International Treaties and Moral Promises

Thesis by
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Introduction

Ideological Warfare: *Nicaragua V. The United States of America*

What is the relationship between morality and international law? This question is extremely broad, complex, and daunting, and it does not have a simple answer. Rather, its answer depends on an intricate exploration, examination, and analysis of the deep entanglement that exists between law, morality, politics, and society. It suffices to say that no one book, paper, or thesis will ever be able to answer this question at once by itself. Yet, we can chip away at this broader question by starting with a smaller, more foundational one.

The question of this thesis is as follows: are signed international treaties moral promises? That is to say, are signed international treaties a form of promise that generates a promissory obligation for nations to preserve and comply with the terms of the treaty, or are these such international legal agreements independent of morality's grasp? Answering this question will hopefully illuminate some insights about the fundamental relationship between morality and international law.

Even this fundamentally basic question, however, does not exist inside of a vacuum. To start answering this question, we must first understand why it is even a question at all. To that end, we need some historical context. Thus, before embarking on our philosophical exploration of morality, promises, and treaties, let us first consider two different historical events.

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The year is 1945. In the wake of the Second World War, the United States has joined together with many of the world's nations to establish an international organization that could promote peace and prosperity. On April 25th, 1945, the United States holds the United Nations Conference on International Organization, also known as the San Francisco Conference. This conference, which consists of 850 delegates from fifty nations, has one clear purpose: to draft

and sign the United Nations Charter, thereby establishing an intergovernmental organization known as the United Nations (UN).[1] The United Nations Charter has lofty goals. It proposes to create an international legal organization through which the worlds' nations can coordinate international cooperation, secure fundamental human rights, negotiate international treaties, air international grievances, promote social progress, and establish justice and respect for the obligations arising from treaties and other sources of international law.[2] To accomplish each of these ends, the new UN Charter establishes four principal organs: The General Assembly, the Security Council, the Economic and Social Council, and the International Court of Justice. The General Assembly will act as the organization's legislative body for constructive and deliberative international dialogue. The Security Council is tasked with maintaining world peace. The Economic and Social Council will advance international social progress. And finally, the International Court of Justice--whose rules and operations are laid out in the Statue of the International Court of Justice--will establish the world's first international judicial court to settle legal disputes between nations according to the various sources of international law. In short, the UN charter promises to create an intergovernmental organization that will champion peace, propagate international trade, maintain international law and justice, and set all nations on equal footing in international relations.

For a world recovering from tumultuous war, the goals of the proposed charter seem lofty and farfetched at best, perhaps even downright naive at worst. Yet, the delegates of the conference maintain a steadfast support of the Charter's ideals, and soon enough, after three months of tenacious debate and compromise, the UN Charter and the Statue of the International Court of Justice are signed by every delegate on June 26th, 1945. As the exhausted delegates celebrate, the United States' President Harry S. Truman gives a final concluding speech, lauding the virtues of the Charter and the Statue and recapitulating the earnest duties of international cooperation, justice, and respect that brought the delegates together in the first place, and which forever must be maintained in order for the UN to achieve its goals:

> You have created a great instrument for peace and security and human progress in the world. The world must now use it! If we fail to use it, we shall betray all those who have

[1] United Nations, "1945: The San Francisco Conference," https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html.
[2] United Nations, "Preamble" https://www.un.org/en/sections/un-charter/preamble/index.html.

> died in order that we might meet here in freedom and safety to create it. If we seek to use it selfishly--for the advantage of any one nation or any small group of nations--we shall be equally guilty of that betrayal. The successful use of this instrument will require the united will and firm determination of the free peoples who have created it. The job will tax the moral strength and fibre of us all. We all have to recognize--no matter how great our strength--that we must deny ourselves the license to do always as we please. No one nation, no regional group, can or should expect, any special privilege which harms any other nation...that is the price which each nation will have to pay for world peace. Unless we are all willing to pay that price, no organization for world peace can accomplish its purpose. And what a reasonable price that is![3]

Indeed in 1945, that seemed like a reasonable price.

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Now the year is 1984, exactly thirty-nine years after Truman's speech and the signing of the UN Charter and the Statue of the International Court of Justice. The International Court of Justice (ICJ), by now well-established, has agreed to hear its most contentious international legal dispute yet: *Nicaragua V. The United States of America*. In the case, Nicaragua alleges that the United States has flagrantly and odiously violated several counts of international law by supporting the Nicaraguan Contras who attempted to overthrow the Nicaraguan government during the Nicaraguan Revolution:

> The United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, and in particular, its charter and treaty obligations under: Article 2 (4) of the United Nations Charter; Articles 18 and 20 of the Charter of the Organization of American States; Article 8 of the Convention on Rights and Duties of States; Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife...[and the] Treaty of Friendship, Commerce and Navigation concluded between the Parties in 1956...As a matter of law, Nicaragua claims, *inter alia*, that the United States has acted in violation of Article 2, paragraph 4, of the United Nations Charter, and of a customary international law obligation to refrain from the threat or use of force; that its actions amount to intervention in the internal affairs of Nicaragua, in breach of the Charter of the Organization of American States and of rules of customary

[3] Harry S. Truman, "Address in San Francisco at the Closing Session of the United Nations Conference in San Francisco" June 26, 1945. https://s3-eu-west-1.amazonaws.com/s3-euw1-ap-pe-ws4-cws-documents.ri-prod/9781138915718/doc_04.pdf

> international law forbidding intervention; and that the United States has acted in violation of the sovereignty of Nicaragua, and in violation of a number of other obligations established in general customary international law and in the inter-American system.[4]

The United States of America denies the grave allegations and petitions the Court to examine the issue of the Court's jurisdiction over the case. The Court complies and holds hearings over the matter, and on November 26th, 1984, the court rules that it has jurisdiction to entertain the case, *inter alia*, pursuant to Article 36, paragraphs 2 and 5 of the Statute of the Court.[5] Angered by the Courts' decision, the United States refuses to take part in the case and pens its dismissal to the Court:

> The United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view...that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case and reserves its right in respect of any decision by the Court regarding Nicaragua's claims.[6]

Between 1982 and 1986, Nicaragua sends seven resolutions to the United Nations Security Council (UNSC) urging the council to force the United States into full and immediate compliance with the case before the ICJ.[7] All seven resolutions are vetoed. Despite the United States' refusal to participate in the case, the Court continues to faithfully carry out its duties and proceeds with the case. Two years later, on June 27th, 1986, the Court issues its judgment. The ICJ rules that the United States has violated eight counts of international law, and accordingly the US has an immediate duty to cease and refrain from further illegal activity and has a legal obligation to pay roughly 17 billion in monetary reparations to Nicaragua for all injury caused by their breaches of treaty obligations under international law.[8] The United States promptly ignores the ruling, refuses to comply with the Court's order to pay reparations to Nicaragua, and

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[4] I.C.J. Reports, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua V. United States of America)*, Merits, Judgment, 1986, 18-22.
[5] Ibid, 17.
[6] Ibid, 17.
[7] Celine Nahory, Giji Gya, and Misaki Watanabe, "Subjects of UN Security Council Vetoes," *Global Policy Forum*, 2009, https://www.globalpolicy.org/component/content/article/102/40069.html.
[8] I.C.J. Reports, *Nicaragua V. United States of America*, 146-149.

continues to unlawfully support the Contras. Four months after the ruling, on October 28th, 1986, Nicaragua sends one last resolution to the United Nations Security Council imploring the UNSC to observe, uphold, and respect the rule of international law by punishing the United States. Despite eleven votes in favor and three abstentions, the resolution is unilaterally blocked by the United State's one vote against, per the rules of the UNSC.[9] A year later, Nicaragua turns to the U.N. General Assembly (UNGA) in a last-ditch attempt for rectification. The 41st General Assembly votes on resolution Thirty-One calling for the United States' immediate compliance with the ICJ ruling.[10] The resolution passes 95-2, with only the United States and Israel opposing. However, due to its lack of enforcement mechanisms, the UNGA resolution effects no change on the USA's behavior. Bereft of further legal options, Nicaragua withdraws the complaint from the court in 1992 after a decade-long legal struggle. To this day, Nicaragua has received neither the monetary reparations nor an apology on the behalf of the United States.

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Although this is only a brief account of these two historical events, one point is immediately apparent: within the span of only forty years, the United States drastically changed their views regarding the imperative of respecting international treaty law. Forty years saw the very champions of international law become its sworn nemesis. This is the crux of why the principal question of this thesis--whether signed international treaties are moral promises--is even a question at all. If international treaties were always observed, then our conclusion about the moral nature of international treaties would be forthright. But as history indicates, this is not the case. Rather, our two historical events indicate that there exists two fundamentally different ideas about the relationship between international treaties and morality. The first, as evidenced by the documents and zeitgeist behind the creation of the United Nations, is the idea that international treaties and international cooperation are fundamentally moral. On this reading, the very idea of international treaty-making and international cooperation is born out of the desire to achieve the moral values of peace, justice, progress, etc., and they therefore require a principled

[9] United Nations Security Council, "Provisional Verbatim Record of the Two Thousand Seven Hundred and Eighteenth Meeting," 1986, 51. https://www.un.org/ga/search/view_doc.asp?symbol=S/PV.2718.

[10] United Nations General Assembly, "Judgement of the International Court of Justice of 27 June 1986 concerning military and paramilitary activities in and against Nicaragua: need for immediate compliance," Resolution 31, 1986, https://undocs.org/en/A/RES/41/31.

commitment to these moral values on everyone's behalf in order to be effective. The second idea, as evidenced by the historical events of the Nicaragua ICJ case, asserts that international treaties are amoral, social and political products of self-interested nations who bargain treaties when it benefits them, but reneges on them as soon as they become a hindrance to the advancement of national interests. On this reading, international treaties are not founded upon even the slightest hint of moral principles, but rather they are formed from a complex set of legal grounds and political motivations whose convoluted intricacies thus permit and justify nations to do whatever they please irrespective of their international treaty obligations.

How then, does one go about determining which reading is right, when both are clearly supported by historical precedent? That is where this thesis takes the reigns. Through a detailed exploration, analysis, and examination of moral promises and international treaties, we can illuminate some kind of support for one reading or the other. If it turns out that promises and treaties look alike--that they are constituted by the same core assumptions and their core principles function in the same way--then we can conclude that international treaties entail the same set of moral obligations that promises do (which, generally construed, is the idea that promises are not supposed to be broken), thus illuminating some kind of support for the first, moral reading of international treaties. However, if through our examination we find that promises and international treaties look nothing alike, that they operate from completely different sets of principles and assumptions, then we will be forced to conclude that international treaties do not entail the same set of moral obligations that promises do, thus illuminating some kind of support for the second, amoral reading of international treaties. Accordingly, this thesis will present a detailed treatment of the question "are signed international treaties moral promises?" in hopes of illuminating some insights about the core relationship between international law and morality.

This thesis will proceed as follows. In the first three chapters, we will embark on a profound analysis and evaluation of three concepts of promise and the concepts of treaty, ultimately establishing and defending one definition of promise and one definition of treaty as constituting the best definitions of these concepts. In the last chapter, Chapter Four, I will take on the principle goal of this thesis: arguing, by way of analogy, that international treaties are a form of moral promise.

Chapter 1

What is a Promise? Three Concepts

Our inquiry begins with a simple, crucial, but deceptively complex question: what is a promise? For, in order to argue that international treaties are moral promises, we must first understand exactly what it means to say that something is a promise. Promises are a concept, and like any concept, we can explore its foundations, expose its mechanisms, and test its definitions against real world cases. The question at hand in this chapter, then, is uncovering the most philosophically robust concept of promise.

Philosophical explorations of promises are as old as philosophy itself. The subject has been treated by important figures in the history of philosophy spanning the ages, from Aristotle to Hume, to Kant and to Mill and to Rawls--just to name a few. While the focus of many of these inquiries have been ethical investigations, a great deal of them have also been the kind of inquiry that we are interested in doing today: analytically defining the nature of promises. To treat every single inquiry would be impossible--but more importantly, it would not be helpful in getting us any closer to a working concept of promise for our present investigation.

Thus, to achieve the goals of this present thesis, I have compiled what I take to be three of the most well-known, strongly defended contemporary contenders for a concept of promise: Joseph Raz's obligation concept of promise (PO), P.S. Ardal's intention concept of promise (PI), and P.S. Atiyah's material interest concept of promise (PM). These three concepts of promise were chosen because they are paradigmatic of roughly three contemporary theories of promise that have seen much debate: normative power theories, assurance theories, and reliance theories, respectively. Normative power theories tend to argue that uttering promises invokes a special normative power that morally obligates us to the contents of the promise.[11] On this account, promissory obligations--i.e. a promise's generation of a moral obligation--are generated by the promiser's voluntary, self-induced commitment to the contents of the promise during the act of promising. Assurance theories and reliance theories are both kinds of expectation theories, which

[11] Allen Habib, "Promises," *The Standford Encyclopedia of Philosophy*, 2018, https://plato.stanford.edu/archives/spr2018/entries/promises.

asserts that promises derive their normative power and engender promissory obligations from generating expectations in the promisee.[12] These theories operate on the principles that promises are designed to produce trust in the promisee, and thus breaking the promisee's trust constitutes a wrongful harm. Where Assurance theories differ from Reliance theories is in defining what counts as wrongful harm. Assurance theories argue that merely disappointing the expectations of a promisee constitutes a wrongful harm, whereas reliance theories hold that only tangible, measurable harms to the promisee that result from broken promises count as wrongful harm.[13] Roughly, Raz's PO concept is a normative power theory, Ardal's PI concept is an assurance theory, and Atiyah's PM concept is a reliance theory.

