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.† 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-
tional legal theory 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, 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.

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

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, Harold D. Lasswell & Myres S. McDougal, 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).


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) (“[I]law 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. Intl’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. Intl’l L. 367 (1998) (describing the recent overlap between IR theory and international legal scholarship).

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

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


10. Hafner-Burton et al., supra note 5, at 49; see ADRIANA SINCLAIR, INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW 1 (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. 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 (1993)). 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.\(^\text{13}\)

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.\(^\text{14}\) In the political realm, Jack Goldsmith served as the head of the Office of Legal Counsel during the George W. Bush administration.\(^\text{15}\) 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.\(^\text{16}\)

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.\(^\text{17}\) 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

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\(^{13}\) 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. \textit{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.}

\(^{14}\) \textit{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”).}

\(^{15}\) \textit{See Jack Goldsmith, The Terror Presidency 9, 11 (2007) (detailing Goldsmith’s experiences as head of the Office of Legal Counsel).}

\(^{16}\) \textit{Id. at 20–21.}

\(^{17}\) \textit{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.
for the purpose of understanding international law.\footnote{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.\footnote{23}

Rationalists are generally committed to treating states as unitary actors.\footnote{24} Rationalist theory associates the preferences of states with those of a state’s “leadership,”\footnote{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.\footnote{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.”\footnote{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.\footnote{28} While some versions of rationalism characterize international law as the result of

\footnote{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”).}

\footnote{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).}

\footnote{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.}

\footnote{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 . . . .”).}

\footnote{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).}

\footnote{27. Guzman, supra note 8, at 17.}

\footnote{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, other versions acknowledge the possibility that international law can affect state preferences and thus can shape states’ conceptions of their own self-interest.

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. These two core assumptions rendered international cooperation difficult to explain in realist terms. Rationalism deploys game-theoretic models (mostly cooperation and coordination games) to explain state behavior within the international system. 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.

B. The Limits of Rationalist Theory

IR theory has produced an extensive literature evaluating rationalist theory. 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 Rausitala, 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”).


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 scientistic—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

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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,
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{53} In addition, individuals exercise only “bounded rationality, bounded willpower and bounded self-interest.”\textsuperscript{54} Rationality is “bounded” because various judgment errors arise due to biases and heuristics.\textsuperscript{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.\textsuperscript{56} With respect to bounded self-interest, recent research suggests “that many people care about both giving and receiving fair treatment.”\textsuperscript{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.

\begin{itemize}
\item based on domestic politics “would be too complicated . . . to yield general insights or predictions”).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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”).
\item \textsuperscript{54} Id. at 6 (emphasis omitted).
\item \textsuperscript{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).
\item \textsuperscript{56} Id. at 10.
\item \textsuperscript{57} Id. at 11.
\end{itemize}
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. Paust further notes that customary international law, including customary human rights and humanitarian law, can bind private actors such as corporations. More generally, Paust invokes the New Haven School in highlighting the role that individuals play in the “formation, reaffirmation, and termination of international law.” 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 . . . .”

In its quest for parsimony, rationalism can simplify the world of international relations and international law beyond recognition. 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, hap[il]y” or mendaciously speaking as if the routines and mere memoranda of understanding that emerge from this contest were law.

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. However, rationalism has yet to make any testable predictions, and its critics maintain that it is incapable of doing so in its present form. 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

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).
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-


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).
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, 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.

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. 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.

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; 2) the threat that intervention might lead
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

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).
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. This right, Paust reminds us, is vested not in states but in the people. 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. 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, answers to the Israeli Defense Minister, who usually possesses a great deal of military expertise 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. 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.

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 governments. The fact that the first Israeli Prime Minister, David Ben-Gurion, was able to build 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, is telling.

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).
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 SCHINDLER, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 choosing\textsuperscript{90} 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,\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{88} Jong S. Jun, Rethinking Administrative Theory: The Challenge of the New Century 223 (2002).
\item \textsuperscript{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.
\item \textsuperscript{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.
\end{itemize}
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. 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.” 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, the West Bank and Gaza remain only semi-autonomous and lack the vital ability to maintain their own security. 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.

The legislature of the Palestinian Authority is the Palestinian Legisla-

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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.”).

tive Council.\footnote{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].} 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.\footnote{100. Id.} 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.\footnote{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.} In 2007, the Palestinian Authority instructed judicial officers to leave their jobs.\footnote{102. Goldstone Report, supra note 99, ¶ 212} In violation of Palestinian law, the Gaza authorities appointed “judges and prosecutors generally lacking experience and independence.”\footnote{103. Id. ¶ 212.} Palestinian political parties have their own armed wings or armed groups with which they are affiliated.\footnote{104. Id. ¶ 439.} 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,”\footnote{105. 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).} 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.\footnote{106. See 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).} 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.\footnote{107. 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”).}
Social 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

110. See, e.g., We Are All Khaled Said, FACEBOOK, http://www.facebook.com/elshaheeed.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.
later inspired Egyptian protesters in Tahrir Square.\textsuperscript{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.\textsuperscript{118} While more flexible versions of rationalism acknowledge law as an exogenous force that can affect state conduct,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{117}Id.
  \item \textsuperscript{118}GOLDSMITH & POSNER, supra note 8, at 13.
  \item \textsuperscript{119}See GUZMAN, supra note 8, at 17 (claiming that state interests are “exogenous and fixed”).
  \item \textsuperscript{120}GOLDSMITH & POSNER, supra note 8, at 473.
  \item \textsuperscript{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).
\end{itemize}
they would not otherwise have had at their disposal. They are applicable both to the Libyan opposition to Colonel Ghaddafi and to the Israeli/Palestinian conflict.

Law can directly shape state preferences. 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.’” 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,” 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. 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, but also with IR theory, which has come to

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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).
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 sovereignty as “a position consistent 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 sovereignty as “grounded in a general skepticism of international law and international lawmaking processes”). Leading sovereignists 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 sovereignist 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


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

\textsuperscript{129} See \textit{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”).

\textsuperscript{130} See Hafner-Burton et al., \textit{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).

\textsuperscript{131} \textit{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.