A LIBERAL THEORY OF INTERNATIONAL LAW

by Anne-Marie Slaughter[*]

I begin with several disclaimers. First, note the title. I wish to propose *a* liberal theory of international law. There are many possible theories derived from or based on liberal political philosophy, ideology or international relations (IR) theory; mine is only one. It is based on a particular account of a liberal theory of international relations—a positive theory rather than a normative theory—that I seek to transpose to international law. Second, as the word *transpose* suggests, I use the term *theory of international law* in its broadest sense: as indicating an approach or conception. I begin from the proposition that seeing the international political system as some political scientists see it—from the bottom up rather than the top down—radically changes our view of the international legal system. The "theory" of international law developed here sketches the broad contours of that re-vision.

Having disclaimed, however, I will claim that the prevailing account of liberalism in international law is simplistic and misleading. In the words of Gerry Simpson, "[W]here domestic liberal theory appeals to a conception of the individual as a bearer of rights and a democratic actor, classical liberalism substitutes the State for the individual and posits the nation-State as the free and equal object and subject of international law."[1] There are many variations on this theme, all venerating sovereign equality as the concomitant of individual autonomy, and the concomitant impossibility of distinguishing between states or looking within them. Martti Koskenniemi's *From Apology to Utopia*, for instance, is built on this premise[2]; it is the foundation for his and many others' application of the Critical Legal Studies (CLS) critique of domestic liberalism to international law. Only in the past decade, with the revival of Kantian liberalism by scholars such as Fernando Teson and Thomas Franck, have international lawyers begun to reexamine these assumptions. But the label *liberal* in international law is still generally used to denote the classic international paradigm of a consent-based system of sovereign states without regard to the individuals who live within them.

Andrew Moravcsik offers a *positive* liberal theory of international relations that reflects or is consistent with the thinking of such liberal thinkers as Kant, Mill, Cobden, Mazzini, Hobson, Wilson, Norman Angell, and Keynes.[3] But the label *liberal* is ultimately less important than the theory itself, which Moravcsik presents as a distinctive and coherent theory of international relations. Theory, in this context, refers to a causal paradigm: a set of propositions about the basic actors in the international system, their motives, and the outcomes of their interactions.

The fundamental premise of Moravcsik's account of liberal theory is that "the relationship of states to the domestic and transnational social context in which they are embedded" critically shapes state behavior by influencing the social purposes underlying state preferences. He elaborates this premise in terms of three core assumptions:

> *The primacy of societal actors*: "The fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence." (at 516)

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[1] Gerry J. Simpson, *Imagined Consent: Democratic Liberalism in International Legal Theory*, 15 AUSTL. Y.B. INT'L L. 103 (1994) at 113.

[2] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 68 (1989).

[3] Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

> *Representation and state preferences*: "States (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics." (at 518)
>
> *Interdependence and the international system*: The configuration of interdependent state preferences determines state behavior—for example, "[W]hat states want is the primary determinant of what they do." (at 520)

Thus specified, this theory, hereafter referred to as *Liberal theory* or *Liberal international relations theory*, offers a way of looking at the world that is radically different from the traditional assumptions underlying international law and IR theory, which conceive of the international system as composed of unitary, identical state actors with fixed preferences (the billiard ball model). Liberal IR theory can be characterized in the following ways:

1. It is a bottom-up view rather than a top-down view.
2. It is an integrated view that does not separate the international and domestic spheres but, rather, assumes that they are inextricably linked.
3. It is a view that preserves an important role for states but deprives them of their traditional opacity by rendering state-society relations transparent. In this model, states bear no resemblance to billiard balls, but rather to atoms of varying composition, whose relations with one another, either cooperative or conflictual, depend on their internal structure.
4. It is a view that transforms states into governments. By requiring us to focus on the precise interactions between individuals and "states," it leads us quickly to identify and differentiate between different government institutions, each with distinct functions and interests.