This overview of our three competing theories of promise is meant to serve as a helpful architectural guide of the different concepts of promise, not as a concrete taxonomy of promising theories. What really matters is the specifics of each theory: How do they define what a promise is? How do they derive promissory obligations from promises? Do they explicate if, how, and why promises have moral weight? And finally, what is their justification for why their promise concept offers the best insights and understanding of promises? These are the four questions we will be exploring as we attempt to understand each concept of promise. With these introductory marks out of the way, let us now turn our attention to the first concept of promise we will be investigating: Raz's obligation concept of promise (PO).

Raz's Obligation Concept of Promise

Raz's obligation concept of promise (PO) begins with a concise definition of what a promise is: "Whoever communicates, in circumstances of kind C, an intention to undertake by the very act of communication an obligation to perform an action and invest the addressee with a right to its performance ought to perform that action and his addressee has a right that he shall do so (unless the addressee releases him from this requirement)."[14] This definition lays out three important features that Raz believes distinguishes promises from other acts of communication. So, according to the PO concept: 1) promises engender obligations, 2) promises require explicit

[12] Ibid.
[13] Ibid.
[14] Joseph Raz, "Promises and Obligations" in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Oxford University Press, 1977), 211.

acts of communication, and 3) promissory obligations are voluntary and self-imposed. We will look at each of these points in turn.

First, Raz points out that what distinguishes promises from other acts of communication is that promises engender obligations all by themselves. Raz's invocation of obligation as the backbone defining feature of a promise is the central core of his PO concept (hence why it is called the "obligation concept of promise"). For now, we will only focus on the big picture of what this means, saving the discussion of how it works for later on. Raz understands obligation to mean "a binding commitment to perform an action."[15] So, when Raz says that promises engender obligations all by themselves, what he means is that the very utterance of the promise is what generates the promissory obligation, instead of pointing to some other facts surrounding the promise--such as the circumstances or effects of the promise--as being responsible for the generation of the promissory obligation. According to Raz, a promise looks like this: when a promiser utters a promise, that promiser thereby expresses an "intention to undertake obligations"[16] to perform the promise for the promisee. In expressing such an intention to undertake an obligation, the promiser has now both committed himself to the performance of the act required by the promise and invested the promisee with a right to the promise's performance. What remains, then, is an explication of how exactly the mere utterance of the promise actually generates the promissory obligation. However, we will briefly set aside this conversation of promissory obligations and turn our attention towards completing our definition of the PO concept by looking at the two other crucial features of PO promises.

Another point of interest in the PO concept definition is Raz's insistence that promises require explicit acts of communication between a promiser and a promisee with an expressed understanding between the promiser and promisee that the promisee is being invested with a right to the promise's performance by the promiser. This highlights two insights about what counts as a promise according to the PO concept. First, it indicates that we should exclude vague or ambiguous acts of communication from constituting promises. For example, if I were to say to my friend, "I might go to the store later," under Raz's PO concept, this act of communication does not constitute a promise, as the vagueness and ambiguity of the words on the behalf of the promiser do not clearly invest the promisee to a right of the promise's performance. Second, the

[15] Ibid, 219.
[16] Ibid, 211.

requirement that promises can only be created through explicit acts of communication emphasizes that promise-making is a voluntary act. Raz believes that we cannot accidentally stumble into a promise because promises derive their normative power from being self-imposed, voluntary commitments to undertake an obligation. This means that promises cannot be conferred onto us by others. Acts of communication that merely generate expectations, no matter how obligatory or dutiful they are, cannot be promises unless the promiser has voluntarily committed himself to the obligation. To take an example, an employer and an employee may have mutual expectations about how to treat one another, and a senator may have mutual expectations with his constituents that he/she is expected to make decisions that benefit the constituents. However, according to the PO concept of promise, if the employer and the senator have not explicitly expressed that they are voluntarily obliging themselves to the performance of these duties, then we may not construe either of them as having made a promise.

Now that we have a solid understanding of what constitutes a promise under the PO concept, let us return to the discussion of promissory obligation. Unpacking Raz's account of promissory obligation will yield a complete account of the PO concept. Just a bit ago, I introduced an architectural sketch of how PO promises generate promissory obligations. As a refresher, the PO promise asserts that the very utterance of the promise itself generates an obligation on the promiser to perform the promise, and we refer to this obligation as a promissory obligation. We will now examine this process more closely: concretely, how does the mere utterance of a promise actually generate a promissory obligation?

Contrary to other normative power theorists, Raz does not assert that the utterance of a promise magically imbues the promise with some mysterious normative power that thereby generates the promissory obligation.[17] Instead, Raz asserts that promises generate promissory obligations because the combination of the validity of the promising rule and the utterance of the promise itself gives the promiser reason to abide by his promise and perform the promised act:

> If other [promises] do impose obligations, that can only be because of the validity of some (PO) principle to the effect that if one communicates an intention to undertake, by that communication, an obligation to X, then one has an obligation to X, provided some further conditions are met. It is the fact that there is such a valid (PO) principle which is the reason to keep those promises...together with the fact that one promised to do X that is a reason for X-ing. Thus according to the obligation conception, both the promising rule and the promise can be said to be

[17] Ibid, 218.

> reasons for performing the promised act. Each is a partial reason, and together they are a complete reason.[18]

Allow me to break this down. Raz's account of promissory obligation is an appeal to our reasoning to explain how promissory obligations derive from promises. He claims that uttering a promise gives us two partial reasons to thereby abide by that promise, and if we accept both of them, then we have a complete reason as to why we have an obligation to perform our promise. First, Raz maintains that uttering a promise invokes an appeal to the validity of a social convention, and if this social convention is valid, then its validity acts as a reason to abide by that social convention. The argument follows this structure: if there exists principle X, and I invoke principle X, and principle X has been deemed a valid principle, then I have reason to abide by principle X when I invoked it by the very fact that society has deemed principle X to be a valid principle. Constructing Raz's argument in this structure looks like this: if there exists promising principle PO, "if one communicates an intention to undertake, by that communication, an obligation to X, then one has an obligation to X," and I invoke promising principle PO, and society has deemed promising principle PO to be a valid principle, then I have reason to abide by promising principle PO when I invoked it and keep my promises by the very fact that society has deemed principle PO to be a valid principle. This completes Raz's first partial reason for how promises generate promissory obligations. Second, Raz asserts that the act of uttering a promise invests the promiser into the promise, and this investment generates reason for the promiser to thereby comply with his utterance. The moment a promiser utters a promise, his utterance of that promise consequently gives him reason to comply with that promise, namely because he invoked the promise in the first place. To suppose otherwise, that in uttering a promise we are not invested in keeping it, flies in the face of practical reasoning: "To say 'I promised to X but I have no reason to X' is paradoxical."[19] This completes Raz's second partial reason for how promises generate promissory obligations. To sum up, Raz asserts that the validity of the promising rule, along with the utterance of the promise itself, gives the promiser reason to abide by his own promise, and this explains how promissory obligations are generated by PO promises.

This completes our account of Raz's PO promise concept.

[18] Ibid, 218-219.
[19] Ibid, 212.

Ardal's Intention Concept of Promise

In contrast to Raz's obligation concept of promise (PO) where promises are expressions of commitment to undertake voluntary obligations, Ardal's intention concept of promise (PI) sees no such relationship between obligations and promises. Ardal argues that promises are merely statements of intentions that generate expectations: "Ordinary promises thus both state an intention of the speaker, and make an assertion about his future action."[20] Ardal maintains two reasons for defending the view that promises are statements of intent: 1) most promises in ordinary language are made by declaring statements of intent without using the explicit locution "I promise..."; and 2) promises are often invoked to state false intentions, such as the lying promise, and lying promises are still forms of promise. On account of this defense of promises as statements of intention (PI), Ardal asserts that promises are not binding because they do not generate promissory obligations. He defends two reasons for this view: 1) promises do not generate promissory obligations because promises are often invoked as threats and as obligations to undertake immoral behavior, neither of which are ever justified in entailing obligations; and 2) there is no such *prima facie* obligation to keep a promise. Let's take a look at these claims one by one.

Ardal maintains that most promises in ordinary language are made without using the explicit words "I promise...." He takes it to be true that people generally rely on other locutions, which he deems "emphasizing expressions" to express their promissory intents, such as by saying "I shall X" or "I will X, without fail" or "I will do X, you can count on me."[21] Ardal additionally maintains that many people make promises by simply stating their intentions without resorting to these "emphasizing expressions" at all, such as with the case of "I will meet you tomorrow for lunch."[22] Ardal concludes that it would be utterly absurd for a person to misconstrue a statement of intent like "I will meet you tomorrow for lunch" as not constituting a promise by relying on this such excuse: "In fact I did not promise you at all, I only told you what I was going to do."[23] He points out that the absurdity of this excuse lies in the fact that it attempts to argue that assertions about future actions in the form of "I will do X" do not entail statements

[20] Páll S. Árdal, "And That's a Promise," *The Philosophical Quarterly*, Vol. 18, No 72, 1968, 226.
[21] Ibid, 225.
[22] Ibid, 225.
[23] Ibid, 225.

of intent in the form of "I intend to do X." Yet this argument is misguided because it is self-contradictory to say "I will do X, but I do not intend to do X."[25]It is self-contradictory because one cannot *purposefully* realize a future state of affairs without intending to bring about its realization.[25] This, for Ardal, provides an essential link for why statements of intent which generate expectations must be construed as promises. If Person A declares his intention to do X, and this intention thereby generates in Person B an expectation to rely on Person A, then Person A has made a promise insofar as he has purposefully told Person B that he intends to do X so that Person B can change his actions accordingly. To believe otherwise, according to Ardal, would be misrepresenting ordinary language's use of promises.

Staying on the subject of locution, Ardal recognizes that a potential problem with the PI concept is that in ordinary language, people do not normally use the phrase 'I intend to do X" to make a promise:

> It may be thought strange that I am claiming that promises are statements of intention when one does not usually make a promise by saying 'I intend to do X.' The reason for this is that when one says 'I intend to do X' one is leaving it to a certain extent an open question, whether or not one will do it. [26]

Ardal accounts for this problem by asserting that statements of intention essentially convey two pieces of information: a present intention and a declaration that one will carry out that intention (i.e. a promise to fulfill that intention). [27] He gives the example of a person who says "I am going to Europe." Ardal believes that that statement contains both a statement of intent "I intend to go to Europe," as well as a declaration that the intent will be fulfilled by one's future actions, I.e. "I shall go to Europe." This is a key defense to Ardal's PI concept. However, he admits that this understanding of intention differs from its ordinary usage: "The verb 'intend' must in this analysis

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[24] Ibid, 228.

[25] There is emphasis here on purposeful realization because it is entirely possible, and not self-defeating, for a state of affairs to realize which one did not intend to bring about. It is entirely self-defeating, however, to attempt to purposefully realize a state of affairs without intending its realization. To give an example, I may accidentally gain muscle mass without intending to gain muscle mass if I, by happenstance, participate in activities that grow my muscle mass. However, it would be utterly self-defeating for me to say "I will purposefully gain muscle mass by participating in activities that grow my muscle mass," and then follow that statement with the statement, "but I do not intend to gain muscle mass." Ardal does not explicitly make this link, which is why I have provided it.

[26] Ibid, 227.

[27] Ibid, 229.

be understood not to indicate any hesitancy about the occurrence of the intended action. This involves a slight deviation from the ordinary meaning."[28]

Ardal's second justification for the PI concept is that the PI concept can account for scenarios where promises are invoked to state false intentions, such as seen in the lying promise. In a lying promise, Person A promises Person B that he intends to do X, but in reality, Person A actually has no such intention to perform X. Earlier, Ardal observed that it is self-contradictory to assert "I will do X" without asserting "I do not intend to do X." It turns out, however, that the inverse is not true for promises if promises are viewed as merely statements of intention. In this case, then, there is no contradiction in asserting both "I promise to do X" and "I do not intend to do X": "You cannot make a promise without making a statement of intention, but that statement may be false. 'I intend to do X' need not be true for 'I promise to do X' to constitute a promise."[29] However odious the lying promise seems, Ardal argues that it would be remiss to exclude lying promises from our definition of promise because ordinary people invoke promises all of the time to make lies: "The most common way of being deceitful, when the use of words is involved, is to say something false, intending it to be believed. A lying promise is a promise one does not intend to keep...but lying promises are promises."[30] The PI concept's ability to account for lying promises thus serves as a second defense for the PI concept.

