

**NORM DEVELOPMENT AND KNOWLEDGE CREATION IN THE WORLD
SYSTEM – PROTECTING PEOPLE, INTELLECTUAL PROPERTY AND THE
ENVIRONMENT**

**Submitted by Preslava Stoeva, to the University of Exeter as a thesis for the degree of
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Preslava Stoeva

Abstract

This thesis develops a theoretical model to explain the creation of international behavioural norms drawing on two literatures: Constructivism in International Relations and the Sociology of Knowledge. This theoretical model draws attention to the interplay between scientific knowledge and normative concerns in the process of norms creation, to the role of non-state actors in norm construction, as well as to the importance of states in normative negotiations. I have also sought to uncover different types of power that both states and non-state actors have employed and the tactics of bargaining and persuasion which prevail and lead to the successful creation of international norms.

The proposed theoretical model is applied to three case-studies, which are the creation of the norm outlawing the use of torture, the norm protecting intellectual property rights in the pharmaceutical industry, and the norm for the protection of the atmosphere from the effects of human activities to prevent or slow down global warming. The historical reconstruction of events leading up to the legalisation and operationalisation of these norms has revealed important similarities in the way that these norms were negotiated. There is a resemblance in the manner in which scientific knowledge and normative beliefs interacted. All three case-studies exposed the degree to which non-state actors – NGOs, scientific communities, advocacy organisations, religious groups, businesses, etc. – participated in the creation of international norms, and although this is not a new concept in itself, it is worth reconsidering its intensity and the role of these actors in world politics. My research into the development of these three international norms has also emphasised the need for a better understanding of the points of closure in scientific, normative, and political debates. I argue that the way in which closure is reached is directly relevant to the strength, effectiveness and authority of the norm created.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACAT	Action by Christians Against Torture
ACTPN	Advisory Committee on Trade Policy and Negotiation
AGBM	Ad-hoc Group on the Berlin Mandate (relating to the Convention on Climate Change)
AI	Amnesty International
AOSIS	Allience of Small Island States
APPEN	Asia-Pacific Peoples' Environment Network
APT	Association for the Prevention of Torture
ASEP	Asian Society For Environmental Protection
BIRPI	United International Bureaux for the Protection of Intellectual Property
BIPs	Bilateral Intellectual Property Agreements
BITs	Bilateral Investment Treaties
BMA	British Medical Association
CAT	Convention Against Torture
CHR	Commission of Human Rights
CINAT	The Coalition of International NGOs Against Torture
CIOMS	Council for International Organisations of Medical Sciences
CO ₂	Carbon Dioxide
CoP	Conference of the Parties taking place under the Framework Convention on Climate Change
CPT	Consumer Project on Technology
CSCT	Swiss Committee Against Torture
ECOSOC	Economic and Social Committee of the United Nations
EU	European Union
FCCC	Framework Convention on Climate Change
FIELD	Foundation for International Environmental Law and Development
GATT	General Agreement on Tariffs and Trade
GCC	Global Climate Coalition
GCMS	General Circulation Models
GEF	Global Environmental Facility

GHGs	Greenhouse Gases
HAI	Health Action International
Health GAP	Global Access Project Coalition
IAPL	International Association of Penal Law
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
ICSU	International Council of Scientific Unions
ICTSD	International Centre for Trade and Sustainable Development
IIPA	International Intellectual Property Alliance
ILO	International Labour Organisation
INC	Intergovernmental Negotiating Committee to negotiate a framework convention on climate change
IP	Intellectual Property
IPC	Intellectual Property Committee
IPCC	Intergovernmental Panel on Climate Change
IPRs	Intellectual Property Rights
IRCT	International Rehabilitation Council for Torture Victims
LDC	Least Developed Country
MIT	Massachusetts Institute of Technology
MSF	Medecins Sans Frontiers (Doctors Without Borders)
NASA	National Aeronautics and Space Administration
OECD	Organisation for Economic Co-operation and Development
OMCT	World Organisation Against Torture
OPCAT	Optional Protocol to the Convention Against Torture
OPEC	Organisation of Petroleum Exporting Countries
PhRMA	Pharmaceutical Research and Manufacturers of America
PR	Public Relations
RCT	Research Centre for Torture Victims
SCEP	Study of Critical Environmental Problems
SCOT	Social Construction of Technology
SEI	Stockholm Environmental Institute
SMIC	Study of Man's Impact on Climate