Liberal IR theory thus literally turns the world upside down for international lawyers. We must learn to reframe every international issue, which we are accustomed to thinking about in terms of "state to state" interaction, in terms of the interaction between individuals and specific government institutions. Rethinking international politics this way has broad implications for how we think about the creation and maintenance of international order.

A final note on definitions. As used in the title of this lecture, *international law* is defined as broadly as possible to include all bodies of law that directly and intentionally affect international order. International order, in turn, does not simply mean peace and stability; it includes social and political justice, a measure of prosperity and preservation of the environment.[4]

Another way to approach the definition of *international law* is to imagine the first-year law student or even the applicant to law school who dreams of using law to achieve a wide range of goals in the international or global realm—the world outside her country or community, the world of crossed borders. She will ultimately discover our myriad self-categorizations: public international law (hard and soft), private international law, transnational law, international business transactions, international litigation, and more besides. The Liberal theory of international law advanced here sweeps all those bodies of international law into a specific account of how law contributes to international order.

The categorizations are not irrelevant, however. To the extent that they have agreed meanings (all are, to some extent, under siege), they are the everyday tools of international lawyers and different but complementary building blocks of international order. Liberal IR theory specifies relations between these different bodies of law and traditional public international law in a wider and deeper context.

[4] HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 127–61 (1977). I also use *international order* interchangeably with *world order* and *global order*, although I recognize the many ways in which these conceptions can differ.

The first section of this essay elaborates this context in terms of the relative impact of these different bodies of law on international order. The second and third sections elaborate the flip side of this proposition: a reconceptualization of both the functions and the effectiveness of traditional international law and institutions. In sum, much of this essay focuses on public international law. But in it, I seek to integrate that body of rules and institutions with a wider theory of rules and institutions constituting, creating, and contributing to international order.

The Sources and Relative Impact of Rules Regulating International Order

Public international law, as traditionally taught and practiced, assumes its own pride of place in the rules contributing to international order. International law is defined as "inter-state" law. International society is a society of states; international law seeks to achieve the goals and values of that society; it does so primarily by regulating states. The tables of contents of international law casebooks tell the story. The unmistakable message is that international order is created from the top down.

A Liberal approach to international law *assumes that international order is created from the bottom up*. It identifies multiple bodies of rules, norms and processes that contribute to international order, beginning with voluntary codes of conduct adopted by individual and corporate actors operating in transnational society and working up through transnational and transgovernmental law to traditional public international law. Some of these bodies of rules are already covered in existing casebooks on international and transnational law, but typically as peripheral or interstitial phenomena. Others are largely invisible. Voluntary codes of conduct adopted by transnational enterprises, for instance, simply do not fit into a state-centric, top-down framework. The Liberal approach, by contrast, brings them into the center of the discipline and provides an overarching theory linking them to one another.

In addition to identifying and integrating these different types and levels of law within a unified framework, the Liberal approach *reorders their relative priority as sources of international order*. If the sources of state behavior lie in the formation and representation of individual and group preferences, then the key to international order lies in shaping those preferences and regulating the individual and collective ability to achieve them. On this metric, traditional international treaties imposing obligations on states without direct links to individuals other than the standard implementing requirements presumptively fall behind national, transnational, transgovernmental and even "voluntary" rules and norms that directly regulate individual and group behavior.

Three "Levels of Law." The three core assumptions of Liberal IR theory suggest three levels of law, or at least of lawmaking. *First*, individuals and groups operating in domestic and transnational society make rules governing themselves. *Second*, governments make rules regulating individuals and groups operating in domestic and transnational society; parts of governments may also cooperate with one another to make rules binding themselves on matters of common concern. *Third*, states make rules governing their mutual relations.