With a complete definition and justification of Ardal's PI concept, we can now consider the relationship between PI promises and promissory obligation. According to Ardal, promises do not generate promissory obligations: "I am rejecting the view that in promising one is putting oneself under an obligation and that this is the whole point of promising."[31] Ardal explains that just as lying promises can be made, so can promises be invoked to make threats and to force people into immoral behavior. Take the locution, "I promise you I shall get you for this."[32] Ardal sees this locution as constituting a promissory threats, and this promissory threat is a legitimate form of promise because threats are statements of intent just like promises. Ardal takes it to be true that no one justifies an obligation to fulfill threats if they are made as promises:

[28] Ibid, 228.
[29] Ibid, 227.
[30] Ibid, 228.
[31] Ibid, 230.
[32] Ibid, 229.

> Austin writes as if the use of the expression 'I promise to do X' always commits you to doing X and gives rise to an obligation to do so...but no-one, I take it, thinks people are always under an obligation to carry out threats simply because they made them by the use of the expression 'I promise.'[33]

If threats are a form of promise, and they cannot entail obligations, then promises as a whole cannot entail obligations. Likewise, Ardal argues that the same logic applies to promises that entail immoral action, such as a promise to a friend to kill an ex-lover. Since immoral actions can never be justly entailed by promises--but promises can be, in fact, used to express intents to undertake immoral action--it follows that promises as a whole cannot entail obligations: "there is not a relation resembling entailment between 'I promise' and 'I ought to.'[34] Ardal does not comment on the possibility of a middle-ground to mediate these two extremes, such as by defending a view of promise where promises that entail immoral action or threats do not generate obligations, but otherwise just promises do.

In light of this conclusion, Ardal further argues that there is no such *prima facie* duty to keep a promise. *Prima facie* duties was an epistemic method put forward by David Ross to help us decide how to deal with conflicting moral duties. Roughly, it states that when two or more moral duties come into conflict—e.g. to not break a promise and to not kill someone--then we should follow the moral duty that requires greater stringency (in this case, it is often argued that not to kill is a stronger imperative, so when faced with breaking a promise or killing, one should not kill). Ardal maintains that since promises can be used to express threats or immoral intentions, this alone is enough evidence to suggest that a *prima facie* duty to keep promises does not exist:

> People may have been misled by the common belief that there is a *prima facie* obligation to keep promises...if I am right in thinking that one is sometimes not obliged to keep a promise just because no good will result from keeping it, then there is not a *prima facie* obligation to keep promises, for the obligation ceases without there being a conflict with a more stringent obligation.[35]

Although Ardal already believes that promises never entail obligations, he wants to go the extra mile and defend the claim that given the moral choice between breaking a promise and breaking

[33] Ibid, 229.
[34] Ibid, 231.
[35] Ibid, 230

some other moral duty, we should always break promises because there is no *prima facie* obligation to keep them. The crux of this argument relies on the claim that there are so many justified reasons to break a promise that there we can never impute strong moral value to them. Other than threats and lying promises, he lists two other justifications for breaking promises: the promiser releases us from the promise, or the promise is trivial.[36] Thus, he concludes that promissory obligations do not exist, and there is no such *prima facie* duty to ever keep a promise. This completes the account of Ardal's PI promise concept.

Before moving on to our last promise concept, I will briefly point out some strengths of Ardal's PI concept. Even though Ardal himself does not take any time in the paper to spell these out explicitly, there are some noteworthy aspects of the PI concept that are worth commending. First, Ardal's PI promise concept is the only promise concept that attempts to incorporate lying promises, promissory threats, and immoral promises in his definition of promise. Whether or not he presented a successful defense that these three features should be incorporated in a promise concept will be a subject of discussion in the next section, but nevertheless, these are important discussions that must be defended by any robust account of promise. Second, Ardal's promise concept is well-informed by ordinary language usage. There is some tension between Ardal and Raz, as they both assert that their promise concepts are heavily informed by ordinary language usage, yet they both come to wildly different conclusions about the nature of promises. This, and more, will be explored in the next section. For now, let us explore our final promise concept: Atiyah's promise as material interest concept.

Atiyah's Material Interest Concept of Promise

Atiyah's material interest concept of promise (PM) differs quite substantially from our previous two promise concepts, particularly in its methodology. Allow me some brief remarks about his methodology to better prepare us to follow it. Contrary to Raz and Ardal, Atiyah does not start his investigation with a definition of promise, followed by an account of promissory obligation. Instead, Atiyah begins with a number of empirical observations about the practice of promise-making in society, then he uses these empirical observations to create an account of promissory obligation, and finally he uses his account of promissory obligation to define what a promise is. We will follow this same structure in building up Atiyah's material interest concept

[36] Ibid, 237-236.

of promise. Also noteworthy is the fact that Atiyah does not base his investigation of promises in examples of ordinary language like Raz and Ardal. Rather, Atiyah seeks to create an account of promise that understands promises as they are employed in contracts in positivist law. What follows, then, is a drastically different account of promise than what we have seen thus far.

To begin his account of promises, Atiyah first makes a number of observations about the attitude of society-at-large towards promise keeping and promise breaking. In particular, he cites four empirical claims: 1) business men in the United States and England expect and tolerate a considerable amount of contract-breaking;[37] 2) corporations and governments, after changing governing regimes, frequently have no scruples in breaking promises made by their predecessors;[38] 3), the tradition of positivist law places minimal sanctions on contract-breakers, as neither imprisonment, nor fines, nor even a legal order to actually carry out the contract are doled out as punishments in cases of breach of contract;[39] and 4), the tradition of positivist law provides minimal restitution to recipients of broken contracts, and even then, restitution can only be provided in those cases where it can be proved that the promisee incurred substantial material lost from the broken contract.[40] These empirical examples lead him to conclude and assert that promise-breaking is a fairly widespread, tolerated practice in society:

> The strength of the principle that promises must be kept is not nearly so great as seems to be assumed...it is perfectly clear that a great deal of promise breaking is tolerated and expected. Indeed, it is so widely tolerated that a realist would have to say that beneath the covers we are firmly committed to the desirability of promises being broken, not just occasionally but quite regularly.[41]

Atiyah's empirical conclusion about the widespread tolerance of contract breaking leads him to ask how society justifies such a practice of contract-breaking. To respond to this question, he develops a general account of why people make promises and how people justify breaking promises, both of which then serve as the basis for his account of promissory obligation. We will investigate these claims now.

According to Atiyah, people usually make promises because they want to gain some tangible benefit from the promise: "people who make promises very often--perhaps usually—do

[37] P.S. Atiyah, *Promises, Morals, and Law* (Oxford: Clarendon Press, 1981), 140.
[38] Ibid, 141.
[39] Ibid, 139.
[40] Ibid, 141-142.
[41] Ibid, 138-140.

so because they want to get something from the promisee which they can only get by doing so.[42] Likewise, he maintains that people justify breaking promises because they themselves have been the recipient of a broken promise as well: "Now in law, by far the most important justification for breaking a promise is that a return promise has itself been broken in whole or in part. It is the breach by one party of his contractual duties which is the principal justification for breach by the second party of his duties."[43] So, on this account of promise, people only make promises to gain material advantages, and people subsequently break promises when it seems likely that they will no longer gain that material advantage because their promisee is likely to not follow through with the promise. This gives us his principle view of promises: promises merely exist to facilitate the exchange of goods and services. Hence, promises are declarations of material interests (PM).

On the PM account of promise, promises generate promissory obligations through the actual exchange of goods themselves, rather than the act of uttering the promise. The material advantage offered by the promise is thus the focal point of the promise's source of binding obligation:

> Not only is the receipt of a benefit itself one of the principal grounds for holding a promise to be binding...but also that the failure to receive an anticipated benefit is a strong ground for treating the duty to perform a promise as no longer binding. So…it is not the promise itself which creates the obligation, so much as the accompanying incidents, such as the rendering of benefits.[44]

To illustrate his point more clearly, he gives the example of a person who wishes to buy goods but does not have enough money to do so. In lieu of paying for the goods, the person asks the seller to give him credit, I.e. to accept a promise of payment instead of actual payment.[45] In this scenario, Atiyah declares, "the buyer's obligation to pay the price surely derives from his purchase of the goods, rather than from his promise."[46] Continuing the example, Atiyah asserts that buyer would not be bound to perform his promise (I.e. pay for the goods) if the seller failed to deliver the goods, and likewise, the buyer is still obligated to pay the seller for the goods even in the absence of an explicit promise.[47] In giving this case of the buyer and seller, Atiyah

[42] Ibid, 143.
[43] Ibid, 142.
[44] Ibid, 143.
[45] Ibid, 143.
[46] Ibid.
[47] Ibid, 143.

therefore concludes that promissory obligations are generated by the rendering of material interests and not by some feature of the utterance of the promise.

With an account of how PM promises generate promissory obligations, we can now turn to how Atiyah understands and defines promises themselves. Atiyah explains that promises are declarations of consent:

> It is true that in many cases the verbal formula 'I promise...' cannot, as a matter of language, be easily reduced to anything like 'I consent...'...But the fact surely is that an explicit promise is an expressed willingness or consent to the state of affairs which the promise posits, or which will be required by its performance.[48]

Promises are therefore explicit admissions that one consents to a future state of affairs where the contents of the promise have been realized, and embedded within this consent is also a tacit consent to not change one's initial consent. In defining PM promises as admissions of consents, Atiyah also defines the role that the utterance of a promise serves in expressing and generating promises. Since Atiyah maintains that promises themselves are not responsible for the creation of promissory obligations, we already knew that Atiyah does not take the utterance of a promise to play any crucial part in generating a promise. Instead, according to PM promises, the utterance of a promise is merely a recognition of the pre-existing promissory obligations entailed by the exchange of material interests: "the promise...is an admission, of the existence of some other obligation already owed by the promisor."[49] The takeaway from this is that under the PM concept of promise, the utterance of a promise is only peripherally important to defining and creating the promise itself, as ultimately, the declaration of consent from uttering the promise has zero bearing on one's obligation to actually maintain and keep the promise. It is the successful exchange of material interests which actually generates and determines the bindingness of the promissory obligation, and the utterance of the promise is simply a helpful, but non-necessary contribution. This completes Atiyah's account of PM promises.

To conclude our discussion, we will briefly look at the reason Atiyah offers for why his PM concept of promise best understands promises. Atiyah claims that a particularly notable strength of his PM promise concept is that it best captures societal attitudes towards making and

[48] Ibid, 178.
[49] Ibid, 184.

breaking promises. That is to say, he believes that his PM account of promise was constructed to adequately reflect the incentive structure underlying the majority of promises:

> It seems to me idle to discuss the source of the moral obligation to perform a promise without having some regard to the question *why* promises are given, and *why* they are (normally) performed. If we assume that promises are binding because of some inherent moral power, or even if we assume that they are binding because of the expectations they rouse, or that they are binding because of the existence of a practice of promising, we are in danger of overlooking that *most* promises are performed because it is in the interests of the promisor to perform.[50]

The PM promise concept is certainly shaped according to the numerous empirical observations that Atiyah made about societal attitudes towards promise-making and promise-breaking. Whether or not this is truly a strength, however, depends on whether his empirical claims are as correct as he purports them to be, which will be discussed in the next section.

Atiyah further claims that his promise concept being informed by positivist law makes it particularly strong because philosophers have much to learn from lawyers:

> It remains true that much may be learnt about the morality of promising from some acquaintance with the law, and the legal treatment of promises. It is right to stress that, when people's interests are seriously affected by what they regard as a breach of promise, they can and do have recourse to the Courts for justice; and... the justice which the Courts administer is very largely congruent with the moral sense of the community. Although it may differ from the sort of verdict often to be found in philosophical writings, this is, I believe, because lawyers and judges are more aware of the complexity and subtlety of the problems which are involved.[51]

Just like his empirical observations at the beginning of this sub-section, Atiyah once again makes some very bold claims about the bearing of positivist law on promising concepts. Albeit his tone is slightly denigrating, Atiyah correctly observes that philosophers have very rarely engaged with the law as a means for constructing a concept of promise. Atiyah thus deserves credit for offering a radically different concept of promise based off an expert legal understanding of promises. Whether his PM promise concept is as strong as he purports it to be, however, remains to be seen in the next section.

This completes our exposition of the three concepts of promise. Each promise concept by itself has offered us some strong insights about the nature of promises and promissory

[50] Ibid, 145.
[51] Ibid, 138.

obligations, and altogether they present us with a robust understanding of the difficult intricacies involved in defining what promises are and the mechanisms through which they work. Now that we have a thorough understanding of each promise concept, we have our work cut out for us ahead: we must evaluate them and choose a victor.

Chapter 2

A Defense of Promissory Obligations

Now that we have looked at three promise concepts in depth, it is time to decide which one offers the most robust definition of promise. In this chapter, I will argue that Raz's PO promise concept constitutes the strongest promise concept of the three promise concepts that we reviewed in Chapter One. The chapter will begin with thorough critiques of Ardal's and Atiyah's promise concepts that demonstrate why they do not offer the best promise concept. Then, I will demonstrate how Raz's PO concept solves the issues related to the other promise concepts and thus offers the most robust promise concept.