SSK	Sociology of Scientific Knowledge
TB	Tuberculosis
TRIPs	Trade Related aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UNAIDS	United Nations Programme on HIV/AIDS
UNCED	United Nations Conference on Environment and Development (1992)
UNCHE	United Nations Conference on Human Environment (1972)
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCHR	United Nations Office of the High Commissioner for Human Rights
UNICEF	United Nations International Children's Emergency Fund
USITC	United States International Trade Commission
USTR	United States Trade Representative
VSO	Voluntary Service Overseas
WB	World Bank
WCED	World Commission on Environment and Development
WCP	World Climate Program
WHA	World Health Assembly
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WMA	World Medical Association
WMO	World Meteorological Organisation
WPA	World Psychiatric Association
WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION

Questions of international order and justice, of international law and power have been getting an increasing amount of media coverage, public and research interest in the dynamic context of world politics after the end of the Cold War. I have always had a great interest in understanding the evolution of social perceptions in general and of international norms in particular. This combined with my long-standing interest in the nexus between international relations theories and practice and prompted me to search for theoretical proposals that matched the development of various international norms relating generally to the protection of people. The existing research on international norms puts ample emphasis on issues of norm compliance and state behaviour in the context of the growing legalisation of world politics, and it aims to understand the behavioural choices that states make. Existing studies, however, do not seem to provide a comprehensive explanation of state actions neither prior to the creation of international norms nor in the process of their development. The current research is not concerned with norm compliance; instead it focuses on the question of how international norms come into existence. The niche between the inception of a normative idea and the point at which we question norm compliance provides fertile ground for theorising the practice of international politics.

This research seeks to explore the process of norm development in world politics. The causal variables, the influence of the international politico-economic context, the nature, power, and interests of the actors involved in the process of norm creation, all influence the norms that are constructed. International norms are a product of a sequence of closures and consensus reached at different levels of analysis, which makes them permeate

the social and political fabric of international relations even before they become established principles of state behaviour. International norms are socially constructed and result from a complex and dynamic socio-political exchange among actors with conflicting views, interests and priorities. International norms are aimed at regulating behaviour and are created to address a problem or an injustice, which in turn means that norms combine an ethical element, assigning moral values and a technical element, determining practical solutions. Norms should not be considered as only ethical or only technical because that would undermine our understanding of their very nature and would hinder our perspective on their development and role.

This research aims to understand the process of norm creation and the factors involved in this process. International norms are socially constructed; they are a part of the flow of politics and if we assume that they are exogenously given, we are interrupting this flow and risking overlooking important causal mechanisms in the behaviour of states. Examining norm development will reveal dynamics that might have been ignored by existing approaches to world politics, and will attempt to take into account actors' identities and interests as a determinant of their actions and aims. Studying the complexity of international negotiations will outline the causes of normative change and the circumstances in which actors agree to amend their social constructions of appropriate behaviour.

In other words, the conceptual problem to which this research seeks to respond is two-fold. Firstly, understanding the process of norm creation in more depth will demonstrate that norms have a normative and a technical side where the normative side is not necessarily reflective of what is considered 'good' for or by the public. The example of the norm for the protection of intellectual property rights in the pharmaceutical sector, which is explored in detail in Chapter 4, illustrates the high probability of creating a 'bad'

norm, which caters for the economic interests of a limited social group. At the same time, all three case-studies presented here demonstrate the central role of technical knowledge in constructing the causal relationships that underlie the normative concerns. And secondly, this research seeks to demonstrate that norms are not exogenously given, and also that the process of their evolution may account for the ensuing state behaviour. It is essential, I argue, to understand the process of norm creation, as it accounts for the character, strength, and effectiveness of the resulting norm.

