

# PRECOMMITMENT THEORY APPLIED TO INTERNATIONAL LAW: BETWEEN SOVEREIGNTY AND TRIVIALITY

## A COMMENT ON *COMMITMENT AND DIFFUSION: HOW AND WHY NATIONAL CONSTITUTIONS INCORPORATE INTERNATIONAL LAW*

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### I. INTRODUCTION

This comment very briefly assesses the concrete research questions and the thesis of the paper “Commitment and Diffusion: How and Why National Constitutions Incorporate International Law” by Tom Ginsburg, Svitlana Chernykh, Zachary Elkins.<sup>1</sup> The main objective of this comment is to discuss the paper’s underlying theory, precommitment.

### II. HOW AND WHY NATIONAL CONSTITUTIONS INCORPORATE INTERNATIONAL LAW

Tom Ginsburg and coauthors ask how and why national constitutions incorporate international law. They give the following answers: National constitutions incorporate international law through extremely diverse devices. Why this variety? The paper submits that this variety can best be explained by looking not only at the “external” international audience of a state, that is, its negotiating and treaty partners, but also at the “internal” or domestic audience of the acting politicians. By binding itself to international law, treaties, or customary rules, the government also desires to satisfy national lobby groups. This is especially important in transition states where democracy still needs to be “locked in.”<sup>2</sup>

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1. Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201.

2. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe*, 54 INT’L ORG. 217, 220 (2000).

### A. *Asking the Right Questions*

Ginsburg's paper asks why states chose particular constitutional designs with regard to international law, particularly the constitutional treaty making process. This is a question of political, historical, and strategic reasons and motives. The intention of the paper is to describe a causal mechanism and to give a causal explanation. The underlying agenda is probably normative, because a better understanding of the causal mechanisms allows academics, and the political actors themselves, to design more functional constitutions or to enter into more treaties. The paper's approach complements the traditional strictly legal research which avoids the questions of why states enter into treaties, why they comply, and why they do not comply. These "why-questions" cannot be answered with a juristic methodology, and by purely legal argumentation "within" the legal structure, because the relevant causal mechanisms lie outside the legal system.

### B. *Research Design*

The research builds on a sound empirical basis. The paper establishes convincing typologies. The paper's parameters for shaping the ideal types of international law aspects of constitutions make sense, and its simplifications seem admissible. Its combined look at the international and the domestic sphere, linking of the two levels of governance, and time attentiveness provide good insights. Time attentiveness highlights, for instance, that compliance with a treaty at time 2 (*inter alia*) depends on the motives (*inter alia* domestic ones) for entering into that treaty at time 1. The call that "greater attention needs to be paid to domestic constitutional structures and political structures as determinants of international legal behavior"<sup>3</sup> is very justified. A follow-up question would be: what are the normative implications of this observation? If some states are by their constitutional design structurally less fit to comply with the most basic precepts of international law, such as international peace and human rights, does the dogma of equality of states still make sense?

### C. *The Main Thesis of the Paper*

The main thesis of the paper is that constitutional designers will consider the relative advantages and disadvantages of international law as a means of locking in democracy. The authors therefore expect that when democratic politics become established, the negative features of international law, such as agency problems and dynamics, outweigh the benefits of international bounds, which the authors see mainly in ap-

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3. Ginsburg, Chernykh & Elkins, *supra* note 1, at 227–31.

peasement of the domestic audience. Therefore, mature democracies do not easily conclude international treaties, because they do not need to lock in democracy. This sounds like a perfect explanation of U.S. history: the founders were very internationalist, and the nation has now become parochial. Actually Ginsburg and coauthors reformulate—in scientific terms and with a theoretical and empirical basis—the U.S. attitude that the country does so well in protecting democracy and human rights domestically that it does not need international law. So the paper offers, to put it bluntly, a superstructure for current U.S. politics.

However, on the premise that international peace and human rights protection are important objectives, which should be supported by legal and political action, we can (and I think we should) ask whether this U.S. posture really furthers those objectives—even in borrowing a Max Weberian term, “value-free” science terms. This leads us to this comment’s second level of analysis: the paper’s precommitment theory explanation pattern.