Critiquing PI Promises

Ardal's PI promise concept makes many philosophical errors in its treatment of promises, resulting in an account of promise that leaves much to be desired. I will highlight four in particular which I take to be his biggest errors: 1) defining promises in terms of intentions disagrees with ordinary language use of promises and results in what I call "odd promising situations" where what we ordinarily would take to be non-promising scenarios would be deemed promises under the PI principle; 2) Ardal's lack of argument for the lying promise; 3) Ardal's conflation of moral oughts with plain oughts to conclude that promises do not generate promissory obligations; and 4) Ardal's false dismissal of the *prima facie* obligation to keep promises.

Ardal's reliance on intentions as the backbone of promises dismisses a significant ordinary language distinction between intentions and promises. Normally, in ordinary language, we draw explicit distinctions between intending to X and promising to do X, precisely so to indicate what level of commitment we have to X. Yet, when intentions become the basic principle that determines promises, this ordinary language distinction breaks down. Raz formulates this point emphatically: "A who, knowing B will decide his plans in the light of his estimate of A's likely action, tells him that he firmly intends to do X but that he refuses to

promise to do so. Is he conceptually confused?"[52] From the outset, Ardal faces the challenge of needing to explain why there is good reason for this distinction to evaporate. Without such an explanation, Ardal must concede that a person who says they intend X but does not promise X *is* conceptually confused, drawing a distinction where none really exists. Unfortunately, Ardal does not offer much in the way of a rebuttal to this point. He acknowledges that defining promises based on intentions is strange and works hard to give an account of how this is possible—but his account does nothing to convince us why we should forgo this obvious ordinary language distinction.

Additionally, defining promises as expressions of intent results in some "odd promising situations" where what we ordinarily would take to be non-promising scenarios would be deemed promises under the PI principle. Consider two following scenarios:

> S1: Alex communicates to Bob his intention to buy fast food for the house. Bob was going to go to the store later that night to buy food to cook for the house, but having learned that Alex intends to buy fast food for the house, Bob ultimately decides not to go to the store. Alex then returns home without fast food, stating that after running arduous errands, he changed his mind and did not feel like getting fast food anymore. Bob is now upset. Alex feels Bob has no right to be upset.

> S2: Alex communicates to Bob his intention to buy fast food for the house. Alex and Bob's roommate Steve overhears the conversation. Knowing that Alex will be out of the house, Steve brings his girlfriend over once Alex walks out to his car, because Steve knows that Alex won't allow his girlfriend in the house. Alex then changes his mind and returns home, finding Steve's girlfriend in the house. Alex kicks Steve's girlfriend out of the house. Steve is now upset. Alex feels Steve has no right to be upset.

In S1, Alex's intention to go buy fast food creates an expectation in Bob that subsequently changes his behavior to not go to the store. According to Ardal's PI concept, Alex has made a promise to Bob. But there is something strange about calling this a promise. In only communicating that he intends to buy fast food, Alex is not explicitly obligating himself to carry out the action. There is thus an ambiguity surrounding whether or not Alex will actually perform his expressed intention, whereas normally we think promises as being certain and unambiguous. As I indicated in Chapter One, Ardal recognizes that intentions are inherently ambiguous and acknowledges that his account supposes an unorthodox account of intention: "The verb 'intend'

[52] Joseph Raz, "Promises and Obligations," 216.

must in this analysis be understood not to indicate any hesitancy about the occurrence of the intended action. This involves a slight deviation from the ordinary meaning."[53]

If it is strange to call S1 a promise, it is almost absurd to call S2 a promise. In S2, the act of Alex expressing his intentions to Bob creates an expectation in a third party, Steve, who consequently changes his behavior based on Alex's intentions. Although Ardal does not address this possibility explicitly, it is not clear that the PI concept would not consider this a promise. By only defining promises in terms of whether intentions arouse a change in behavior, it leaves open this option of non-parties to the promise having a promise claim. Certainly, both intentions and promises between two parties can and do cause changes in expectations and behaviors in third parties, but a good concept of promise should not consider these external changes as constituting promises. Hopefully these two scenarios have demonstrated how the considerations on which Ardal's PI principle rests may apply to many non-promising cases.

Ardal's second mistake his is lack of argument for incorporating the "lying promise" into the definition of promise. It is not clear why Ardal thinks lying promises should be considered promises instead of just being lies--other than the fact promise is in the name. On the contrary, I maintain that "lying promises" support a fundamental aspect of the promise definition that the PI concept misses. A lying promise is only successful because it tricks someone into thinking that one has undertaken an obligation that they intend to keep, when in reality they will not be keeping that obligation. In doing so, the liar gains some advantage by tricking the victim into thinking that they are obligated to some X that they have no plans of keeping. What this demonstrates is that the "lying promise's" deceit is only successful because it presupposes that promises engender obligations, that by making the lying promise, the victim will have an obligation to X that the liar can benefit from not having. This presents some positive evidence for the fact that promises engender obligations.

Ardal's third mistake is conflating moral oughts with plain oughts to conclude that promises do not entail obligations. This mistake occurs during his account of how promises do not generate promissory obligations. Recall that Ardal justifies that promissory obligations cannot be derived from promises by appealing to the fact that promises are often invoked as threats and/or to generate obligations to undertake immoral behavior, neither of which are ever justified in entailing obligations:

[53] Ardal, "And That's a Promise," 228.

> Carrying out some threats may be obligatory, but no-one (sic), I take it, thinks people are always under an obligation to carry out threats simply because they made them by the use of the expression 'I promise.'[54]

Ardal here is conflating two senses of "ought." On one sense, the moral sense, "ought" means that we have a moral duty to do so, as in "I ought not to kill" or "I ought not steal." This is what philosophy normally means when using the term "ought." Yet, there is another sense of "ought," the plain sense, which is often used in speech outside of philosophy. On the plain sense view, "ought" is simply a recognition of a duty or responsibility that must be fulfilled, irrespective of whether they want it to be fulfilled, such as in the case "I ought to pick my son up from school" or "I ought to attend this meeting." In these cases, the obligations are not necessarily moral obligations, they are just duties that we have agreed to take on and fulfill. Often, the plain view coincides with the moral view. In the case "I ought to be a good mother," we might construe this as both a moral duty, as well as a plain obligation that the mother herself has voluntarily accepted. But it is not necessarily the case that these two oughts always coincide, as is with the example of "I ought to attend this meeting."

Ardal tries to reason that an impermissible moral ought to carry out threats leads to the conclusion that promises cannot entail obligations in the form of the plain oughts, but this reasoning is confused. Ardal is correct that there is no support for the idea that we can be morally obligated to take immoral actions like carrying out threats. Yet, this does not entail, as he tries to assert, that it is impossible for one to have a plain ought to carry out their threats in virtue of the fact that one has agreed to take on such a duty. For example, I can promise a friend that I will threaten to beat up the nerdy kid in order to steal his lunch money, and by doing so I undertake a plain obligation. I may learn later on that I could be expelled for such odious behavior, and that such behavior is morally wrong, so I should not do it. Yet, my sudden recognition of the action's moral status does not suddenly mean the plain obligation has vanished. Perhaps one might rebuttal that I could not have been obligated to such immoral behavior in the first place, regardless of whether I recognized it was immoral or not, because we cannot be morally obligated to take immoral actions. But this does not counter the practical consideration, the physical sense of obligation that I have felt by promising my friend to engage in this behavior.

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[54] Ibid, 229.

That feeling is very real, and it does not suddenly vanish if I were to realize that I could not be obligated to do such an immoral act. The point is, the question of when we are justified in breaking our obligations is a somewhat different question from whether the obligation ever existed in the first place, and it does not suffice to say that just because the promised action is immoral that the obligation never existed at all. As a final consideration, it is not clear why Ardal does not consider the possibility of a middle-ground to mediate the two extremes of "promises never entail obligations" and "promises always entail obligations." It is possible, and common, to defend a view of promise where promises that entail immoral actions or threats do not generate obligations, but otherwise just promises do.

Finally, Ardal's last mistake is his false dismissal of the *prima facie* obligation to keep promises. From pointing out some considerations by which promissory obligations may be dismissed, Ardal tries to reason that this demonstrates that there is no such *prima facie* obligation to keep promises. Once again, he makes a large leap in logic. Ardal correctly asserts that one of the ways in which we can be released from a promissory obligation is that the promiser no longer cares about the promise's performance:

> The point of promising John to meet him for lunch is that John wants to be certain that you are going to be there...once he could not care less whether you come or not, why should you bother? ...if I am right in thinking that one is sometimes not obliged to keep a promise just because no good will result from keeping it, then there is not a *prima facie* obligation to keep promises.[55]

If John no longer cares that I meet him for dinner anymore, then I am released from John's promise. But this is not a crushing defeat of the *prima facie* duty to keep promises as Ardal purports it to be. Prima facie duties help us to decide when we are justified in breaking one moral duty in order to keep another, i.e., choosing to break my promise, thereby breaking my obligation, to cheat on my friend's test because the moral duty to not cheat is stronger than my obligation to keep my promise. However, Prima facie duties are not needed if the obligation ceases to exist. If the promiser releases us from the obligation to keep the promise, then we no longer have the obligation to keep the promise, and thus we no longer face a moral crisis of choosing between two prima facie duties. So, all Ardal has shown here is that our obligation to keep our promises can cease to exist by certain particular circumstances, e.g., the promiser

[55] Ibid, 235.

releasing us from the promise's obligation, but his account does not bear at all on prima facie duties. For these four reasons, Ardal's PI promise concept does not offer the most robust concept of promise.

Critiquing PM Promises

Atiyah's account of PM promises offers a very unorthodox concept of promise. Although it presents a unique contrast to the two philosophical concepts of promise, its pure reliance on positive law hinders its ability to accurately capture how promises work outside of law firms. I will highlight three mistakes of Atiyah's philosophical mistakes: 1) Atiyah's account of promise strongly relies on circular reasoning; 2) Atiyah wrongly conflates the reasons one has to perform an obligation with how the obligation itself is actually derived; and 3) PM promises create an external, depersonalized account of promise that do not allow promises to act as reasons for or against action.

It is no secret that Atiyah's worldview is sympathetic to, and built off, English Common Law. He recognizes as much several times in his account that he hopes to offer an unorthodox view of promises based off his profound knowledge of the law. While he is not wrong that the law is all too often ignored by philosophers, he jeopardizes the integrity of his conclusions about promises by drawing so freely from the law of contracts. Due to the fact that Atiyah only relies on contract law to explain various definitional criteria of promises, this creates an unspoken presupposition that underlies his entire theory of promise: namely, that all contractual obligations are promissory obligations, and all contracts are promises. Atiyah does not even consider this a proposition worthy qualifying. By not exposing this presupposition, Atiyah's argument falls victim to some vicious circular reasoning: it begs the question. Whether contractual obligations are promissory obligations may certainly be a conclusion, but it cannot simultaneously also be the premise.

Additionally, I maintain that Atiyah's account of where promissory obligations come from wrongly conflates the reasons one has to perform an obligation with how the obligation itself is actually derived. Remember, Atiyah claims that promissory obligations originate from each promisor's interest in reaping the material profit of the promise. Yet, by appealing to the material interests that motivates promises, Atiyah is really only giving an account of why one might be interested and/or motivated to perform the promise. Such an acknowledgement of

interests cannot reasonably demonstrate how the binding force of the obligation is created or derived. Here's an example to demonstrate this point.

Imagine that my parents and I both have something we each want from one another: perhaps I want money to buy a new car, and my parents want me to get an A on my next history test so that they can brag about it at the next Parent's Association meeting at the local high school. My parents thus tell me: "Next Friday night, if you stay in and study for your history test instead of going to a party, we will give you some money to start saving for a car." I promise them that I will stay in and study, thereby generating for me a promissory obligation to my parents not to go to the party in virtue of the fact that I acknowledge there is a significant material interest for me to keep the promise—and not because I told them that I promised. Yet, despite this promissory obligation, I later find out that there will be a very small party held on Friday to which one of my friends is going to. I know that all of the people going to the party are neither people I am friends with nor people that I will have a fun time with. Nevertheless, my friend tells me that I should come anyway. Imagine if, despite the promise I made to my parents, and despite my general lack of interest in attending the party, I decided to go to the party anyway because I have a bad case of FOMO (fear of missing out, i.e., social anxiety about skipping social events).

This example describes an account of Aristotle's akrasia, or weakness or will. Akrasia refers to the state of mind in which one acts against their better judgement due to a lapse in self-control. Akrasia is a metaphysical problem not distinct to promises, so the mere fact that we may break promises due to lapses of self-control is not detrimental to Atiyah's account. However, what this example of akrasia demonstrates is that there exists a plurality of interests, motivations, desires, passions, etc. that we acknowledge and grapple with when making decisions. It seems odd to say that the recognition of material interests thus creates a promissory obligation and constitutes a promise when there will always be a plethora of competing interests vying for our attention when we need to make decisions. In the above example, imagine if, instead of having FOMO, my friend offered to take me out to lunch the next day if I attended the party with him. In such a scenario, I would have two strong material interests to pursue two juxtaposing courses of action. Does it make sense to say that I have promissory obligations to both of them simultaneously? No, it does not, because a mere account of the material interests, motivations,

passions, or desires that may be compelling me to make a decision do not count as binding obligations for me to make those decisions.