Thus far, this description is static. It recapitulates Kenneth Waltz's celebrated specification of the "levels of analysis" in international relations generally: the individual, the state and the international system.[5] The distinctive contribution of Liberal IR theory is its emphasis on interaction between individuals operating in society and the "state," meaning an aggregation of government institutions, and the way in which that interaction shapes state behavior at the international level. As applied to law, the theory's power lies not in a static typology of levels of law, but in a dynamic account of lawmaking, implementation and enforcement.

As developed to date in the IR literature, Liberal IR theory focuses more on politics than on law, emphasizing preference formation among individuals and groups and the way in which state governments represent some subset of those preferences and bargain with each other in

[5] KENNETH NEAL WALTZ, MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS (1959).

inter-state relations. Extended to law, the relationship between governments and society becomes more complex, involving regulation as well as representation. Indeed, the twin processes of representation and regulation take place simultaneously and interactively, structuring and shaping both state and society. In classic liberal contractarian theory, individuals in the state of nature create the state to establish order among themselves and thus to create the conditions necessary for society. In a democracy, however, individuals elect the officials who comprise the state and make the law that establishes order.

Liberal IR theory thus assumes a relationship between individuals and some kind of "state" authority, consistent with the classical liberal view of a social contract and of the need for a state to provide both legitimacy and effective governance. This relationship takes many forms: individual and group action spurs state action; state action, or even the possibility of state action, can spur individual and group action; state support can underpin and encourage individual and group action. It is a traditional liberal assumption, however, that "law" requires some kind of state involvement. Thus, the Liberal account of international law offered here searches always for the seam of individual-state interaction running through all three levels of the international system.

From this perspective, the three "levels" of law that a Liberal theory highlights could be reinterpreted to reflect three standard and frequent types of individual-state interaction. Individuals and groups interact with each other in the shadow of government institutions, directly through government institutions, and through government institutions with the individuals and groups of other states. These are not the exclusive sites of interaction, however; state authority can be delegated directly to international institutions, which can then interact directly with individuals and groups independent of national government institutions, as discussed further below. But the three levels discussed here are the dominant sites.

The first level of law is the voluntary law of individuals and groups in transnational society. The Liberal focus on state-society relations leads first to an examination of rules arising out of the interactions of individuals, private groups and organizations across borders. These actors regulate themselves in a variety of ways, from decentralized choice of national laws and fora to regulate private commercial transactions to the adoption of both civic and corporate codes of conduct designed to substitute for or supplement state regulation. Although much of the literature on this growing body of rules and norms treats them as entirely "private," the state is never far away.

The voluntary law governing transnational society further sub-divides into several categories. First is a category of protolaw generated by a wide range of business and professional organizations. In the domestic context, Robert Cooter has described these rules as the "new law merchant," voluntary norms adopted by corporate networks, self-regulating professions and business associations.[6] Many of these networks and associations extend transnationally as well, generating an accompanying network of transnational voluntary norms, or, as political scientists call them, private regimes.[7]

The content of these regimes also extends beyond purely commercial matters, at least as traditionally defined. Many human rights and environmental nongovernmental organizations (NGOs) have been working hard to give substance to the concept of "corporate accountability" by convincing multinational corporations to adopt specific codes governing their responsibilities to their workers and the social and environmental conditions of the societies in which they operate. NGOs, in turn, face growing challenges to their accountability, to which they are responding by adopting codes of conduct on their own.[8]

[6] Robert Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, INT'L REV. L. ECON. 143, 144 (1994).

[7] VIRGINIA HAUFLER, INTERNATIONAL BUSINESS SELF-REGULATION: THE INTERSECTION OF PRIVATE AND PUBLIC INTERESTS (2000).

[8] P.J. Simmons, *Learning to Live with NGOs*, 1998 FOREIGN POL'Y 88.

These codes and norms may not seem like law at all. Yet scholars and practitioners seeking to predict actual behavior must take them into account as empirical facts that guide action. Further, as will be discussed below, these bodies of rules may be templates for future law.