The principal hypothesis of this research is that normative ideas have similar and logically ordered paths of evolution, where the actors involved aim at generating scientific knowledge and formulating normative beliefs in a way that will secure support for a new behavioural norm. Many behavioural norms that are part of the international normative environment today can be traced back to moral beliefs held by individuals or to normative campaigns led by different institutions or organisations. What forces help individual ideas to develop into international legal rules or non-legal norms that bind states across the world? What are the necessary conditions that turn a normative campaign into an integral part of our constructions of appropriate behaviour? Who determines which moral principles will grow to become a behavioural norm and which ones will be discarded? Are there favourable factors within the political and social environment, which affect positively norm creation? Why are some norms questioned and challenged and others are not? An essential goal of this research is to develop a theoretical framework through which answers to these questions can be found.

A further contribution of this research to the wider context of international relations theory and practice lies with a pragmatic approach to international policy-making and an improved understanding of complex international negotiations on standards of appropriate behaviour. A pragmatic approach to international relations will be based on the acceptance

of the fact that social relations are highly dense, that social processes are influenced by a large array of factors that cannot always be accounted for, and that contingencies play a significant role in international politics.

The study of the *process* of norm development is vital for addressing the conceptual problems discussed earlier. Understanding norm evolution will involve breaking down the process of norm development in distinct stages that lead to normative change, and studying the channels through which ideas travel to become legal rules or non-legal norms. This analysis is best conducted through the historical reconstruction of the events leading up to the creation of a given norm. In this way, we can also begin to appreciate the influence of the wider political and normative context on the construction of international norms. It is argued here that similar factors influence ideas to evolve into successful norms. Solid scientific knowledge and strong normative arguments help a normative campaign pick up speed and support, and draw the attention of policy-makers. Historically reconstructing this process will provide useful insight not only into the mechanisms of international policy-making, but also into the power relationships among states, between states and non-state actors, and the interplay between the different levels of analysis of the international system. Understanding the dynamics of the norm creation process might provide insight into when and how this process can be influenced or changed. An improved conceptualisation of international negotiations, of causes and effects, and of successful negotiating tactics can offer useful tips for international campaigners and a more profound idea of who the movers and shakers of the international system are.

The theories that provide the most useful tools for conducting this research are the conventional constructivism in international relations and the sociology of scientific knowledge. On the one hand, the need to engage the methodology of process tracing in recreating the evolution of norms points to conventional constructivism as the appropriate

theoretical approach.¹ On the other hand, it is crucial that the above two literatures are engaged in conjunction with each other because of their expertise in analysing dynamic social relations and questioning what already exists as ‘hard fact’, as natural and given. While “conventional constructivism [aims] to ‘denaturalise’ the social world, that is, to empirically discover and reveal how the institutions and practices and identities that people take as natural and given, are, in fact, the product of human agency, of social construction”,² the sociology of scientific knowledge is concerned with “what comes to count as a scientific fact and how it comes so to count”.³ The social constructivists of international relations examine the interplay between the material and the ideational in explaining state behaviour and state decision-making. Social constructivists have also paid attention to the role of non-state actors in world politics, which have emerged as new nodes of power in the global system most notably over the past forty years. This research takes advantage of the findings of conventional constructivism in these areas, as well as the research tools applied to the processes of historical reconstruction of events. These findings are combined with the achievements of the sociologists of scientific knowledge. They draw attention to “the *process* by which scientists make sense of their observations”⁴ and emphasise that changes in science and technologies “cannot be explained in isolation from

¹ Jeffrey Checkel, “It’s the Process Stupid! Process Tracing in the Study of European and International Politics”, Working Paper No. 26, Arena Centre for European Studies, University of Oslo, Oct 2005, <http://www.arena.uio.no> – pp.6

² Mark Hoffman, “Critical Theory and the Inter-Paradigm Debate”, *Millennium: Journal of International Studies*, Vol. 16, no.2, 1987, 233-236. The term ‘conventional constructivism’ has been used by Ted Hopf to distinguish it from critical constructivism, which offers a different approach to the study of IR – see T. Hopf, “The Promise of Constructivism in International Relations Theory” *International Security* Vol. 23, No. 1, 1998, 171-200. This research has been conducted from the theoretical vantage point of conventional constructivism, to which I will refer as constructivism.