This further results in an oddly external, depersonalized account of promise. We normally take promises to be reasons for actions. In the above example, I think most people would say that I have a stronger reason to stay in to study in spite of my FOMO *because* I have promised my parents that I would. That is, the promise itself counts as a strong reason for me to choose one action over the other. Atiyah's account removes the possibility for the promise itself to be considered as a reason for or against an action since it is only the material interest that drives the reasoning behind the promise. When material interests become the central definition of promises in this way, we begin to lose the intimate feeling that promises are normally associated with. If a bigger fish comes along to offer us a fatter material advantage—e.g. in the above scenario, my friend promises to actually buy me the car whereas my parents will only give me a small, insignificant sum towards it—then on Atiyah's account, there is nothing wrong with breaking our prior promises because they no longer offer us any material benefit. This might hold true in the business world with its noisy dealings and *quid pro quos*, but when you have to tell your grandmother, your friend, your significant other, etc. that you cancelled the lunch you promised to go to because a richer business figure will take you out to a more expensive lunch—there, I think, most people would agree that Atiyah has missed the mark when it comes to promises.

Promise as Obligation

I maintain that Raz's PO promise concept offers the best understanding of promises for three reasons: 1) PO promises correspond to ordinary language attributes of promises, namely that promises are voluntary, based on rules, and impose obligations; 2) PO promises can actually explain why promissory obligations entailed by promises are binding; and 3) PO promises explicate the concept of obligation.

The PO promise concept offers a particularly compelling account of promise because it corresponds to three specific attributes that ordinary language usage imputes to promises: "they are said to be based on *rules*, to impose *obligations* which are of a special kind, namely *voluntary*."[56] In everyday ordinary language, I take it to be a ubiquitously accepted fact that promises are voluntary. After all, no one forces us to make promises. Usually, we make promises

[56] Raz, "Promises and Obligations," 217.

because we want to—that is, we want to take on an obligation voluntarily, and we demonstrate this through uttering a promise. We always take promises to be firm expressions of obligations. We do not, for example, routinely make promises just to break them. Those who do are often seen as untrustworthy, not reliable, etc. because they have broken a commitment that they themselves were not required to make. When we tell our friends, "I promise to go the cinema with you," this indicates a commitment, one that is voluntarily and willfully made, and this commitment is different from merely expressing "I wish to go to the cinema, I want to go to the cinema, I intend to go to the cinema, etc." This difference is best explained by the feature that promises are voluntary commitments to obligations, which is how the PO promise concept conceives them.

The second strength of the PO concept lies in its ability to explain the peculiar features of promises, as well as the peculiar features of obligations, that ordinary language ascribes to them. Regarding promises, Raz maintains that PO promises can further explain how promissory obligations make promises binding. Regarding obligations, Raz maintains that PO promises can further explain why obligations feel binding to the agent bound by them, whether obligations must be understood in exclusively moral terms, and whether it is possible for categorical obligations to conflict with special obligations. We will look at these each in turn.

How do promissory obligations make promises binding according to the PO concept? An important feature in the creation of promissory obligations is the prior reference to the validity of the PO principle. Raz goes on to emphasize that under the PO concept of promise, promises depend on referencing rules to explain how they derive their normative power: "the fact that the promising principle is itself a reason for action, that the statement of that principle is an essential premiss in the practical inference yielding the conclusion that one ought to do as one promised, is the key to the dependence of promises on rules."[57] Referencing rules as the backbone of promissory obligations explains why obligations are binding: obligations are assertions that an action must be performed because "its performance is required by a categorical rule, i.e. a rule not dependent for its validity on the goals and desires of the agent."[58] So, to say that the performance of a particular action is obligatory is to say that that the performance of that action is required by a set of categorical rules. Highlighting rules as the backbone of obligations also

[57] Ibid, 219.
[58] Ibid, 219.

further clarifies why there is a requirement to keep promises: breaking a promise constitutes violating a categorical rule to which one voluntarily obligated oneself.

Finally, reconstituting the concept of obligation in terms of rules explains some peculiar features of obligations. Raz names three in particular: First, why do obligations feel binding to the agent bound by them?[59] Second, must obligation be understood in exclusively moral terms?[60] Third, is it possible for categorical obligations to conflict with special obligations (e.g. a statesman who holds special obligations to his own country that might conflict his other obligations)?[61] I will briefly answer these questions. As to the first question, Raz answers that obligatory acts are binding because they are required by mandatory rules with exclusionary force, meaning the agent must perform them even if they feel they should not act on the balance of reasons.[62] Per the second question, Raz maintains that obligations are not exclusively moral. What makes an obligation to keep a certain promise moral or not is whether the content itself of that promise is moral. Finally, Raz offers no conclusive response to the third question, although he suggests that perhaps the issue could be resolved through a full-scale examination of the bases of special responsibility.

After thoroughly reviewing each of the three promise concepts, this chapter has concluded that Raz's PO promise concept offers the best understanding of promise. In the next chapter, we will briefly set aside our discussion of promises to take up treaty concepts and decide what concept of treaty offers the best understanding of treaties.

[59] Ibid, 223.
[60] Ibid.
[61] Ibid.
[62] Ibid, 224.

Chapter 3

What is a Treaty? Three Concepts

As we saw in the last two chapters, different promise concepts substantially disagreed with one another over which locutions express a promise, what conditions must obtain for a promise to have occurred, and to what extent do promises entail promissory obligations. Treaty concepts, on the other hand, are more straightforwardly comprehensible, as the very act of signing a treaty is a significantly more concrete act than that of speaking a promise. This means that treaty concepts usually neither disagree over what agreements count as treaties nor dispute that signed treaties impose an obligation on both parties of expected performance of the treaty's terms.[63] Instead, treaty concepts mainly disagree over what circumstances justify a state's abrogation of the treaty. And this makes sense given how concrete of an act treaty signing is. It is much harder to argue, retrospectively, that what one signed was actually not a treaty, or that one was unclear about the meaning or entailed obligations of the written-down treaty terms. Thus, nations normally resort to arguing over what kinds of changed circumstances count as sufficient conditions for them to renege on treaty obligations. Therefore, since treaty concepts are concrete and do not involve multifaceted substantive disagreements, we can move through them sequentially, introducing them and evaluating them as we go.

In this chapter, we will be examining these three treaty concepts: the natural law contract theory of treaties, the private contract theory of treaties, and the political contract theory of treaties. In our examination and analysis of each treaty concept, we will be exclusively following Sean Fleming's "A Political Theory of Treaty Repudiation." In this article, Fleming has done a phenomenal job tracing the historical developments regarding the natural law contract theory and the private law contract theory, as well as evaluating the shortcomings and advantages of each treaty concept. After Fleming's assessment of these two treaty concepts, he subsequently

[63] It is worth acknowledging, however, in light of the numerous historical examples where hegemonic powers compelled and coerced weaker powers under duress to sign unfavorable and unethical treaties, that there remains the question of whether coerced treaties count as a permissible agreement under international law, or if they even count as treaties at all. Unfortunately, the complexity of this issue is too great to be adequately treated in this present investigation.

develops his own political contract theory of treaties which, according to him, captures the essential features of treaties highlighted by the two previous concepts while still managing to avoid the historical baggage brought on by each one. In the coming sections, I will outline his arguments and evaluations for each treaty concept, filling in the gaps as needed, and then I will assess his evaluations. This will put us in a position to decide for ourselves which theory of treaty presents the strongest, most robust theory, independent of Fleming's own conclusion.

As a last consideration before we begin the chapter, I should say something about the evaluative apparatus I will be using to judge what makes a treaty concept good. I contend that a good treaty concept requires two aspects: 1) it must correspond to the way in which contemporary treaties are negotiated and signed; 2) it must include an account of treaty obligations where signatory parties are expected to perform the duties they have agreed upon in the treaty. I take it as a practical and historical fact that treaties are not merely figurative and symbolic gestures. Reducing treaties to figurative gestures disaccords with the delicate and arduous process through which treaties are bargained and agreed upon, and it ignores the real social impact that treaties have had, and continue to have, throughout history.

With these introductory marks out of the way, let us begin with our first concept of treaty: natural law contract theory of treaties.

Natural Law Contract Theory of Treaty

According to Fleming, the natural law contract theory of treaties conceptualizes international treaties as contracts between individuals in a state of nature.[64] While Fleming analyzes several different accounts of this theory of treaty, we will be focusing on only one: the Hobbesian natural law contract theory of treaty. Hobbes is the first proponent of the natural law contract theory of treaty, and the foundational state of nature & natural law theory that he espouses is shared across historical variants of this theory. Therefore, we can gain a strong understanding of this theories' mechanisms solely by focusing on Hobbes' account. To understand this theory of treaty, however, we must first understand the Hobbesian theory of natural law that underlies it. To this end, we will begin this section with a brief digression from Fleming's analysis and construct an account of Thomas Hobbes' state of nature and theory of

[64] Sean Fleming, "A Political Theory of Treaty Repudiation," *The Journal of Political Philosophy*, Vol. 8, No. 1, 2020, 8.

natural law, thereafter returning to the Hobbesian account of international treaties along with Fleming's analysis.

Thomas Hobbes chiefly concerned himself with accounting for the origins and justification of state authority, as well as establishing a moral foundation for a citizen's civic duty to obey the law. Hobbes achieved these goals by asserting three principal arguments: 1) left unfettered, humanity lives in a cruel state of nature where violence and domination are employed by all to ensure their own survival; 2) humanity can avoid this harsh state of nature by cooperating and agreeing to sign a contract, enforceable only by a sovereign, wherein every man consents to mutually laying down arms in exchange for peace, security, and law-abidingness under that sovereign; and 3) the laws to which man consents in that contract are the fundamental Laws of Nature, and these Laws of Nature are discovered through reason. We shall briefly go through each of these justifications one by one before returning to our present theory at hand.

Hobbes' first premise, the state of nature, establishes what he takes to be the origin for why state authority is needed. The Hobbesian state of nature refers to the brutish way of life that ensues when man is left to fend for themselves outside of a society with enforceable laws:

> Every man is enemy to every man, the same [being] consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for...society...no account of time...and, which is worst of all, continual fear and danger of violent death; and [thus] the life of man [is] solitary, poor, nasty, brutish, and short.[65]

Essentially, Hobbes' state of nature asserts that it is rational for humankind to conquer and dominate over all those who are weaker than him when humankind does not live in a society that deters this kind of behavior. The rational justification for this is that man's primary rational priority is to ensure his own safety and survival. Thus, when man is left to fend for himself outside of the confines of a society, all acts of domination and violence are rationally and morally permissible in pursuit of this goal.

However, Hobbes recognizes that this brutish state of nature is actually not collectively rational for all of humanity. Even though there exists an individual rational thrust to kill and

[65] Hobbes, *Leviathan*, in Russ Shafer-Landau, *Ethical Theory: An Anthology* (Oxford: Wiley and Blackford Publishing, 2013), 559.

dominate others to ensure one's own safety and security, when all of humanity participates in this, it results in significant losses of life that contradict the individual rationality of the decision:

> Because the condition of man...is a condition of war of every one against every one--in which case everyone is governed by his own reason...--it follows that...every man has a right to everything...therefore, as long as this natural right of every man to everything endures, there can be no security to any man, how strong or wise soever he be, of living out the time which nature ordinarily allows men to live.[66]

As a solution to this problem, Hobbes proposes that every man consents to signing a contract where they agree to lay down arms and instead seek to live peacefully together in a society. These two terms of the contract--seeking peace and laying down arms--are called Laws of Nature by Hobbes because he believes that they are laws that are easily derived from the state of nature when man employs his faculties of reason to resolve the crisis of the state of nature:

> A LAW OF NATURE, *lex naturalis*, is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life or takes away the means of preserving the same...consequently, it is a precept or general rule of reason that *every man ought to endeavor peace, as far as he has hope of obtaining it*...from this fundamental law of nature...is derived this second law: *that a man be willing, when others are so too, as far forth as for peace and defense of himself he shall think it necessary, to lay down this right to all things, and be contented with so much liberty against other men as he would allow other men against himself* .[67]

Thus through mutual agreement to enter into a society that abides by the laws of nature, Hobbes affirms that man is able to successfully escape the state of nature and live together peacefully in a society that ensures peace and security for all of humanity.