A second category of rules governing transnational commerce is the law selected by individual actors to govern the interpretation and application of bilateral commercial agreements and the mode of resolving disputes arising out of those agreements. The actors enter into contractual relations. Their interaction is to be governed by the contract. But they also determine what law shall govern the contract and where and how disputes arising out of or related to the contract will be resolved. They can choose either a judicial or an arbitral forum. If they choose arbitration, they can also write their own rules of procedure governing the dispute resolution process.

A final example is the "other" new *lex mercatoria*, the rules developed by arbitration. Within international commercial arbitration, individuals and groups may find themselves, either by specification or not, governed by an independent body of law developed by international commercial arbitrators on the basis of customary transnational business practices. These rules have also been referred to as "the new law merchant," or *lex mercatoria*. The arbitrators derive their authority from the arbitral agreement. They themselves form an informal network,[9] such that they can effectively draw on their collective experience in distilling and applying these rules. Formally, this body of law has no more status than voluntary norms developed and adopted by professional associations. It similarly evolves from social and economic practice in transnational society.

Thus far, the law of transnational society has been presented as essentially stateless. This is an accurate depiction in that individuals and groups are the primary actors; state functions are ancillary to the functioning of the system. But the state appears in several guises.

First, social norms can simply coexist alongside more formal legal rules, with the state acquiescing in or even welcoming the arrangement. Virginia Haufler finds that officials in the United States and Europe welcome voluntary corporate initiatives as a complement to traditional regulation and public law.[10] States also provide the bodies of rules available for selection by individual and corporate actors in arbitration agreements. The *lex mercatoria* of international commercial arbitration coexists with formal bodies of national and international law governing arbitral procedures.

Second, governments can play an active role in the development of private regimes. They can underpin them with the assured exercise of public authority to enforce private arrangements. The best traditional example is the way in which private commercial arbitration agreements depend on the framework provided by the New York Convention, which secures the coercive power of national courts to make such agreements transnationally enforceable. Governments can also trigger private regimes by threatening state action in the absence of changed behavior through self-regulation. From this perspective, many of these private regimes may be better understood as privatized law. Finally, as many law and economics scholars have urged, states can allow private actors to develop their own codes of conduct and then incorporate those codes into official regulation, thereby purportedly ensuring the efficiency of the rules that are adopted.

Third, state law is likely to be needed to regulate conflicts between different private actors in transnational society. When one side or the other—corporations or NGOs—perceives a major power imbalance, it is likely to appeal for state intervention. Many NGOs are already rediscovering the value of state power over international talking shops; many corporations on the receiving end of NGO-organized consumer boycotts are likely to seek some kind of

[9] *See* Yves Dezalay & Bryant G. Garth, *Grand Old Men vs. Multinationals: The Routinization of Charismatic Arbitration into Off-Shore Litigation*, secs. IV, VI (American Bar Foundation Working Paper No. 9317) (1994).

[10] HAUFLER, *supra* note 7.

government redress. The result will be more traditional direct regulation of private actors in various ways, with deliberate transnational or global intent.

These sources of law barely appear in international law treatises and casebooks; they are marginal at best. But from the perspective of a Liberal theory of international relations, they may be the most important and effective sources of law, since they directly regulate the primary actors in the international system without intermediation.

The second level of law is transnational and transgovernmental law. A focus on state-society relations also leads to a focus on the activities of different government agencies as they respond to the increased ability of the individuals and groups they regulate to move, and to conduct transactions, across borders. The result is a growing body of transnational and "transgovernmental" law. Transnational law has many definitions. I mean to include here simply national law that is designed to reach actors beyond national borders: the assertion of extraterritorial jurisdiction. Extraterritorial jurisdictional provisions are often the first effort a national government is inclined to make to regulate activity outside its borders with substantial effects within its borders. The United States has pioneered this "effects" jurisdiction, notably in antitrust, but increasingly in every area of law. Its efforts have produced a great deal of conflict but have also increasingly spawned imitation.