³ H. Collins, “The Sociology of Scientific Knowledge: Studies of Contemporary Science” *Annual Review of Sociology*. No.9, 1983 – pp. 267

⁴ B. Latour and S. Woolgar, *Laboratory Life – The Construction of Scientific Facts*, (Princeton University Press. Princeton, New Jersey: 1979) – pp. 32

the economic, political, and other social circumstances of that change”.⁵ Since studying dynamic social systems is rather complex, the research tools used by these social scientists will be very useful to the aims of this current study. The need to bridge these two literatures has been recognised by other authors in the past, who have acknowledged that the expansion of scientific knowledge is a political process,⁶ as well as that social interactions produce not only ideas, understandings and identities, but also facts and artefacts.⁷

There is another reason why the social constructivists in international relations and the sociologists of knowledge need to communicate and that is their shared interest in the social moment of closure or tipping in the process of development of norms/scientific facts. Closure, according to the sociologists of scientific knowledge, signifies the end of a scientific debate and the transition of a newly established scientific fact into the larger body of knowledge.⁸ Tipping has been defined by constructivists as the moment at which a new norm is agreed upon and processes for its institutionalisation begin.⁹ Obtaining a clearer understanding of the dynamics of closure, its importance in the continuum of norm development and the processes that lead to it, is essential for this study, as this social moment has been understudied with regards to international behavioural norms.

Based on the two sets of literature discussed above I propose a theoretical model of norm development and knowledge creation in world politics, which takes into account the context within which the need for a new behavioural norm has emerged, follows the

⁵ D.MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance*. (The MIT Press. Cambridge, Massachusetts: 1990)- pp. 9 citing D. MacKenzie and J. Wajcman, eds., *The Social Shaping of Technology*, (Open University Press: Milton Keynes, England: 1985).

⁶ F.Kratochwil and J. Ruggie, “International Organization: A State of the Art on an Art of the State” *International Organization*. Vol. 40, no. 4, 1986 – pp.773

⁷ J.Lezaun, “Limiting the Social: Constructivism and Social Knowledge in International Relations”. *International Studies Review*. Vol. 4, no. 3, 2002 – pp. 233

⁸ H.Engelhardt and A. Caplan, eds. *Scientific Controversies – Case studies in the resolution and closure of disputes in science and technology*. (Cambridge UP, New York: 1987)

⁹ M.Finnemore and K. Sikkink, “International Norm Dynamics and Political Change”. *International Organisation*. Autumn 1998, vol. 52, no. 4 – pp. 901-3

development of the normative idea, and examines the entry into force of a newly constructed norm. The stages of the proposed model have a causal character, as the conclusion of each stage leads the process of norm evolution onto the next. Some of the model stages take place simultaneously, as discussed in Chapter 2. Research indicates that closures can be reopened, leading to loops in the model, and to the need for further closures to be reached.

This synthetic model of norm development is then compared to three unrelated empirical case-studies to analyse its accuracy and to evaluate the variation among the examples. In other words, the empirical case-studies test the theoretical model, and thus assess the theory behind this research. Comparing the three examples with the theoretical model and with each other shows the recurring themes and the emerging differences, reflecting on the strengths and weaknesses of the hypothesis. The theoretical model presented in this research seeks to reveal in some detail the process via which international norms emerge, the types of actors involved in pursuing the development of international norms and the mechanisms, institutions, arguments and persuasion techniques that these actors use to achieve their aims. In other words, what I seek to achieve here is a more in-depth understanding of the process of norm evolution.

The deconstruction of the process of norm formation and the examination of the characteristics of successful normative campaigns will assist our understanding of the points of reconciliation between *idealpolitik* and *realpolitik*,¹⁰ and the place of concerns about *idealpolitik* in state behaviour. The analysis of the processes of norm evolution will provide an opportunity to study the different types of power, apart from the material

¹⁰ Christopher Rudolph uses the term *idealpolitik* to describe the achievement of creating an effective atrocities regime based on humanitarian norms despite the political and procedural obstacles created by powerful states and bureaucratic factors. For further discussion see: C. Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" *International Organization*. Vol. 55, no. 3, 2001 – pp. 656

capabilities of states, which exist and operate in the international system. The current research will also draw attention to the role that non-state actors – such as communities of scientists, INGOs, advocacy networks, social movements, local community groups, multinational corporations, etc. - play in world politics, which will necessitate the redefinition of the conventional concept of power nodes in the world system. Non-state actors form diverse networks, which may sometimes wield more power than nation-states, command more public support than politicians, and pool more finance than national governments. This certainly complicates our concept of the way in which world politics operate, but only in this way we can gain a clearer and more pragmatic idea of what drives international relations and with what effect.