### III. QUESTIONING THE EXPLANATION PATTERN: PRECOMMITMENT THEORY

#### A. *Precommitment Theory in a Nutshell*

Generally speaking, the theory of precommitment offers a framework for understanding why and by which means individuals and communities seek to bind themselves in the sense of restricting their full liberty of action at a time in the future.<sup>4</sup> “Commitment” here means—in an authoritative formulation—

being committed, bound, or obligated in some course of action or inaction or to some constraint on future action. It is relinquishing some options, eliminating some choices, surrendering some control over one’s future behavior. And it is doing so deliberately, with a purpose. The purpose is to influence someone else’s choices. Commitment does so by affecting that other’s expectations of the committed behavior.<sup>5</sup>

Strategies of exercising power over others through self-incapacitation or auto-limitation, as identified, described, and analyzed by Thomas Schelling since the 1960s,<sup>6</sup> have been seminal related to constitutionalism by Jon Elster. Elster’s classical image is Ulysses having himself tied to the mast in order not to succumb to the sirens.<sup>7</sup> In that vein, democratic con-

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4. Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2057 (2003) [hereinafter Ratner, *Precommitment Theory*].

5. THOMAS SCHELLING, STRATEGIES OF COMMITMENT AND OTHER ESSAYS 1 (2006) [hereinafter SCHELLING, STRATEGIES OF COMMITMENT].

6. THOMAS SCHELLING, THE STRATEGY OF CONFLICT 21–52 (1960) [hereinafter SCHELLING, STRATEGY OF CONFLICT] (a seminal source).

7. JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36–111 (1979) [hereinafter ELSTER, ULYSSES AND THE SIRENS]; JON ELSTER, ULYSSES UNBOUND:

stitutions have been explained as precommitment strategies.<sup>8</sup> Notably, the establishment of a constitutional court, which has the power to review and eventually to declare void laws enacted by democratic procedures, has been reconstructed as a shared precommitment of the people to prevent future human rights abuses that might ultimately undermine the functioning of the democratic system itself.<sup>9</sup>

### B. *Precommitment Applied to International Law*

So far, international legal scholarship has only tentatively made use of precommitment theory.<sup>10</sup> The paper by Ginsburg and others performs pioneering work by submitting that international agreements function as precommitments in the sense of giving up future choices to guard against preference shifts.

#### 1. *Special Characteristics of International Legal Precommitment*

In applying precommitment theory to international law, some specific features have been added to the original idea. First, legal commitments differ from most of the commitments described by Thomas Schelling and others.<sup>11</sup> They do not (unlike burning bridges) factually render impossible an unwanted behavior. They only create normative constraints, which can never rule out contrary factual behavior. Legal norms do not make illegal actions impossible but only make them more unlikely, due to the law's normative pull.

Second, international legal precommitments are made by states or nations, not by individuals. The analogy between both is fraught with problems. Of course, the proponents of precommitment were not the first to rely on the analogy of individuals and groups (nations, states, etc.). Throughout the entire history of the discipline, international legal scholarship has relied on this analogy. For instance, natural law theory

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STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–174 (2000) [hereinafter ELSTER, ULYSSES UNBOUND] (elaborating in more detail on constitutional aspects that had only briefly been touched upon in his earlier book and also revising some exaggerated claims on constitutions as precommitments).

8. CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 241 (2001) (“[D]emocratic constitutions operate as ‘precommitment strategies,’ in which nations, aware of the problems that are likely to arise, take steps to ensure that those problems will not arise or that they will produce minimal damage if they do.”); see also Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 230–38 (Jon Elster & Rune Slagstad eds., 1988).

9. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 *LAW & PHIL.* 327, 353–54 (1990). But see Jeremy Waldron, *Precommitment and Disagreement*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 271, 282–85 (Larry Alexander ed., 2001).

10. See generally Steven R. Ratner, *Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint*, 5 *THEORETICAL INQUIRIES IN L.* 81 (2004) [hereinafter Ratner, *Overcoming Temptations*]; Ratner, *Precommitment Theory*, *supra* note 4.

11. See generally ELSTER, *ULYSSES AND THE SIRENS*, *supra* note 7; SCHELLING, *STRATEGY OF CONFLICT*, *supra* note 6.

compared states to individual persons in the state of nature. Public international law was the law of nature, applied to states.<sup>12</sup> Thus states enjoyed natural rights that incumbend equally on all, and were inalienable. These fundamental, natural rights were, for example, the right to liberty, security, commerce, equality, and finally, sovereignty.<sup>13</sup>

However, to study the behavior of collectives as if they were individuals writ large might be misguided,<sup>14</sup> and some of the resulting errors will be discussed below. This objection concerns not only precommitment, but rational choice theory generally. The third special feature of the theory has been a focus on *self-bindingness*, which is likewise problematic and will be discussed below.<sup>15</sup>