Yet, Hobbes declares that man is utterly incapable of realizing this contract between individuals in the state of nature without the help of an external, third party that can enforce the terms of the contract. Hobbes believes that the mere idea of a contract is not actually enough to ensure its enforcement, as the prospect of a peace contract may be used merely as a subterfuge by depraved men to trick others into security, only to then slaughter them. To account for this possibility, in what Hobbes takes to be a final and vital consideration needed to protect the sanctity of this contract between men, Hobbes asserts that the resulting society formed by the

[66] Ibid, 560.
[67] Ibid, 560.

contract must be governed by a sovereign who can always enforce the contract. By allocating enforcement of the peace contract to a sovereign, the sovereign can thereby prevent particular individuals from agreeing to the contract only under a false pretense to gain more power and inflict harm:

> For he that performs [the contract] first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions without the fear of some coercive power which in the condition of mere nature, where all men are equal and judges of the justness of their own fears, cannot possible be supposed...[therefore] there must be some coercive power to compel men equally to the performance of their covenants by the terror of some punishment greater than the benefit they expect by the breach of their covenant, and to make good that propriety which by mutual contract men acquire in recompense of the universal right they abandon; and such power there is none before the erection of a commonwealth.[68]

The coercive power of the sovereign thus obliges all parties to the contract to faithfully adhere to its terms, otherwise the sovereign can punish the oathbreaker with a punishment far greater than whatever benefit the oathbreaker would gain from breaking the peace treaty. This completes our account of Hobbes' state of nature and his theory of natural law.

With the background of Hobbes' theory of natural law and state of nature laid before us, we are now in a position to understand the Hobbesian natural law contract theory of treaties. Fleming asserts that according to the Hobbesian natural law contract theory of treaties, international treaties are contracts between sovereigns in a state of nature:

> The Law of Nations, and the Law of Nature, is the same thing...the same Law, that dictateth to men that have no Civil Government, what they ought to do, and what to avoyd in regard of one another, dictateth the same to Commonwealths.[69]

Accordingly, we can spell out the mechanisms of international treaties under this concept by replacing every instance of "man" with "sovereign" in Hobbes' account of the state of nature. To start off, if sovereigns are in a state of nature, this means that every sovereign has the right to everything in nature which he can acquire with his own force. Yet, just as is the case with individuals in an unfettered state of nature, this results in brutish war and violence whose

[68] Ibid, 562-564.
[69] Fleming, "A Political Theory of Treaty Repudiation," 8.

deleterious outcomes outweigh the individual rationality of the every-man-for-himself mindset. To avoid this destructive way of life, natural law thus dictates to sovereigns that they are expected to sign contracts with other sovereigns to lay down arms and establish peace. However, unlike individuals in a state of nature, sovereigns do not have recourse to a higher authority that can enforce these treaties between them, as they are already the highest authority.[70] Consequently, as Fleming aptly puts it, "Sovereigns effectively have the right to repudiate treaties whenever they see fit [because] agreements between commonwealths are 'so long onely valid, as there ariseth no just cause of distrust,' [but] whether there is a just cause of distrust is ultimately up to the sovereign."[71] Sovereigns are thus free to renege on treaty obligations and abrogate treaties whenever they see fit, such as when they determine the treaty obligations to be disadvantageous for their themselves or their nations, or when they judge that such treaty obligations would detriment the welfare of their people.[72]

On this reading of international treaties, international treaties serve the purpose of pushing society towards peace and away from the self-destructive, individually-rational mindset of the winner-takes-all violent state of nature in which all nations find themselves in international relations. Yet, despite this outwardly noble goal of treaties, this concept of treaty fundamentally declares that treaties do not generate binding obligations on sovereigns to comply with the terms of the treaty since there is no higher authority that can compel sovereigns to act against a will. Therefore, treaties do not create binding obligations, and sovereigns have the sole right to abrogate treaty obligations whenever they deem fit.

Fleming contends that there are two main critiques of the natural law contract theory that render it unfeasible as an accurate treaty concept: 1) the idea that modern international relations is a Hobbesian state of nature has been extensively and comprehensively criticized to the point that it is no longer considered a valid theory in international political theory;[73] and 2) the natural law contract theory "depends on an outdated view of the relation between sovereign and citizen."[74] We will evaluate these in turn.

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[70] Ibid, 8.
[71] Ibid, 9.
[72] Ibid, 9.
[73] Ibid, 9.
[74] Ibid, 10.

The most famous critique of the Hobbesian state of nature theory of international relations comes from political theorist Charles Beitz.[75] I will quickly highlight some of Beitz's main arguments concerning the false equivalence between the Hobbesian state of nature and current international relations. Beitz contends that in order for international relations to be considered analogous to the state of nature--where Hobbes' state of nature is centrally defined as the incessant recourse to violent war--four empirical observations must be true:

> 1. The actors in international relations are states;
> 2. States have relatively equal power (the weakest can defeat the strongest);
> 3. States are independent of each other in the sense that they can order their internal (i.e., nonsecurity) affairs independently of the internal policies of other actors;
> 4. There are no reliable expectations of reciprocal compliance by the actors with rules of cooperation in the absence of a superior power capable of enforcing these rules.[76]

Beitz subsequently argues that all four of these empirical propositions about modern international relations are false.[77] Although we will not expend any time exploring the veracity of each of these claims, I offer up Beitz's conclusion as a conclusive recapitulation of his arguments for each of the individual claims:

> The point is that the concerns of international relations have broadened considerably, with the result that competition among international actors may often take a variety of nonviolent forms, each requiring at least tacit agreement on certain rules of the game...the actors in international politics, their forms of interaction and competition, their power, and the goals the system can promote have all changed...this new complexity, which has both analytical and normative importance, is likely to be obscured if one accepts the model of international relations as a state of nature in which the only major problem is war.[78]

The essence of Beitz' argument is thus that the Hobbesian state of nature explanation of international relations is untrue because it both necessitates certain false propositions about international relations to be true, and its explanations of the mechanisms of international

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[75] Fleming merely cites the entire first part of Beitz's book to back up his first critique of the natural contract theory of treaty without exploring any of Beitz's claims themselves. I, too, do not find it useful in this present investigation to debate the veracity of Beitz's claims. However, it is in my interest to qualify this particular criticism of the natural contract theory as being substantive.

[76] Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), 36.

[77] Ibid, 36-50.

[78] Ibid, 48-49.

relations are too simplistic and reductionist. While it remains to be seen whether or not Fleming is overstating this first criticism of the natural law contract theory of treaties, Beitz provides enough welcomed substance to its veracity for us to take seriously the idea that international relations likely looks a lot different from the picture of the state of nature that Hobbes has espoused.

Fleming's second critique of the natural law contract theory of treaties relies on what I call the objection against paternalism. Fleming states that this theory of contract "depends on an outdated view of the relation between sovereign and citizen" called paternalism.[79] The paternalistic view asserts a paternalistic relationship between sovereign and citizen whereby citizens are treated as passive agents that need to be protected by their sovereign:

> [This view] treats citizens as purely passive, like wards or children, and sovereigns as their paternalistic guardians. The sovereign has an overriding duty to act in the interests of his subjects, much as a parent has an overriding duty to act in the interests of his children. Just as we should forgive a father who breaks a contract in order to protect his children, we are supposed to forgive a sovereign who repudiates a treaty in order to protect his subjects...thus [it] appeals solely to the *interests* of citizens; it pays no mind to their *wills* or *preferences*.[80]

The paternalism view thus allows sovereigns to abrogate treaties freely and unilaterally without consent from citizens because the sovereign's actions are interpreted as being in the protective interest of his citizens.

Although Fleming does not explicitly clarify in what sense he believes the paternalism view to be outdated, we can reasonably interpret that Fleming is raising the same kind of objection he raised previously: the paternalism view is outdated in the sense that it erroneously captures the current dynamic between citizens and their governments in modern governing regimes. Given this interpretation, his objection falls in line with the observation that the majority of nations currently active in international affairs no longer rule with unitary monarch sovereigns, but rather with democracies and republics. In these such governing regimes, the citizens play an active and vital role in the decision-making and governing apparatus of their government. By voting to elect their executives and legislators, as well as directly voting on policy proposals, etc., citizens demonstrate that they are deeply concerned about, engaged with,

[79] Fleming, "A Political Theory of Treaty Repudiation," 10.
[80] Ibid, 11.

and affected by the decisions of their governments. In other words, citizens demonstrate that they are not passive citizens, but active agents who want their wills and preferences to be heard and met by their governments. Accordingly, the best reading of Fleming's objection that "paternalism is outdated" seems to rely on the empirical observation that the majority of governing regimes in international relations have democratic governments, and these democratic governments are understood as not having the executive powers to unilaterally repudiate treaties based on perfunctory, paternal assessments of citizens' interests since democracy listens to citizens' stated wills and preferences and treats them as active citizens.

The strength of Fleming's objection against paternalism turns on the extent to which modern democracies' executive decision-making concerning international treaty abrogation does, in fact, appeal to citizens' wills and preferences, instead of merely their perceived interests by the government. However, in this regard, a great deal of powerful democracies routinely get away with Hobbesian-paternalist treaty repudiations. US presidents, for example, rarely consult or seek approval from their legislature when considering derogations from treaty obligations. Usually, US presidents employ sly executive tricks and power maneuvers to unilaterally abrogate treaties as they deem fit according to their own interpretation of "national interest." Such examples from the United States include Trump's repudiation of UNESCO[81] in 2018 and WHO[82] in 2020, both of which occurred through unilateral executive decisions, without congressional approval, and simultaneously violated international law.[83] These empirical examples demonstrate that Fleming's objection against paternalism greatly oversimplifies the extent to which the executive figureheads in democracies actually maintain and rely upon an active sovereign-citizen relationship.

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[81] United Nations Educational, Scientific and Cultural Organization, *Financial Statements 2018*, 9, https://en.unesco.org/sites/default/files/2018-unesco-consolidated-financial_statements_en.pdf & United Nations Educational, Scientific and Cultural Organization, *UNESCO Constitution*, 1946, Article II.6, http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[82] United Nations Treaty Collection, *Constitution of the World Health Organization*, 1948, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-1&chapter=9&clang=_en#11, & World Health Organization, *Statement of Account: United States of America as at 31 January 2020*, 2020, https://www.who.int/about/finances-accountability/funding/account_statement/2020/usa_en_2020.pdf?ua=1.

[83] In both cases, the US under President Trump sent notices to each international body letting them know that they would be immediately withdrawing from the body without paying their outstanding financial obligations. These notices were unapproved by US Congress in any capacity. In addition, both the UNESCO and the WHO constitution stipulate that withdrawals from the body require a year's notice before they take effect, and that the withdrawal has no effect on the nation's outstanding financial obligations, which must still be met in full. In 2018, the US still owed $611.8 million to UNESCO, and in 2020, they owed $99.1 million to WHO.

Moreover, Fleming's objection against paternalism relies upon an excessively-idealistic concept of democracy. In reality, democracy is messy, and democracies always support some kind of Hobbesian-paternalist view of citizens in the way that legislatures treat their citizens. There often exists, for example, multifarious socioeconomic and legal barriers maintained by democratically-elected legislative officials in order to strip agency away from particular groups of citizens so as to prevent them from exercising their democratic powers. Voting rights laws and laws that promote socioeconomic inequality are two such common ways in which democratic governments prevent particular groups of citizens from actively expressing their wills and interests. The reason this occurs is exactly so that the government can act on behalf of what it takes to be these groups' perceived interests, without having to entertain their actual stated wills and interests. Thus, Fleming's objection not only oversimplifies the actions of executive figureheads in democracies, it also presumes an overly idealistic picture of legislative representation of citizens. In light of these comments, let us dispense with Fleming's objection against paternalism.

Fleming ultimately concludes that the natural law contract theory of treaty is not the best concept of treaty. While this theory has a notable strength of bringing the relationship between the sovereign and its citizens back into view, its justification of the grounds for abrogating a treaty relies on a disproved characterization of international relations and an unfounded paternalistic conception of the sovereign-citizen relationship. I agree with Fleming's conclusion: the natural law contract theory of treaty does not offer the best understanding of international treaties. However, I disagree in part with his justification. While Fleming and I agree about Beitz's objection, that international relations does not look like Hobbes' state of nature, I have disagreed with his objection against paternalism. The reason I have levied such intense criticism of Fleming's paternalism objection is because I believe it distracts from the main objection towards the natural law contract theory of treaty, which is as follows: the natural law contract theory of treaty establishes no obligations for expected performance of the treaty obligations. By conferring sole repudiation of treaties to sovereigns, without justification, the natural law contract theory of treaty establishes no obligations for the expected performance of treaty obligations. Without such a concept of binding obligation in treaty-making, treaties are rendered as mere political charades, which, as will be continually discussed throughout this chapter, strongly contradicts the delicate, pain-staking process through which treaty terms are bargained

and agreed upon, as well as the historical importance that treaties have played in resolving international disputes. The natural law contract theory of theory thus does not constitute the best treaty theory.

The Private Contract Theory

Private Contract Theory is the treaty concept built up by a wealth of international case law under the United Nations. As dictated by the Vienna Convention on the Law of Treaties, its core tenet is *pacta sunt servanda*[84] : "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[85] As evidenced here, the main idea behind private contract theory is that international treaties are contracts that create strict legal obligations between governments that must be observed and cannot be abrogated for political reasons. In this section, we will explore how the private contract theory of treaties essentially defines and treats treaties like contracts in positive law, and then we will view some limited exceptions for treaty abrogation under international law.