A more detailed overview of the two theoretical approaches that I will use as the basis for the synthetic theoretical model in this research is provided in Chapter 2. The chapter outlines the key assumptions and the main arguments of the two sets of literature. It offers a critical evaluation of the typology of actors, as defined by the social constructivists of international relations. It then goes on to consider the manner in which these theorists construct the understanding of process. Chapter 2 further examines the literature of the sociology of scientific knowledge and technologies (SSK). After emphasising the main assertions of this approach, I proceed to examine SSK's understanding of process and closure, which is then used in the synthetic theoretical model.

Chapter 3 studies in detail the historical development of the norm prohibiting the use of torture, which has been institutionalised by the Convention Against Torture and its Optional Protocol. This is a norm protecting individuals and stemming from the more general context of human rights and concerns for individual welfare. CAT may appear as a logical development of human rights legislation, supported by the 'civilised world', but despite its seemingly natural evolution, there are severe problems of implementation and

compliance by various states. This signals a fault in the normative determinist's reasoning because if the norm's development was as logical as portrayed, states would have automatically taken it on board. The norm evolution process in this chapter reveals an interesting interplay between states and non-state actors, and shows how scientific knowledge and normative ideas merge into one powerful normative campaign to persuade states to create new behavioural norms.

Chapter 4 is an inquiry into the development of intellectual property rights in the pharmaceutical industry. This international norm has evolved in a direction that few could predict – starting from a strong case in favour of increased worldwide protection of intellectual property, made by some of the largest industries in the world, it was later defeated by global civil society working together with the global South, and the norm was re-shaped into a more human life-friendly version. The industries interested in intellectual property protection are some of the most powerful industries in the business world. These industries had the governments of most of the economically-developed countries on board for the creation of a blanket norm to protect all intellectual property with the strongest possible norm. With time and with the increased interest of NGOs, social movements, non-governmental professional organisations and advocacy networks, the normative belief in the rights of human beings to life and health prevailed over corporate interests and nation-states agreed to concessions towards those most needy in the international system. This is an interesting case-study with an unexpected end, which shows most clearly that conventional wisdom and generalisations with regards to actors, power and process in international relations, need to be re-examined and re-defined.

The third case study presented in chapter 5 is the study of the creation of a norm for the protection of the atmosphere and the reversal of climate change. The reasons for choosing this study are multiple. Negotiations on the issue of climate change have been

long and difficult, ridden with scientific uncertainty, political opposition, normative issues of responsibility, equity and justice, as well as by controversies among industries. A real blow to the implementation of the norm to reverse climate change has been dealt by the US President George W. Bush's coming into power, when he rejected the scientific agreement that climate is changing with long term effects on human activity. This norm is very rich in material for analysis – there is the disagreement among experts worldwide regarding the causal relationship between CO₂ and anomalies in the environment and world climate; negotiations are difficult among states who are unwilling to give up what they call their chance for economic development; one of the most powerful countries and one of the largest polluters – the United States - refuses to sign one of the major documents relating to climate change – the Kyoto Protocol; while the biggest problem is that there is no reliable prediction of how bad the effects of climate change can be. The development of the Kyoto Protocol is the most contemporary case-study and to an extent I join the race of analysts attempting to explain the long road to the creation of this legally binding treaty and the roles that different states and non-state actors have played.