## 2. *International Treaties as Strategic Precommitments*

International treaties might be considered strategic precommitment. Strategic precommitment is present when an entity binds itself not out of fear of what it might do in the future, but to make a credible threat to others that it will not do something (but instead will do something which they do not like). The classical example is the attacking army burning bridges behind itself. This prevents the attacker from retreating, but it also frightens the enemy because the enemy realizes that the attacker can not turn back.<sup>16</sup>

The most common motives for entering into international obligations may be fitted into this pattern. In that vein, Steven Ratner has characterized international commitments by which states seek to enhance reputation, to curry favor (to receive a benefit from another state on a different issue in exchange for a commitment), to pursue a reciprocity strategy (most obviously in international humanitarian law or in consular relations), or to demonstrate belief in a regime and tempt other states to agree to the regime (e.g., human rights regimes), as strategic precommitments.<sup>17</sup>

12. 1 GEORG-FRIEDRICH DE MARTENS, *PRECIS DU DROIT DES GENS MODERNE DE L'EUROPE* 37, 40–41 (2d ed. 1864); 1 EMER DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DE NATIONS ET DES SOUVERAINS* [THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW] 2–3 (James Brown Scott ed., Canegie Inst. of Wash. 1916) (1758); 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTORUM* 9 (James Brown Scott ed., Joseph H. Drake trans., Clarendon Press 1934) (1764).

13. Along this line, Emer de Vattel wrote: “Un Nain est aussi bien un home, qu’un Géant: Une petite République n’est pas moins un Etat souverain que le plus puissant Roiaume.” VATTEL, *supra* note 12, at 11 (“A dwarf is as much a man as a giant is; a small republic is no less sovereign than the most powerful Kingdom.”).

14. ELSTER, *ULYSSES UNBOUND*, *supra* note 7, at 92, 167–68; Ratner, *Precommitment Theory*, *supra* note 4, at 2063–64. For further discussion of disanalogies between individual self-incapacitation in Schelling’s sense and constitutionalism, see Holmes, *supra* note 8, at 237–38.

15. See discussion *infra* Part III.C.2.

16. Thomas Schelling refers to Xenophon who, pursued by the Persians, halted against an almost impassable ravine. SCHELLING, *STRATEGIES OF COMMITMENT*, *supra* note 5, at 1.

17. Ratner, *Precommitment Theory*, *supra* note 4, at 2058–59.

### 3. *International Treaties as a Shield Against Domestic Preference Changes*

In contrast, Tom Ginsburg's paper highlights that international treaties frequently function as a shield against domestic preference changes. This hypothesis can easily be bolstered by additional anecdotal evidence. For instance, in the area of foreign investment before the era of bilateral-investment treaties, investors wanted to "transnationalize" their treaties with foreign governments so that international law, as opposed to the domestic law of the host state, would apply. Thereby, investors were shielded against preference changes of the host state which might lead to expropriation.

A second field is international human rights law. This body of law is designed to protect individuals against domestic human rights standards that are too low, and also against regime change. Domestic constitutional guarantees are not sufficient, because their interpretation and application is managed by state actors without external checks and the state itself can change the rules. International prohibitions of torture and other fundamental-rights guarantees become particularly relevant in times of crises (such as the war on terror), when the temptation to violate human rights standards is higher than in other times.<sup>18</sup>

A special situation of shielding against preference changes is given when leading democratic politicians lock in their political objectives. One reason may be distrust of the people. For instance, after the Second World War, the first Chancellor of the young Federal Republic of Germany sought the "Westbindung," which meant to integrate Western Germany firmly into the Western alliance, because Konrad Adenauer distrusted his own German people.<sup>19</sup>

Likewise, party politics may be locked in against rivaling political parties. The German Chancellor Helmut Kohl, for instance, wanted to lock in a particular type of monetary and economic policy.<sup>20</sup> He knew that the social democrat party, which would most likely succeed his party in power, would abandon this policy. Therefore the chancellor tried to fix the economic stability objectives in the legal framework of the European Union. (However, this objective was realized only in part, because the European Stability Pact was later breached by Germany).

Finally, locking in may occur with a view toward appeasing foreign nations. For example, Germany ratified the European Convention on Human Rights (ECHR) very early, in 1952,<sup>21</sup> in order to show other

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18. Ratner, *Overcoming Temptations*, *supra* note 10, *passim*.

19. HANS PETER SCHWARZ, ADENAUER: DER STAATSMANN: 1952–1967, 145–49 (1991).

20. Susanne Lohmann, *Federalism and Central Bank Independence: The Politics of German Monetary Policy, 1952–92*, 50 *WORLD POL.* 401, 406 (1998).

