reality scientist measured the amount of time it took for political posts on Facebook to generate comments and that the time reduced from four days in November 2010 to two hours in January 2011).

107. See generally Hannibal Travis, *Wargaming the “Arab Spring”: Predicting Likely Outcomes and Planning U.N. Responses*, 46 CORNELL INT’L L.J. 75 (2013) (noting the role of Facebook and Twitter in the Egyptian Revolution of Spring 2011).

108. See Bobby Ghosh, *Rage, Rap and Revolution: Inside the Arab Youth Quake*, TIME (Feb. 17, 2011), <http://www.time.com/time/magazine/article/0,9171,2050022,00.html> (asserting that the 2011 revolts were led by young people who used “modern tools, like social-networking sites on the Internet and texting over mobile phones, to organize and amplify their protests”).

[S]ocial media and smart phones did not replace face-to-face social bonds and confrontation but helped enable and turbocharge them, allowing protesters to mobilize more nimbly and communicate with one another and the wider world more effectively than ever before. And in police states with high Internet penetration – Ben Ali’s Tunisia, Mubarak’s Egypt, Bashar Assad’s Syria – a critical mass of cell-phone video recorders plus YouTube plus Facebook plus Twitter really did become an indigenous free press. Throughout the Middle East and North Africa, *new media* and *blogger* are now quasi synonyms for *protest* and *protester*.¹⁰⁹

Protesters used social media sites to share images and videos of brutality, inspiring others to become involved.¹¹⁰ In addition, Facebook and Twitter played an active role in informing fellow protesters about the logistics of the protests, including locations and times.¹¹¹

In areas where the government censored the Internet, outlets like Facebook and Twitter provided protesters with freedom of press.¹¹² The mainstream media came to rely on social media to capture the immediacy of the Arab Spring through videos uploaded to YouTube or through messages from Twitter and Facebook that have the unfiltered, first-hand appeal that traditional media cannot replicate.¹¹³ In March 2011, a survey revealed that nearly nine out of ten Egyptians and Tunisians used Facebook to arrange protests and spread the word about such movements.¹¹⁴ In addition, 88% of Egyptians and 94% of Tunisians surveyed said that they received information concerning protests from social networking websites.¹¹⁵

Because the social media are global in nature, they easily penetrate national boundaries. Thus protesters in Bahrain adopted a popular Tunisian song that became the “battle hymn of the Jasmine Revolution” that toppled Tunisia’s dictator, Zine el Abidine Ben Ali, despite the fact that its lyrics referenced a President, while Bahrain has a king.¹¹⁶ The same song

109. Kurt Andersen, *The Protester*, TIME (Dec. 14, 2011), http://www.time.com/time/specials/packages/article/0,28804,2101745_2102132,00.html.

110. See, e.g., *We Are All Khaled Said*, FACEBOOK, <http://www.facebook.com/elshaheed.co.uk> (last visited Apr. 15, 2013) (the webpage was created by a Google executive, Wael Ghonim). Police allegedly dragged Said from a cybercafé in Alexandria and beat him to death in the street because they feared that he would upload videos to the internet showing police dealing drugs. Pollock, *supra* note 106.

111. See Pollock, *supra* note 106 (citing Ahmed Maher, an Egyptian activist who was amazed when a Facebook page set up by protesters attracted 3000 new fans a day).

112. See Andersen, *supra* note 109 (observing that in states containing high internet censorship, such as Ben Ali’s Tunisia, Mubarak’s Egypt, and Bashar El-Assad’s Syria, social networking sites served a function that is ordinarily reserved for the press).

113. See *A Special Report on the News Industry: Bulletins from the Future*, ECONOMIST (July 7, 2011), <http://www.economist.com/node/18904136> (describing how the print media has turned to social networks and websites to convey to society the “man-in-the-street accounts” of events such as the Arab spring).

114. See Carol Huang, *Facebook and Twitter Key to Arab Spring Uprisings: Report*, NATIONAL (June 6, 2011), <http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report> (reporting the number of Tunisians and Egyptians utilizing Facebook in protesting).

115. *Id.*

116. Ghosh, *supra* note 108.

later inspired Egyptian protesters in Tahrir Square.¹¹⁷

Rationalist theory can generate some useful models for understanding state behavior even in conflicts as complex as those in the contemporary Middle East. However, as the actors on which rationalist theory focuses come increasingly to share the spotlight with actors it ignores, rationalism loses its appeal as a descriptive and predictive model for international law and IR theory. The nature of conflicts in the Middle East is so multi-faceted and the relevance of state actors, as traditionally conceived in rationalist theory, is so diminished, the result is an utter breakdown of the theory as a descriptive or predictive model.