Selection of Case Studies

The empirical scope of this thesis encompasses norms that are contemporary, as all three norms have been created within the past thirty years, so that the controversies surrounding them have still not had a chance to settle down completely. The analysis of the historical development of the norm outlawing the use of torture, the norm protecting intellectual property in the pharmaceutical industry, and the norm for the protection of the atmosphere and the control of climate change, is aimed at providing a varied background against which the synthetic theoretical model is tested. The case studies were chosen from three different fields of contemporary international concern, which were also of great

interest to me, as emerging spheres of international regulation. There is no relationship between the case-studies, apart from the increasing concern for the protection of the individual, evident from the changing behaviour of states under pressure from civil society and other actors in global politics. The combination of case-studies coming from different social fields indicates similar trends in the process of policy-making at the international level. These developments are not accidental; they are directly related to the changes that have taken place after the end of the Cold War in the international social, political and economic context. IR theories cannot afford to ignore these changes as they have implications for state behaviour, state identities, and the way in which the latter interact with the material and ideational context of world politics.

The three case-studies have purposefully been chosen to not have direct relevance to strategic and security interests of states. This in my view softens the impact of strategic national interest as the reason for states to negotiate and act, and makes the question of why states get engaged in norm development in the first place even more relevant. Some may argue that issues not directly related to national interests make negotiations more likely because states feel that their vital interests are less threatened. I argue that when national interests are not directly at stake, negotiations are not more likely *per se*, but instead they may be more likely to be successful. This, however, still does not explain why states choose to get involved in the development of new behavioural norms that would shape their behaviour in the future.

The empirical examples in this research have been compiled from a variety of different sources, in order to reconstruct the events leading up to the creation of international norms. I have sought to incorporate sources that reflect the position and arguments of all sides involved, thus making this study a relatively exhaustive and neutral reflection of larger-scale social and political processes. In other words, these historical

overviews are themselves original contributions to the body of social knowledge.

Methodology and Research Methods

The methodology of this research is based on theoretically informed historical reconstruction of the sequence of events leading to norm formation.¹¹ This methodology will help uncover the relationship between the product - a new behavioural norm – and the complex process of conflict and collaboration between a range of social actors, scientists, corporations, and political leaders leading up to norm creation.¹² The historical reconstruction of negotiations will further allow the examination of actors’ positions, the changes in these positions, the argument and persuasion techniques used, as well as the techniques that were successful, as these reveal information about actors, power and process in international relations.

One aspect of this study is focused on the closure of scientific, normative, and political debates, and how we can show that closure has taken place. An important controversy surrounding normative research is related to the issue of proving that a norm exists. Some authors have proposed that we can infer the existence of a norm from state practice;¹³ others argue that state action alone does not signal the existence of a norm;¹⁴ yet others point out that it is the justifications that states give for their actions that indicate the

¹¹ George, Alexnader (1979) “Case studies and theory development: the method of structured, focused comparison” in Paul Gordon Lauren (ed.) *Diplomacy: New Approaches to History, Theory and Policy*, (Free Press: New York) – 43-68

¹² D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance*. – pp. 3

¹³ M. Finnemore, “Constructing Norms of Humanitarian Intervention” in P. Katzenstein, (eds.) *The Culture of National Security* – pp. 159 and M. Finnemore, *National Interests in International Society* – Chapter 1.

¹⁴ “As shared expectations about behaviour, both behavioural norms and normative beliefs may have common knowledge effects, decreasing uncertainty about what actors are likely to do in certain circumstances, and facilitating coordination because “norms”, that is, both behavioural norms and normative beliefs, are ‘functional’ in ways similar to the role of other ideas or knowledge and institutions. In this sense, norms are not unique. Non-normative beliefs, habits and rules – indeed any form of common knowledge and agreed upon procedures – may help actors coordinate or limit the range of choice” – N. Crawford, *Argument and Change in World Politics* – pp. 88

existence of a norm.¹⁵ Norms are “shared and social”¹⁶ prescriptions of behaviour; they are “intersubjective in that they are beliefs rooted in, and reproduced through, social practice”.¹⁷ Intersubjectivity infers more than a subjective existence – beliefs need to be expressed, if not codified and recorded, in order to be shared. In this way beliefs leave physical residues. Further proof for the existence of norms can be found in the justifications that states use for their actions when in breach of a written or customary norm. Disapproval and justification are both based on the acceptance of a behavioural norm, as a prescription for appropriate behaviour. There is a quantitative element involved in judging whether a norm has been accepted by enough states. Norms that are in the process of becoming legalised need a minimum number of states to accept them, but what is also important is that they are underpinned by the “concurrence of the major powers in the particular field”.¹⁸

It is clear that the participation and the willing cooperation of the powerful states in the system can speed up a process of norm evolution; however, this in itself is not a sufficient condition to establish a new norm and make it work. As Finnemore argues, “rules backed only by force, without any legitimacy or normative authority, are difficult to sustain and tend not to last long”.¹⁹ In other words, power alone is not sufficient to enforce long-term compliance with norms and its influence may wear off with time, as normative agendas and national priorities change.