21. The European Convention on Human Rights of 4 November 1950 was ratified by Germany on 5 December 1952. It entered into force on 3 September 1953. Other signatory states such as France or Switzerland ratified only 20 years later. For information on the ECHR, including a chart of

European Nations that Germany was prepared to become a good member of the international community. The historical records show that Germany primarily desired the neighboring states to overcome their reserved attitude and to prevent new suspicions from arising.<sup>22</sup> It was relatively easy to pursue this strategy, because the interior costs of ratifying the ECHR were low. The German Basic Law's fundamental-rights catalogue had established an extremely high fundamental-rights standard which made it quite unlikely that Germany would have to defend itself before the European Convention's monitoring bodies. In fact, the number of ECHR cases in which Germany has been sanctioned by the Strasbourg court has remained comparatively low.<sup>23</sup>

Similarly, after the German reunification, the German political elite feared that the sheer size of unified Germany, situated right in the middle of Europe, might provoke mistrust on the side of European neighbor states. Political leaders therefore pressed for the establishment of the Economic and Monetary Union in 1992 and gave up the German Deutschmark, a symbol of Germany's economic and political strength, even against the preferences of the German population.

### C. Critique of the International Legal Precommitment Theory

#### 1. *Déjà vu: Precommitment as a Savior of Sovereignty*

By construing international legal obligations as self-regulation of states and focusing on rational choices, precommitment theory as applied to international law resonates with the 19th century focus on the sovereign will of states. In the precommitment perspective, entering into international engagements does not place external constraints on sovereign actors. Quite to the contrary, entering into an agreement, conceived as a precommitment, is an indirect technique by which the actor can assert its will, and therefore, constitutes the "epitome of self-government."<sup>24</sup>

This view is far from new; it was sustained by medieval scholastics in the debate on God's omnipotence. In that view, God could bind himself as an expression of his omnipotence. To deny this capacity would have

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signatures and ratifications, see Complete List of the Council of Europe's Treaties, <http://conventions.coe.int/Treat/Commun/ListeTraites.asp?CM=8&CL=ENG> (follow "Convention for the Protection of Human Rights and Fundamental Freedoms" hyperlink).

22. See, e.g., Christoph Gusy, *Die Rezeption der EMRK in Deutschland*, in MENSCHENRECHTE IN DER BEWÄHRUNG. DIE REZEPTION DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION IN FRANKREICH UND DEUTSCHLAND IM VERGLEICH 129, 132–35 (Constance Grewe & Christoph Gusy eds., 2005).

23. In thirty-eight years (between the first judgment against Germany in 1968 and April 2007), the ECHR issued only 118 judgments in which Germany was a defendant, and in about half of those a violation of the Convention was found. The author compiled this data on basis of HUDOC database of the ECHR.

24. Waldron, *supra* note 9, at 275.

meant to deny God's almightiness.<sup>25</sup> Later, this line of reasoning was applied to the (absolute) political sovereign.<sup>26</sup>

In international law, the idea of self-restriction as a vehicle of sovereignty found its classical expression in the Wimbledon decision of 1923. Here the Permanent Court of International Justice held that "the right of entering into international engagements is an attribute of State sovereignty."<sup>27</sup> In that perspective, states remain subject to their own decisions. Consequently, they remain sovereign, as Georg Jellinek already explained in 1914.<sup>28</sup>

Viewing treaties as an "epitome" of sovereignty necessarily implies that the "will" of the states, especially their will to bind themselves, is not only the (factual) reason why states enter into agreements in the first place, but also, the (normative) reason why states should observe them. If states exercise their sovereignty by binding themselves and if this is the "source of validity" of international law, or—put more clearly—the source of its legitimacy,<sup>29</sup> the precommitment-paradigm serves, not unlike its 19th century precursors, as a savior of sovereignty.

However, this obsession with sovereignty is prone, as historical experience shows, to engender undesirable consequences such as nationalism and territorial and ethnic strife, and it should, therefore, be viewed with caution.