III. Supplementing Rationalist Models with Normative Theory

At times the main lesson that rationalist international legal theory seems to have drawn from IR realism is that law and legal norms do not matter because ultimately states simply act in their own self-interest.¹¹⁸ While more flexible versions of rationalism acknowledge law as an exogenous force that can affect state conduct,¹¹⁹ this final Part illustrates ways in which other theoretical approaches can supplement rationalism usefully by better illuminating the dynamic interactions among states, non-state actors and legal norms.

Rationalists contend that theirs is the only comprehensive theory of international law. They maintain that no sufficient alternative theory has been proposed because a theory encompassing non-unitary states, non-state actors, and behavioral economics “would be too complicated and fine-grained to yield general insights or predictions.”¹²⁰ That may well be true, but while rationalism’s parsimony might enable it to generate predictions, those predictions are unreliable because rationalism’s assumptions exclude too many components that affect international law and politics.

In some ways, rationalism marks a return to the positivist notion that law consists of a legal norm established by a due authority coupled with the authority to coerce those subject to the norm into compliance.¹²¹ Rationalism thus loses sight of the more subtle ways in which international law can influence behavior. As Paul Schiff Berman has pointed out, international law

may slowly change attitudes in large populations, effecting shifts in ideas of appropriate state behavior. In addition, international legal norms may well empower constituencies within a domestic polity and provide them with a language for influencing state policy, thereby affording them leverage that

117. *Id.*

118. GOLDSMITH & POSNER, *supra* note 8, at 13.

119. See GUZMAN, *supra* note 8, at 17 (claiming that state interests are “exogenous and fixed”).

120. GOLDSMITH & POSNER, *supra* note 8, at 473.

121. See, e.g., H. L. A. HART ET AL., *THE CONCEPT OF LAW* 16 (1961) (characterizing J. L. Austin’s view of law as “an order backed by threats”); HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS* 56 (1948) (characterizing “true law” as a coercive order in which only the centralized authority can exercise the legitimate use of force).

they would not otherwise have had at their disposal.¹²²

These insights are applicable both to the Libyan opposition to Colonel Ghaddafi and to the Israeli/Palestinian conflict.

Law can directly shape state preferences.¹²³ Berman writes of the development of what sociolegal scholars have come to call “legal consciousness” through which “international law norms may alter what both governmental actors and larger populations view as ‘right,’ ‘natural,’ ‘just,’ or ‘in their interest.’”¹²⁴ Such legal consciousness clearly informed decision-making processes both within NATO and among the Libyan opposition factions. No existing theoretical models can adequately account for or predict the behavior of the various factions in the Libyan opposition. Still, normative theories that do not focus exclusively on state conduct are far better equipped than rationalism to help us understand both the Libyan opposition and the transnational factors that influenced NATO’s decision to intervene in Libya.

Critics of the Goldstone Report denounced it as an attempt “to shift authority over critical judgments about the conduct of war from states to international institutions,”¹²⁵ but that shift has in fact been underway for decades. As Oona Hathaway has suggested, some forms of rationalism are tied to the new revisionist approach to international law and national security law.¹²⁶ But to the extent that such revisionism remains attached to outmoded notions of sovereignty, it is out of touch not only with international legal scholarship,¹²⁷ but also with IR theory, which has come to

122. Berman, *supra* note 29, at 1266.

123. See Moravcsik, *supra* note 11, at 513 (“Societal ideas, interests, and institutions influence state behavior by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments.”).

124. Berman, *supra* note 29, at 1269. See generally *id.* 1280–95 (reviewing scholarly literature on legal consciousness).

125. Peter Berkowitz, *The Goldstone Report and International Law, in THE GOLDSTONE REPORT “RECONSIDERED”: A CRITICAL ANALYSIS*, *supra* note 98, at 181, 181.

126. See Hathaway & Lavinbuk, *supra* note 8, at 1406–07 (contending that Posner and Goldsmith’s conclusions owe less to their rationalist theory than to their “deeply held normative concerns” about a transfer of policy-making power from the political branches to judges and international bodies, and characterizing these concerns as revisionism).