¹⁵ “Repeated declarations by authoritative actors are indicative of the state’s commitment to the rule” – A. Cortell and J. Davis, “How do International Institutions Matter? The Domestic Impact of International Rules and Norms”, – pp. 456; “When actors regularly refer to the norm to describe and comment on their own behaviour and that of others, the validity claims of the norm are no longer controversial, even if the actual behaviour continues violating the rules” – Risse-Kappen as cited in A. Cortell and J. Davis, “How do International Institutions Matter? The Domestic Impact of International Rules and Norms”– pp.456; M. Finnemore, *The Purpose of Intervention – Changing Beliefs about the Use of Force*. – pp. 12

¹⁶ M. Finnemore, *National Interests in International Society* – pp. 22

¹⁷ T. Farrell, “Transnational Norms and Military Development: Constructing Ireland’s Professional Army”– pp. 71

¹⁸ M. Shaw, *International Law*, 4th edn. (Cambridge University Press, Cambridge: 1997), – pp.63 – although Malcolm Shaw uses this criteria to distinguish customary international law from general state practice, the involvement of the major powers in the field is crucial for the development of an effective norm.

¹⁹ M. Finnemore, *The Purpose of Intervention* – pp. 2

The study of norm development requires the use of detailed empirical analysis for the recovery of the historical process of norm development. Historical reconstruction of the events leading up to the creation of a new norm will show the role and influence of non-state actors in the evolution of a norm. Evidence of the evolution of normative ideas can be found in historical records, memoirs, journal articles, newspapers. The processes of network configuration and of specifying the parameters of an issue are normally marked by conferences and meetings, which means records of meetings and conferences can be a valuable source of information. Qualitative content analysis of the speeches of delegates and transcripts of debates will reveal the dynamics of network formation, issue specification and processes of bargaining and persuasion. Speeches and debates will hold clues as to which arguments prevail in these initial meetings and whether it is moral ideas or technical knowledge that sets the agenda. Some political speeches and government positions are determined in advance and this means that they carry less personal bias and more organisational bias, which will help understand better the standpoint and interests of groups and organisations involved in these meetings. Interviews with participants in such conferences are also a valuable and helpful source in reconstructing historical events. The dialogue with the conservative actors may be a challenging process to follow, since the records of some inter-state negotiations are not made public and one has to rely on the recollection of participants and other secondary sources. When normative ideas that have previously been publicised by civil society or scientific research become the subject of international negotiations, one can begin to find more in-depth analysis of the surrounding controversies and debates in academic journals and books. Conferences are also being held more often among states and there usually are parallel civil society conferences, which provide abundant research materials.

To summarise, the sources that will be analysed in this research are largely primary

sources where available, such as historical documents, legal documents, memoirs, personal accounts, speeches, debates, newspaper articles, statements of state officials; some secondary sources have been considered such as books, articles from academic journals and conferences. Interviews will be conducted where possible with individuals who are as close as possible to the real negotiations – representatives of NGOs and IGOs, technical experts, state officials.

CHAPTER 2

THEORISING NORM DEVELOPMENT

In this chapter I develop a theoretical framework for understanding norm development. This framework is based on the research and findings of two fields of social research – social constructivism in international relations and the sociology of scientific knowledge. After examining these paradigms and outlining their limitations, I propose a synthetic model, which reflects the key stages in the evolution of international norms. There are a few key questions that this chapter seeks to address, namely, how international norms evolve, what roles different actors play and how closures on new norms are reached. The emphasis on theoretically informed process-tracing throughout this study makes it crucial that the studies of conventional constructivism are engaged.²⁰ The analysis of the types of actors involved in the process of norm development is one of the meeting points of social constructivists of IR and the sociologists of knowledge. Both of these theories examine a larger spectrum of internationally active social groups and engage in analysing the varying degrees of persuasion, argumentation and coercion that these actors use. The moment of closure, discussed in this research as having three components – social, scientific and political closure, has been studied in more depth by the sociologists of knowledge and to a lesser degree by the social constructivists. This is a nexus where the two literatures can benefit from each other's findings.