## 2. *External Transitivity: Promises to Other Actors, Not Self-Bindingness*

Legal obligations can not be explained as flowing from the unilateral choice to bind "oneself." Again, this insight is far from new. Classical authors, raging from Seneca over Jean Bodin to Thomas Hobbes, have argued that self-bindingness is in logical terms impossible. Any obligation must involve more than one actor. Seneca asserted: "The word 'owe' has no place unless two persons are involved; how, then, will it apply to one person, who, in the act of uncuring debt, frees himself from

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25. See BERNDT HAMM, *PROMISSIO, PACTUM, ORDINATIO: FREIHEIT UND SELBSTBINDUNG IN DER SCHOLASTISCHEN GNADENLEHRE* (1977); FRANCIS OAKLEY, *OMNIPOTENCE, COVENANT, AND ORDER: AN EXCURSION IN THE HISTORY OF IDEAS FROM ABELARD TO LEIBNIZ* (1984).

26. See Holmes, *supra* note 8, at 214 (discussing Bodin); see also PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* 12 (1990) ("If an entity has the power to make any law or do any act at any time, then can it limit its own power to act or make a law? If it can, then it can't, and if it can't, then it can.").

27. S.S. Wimbledon (U.K., Fr., Italy, Japan v. Germany), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Judgement of Aug. 17).

28. GEORG JELLINEK, *ALLGEMEINE STAATSLHRE* 479 (3d ed., 1914).

29. The old term "source of validity" is somewhat misleading, because it obscures that the question was much less the factual question of whether international law was observed, but more the normative question why it should be observed. That debate was linked to and overlapping with the debate on dualism versus monism, the core theoretical debate in international legal scholarship of that epoch.



it?”<sup>30</sup> Quite convincingly, this basic objection to auto-obligation has been elaborated by Samuel Pufendorf,

[A] man cannot become obligated to himself, or enter into an agreement with himself, or promise himself something which concerns only himself. For whoever obtains a right by an obligation is at liberty to relinquish it, provided no injury is thereby done to a third party. In this instance the person obligating and the person obligated, that is, the one obtaining a right and the one giving it, are the same, and so, no matter how much a man may strive to obligate himself, it will be all in vain, since he can free himself at his own pleasure, without having carried out any obligation whatever; and the one that can do this is actually free.<sup>31</sup>

In modern times, research in logic has demonstrated that reflexive actions (to obey oneself, to give a promise to oneself, etc.) are qualitatively distinct from transitive ones.<sup>32</sup>

In a normative perspective, Immanuel Kant pointed out that, if we accept that in some instances “inner reservations” may obliterate our commitments, no legal engagements would be possible, because nobody would believe in promises any longer.<sup>33</sup>

The paradoxality of binding law based on unilateral choices becomes manifest if we consider the following: if, as the precommitment theory (at least in its rational choice variant) holds, legal commitments ultimately depended on the “will” (in modern terminology: the “rational choice”) to bind oneself, the actors are no longer bound as soon as they change their mind.<sup>34</sup> This has been argued for example by the German

30. 5 LUCIUS ANNAEUS SENECA, ON BENEFITS, in 3 MORAL ESSAYS, 313 (John W. Basore trans., 1935) (A.D. 64). In this tradition, see also JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE 132 (Darmstadt 1977) (1583) (“Si donc le Prince souverain est exempt des loix de ses predecesseurs, beaucoup moins seroit-il tenu aux loix & ordonnances qu’il fait: car on peut bien recevoir loy d’autrui, mais il est impossible par nature de se donner loy, non plus que commander à soy-même chose qui depende de la volonté, . . .”); THOMAS HOBBS, LEVIATHAN 173 (Michael Oakshott ed., Basil Blackwell Oxford 1955) (1651) (“Nor is it possible for any person to be bound to himself; because he that can bind, can release; and therefore he that is bound to himself onely, is not bound.”).

31. 2 SAMUEL PUFENDORF, DE IURE NATURAE ET GENTIUM LIBRI OCTO 94 (James Brown Scott ed., C. H. Oldfather & W. A. Oldfather trans., Clarendon Press 1934) (1688).

32. ULRICH PARDEY, BEGRIFFSKONFLIKTE IN SPRACHE, LOGIK, METAPHYSIK 270–74 (2006).

33. 7 IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 53 (Wilhelm Weischedel ed., 1978) (1785) (“Denn die Allgemeinheit eines Gesetzes, daß jeder, nachdem er in Not zu sein glaubt, versprechen könne, was ihm einfällt, mit dem Vorsatz, es nicht zu halten, würde das Versprechen und den Zweck, den man damit haben mag, selbst unmöglich machen, indem niemand glauben würde, daß ihm was versprochen sei, sondern über alle solche Äußerung, als eitles Vorgehen, lachen würde.”).