A more cooperative approach, and one often developed as a way of trying to resolve the conflict caused by assertion of extraterritorial jurisdiction, is the conclusion of agreements and understandings between government institutions and their foreign counterparts. The "memorandum of understanding," the typical vehicle of transgovernmental regulation, is the fastest growing legal instrument of the past decade. Such instruments codify agreements to share information, coordinate regulatory efforts, and cooperate in the development of joint regulatory approaches. They are agreements made by parts of states, although one of their major advantages, at least from the perspective of the regulatory agencies that conclude them, is that they do not have to be ratified by the state as a whole.

An additional source of transgovernmental law is the rules adopted by transgovernmental regulatory organizations such as the Basel Committee, the International Organization of Securities Commissioners and the International Association of Insurance Supervisors.[11] These are more formalized transgovernmental relations, but the resulting promulgations and model codes have no formal binding power. Nevertheless, they often have considerable impact on state behavior, as they can be used by investors and international institutions as indicators of government performance in a particular issue area.

Finally, at the third level, a Liberal approach to international law would also incorporate the traditional sources of public international law—treaties and customary law. States here are conceived of as agents of individuals and groups. The resulting rules are thus at least at one remove, and often at two removes, from the actors whose behavior they seek to modify. The interesting questions in this category concern those relatively infrequent cases in which states create international institutions to which they delegate enough power to interact autonomously and effectively with individuals.

Reordering International Order. Parts of the first two levels of law may be found scattered across the pages of international law casebooks. But they are peripheral, or at least secondary, to the third level. This traditional ordering reflects implicit value judgments about the relative impact of these three levels of law on international order.

As discussed above, Liberal IR theory not only supplies a different ontology of the international system, in terms of changing our conception of relative actors and activity; it also provides the foundation for a theory of international order that *reorders* the relative impact of these different bodies of rules. Global problems have domestic roots. Law that directly regulates

[11] David T. Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998).

individuals and groups thus is more likely to get at the root of the problem. Law that has a direct impact on individuals and groups will thus have the greatest impact on international order.

Whether pride of place belongs to transnational voluntary law, traditional transnational law or transgovernmental law depends on the relative impact of self-regulation and social norms versus at least the threat of coercive power. But both these levels of law should have a greater impact than public international law, except to the extent that national-level authorities delegate real power to supranational authorities. Alternatively, international law and institutions can explicitly target individual and group behavior or the nature and quality of state-society relations. That project is the subject of the next two sections.

The Functions of Public International Law

The traditional function of public international law is to allow states to solve coordination and collective-action problems in relations with one another, or arising from the need to regulate their common geographical space. But, again from the perspective of Liberal IR theory, many if not most "international" problems have domestic roots. War, environmental degradation, protectionism—all spring from either adverse individual and group preferences or distortions in the representation of those preferences by governments. Alternatively put, the *levers of progressive change in the international system lie in state-society relations*—the plethora of ways in which domestic institutions interact with individuals and groups in domestic and transnational society. In a shorthand formulation, the global rule of law depends on the domestic rule of law.

It follows that, from a Liberal perspective, *a*—if not *the*—primary function of public international law is not to create international institutions to perform functions that individual states cannot perform by themselves, but rather *to influence and improve the functioning of domestic institutions*. This function is increasingly evident in international legal life, as the following examples will demonstrate, but it is again regarded as exceptional, problematic, or marginal. A Liberal theory of international law would privilege these issue areas, doctrines, and developments as the *core of the discipline and as most likely to achieve its substantive goals.*

Human Rights Law. From the perspective of Liberal theory, human rights law is the core of international law. Human rights lawyers such as Louis Henkin have long maintained this position, of course, but from a normative rather than a positive perspective. Many international lawyers and policymakers still see human rights law as an exception to the fundamental proposition of state sovereignty and nonintervention—a specialized area that is apart from the core discipline. Yet human rights law is precisely about structuring state-society relations to ensure at least minimal individual flourishing. We can justify that function from a moral perspective; Liberal IR theory would also argue that governments that oppress their citizens are more likely to present a threat to other governments or to the international system.