The analogy that international treaties are essentially positive law contracts whose constituents are states rather than individuals was purposefully built into the system of international law. Fleming explains that all of the features that essentially characterize international law—i.e. the strict legal obligations to follow treaties, the particular grounds for treaty abrogation, etc.—were all adapted from contract law:

> The law of treaties is built on them [private law analogies]. The legal grounds for non-performance of a treaty...were adapted from contract law. Coercion, fraud, and error in the international realm correspond to duress, misrepresentation, and mistake in the domestic realm. Material breach parallels breach of contract, while impossibility and fundamental change are essentially subtypes of what is called 'frustration' in English contract law.[86]

This mirroring of concepts from positive law to international treaties solidifies the analogy that international treaties are contracts and thus impose the strict legal obligations attached to contracts. In completing this analogy, the private law contract theory maintains that treaties are "black boxes" as much as contracts are. The "black box" idea of contracts argues that individuals

[84] Latin for "agreements must be kept"
[85] UN 1969, Art. 26.
[86] Fleming, "A Political Theory of Treaty Repudiation," 7.

and corporations cannot withdraw from or otherwise repudiate a contract due to "psychological, biological, or organizational changes in the parties."[87] Likewise, when the idea of "black boxes" are applied to states, states are encumbered with similar restrictions in regards to the treaty: they cannot withdraw from treaties due to changes in "policy, public opinion, or government."[88] In this way, the private law contract theory of treaty succeeds in maintaining the same strict legal obligations that derive from contracts.

Having completed the account of international treaties as a form of positive law contracts, we now turn to the limited justifications for treaty abrogation under this theory of treaty. Current international law outlines only two ways in which a treaties fail to impose legal obligations: 1) it can be invalid ab initio, or 2) a state may formally withdraw from a treaty following the appropriately outlined legal channels.

Starting with the first method, a treaty may be declared invalid ab initio if the circumstances of the treaty somehow violate an international peremptory norm. This can manifest in two ways: a) the content of the treaty allows for an unlawful derogation from a peremptory norm, such as by declaring torture, slavery, piracy, etc. legal, or b) the signing of the treaty violated international law, such as by involving coercion, corruption, deception, violence, etc.[89] Such conditions render a treaty invalid from the start, thereby not creating a legal obligation to abide by the treaty.

Apart from being declared invalid, an international treaty may also be abrogated if a state formally withdraws from it. Fleming explains the four bases laid out in the Vienna Convention by which a state may formally withdraw from a treaty:

> 1) the parties to the treaty have agreed to terminate it; 2) the treaty has become impossible to perform because of 'the permanent disappearance or destruction of an object indispensable for the execution of the treaty; 3) one of the parties has committed a 'material breach,' or a serious violation of the treaty, or 4) there has been a 'fundamental change in circumstances.'[90]

The first three grounds are self-explanatory, and they exactly mimic the grounds for abrogating private law contracts. The fourth ground, sometimes called the "fundamental change" doctrine, is

[87] Ibid.
[88] Ibid.
[89] Ibid, 5.
[90] Ibid, 5.

more complicated. Although we will not explore it more in-depth here, it is important to clarify that the "fundamental change" doctrine does not include internal changes in a state's government or public policy as constituting a "fundamental change." As Fleming stresses, "only changes in *external circumstances* can legally justify withdrawal. Internal changes in the state are excluded as being 'political.'"[91] Accordingly, this strengthens the "black box" concept created by treaties, preventing any derivation from the obligations of a treaty due to internal, political circumstances. This completes the explication of the private law contract theory of treaty.

The strength of the private law contract theory of treaty is clear: it sets up a very strong concept of legal obligation, similar to that created by private law contracts. A strong concept of treaty ultimately needs a strong concept of legal obligation. This is a practical intuition with a strong historical precedent. There is a lot at stake in negotiating treaties in international relations: throughout the course of history, treaties have been negotiated to end wars, build friendships, strengthen economies, provide humanitarian aid, etc. To accomplish these goals, treaties need to be reliable, as well as the international institutions that support them. In our social world, there is no stronger entity that create legal obligations to mutually observe the contents of an agreement than the private law contract. This is why the private law contract theory of treaties turns to the contract law analogy. Contracts, with their rich history of positive law, have always been heralded as the epitome of obligation, and this is rightfully so. The meticulous fashion in which contracts are negotiated, agreed upon, and signed testify to the incontrovertible strength of the obligations that they entail. Moreover, we as humans have created and maintained powerful social institutions such as courts, legislatures, etc. that can enforce the legal obligations entailed by these contracts by dispersing retribution when they are wrongfully violated. It is thus natural, since treaties are negotiated, agreed upon, and signed in a similar fashion to contracts, to turn to the analogy of private law contracts as both the foundation of international law and the justification for the legal obligations entailed by treaties.

Yet, despite the private law theory of treaty being endorsed by the current regime of international relations, I argue that the private law contract theory is not the best theory of treaty. There is an important normative differences between private law contracts and international treaties that a strong theory of treaty must take into account. When contracts are negotiated, agreed upon, and signed, this deliberation process occurs between *only* the negotiators, and it

[91] Ibid, 6.

subsequently affects *only* the negotiators. International treaties do not have this same property. Treaties are negotiated by two individual sovereigns representing their respective governments, but the effects of the treaty affect the *entire* population of both nations. This results in an unbalanced equilibrium between the constituents of international treaty agreements and the population that are affected by the treaty's effects. In private contract law, contracts sometimes must deal with this unbalanced equilibrium, but there exists a very strict, detailed set of case law surrounding when contracts may be signed on behalf of those who cannot participate in the deliberation process. Power of attorneys (POA), the terminally ill, or those deemed "mentally incapacitated" (such as from psychological issues) are such examples from contract law. Yet, in each of these cases, there always exists some sort of parameter by which the resulting contract can still be repealed by the non-agent whose contract was signed for him. POAs, for example, can be repealed and invalidated by proving the Principal (i.e. the person in charge) to be abusive or not according to one's best interests, and so on. The affected population of an international treaty, the citizens of the sovereign, do not have such possibilities. In a democratic country, the democratic process offers a long-term relief: citizens can vote out an old sovereign and replace him with one who will roll back deleterious treaties and institute new treaties supported by the citizens, but this process can only occur every iteration of the democratic process. In the short-run, if a majority of citizens oppose a treaty signed by their elected sovereign, there does not exist any proper legal channel to invalidate that treaty. This is thus an important normative difference that separates private law contracts from international treaties, and this difference must be accounted for by a strong theory of treaty.

The Political Contract Theory of Treaty

So far, we have reviewed two historical theories of treaties, and we have concluded that neither of them constitutes the best treaty theory. From the various objections levied against them, both the Natural Law Contract Theory of treaty and the Political Contract Theory of Treaty fail in some way to capture a realistic picture of international affairs and treaty abrogation. Yet, even in spite of these theories' weaknesses, Fleming believes that the fundamental disagreement between these two theories offers crucial insight about the nature of treaties, which can be used to construct a better, more accurate treaty concept.

Fleming contends that the disagreement between the Natural Law Contract Theory of treaty and the Private Law Contract Theory of treaty fundamentally revolves around resolving the question of whether treaties are, by their nature, essentially contractual or essentially political.[92] Briefly recall the arguments of each theory. Natural Law Contract Theory argues that treaties do not create binding obligations because sovereigns are foremost obligated to the welfare of their citizens. Treaties are thus only followed insofar as they remain useful to the interests of the state (based on the sovereign's judgment of the interests of his citizens). In appealing to the sovereign-citizen relationship--a political consideration--as the justification for treaty abrogation, Natural Law Contract theory concludes that treaties are essentially political in nature. On the contrary, Private Law Contract Theory, which forms the backbone of modern international law, appeals to established political-legal rules and channels as the justification for treaty abrogation. It argues that treaties between states always engender binding treaty obligations which cannot be abrogated due to political grounds outside of the established legal channels (i.e. changes in state government, public opinion, preferences of the sovereign, etc.). In appealing to strict political-legal rules as the justification for treaty abrogation, Private Law Contract Theory concludes that treaties are essentially contractual.

Fleming's contribution to theories of treaty is realizing that both of these treaty theories make valid observations about the nature of treaties: sometimes treaties need to be abrogated for political reasons, such as when the majority of a sovereign's citizens do not support a treaty signed by the sovereign, but by and large, treaties need to be construed as contractual entities to ensure the validity of the agreement. Fleming thus asserts that this core tension between the Natural Law Contract Treaty Theory and the Private Law Contract Treaty Theory is not just a matter of theoretical debate, but rather it is an empirical observation about the complex duality of treaties themselves.

Accordingly, the Political Contract Theory of treaty incorporates this tension into the core definition of international treaties and dives into explicating the mechanisms of this tension. Fleming's Political Contract Theory of treaties asserts that treaties have both a contractual nature and a political nature:

[92] Fleming, "A Political Theory of Treaty Repudiation," 11.

> Treaties have a dual character: they are both contractual and political. Although treaties are voluntary agreements (like contracts), they are also binding acts of involuntary associations (like laws).[93]

This dual contractual-political nature of treaties derives from the competing populations which treaties affect, serving as a bridge between the two strengths of the previous two theories of treaty. As voluntary, international agreements, treaties engender expectations and obligations to other nations and thus must be followed so as not to violate those self-imposed expectations and obligations.[94] However, unlike regular contracts which only affect those who participated in the bargaining process and agreed to the resultant binding obligations, treaties affect more than merely the individuals who sign them. Citizens who have no control over the signing of an international treaty or its bargaining conditions are affected by the treaty and obligated to adhere to it, regardless of whether they want to or not. This subsequently renders citizens as involuntarily coerced associations to the treaty. So, in addition to their contractual element, treaties are also binding political decrees with which citizens are involuntarily and coercively associated.[95]

Fleming argues that this dual contractual-political nature of treaties subsequently entails conflicting demands on the problem of treaty repudiation:

> The two facets of treaties give rise to different requirements. While the contractual facet requires rational consistency (or 'integrity'), the political facet requires responsiveness to citizens...the problem of treaty repudiation follows from the tension between these two requirements.[96]

To explain these conflicting demands and how they subsequently impact the problem of treaty repudiation, Fleming draws on the philosophical literature on corporate agency. Fleming frames the contractual-political tension as a "discursive dilemma, or a conflict between rational consistency and responsiveness."[97] On the one hand, the contractual nature of treaties requires adherence to rational consistency because, in signing a treaty, a nation is voluntarily obligating itself to the mutual performance of a set of agreed-upon obligations, and it is vital for its own

[93] Ibid, 11.
[94] Ibid, 11.
[95] Ibid 15.
[96] Ibid, 11.
[97] Ibid.

rational consistency that it follows its own voluntary agreements. Yet, on the other hand, nations have a duty to act in the interests of their citizens. Since citizens are involuntary associates to the contract, when citizens overwhelmingly disfavor a treaty, nations are obligated to respond:

> Treaties impose burdens on citizens that they can opt out of only with great difficulty, if at all...representative politics is often the only form of recourse that citizens have against a treaty that they consider to be too onerous or restrictive...[so] when citizens object to a treaty...those objections should be taken seriously.[98]

What follows from this conflict between rational consistency and responsiveness is that the question of treaty repudiation must constantly weigh and balance these two requirements on a case-by-case basis.

Balancing the requirements of rational consistency and responsiveness is messy, but Fleming has some ideas about how it can be done. Although he begins by pointing out that there is no "mechanical decision-making procedure... [that can] resolve the tension between them,"[99] he proposes a list of four criteria by which the credibility of a popular repudiation (i.e. repudiating on the basis of citizens' demands) can be evaluated:

> We can judge the credibility of any particular invocation of popular repudiation according to four criteria: (1) the numerical strength of the popular objection to the treaty; (2) the contextual factors, such as the content, burden, and age of the treaty; (3) the character of the government that repudiates the treaty; and (4) whether the repudiation is proportionate.[100]

These criteria are meant to be subjective: there is no numerical priority assigned to any of the four criteria. So we are left with some subjective debate over what constitutes sufficiently meeting a criteria, how many or to what extent do criteria need to be met to justify invoking the popular repudiation, etc. Nevertheless, these disputes can be debated and collectively agreed upon--unlike the Hobbesian repudiation where only the sovereign's input matters. This finishes the account of the political contract theory of treaty.

The advantages of Fleming's political contract theory of treaty are a transparent combination of the strengths of the previous two treaty theories without any of their weakness.

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[98] Ibid, 16.
[99] Ibid,16.
[100] Ibid, 20.

Like natural law contract theory, it maintains that treaties must be responsive to the citizens of the sovereign, as treaties involuntarily associate citizens without giving them a way to repeal the treaty or partake in the deliberation process. Yet, unlike the natural contract theory, it respects a contemporary view of international relations, esteems the agency of citizens' demands to their sovereigns, and supports the view that treaties engender obligations. Like the private law contract theory, the political contract theory maintains that treaties engender strictly observable legal obligations that cannot be abrogated due to internal changes in policy and governing regimes. Yet, unlike the private law contract theory, it recognizes and accounts for the normative difference between contracts and international treaties and thus outlines a popular repudiation criteria by which treaties can be abrogated when the citizens of a nation overwhelmingly reject a treaty.