127. On “sovereigntist” aspects of revisionism, see D.A. Jeremy Telman, *Plural Vision: International Law Seen Through the Varied Lenses of Domestic Implementation*, 44 VAL. U. L. REV. 759, 763 (2010) (noting that many revisionist scholars are better termed “sovereigntists” because of their view that state interests should trump international obligations); see also Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1113–14 (2008) (defining sovereigntism as “a position insistent on a nation’s right to define and delineate its own lawmaking”); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 654 n.16 (2002) (characterizing sovereigntism as “grounded in a general skepticism of international law and international lawmaking processes”). Leading sovereigntists include academics such as Jeremy Rabkin, Curtis Bradley, and Julian Ku, government officials such as John Bolton, and people who have served as both scholars and government officials, such as John Yoo and Jack Goldsmith. Examples of scholarship espousing a sovereigntist position include: JEREMY A. RABKIN, *LAW WITHOUT NATIONS?* (2005); JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY* (2004); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998); JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005); John R. Bolton, *Should We Take Global*

appreciate the role of non-state actors in setting agendas in ways that affect the exercise of power.¹²⁸

Rationalists do not deny that states and non-state actors appeal to law for various purposes. However, they tend to see such appeals as in themselves self-interested.¹²⁹ But this underestimates the degree to which actors on the international stage view law as an independent force and overlooks the fact that international legal norms have been internalized to such a degree that it is often impossible to separate domestic values from international norms.¹³⁰

Clearly, appeals to legal norms can be self-serving, but there comes a point where appeals to legal norms would ring hollow if those who appeal to the norms failed to implement them. For example, dictators such as Ghaddafi and Assad gain little traction when they traffic in the language of human rights because they have no credibility as defenders of the rule of international human rights law. Similarly, Palestinian complaints about Israeli human rights abuses are less effective than they might otherwise be because of evidence of wide-ranging human rights abuses by the governing authorities in the West Bank and Gaza.¹³¹ But Israel too has little credibility when it points to such evidence, because it has not established any abiding interest in the human rights of Palestinians.

In Israel itself, it is clear that international norms inform the actions of state actors, such as the International Law Group within the Israeli armed forces, private citizens, such as the protestors who objected to Operation Cast Lead, and non-governmental organizations, such as B'Tselem. International legal norms do not merely trickle down through state agents and agencies; they circulate through the body politic in a dynamic network of exchanges. State actors may resist the pressure that non-state actors in civil society may seek to exert in favor of conformity with international law, but in the long run, they do so at their peril.

Governance Seriously?, 1 CHI. J. INT'L L. 205 (2000); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000). As Julian Ku points out, at least some sovereigntists object to the label. See Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 342 n.121 (2005) (contending that people characterized as "[s]overeigntists" are more interested in a critique of the "internationalist" conception of international law than in developing a pro-sovereignty ideology).

128. See Hafner-Burton et al., *supra* note 5, at 53 (explaining that non-state actors can set agendas by linking issues together and generating and controlling information and expertise).

129. See GOLDSMITH & POSNER, *supra* note 8, at 169 (concluding that "states provide legal or moral justifications for their actions, no matter how transparently self-interested their actions are").

130. See Hafner-Burton et al., *supra* note 5, at 54 (citing research that emphasizes how norms can "shape behavior by providing states and nonstate actors with information about interests" and that norms also embody social content).

131. See generally, e.g., *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (involving allegations of detention, torture, and extrajudicial killing by the Palestinian Authority).

Palestinian populations might well be among the world's best-versed in international human rights and international humanitarian law norms. Their lives are daily case studies in the variety of violations and test the boundaries of what will be permitted without international outcry. Despite significant efforts on the part of the numerous groups within the Israeli government and civil society to promote human rights for Palestinians, forty-plus years of military occupation have resulted in levels of enmity that make violent confrontations routine, and violations of international legal norms often follow. Moreover, the Palestinians are doubly victimized, because their own civil authorities, as well as the armed groups associated with Palestinian political parties, engage in human rights violations that also victimize Palestinian populations. Until a functioning democracy can be established in the West Bank and Gaza, Palestinians will not be able to safely call attention to the scope of this problem.

Conclusion

If the aim of rationalism is to provide a predictive theory of international relations, its failure to account for the impact of non-state actors limits its effectiveness as a tool for analyzing the contemporary Middle East. Operation Cast Lead and the overthrow of Ghaddafi's regime in Libya suggest not only that non-state actors matter, but that international legal norms influence state and non-state actors in crucial ways. In the age of electronic media, international legal theory and IR theory need to be much more attuned to the complex dynamics through which international legal norms can now be disseminated and deployed by both states and non-state actors. Versions of normative theory receptive to the significance of non-state actors and attuned to the independent valence of legal norms provide scholars with better models for understanding the dynamics underlying the conduct of all actors on the international political and legal scene.