Humanitarian Intervention. Humanitarian intervention is also very much on the current international agenda; UN Secretary-General Kofi Annan made it the centerpiece of his address to the General Assembly this year. Many international lawyers are deeply worried about the move away from the "classicist" doctrine of nonintervention. However, from a Liberal IR perspective, the legitimization of humanitarian intervention is a natural concomitant of human rights law. It is necessitated by some radical breakdown in the functioning of domestic institutions—the failure of a state to provide essential services such as food and shelter to its citizens or the active mass oppression of its citizens. In such circumstances, international action is justified to substitute for and in some cases even rebuild basic state institutions to the extent such efforts have a reasonable chance of success. Again, the justification is not moral, although it can certainly be, but instrumental, in terms of the likely impact of the humanitarian disaster on other states.

At the same time, however, the Liberal approach advocates extreme caution. If the justification for humanitarian intervention is the need to restore and rebuild institutions within a state to reduce the impact of the failure of those institutions on other states, then the task facing would-

be intervenors is a complex and difficult one. To do the job halfway is likely only to exacerbate the situation and may well be worse than inaction. Thus, in the majority of cases, the policy prescriptions grounded in Liberal IR theory are likely to support only a very limited doctrine of humanitarian intervention.

Complementarity. The doctrine of complementarity, enshrined in the Rome Statute of the International Criminal Court, proposes that national courts have primary responsibility to try war criminals and those accused of genocide and crimes against humanity. This is precisely the approach that José Alvarez argues so convincingly should have been tried in Rwanda—efforts should have focused first on helping the Rwandans try their own citizens rather than on moving to an international tribunal.[12] The most important facet of complementarity, however, is the way in which the *possibility* of trial at the international level, if it is determined that a domestic court is unable or unwilling to prosecute, will act as a spur to the initiation and quality of the domestic legal process. The concept is thus a textbook example of how international institutions can be used to influence and improve the performance of domestic institutions, either through oversight or competition.

A Shift from International to Universal Jurisdiction. The International Criminal Court establishes direct individual criminal responsibility directly at the *international* level and uses a mixture of domestic and international tribunals to enforce it. Equally important is a more general effort to transform international jurisdiction into universal jurisdiction—to include more crimes in the category of *delicta iuris gentium*, according to which states have an international obligation to try and punish certain conduct on the basis of their domestic criminal law. The appeal of this shift rests in part on the appeal of a shift from international to national courts.

Three prominent former government officials have recently proposed that nuclear or biological terrorism "become a universal crime, opening the way to prosecute and extradite individual offenders wherever they may be found around the world. Thus the power of national criminal law would be used against people, rather than the power of international law against governments."[13] They cite similar developments in piracy law, airplane hijacking, crimes of maritime navigation, theft of nuclear materials and crimes against diplomats. They see practical advantages in all these areas in shifting to national from international law enforcement. But from a conceptual perspective, the nature of the international legal obligation will also shift from fighting crime through international institutions and coordinated activity to enforcing national laws against domestic criminals. Again, the intergovernmental instrument providing a new set of obligations and a template for common action gives way to a required or recommended reshaping of state-society relations.

Emerging Doctrines of State Responsibility. International institutions are developing a new form of state responsibility—*responsibility for the state of state-society relations.* States have always had the responsibility for domestic implementation of their international obligations, but here the obligation to take domestic action was derivative of an independent obligation to take a particular action vis-à-vis another state. In other words, if two states agreed that they would each honor a three-mile territorial sea, then each state might be obliged to pass a statute prohibiting its nationals from violating the territorial waters of other states. Here the *essence* of the international (state-to-state) obligation is to take domestic action: either to enforce existing laws or to pass new laws to restructure state-society relations.