In short, the political contract theory of treaties offers an updated view of international treaties that attributes all of the practical considerations we recognize in international relations while dispensing with the baggage that comes from older, outdated theories of treaty. Therefore, the political contract theory of treaty represents the best theory of treaty which we will make use of in the next chapter.

Chapter 4

Treaties as Promises

Having defined and defended a concept of promise and a concept of treaty in the last two chapters, we can finally answer our main question: are international treaties moral promises? This chapter will proceed in two sections. In section one, I will argue that treaties as defined by the political contract theory of treaty meet the definition of a moral promise under the promise as obligation concept of promise. I will subsequently conclude that treaties entail promissory obligations on nations to abide by the terms of the treaty. In section two, I will make the case that Raz's concern of the stateman's special obligation to his country does not, in the United States, conflict with the categorical obligation to abide by promissory obligations.

Treaties as Promises

To qualify a treaty as a promise qua promise is to say that treaties possess all of the properties of promises. So, to establish that treaties are promises, all we must do is demonstrate how the definition of treaty encompasses the definition of promise per the promise as obligation definition.

Recall from Chapter One the definition of PO promises. Promises have three important features that distinguish them from other acts of communication: 1) promises engender obligations; 2) promises require explicit acts of communication; and 3) promissory obligations are voluntary and self-imposed. I will now how treaties meet these three aspects of promises and are thus promises.

Given that treaties qua treaties are acts of communication, we can swiftly establish that treaties meet the second and the third aspect of the promise definition. The types of treaties that we have dealt with throughout this thesis have always been explicit acts of communication. While it is possible for nations to enter into pacts and agreements without a formal and explicit process, these forms of treaties are neither the norm in international relations nor the crux of our concern. The majority of treaties, both historical and contemporary, have been tangible

documents that were explicitly bargained for, signed, and acknowledged. Therefore, treaties meet the promise requirement of being explicit acts of communication.

Likewise, the vast majority of treaties have been signed voluntarily with a voluntary, self-imposed commitment to abide by the treaty obligations entailed by the signed treaty. Once again, while there are numerous examples throughout humanity's history of coerced treaties signed by nations that lost wars, the bread-and-butter of treaties are drafted through voluntary participation by two nations who want to agree to self-impose obligations on each other so as to obtain some mutual benefit--whether that be peace, commerce, alliances, etc. Therefore, treaty obligations, like promissory obligations, are voluntary and self-imposed obligations.

The main question, then, is the question of whether treaties engender obligations. So far, we have endorsed a concept of treaty that maintains via *pacta sunt servanda* that they do engender obligations, and we have dismissed treaty concepts that argue that treaties do not engender obligations. This lends some surface-level credence for the idea that treaties encompass the promise definition and are therefore promises. But up until now, we have not discussed *how* treaties engender obligations. This is a question about the mechanisms by which treaties engender obligations. Answering this question holds the key to completing the argument. To say that a treaty is a promise is to say that treaties work in the exact same way as promises work, right down to the very fiber. If treaties and promises both engender obligations, but through different mechanisms, then we may only conclude that treaties engender obligations that *look like* promissory obligations--that is, they are still obligations, but they do not carry the same weight or moral considerations that promissory obligations carry. But since we seek to conclude the stronger version, the argument that treaties *are* promises, we need to show that treaties generate treaty obligations through the same mechanisms that PO promises do.

However, none of the treaty concepts we have looked at have attempted to explain the mechanisms behind how treaties generate obligations. Even *pacta sunt servanda* in the Vienna Convention is stipulated as a given--a socially ubiquitous axiom--without reference to the mechanism of action by which treaties engender obligations. So in what follows, I will begin by evaluating how well the mechanisms by which PO promises generate promissory obligations map onto treaties and treaty obligations, and then I will further develop an account of the mechanism of treaty obligations based on what we have learned about treaties.

Let's begin with the question of how treaties engender treaty obligations. Recall that PO promises explain the generation of promissory obligations based on two partial mechanisms, which together give the promiser reason to abide by his promise. The first mechanism is an appeal to a promising rule that states that promises engender obligations, and if one takes such a promising rule to be a valid rule, then the validity of that rule acts as a reason to abide by the promise (i.e. accept that promises engender promissory obligations). The second mechanism is the utterance of the promise itself, which gives the promiser reason to abide by his own promise by virtue of the fact that the promiser just voluntarily and willfully uttered it. Together, these two reasons explain why the promiser has strong reason to abide by his own promise, thus explicating how promissory obligations are derived from promises. Do treaties engender obligations through this same dual-mechanistic process?

The logic of the first mechanism, the appeal to a promising rule, works for treaties as much as it does for promises. Recall the logic: uttering a promise invokes an appeal to the validity of a social convention of keeping promises, and if this social convention of keeping promises is valid, then the validity of this social convention acts as a partial reason to abide by that social convention. Since treaties are as much social conventions as promises are, there is no obstacle in reformulating this logic to apply to treaties, as follows: signing a treaty invokes an appeal to the validity of a social convention of keeping treaties, and if this social convention of keeping treaties is valid, then the validity of this social convention acts as a partial reason to abide by that social convention. So, from a formulaic standpoint, this partial reason holds for both promises and treaties.

In formulating the above logic to explain how promises generate promissory obligations, Raz is careful not to draw on concrete evidence that such a social convention of keeping promises exists, as such an evidentiary appeal detracts from his point and is not ultimately needed. Yet, in our case, an evidentiary appeal bolsters our claim. Whereas the existence of a promising rule that states that promises engender obligations is not explicitly codified, the existence of a treaty rule that states that treaties engender obligations is codified. Such a treaty rule is enshrined in international law under *pacta sunt servanda* laid out in the Vienna Convention, as well as in the UN Charter. The explicit codification of the treaty rule in bodies of international law, which almost all nations have signed onto, gives this treaty rule institutional validity that strengthens the reasoning behind the mechanism of treaty obligation generation.

As to the second partial reason, treaties, like promises, involve an "utterance" that further explains how the treaty obligation is derived from the treaty. In this case the "utterance" is a written signature of confirmation rather than an oral utterance, but the logic still works the same. This signature, like the promiser's verbal utterance of the promise, gives the treaty signer reason to abide by the treaty in virtue of the fact that the treaty signer just voluntarily and willfully signed the treaty. The act of signing a treaty is a recognition of the fact that there exists a rule to the effect that treaties engender obligations and that one is voluntarily committing oneself to these obligations by that very act of signing the treaty. Even if treaties are signed as a subterfuge without the intent to ever keep them--the treaty equivalent of Ardal's "lying promise"--the very possibility of this subterfuge being successful relies on acknowledging that there does exist a treaty rule, which categorically asserts that treaties engender treaty obligations that must be kept, and that one can deceitfully trick his enemies and benefit by partaking in the act of signing the treaty, which shows commitment to the treaty when one in fact does not actually have such commitment. Signing a treaty therefore constitutes an utterance whose voluntary and willful performance accounts for the generation of treaty obligations from treaties.

Unlike verbal utterances of promises, however, the concreteness of treaty signatures offers a more robust commitment to the generated obligations than the promissory verbal utterance. Signatures have a long social and legal history of being recognized as strongly authoritative confirmations of commitment because they are permanent and traceable. Once a document is signed, the obligations entailed by that document can be traced and reviewed ad infinitum insofar as the document is not destroyed. This robustly strengthens the commitment to the obligation by rendering charges of ambiguity, ignorance, heedlessness, and/or unreliable memory more difficult to prove than they might be regarding an obligation derived from a spoken promise. The concreteness of treaty signatures thus strengthens the reasoning behind this mechanism of treaty obligation generation.

I have therefore shown that treaties engender treaty obligations through the same dual-mechanistic process as promises. This demonstrates that treaties meet the last criterion of the promise definition. I have thus shown that treaties possess all three of the definitional properties of promises: 1) treaties engender treaty obligations through the same mechanisms that promises engender promissory obligations; 2) treaties require explicit acts of communication; and 3) treaty obligations are voluntary and self-imposed. Having demonstrated that treaties meet this

definition, we may now conclude that treaties *are* promises, and treaty obligations *are* promissory obligations.

Dismissing the Special Obligations Objection

Now that we have completed the argument that treaties are promises, we may turn our attention to addressing some empirical questions surrounding our conclusion. In Chapter Two, we identified one of Raz's empirical concerns surrounding his PO promise concept: can the categorical obligations imposed by promise-making conflict with the special obligations imposed by people in positions of special responsibility?

The potential conflict between a categorical obligation imposed by a treaty and the special obligation of statesmen is of particular concern to us. Statesmen and government officials who negotiate and sign international treaties also take oaths of office in their respective nations, and these oaths entail some kind of special obligation to their nation. While it is possible that special obligations may be derived from other sources, I take it as self-evident that the most authoritative and/or commonly-referred-to source are oaths of office. If the special obligation to the state derived from the oath of office is construed as triumphing over the categorical promissory obligation to abide by the treaty, then our mission to elevate treaty obligations as powerful morally and legally binding obligations will have failed, as a practical matter, to be convincing.

Answering this question requires investigating particular sources of special obligation in the United States government. Although our argument thus far that treaties are promises has been generalizable to all treaties, we can only answer this objection in the particular. Each nation must grapple with its own political system to determine the relationship between its treaty obligations and the special obligations it confers onto its governmental representatives. Consequently, the conclusion that I come to regarding the United States government will not necessarily hold for France, Germany, or Great Britain. This is a welcome feature of the argument and should not be seen as detrimental.

I contend that the US Oath of Office does not support a special obligation to advancing the self-interest of the nation that conflicts with, and triumphs over, the categorical promissory obligations entailed by treaties. In the US Oath of Office, it is the Constitution--not the nation--that is the object of the oath:

> I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.[101]

Any senator, representative, statesman, or civil servant who takes this oath is swearing allegiance particularly to the Constitution of the United States. Far from an oath of loyalty to a particular president or political party, this oath entails a special obligation to "support and defend the Constitution." Taken literally, this straightforwardly implies that civil servants have special obligations *only* to uphold the content of all of the articles inside of the Constitution--which would include the not-so-worthy clauses like the Fugitive Slave Clause (Article IV, Section 2).[102] Normally, however, the oath is construed as an obligation to support and defend the institutions of political governance and the framework of law that the constitution represents and embodies. This means supporting and defending the democratic principles and institutions that have resulted because of the spirit of the Constitution, such as a fair and just election process (pursuant to all US election laws), centuries of jurisprudence that has interpreted and reinterpreted the constitution, federal agencies created through executive orders that were not specifically established by the constitution, etc. The American civil servant oath is thus not a special obligation to advance the self-interest of the nation vis-a-vis a particular president or political party, so it does not conflict with the categorical promissory obligation to abide by treaties.

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[101] United States Senate, "Oath of Office," https://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

[102] Unlike the Three-fifths Compromise (Article I, Section 2) which was completely repealed by the Fourteenth Amendment, the Fugitive Slave Clause has not been completely repealed by the Thirteenth Amendment. In *United States V. Kozminski* (1988), the Court ruled that "not all situations in which labor is compelled by physical coercion or force of law violated the Thirteenth Amendment." https://caselaw.findlaw.com/us-supreme-court/487/931.html.

Concluding Remarks

In this thesis, we analyzed and evaluated three concepts of promises and three concepts of treaties. Then, based on our endorsement of the Promise as Obligation concept of promise and the Political Contract Theory of Treaty, we concluded treaties are promises and thus treaty obligations are promissory obligations. I hope that this analysis has given some credence to the idea that treaties are promissory obligations that require a principled commitment to the moral value of keeping promises. By the same token, I hope that this analysis has dispelled some ideas of treaties as being amoral, social and political products of self-interested nations who abrogate treaties as soon as they no longer pose an advantage to the self-interest of the nation. Be as it may, I do not claim to have definitely proven or disproven any interpretation; rather, I hope the analysis of these concepts can help us to think more rigorously about what promises and treaties are, so that no matter what conclusion each one of us ultimately comes to, it is one that is analytically informed and empirically backed.

As a final matter of consideration, I want to dwell for a moment on a minor, but not insignificant, question that is more than likely to have crossed those minds who have read up until now. That question is simply: why does it matter whether treaties entail promissory obligations vs merely legal obligations? After all, legal obligations are still binding obligations that are institutionally supported under the regime of international law that currently exists. Whether or not an obligation is qualified as legal or moral does not change the fact that it exists, and its existence compels compliance. So why put all this work into arguing that treaties are promises that entail promissory obligations?

Because there is a great difference between moral force and legal force. The relationship between law and morality is muddy and entangled, but we all recognize there is a great difference in motivating power between the two forces. Moral concepts speak to us in a way that legal concepts often do not. We all understand, appreciate, and empathize with the guilt of breaking a sacred promise to a friend, but we rarely feel that same way when businesses break their legal contracts to one another. The role of practical ethics is to get us to care about the moral impact of the decisions we make. If we change the way that we think about treaties by considering them as sacred moral obligations rather than tedious legal obligations, we might see more cooperative treaties and less broken ones.

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