34. Interestingly, this idea still persists in the context of *treaty amending procedures*. According to a widespread view, state parties remain free to amend their treaty unanimously without observing special formalities, even if the treaty itself had stipulated special amendment procedures. The argument is that the treaties could any time (without any formalities) conclude a new (amending) treaty and/or simultaneously (implicitly) modify or abolish the amending formalities. This construct privileges the state parties’ sovereign decision in time 2 over their sovereign decision to bind themselves to special procedures in time 1. Thereby, the value of establishing special procedures is very much reduced, even if the parties still benefit from procedures precluding a unilateral departure.

philosopher Johann Gottlieb Fichte.<sup>35</sup> Obviously, that concept is irreconcilable with the principle of *pacta sunt servanda*.

The consequence that treaty parties are free to withdraw due to preference changes is of course not drawn by precommitment theory. On the contrary, the idea of precommitment means to bind oneself *against* one's own future choices. However, there might be an inner contradiction in the theory at this point: if the "sovereign" decision matters, then it is hardly conceivable why the "sovereign" decision at time 1 is superior to the "sovereign" decision at time 2.

As the most popular examples for precommitment show, the precommitment theory in its classical version has probably not fully confronted this inner contraction. Popular examples mostly relate to situations in time 2 in which the person who sought to bind himself beforehand is no longer capable of rational action: Ulysses is enchanted by the fantastic sirens, half women-half beasts; the smoker who asked someone to hide his cigarettes is tortured by withdrawal symptoms; and the party goer who gave his car keys to his friend is drunk.<sup>36</sup> All these are not normal situations of rational preference change in time 2.

If, however, preference change is rational, then why should the new preference not be decisive? If rational choices matter, then the new (changed) preference should carry. This would, as just pointed out, make binding (international) treaties impossible. On the other hand, if we uphold the idea of *pacta sunt servanda*, the bindingness of treaties can not be explained by simply pointing to preferences. The problem of a change of preferences, can, in the words of the German philosopher Claus Offe, "no longer be solved by means of prudent action, but only by resort to emergent notions of justice, to which no way leads from the subjective sphere of rationality of action."<sup>37</sup>

The upshot is, if we assume that treaties, including international treaties, create binding obligations, we can not—as a matter of logic—understand international treaties as the result of unilateral decisions (rational choices) to bind oneself, but can only understand them as commitments towards other actors. The bindingness of a legal instrument (for example a treaty or a pledge not to use nuclear weapons first or to stop nuclear testing) results from the promise given to the other party,

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35. "Beide meinen es in der Stunde des Versprechens aufrichtig. Es ist ein Vertrag zwischen ihnen. Sie gehen hin, und Einer von Beiden, oder Beide, bedenken sich eines anderen *und nehmen in ihrem Herzen ihren Willen zurück. Der Vertrag ist aufgehoben*; die Versprechen sind ungeschehen gemacht; denn Recht und Verbindlichkeit sind aufgehoben." JOHANN GOTTLIEB FICHTE, *Beitrag zur Berichtigung der Urtheile des Publicums über die französische Revolution*, in 6 JOHANN GOTTLIEB FICHTE'S SÄMMTLICHE WERKE 37, 112 (Immanuel Hermann Fichte ed., 1845/1846) (emphasis added).

36. See THOMAS SCHELLING, *The Intimate Contest for Self-command, and Ethics, Law, and the Exercise of Self-command*, in CHOICE AND CONSEQUENCE 57–82, 83–112 (1984).

37. Claus Offe, *Fessel und Bremse, Moralische und institutionelle Aspekte "intelligenter Selbstbeschränkung"*, in ZWISCHENBETRACHTUNGEN: IM PROZESS DER AUFKLÄRUNG, JÜRGEN HABERMAS ZUM 60. GEBURTSTAG 739, 750 (Axel Honneth et al. eds., 1989) (translation by the author).

and the normative expectations created thereby *in the other*, and not from a unilateral decision.<sup>38</sup>

### 3. *Internal Transitivity in a Collective: In a State, the Powerful (or the Majority) Commit the Rest*

Besides being unconvincing, the idea of “self-bindingness” is not even needed to explain state commitments. The idea that the community is a unitary actor which binds “itself” is a consequence of the traditional analogy between individuals and communities or nations.<sup>39</sup> Already Hugo Grotius asserted that “an association, as well as an individual, has the right to bind itself by its own act, or by the act of a majority of its members.”<sup>40</sup>

However, the state is, as the people, a construct, and no unitary actor. “The” state or “the” people never binds “itself.” Not all actors within the state will have the same purpose. A reality-conscious examination of the commitment problem should ask who commits to whom in politics and in international relations.