For example, in *Mejia Egocheaga v. Peru* the Inter-American Commission of Human Rights held Peru accountable for the rape of a woman, Raquel Mejia, by Peruvian security forces as an aspect of the campaign against civilians suspected of having connections with insurgents. The Commission observed that there were no effective remedies within Peru to pursue claims against the security forces. It stated that "[c]urrent international law establishes that sexual assault

[12] Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda* 24 YALE J. INT'L L. 365 (1999).
[13] Ashton Carter et al., *Catastrophic Terrorism: Tackling the New Danger*, 77 FOREIGN AFF. 80, 86 (1998).

committed by members of security forces, whether as a result of the deliberate practice promoted by the state or as a result of failure by the state to prevent the occurrence of this crime, constitutes a violation of the victim's human rights, especially the right to physical and mental integrity."[14] The value of this principle is its recognition of international responsibility for an inadequate national structure to respond to crimes against women.

Holding states accountable for crimes of omission—failing to punish a perpetrator or to take adequate steps to prevent the crime in the first place—may prove more effective in the long run than holding individuals directly accountable for *crimes of commission.*[15] Although direct criminal prosecutions of individual perpetrators of atrocities may be more visible and more satisfying professionally to the college of international lawyers, states still maintain a monopoly on coercive power and have the most capacity to affect the lives of the individuals who live within them. Recognizing the state as still at least the primary actor in the international system, but conceiving of it in terms of its relationship with its citizens, thus means focusing rules and remedies at the national rather than the international level, or at the international level as supplemental to the national level.

Capacity-Building Theories of Compliance. Abram Chayes and Antonia Chayes argue that the "new sovereignty" is not the right to be left alone, but rather the right to participate in the ever-growing web of international regimes and institutions.[16] For many states, however, compliance with the obligations that are consequently imposed requires enhancing their domestic *capacity* to comply, including their ability to educate and regulate their citizens. Capacity building thus requires penetration into the nature and quality of state-society relations.

Enhancing the Effectiveness of International Institutions

International institutions must be embedded in domestic society in some way to be maximally effective. The best examples are international tribunals, which are proliferating.[17] Those that have the maximum impact are those in which individuals can initiate cases, preferably directly as in the European Court of Justice or the European Court of Human Rights, and parts of the North American Free Trade Agreement, or else indirectly, as in the World Trade Organisation dispute resolution system, in which corporations often have direct channels for pressuring their governments to initiate litigation. At the other end of the spectrum is pure inter-state litigation, not because governments do not comply with many of the resulting judgments, but because the tribunals involved cannot develop genuine domestic and transnational constituencies both to bring cases and to press for compliance.

Courts need cases, and states simply have too many incentives not to bring them against one another. If allowed access to individuals (a reversal of the normal assumption that individuals should be allowed access to them), courts can develop constituencies in both domestic and transnational society. Nor is this strategy limited to courts. Kofi Annan has been assiduously courting a transnational constituency of NGOs and corporations alike. At Davos, he urged corporations to take advantage of UN knowledge about how to be good global citizens; elsewhere he encourages NGOs to monitor corporations.[18] This phenomenon and strategy could be called embedded internationalization. However, the capacity of international institutions will in turn depend on differences in the nature of state-society relations among the states comprising or subject to the jurisdiction of a particular international institution.

[14] Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379, 391 (1999).

[15] I am indebted to Hilary Charlesworth for prompting my thinking on this question.

[16] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995).

[17] For a complete database on old and new international tribunals, see the Project on International Courts and Tribunals, *obtainable from* <http://www.pict-pcti.org>.

[18] *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos*, UN Press Release SG/SM/6881 (Jan. 31, 1999), *obtainable from* <http://www.un.org/Depts/dhl/resguide/press/htm>.