To give a classical example, in Jean Jacques Rousseau’s and the French revolutionaries’ claim that every citizen only binds himself by his own will, which then forms part of the *volonté générale*, reflexivity was a rhetorical device which served to camouflage the reality of hierarchical structures.<sup>41</sup>

Although contemporary constitutional legal scholarship has argued that the rule of law means self-bindingness, it is realized that the separation of powers and the distribution of state functions on different organs and institutions are crucial for securing freedom.<sup>42</sup> Thus, in reality, different governmental actors bind one another.

Additionally, the flow of time brings about a change in the composition of the collective. The claim that a people, a corporation, and other moral persons enjoy a moral and legal identity over time<sup>43</sup> is a double fic-

38. On the other hand, the creation of a legal obligation does not necessarily require a full consensus and meeting of the minds. See JOHANNES KÖNDGEN, SELBSTBINDUNG OHNE VERTRAG 156–92 (1981).

39. See WOLFF, *supra* note 12, at 19.

40. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 386 (Francis Kelsley trans., 1925).

41. ULRICH PARDEY, IDENTITÄT, EXISTENZ UND REFLEXIVITÄT 209 (1994).

42. “Die rechtsstaatliche Bindung des Staates ist Selbstbindung.” DIETER GRIMM, *Der Wandel der Staatsaufgaben und die Krise des Rechtsstaates*, in WACHSENDE STAATSAUFGABEN—SINKENDE STEUERUNGSFÄHIGKEIT DES RECHTS 291, 291 (1990). “Der Umstand, dass der Staat das Recht, dem er unterworfen war, selber setzte, wurde dadurch freilich um so problematischer . . . Sein machtbegrenzender Effekt liegt aber darin, dass die Entscheidungen auf verschiedenen Ebenen verteilt und zeitlich auseinandergezogen werden . . . In der Verteilung von Normsetzung und Normanwendung auf verschiedene Organe fand diese Differenz eine organisatorische Entsprechung. Die Gewaltenteilung findet ihren eigentlichen Sinn auf diese Weise in der Sicherung der Selbstbindung.” *Id.*, at 292, 294.

43. “And to be commanded we do consent, when that society whereof we are part hath at any time before consented, without revoking the same after by the like universal agreement. Wherefore as any man’s deed past is good as long as himself continueth; so the act of a public society of men done

tion.<sup>44</sup> Therefore even if we accept the legal fiction that a group of persons which constitutes a moral person (e.g. the state) binds “itself” at a given moment, this construct becomes even more problematic in the precommitment situation in which generation 1 binds the hands of generation 2.

Research which takes seriously its own agenda of integrating the domestic level into the analysis must take the problem of internal multiplicity into account. Because states, like other organizations are composite actors, they “do not have preferences, and they do not choose in the conscious and rational sense that we attribute to people.”<sup>45</sup> The precommitment of “the” state is a collectivist fiction. This legal fiction is a well established and indispensable device to answer legal questions of imputability and responsibility, but it seems problematic when used to give causal explanations.

#### 4. *Triviality*

The idea of precommitment appears to inflate something which is the normal function of international law, namely to place some types of action or behavior beyond the control of domestic actors—and also against future changes of preference. That is what international treaties are about: they oblige the contracting parties “to behave in a certain manner even if [they] subsequently change [their] mind[s] about the desirability of that behavior.”<sup>46</sup> Law brings about bindingness in an uncertain future.

The binding character of law often relates to future scenarios which are anticipated but are hoped not to occur. Take as an example Article 5 of the NATO Treaty, enshrining the obligation of the NATO-Member States to act in collective self-defense in the event of an attack from outside the alliance. You might call this a precommitment, but it might also simply be called a treaty. But if all treaties are precommitments, the meaning of precommitment is expanded “to the point of uselessness.”<sup>47</sup> Precommitment would have to be defined more sharply in order to supply an added value.

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five hundred years sithence standeth as theirs who presently are of the same societies, because corporations are immortal; we were then alive in our predecessors, and they in their successors do live still.” 1 RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* 194–95 (Christopher Morris ed., Dent 1954) (1593).

44. Only in the rather hypothetical case that the problems to which a constitution or a treaty is “offered as a solution can be expected to persist indefinitely,” can the authors “say with some justification that they are acting on behalf of a temporarily extended self.” ELSTER, *ULYSSES UNBOUND*, *supra* note 7, at 168.

45. Michael C. Jensen, *Organization Theory and Methodology*, 58 *ACCT. REV.* 319, 327 (1983). The behavior of a state or other “organization is the equilibrium behavior of a complex . . . system made up of maximizing agents with diverse and conflicting objectives.” *Id.*

46. Michael Byers, *Taking the Law out of International Law: A Critique of the “Iterative Perspective,”* 38 *HARV. INT’L L.J.* 201, 202 (1997).

47. Ratner, *Precommitment Theory*, *supra* note 4, at 2059.

### 5. *Lop-Sided Liberalism*

The precommitment theory so far appears somewhat lop-sidedly liberalist (in the European sense of the term). The theory has up to now been applied only to (negative) legal obligations to abstain from something. It fits laws prohibiting certain actions, such as using military force, or limiting people's freedom of speech. However, the constraining function of State constitutions<sup>48</sup> (and of international law) is only one aspect of the law. Law (in constitutions, codes, regulations, or in international treaties) often positively prescribes specific action, for example an active environmental policy or a means to improve public education. So far, the precommitment theory seems to neglect other functions of law, such as its constituting power, its organizing function (by establishing legal procedures and competencies), and finally, the aspirational and educational function of law. Most modern state constitutions and most international treaties embody numerous programmatic and even hortatory provisions. It seems worth investigating whether these types of legal norms can equally well be captured in the precommitment paradigm.<sup>49</sup>

#### D. *An Alternative View*

Current attempts to explain the bindingness of international law in the precommitment vocabulary, to some extent, revives the nineteenth and early-twentieth century debate on the "source of validity" or "basis of obligation" of international law. In modern terms, this was a debate over the legitimacy of international law.<sup>50</sup> Just like the old debate, precommitment oscillates between description and prescription. Precommitment is used as an explanation of factual state behavior. But, at least implicitly, precommitment is also presented as a normative ground of legal bindingness.

Because of the shortcomings of the precommitment theory, namely the fact that it renders impossible legal obligations if it relies exclusively on the unilateral decision to commit "oneself," international treaties should not be viewed as worthy of respect because they reflect actual and concrete (more or less rational)<sup>51</sup> choices of the actors. Instead, public

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48. The containing function is the historically first function of State constitutions, as formulated programmatically in Wilhelm von Humboldt's memorable work *Ideas on the attempt to define the limits of the effects of the State*. WILHELM VON HUMBOLDT, IDEEN ZU EINEM VERSUCH, DIE GRENZEN DER WIRKSAMKEIT DES STAATS ZU BESTIMMEN (Philip Reclam Jun ed., 1991) (1792).

49. For reflexions on this issue, see Holmes, *supra* note 8, at 225–28.

50. Martti Koskeniemi, *Legitimacy, Rights and Ideology, Notes Towards a Critique of the New Moral Internationalism*, 7 ASS'NS: J. LEGAL SOC. THEORY 349, 358–60 (2003).

51. See Ap Dijksterhuis et al., *On Making the Right Choice: The Deliberation-Without-Attention Effect*, 311 SCI. 1005, 1006 (2006), which provides empirical psychological research showing that choices in complex matters should be left to unconscious thought. The authors conclude: "Although we investigated choices among consumer products in our studies, there is no a priori reason to assume that the deliberation-without-attention-effect does not generalize to other types of choices—political,

international law deserves respect (or put differently, it should be accepted as binding or “valid” or “legitimate”) because it is an indispensable device to uphold international relations and is necessary for the functioning of international relations. Borrowing the formula of the interwar sociological school of international law: “la règle de droit n’est que la traduction normative de la nécessité sociale immanente.”<sup>52</sup> This “social necessity” as a source of legitimacy could be translated in rational choice terms as being in the “long-term and enlightened self-interest” of the nations, which is something different from actual and concrete choices of elites focused on the next election.

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managerial, or otherwise. In such cases, it should benefit the individual to think consciously about simple matters and to delegate thinking about more complex matters to the unconscious.” *Id.* at 1007.

52. 1 GEORGES SCELLE, *PRECIS DU DROIT DES GENS* 31 (1932); see Georges Scelle, *Règles générales du droit de la paix*, 46 *REC. DES COURS* 327, 348, 447 (1933) (“Si la force sociale doit être mise au service de la contrainte juridique, c’est que la règle de droit n’est que la traduction normative de la nécessité sociale immanente ou biologique.” “Le traité, comme la coutume, n’a de valeur obligatoire que lorsqu’il est conforme au droit objectif ou à la nécessité sociale.”).