My discussion, however, will begin with the definition of the concept and form of international behavioural norms, which are then distinguished from other ideational

²⁰ Jeffrey Checkel, "It's the Process Stupid! Process Tracing in the Study of European and International Politics", Working Paper No. 26, Arena Centre for European Studies, University of Oslo, Oct 2005, <http://www.arena.uio.no> – pp.5

phenomena that affect actors' behaviour and decision-making patterns. Norms are often defined as shared expectations about or standards of appropriate behaviour for actors with a given identity.²¹ These definitions, however, are not precise, because 'shared expectations of appropriate behaviour' do not constitute norms - they result from already existing norms or a given normative context. Furthermore, the concept of shared expectations of appropriate behaviour does not indicate with enough authority the level of agreement and support needed to create a norm. The term 'standard of appropriate behaviour' should not be perceived as a synonym for the term norm either, because standards presuppose a high degree of specificity and not all norms are always stipulated in precise terms. Moreover, within a context which has not been precisely regulated, states can still project would-be standards of appropriate behaviour within the context of existing normative principles, but that would not constitute a norm. In other words, while 'shared expectations' is a term that is too loose to be synonymous to a norm, 'standards of appropriate behaviour' is a term too strict to convey the same meaning as 'norm', since "standards of behaviour [are] defined in terms of rights and obligations",²² while that is not always true for norms.

The term 'norm' will be used here to mean prescriptions for appropriate and acceptable behaviour,²³ from which the standards of behaviour are further negotiated and institutionalised. Farrell argues that norms "regulate action by defining what is appropriate

²¹ For a discussion of norms as **expectations** – R. Jepperson, A. Wendt and P. Katzenstein, "Norms, Identity and Culture in National Security" in P. Katzenstein, (ed.) *The Culture of National Security – Norms and Identity in World Politics*. (Columbia University Press, New York: 1996) – pp.54; M. Finnemore, *National Interests in International Society* (Cornell University Press, Ithaca: 1996) – pp. 22; T. Risse, S. Ropp, and K. Sikkink, (eds.) *The Power of Human Rights – International Norms and Domestic Change* (Cambridge University Press. Cambridge: 1999) – pp.7. Norms are perceived as **standards** of behaviour by M. Finnemore and K. Sikkink, "International Norm Dynamics and Political Change". *International Organisation*. Autumn 1998, vol. 52, no. 4 – pp. 891; A. Klotz, *Norms in International Relations – The Struggle Against Apartheid* (Cornell University Press. Ithaca: 1995) – pp. 14; J. Checkel, "The Constructivist Turn in International Relations Theory". *World Politics*, Vol. 50, 1998 – pp. 327-8; S. Krasner, *International Regimes*, (Cornell University Press, Ithaca: 1983) – pp. 2.

²² S. Krasner, *International Regimes*, (Cornell University Press, Ithaca: 1983) – pp. 2

²³ N. Tannenwald, "The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use" *International Organization*. Vol. 53, no. 3, 1999 – pp. 436

(given social rules) and what is effective (given laws of science)”²⁴ However, the internal division of a norm into a technical and normative part is artificial and only useful for the study of the interplay between technical knowledge and normative beliefs in the process of constructing norms. Norms are a product of both social rules and laws of science and they carry forward elements of both. Norms are guiding posts for state behaviour; they become embedded in the belief systems of policy-makers thus, influencing state behaviour. Norms can remain tacit prescriptions for appropriate behaviour but they can also develop into legal principles – either customary or codified. Legal rules institutionalise norms by stating them in technical terms – asserting the parameters of a norm, its definition, its subjects, what constitutes a breach of it, often including specific consequences of non-compliance.

In this research ‘norms’ and ‘behavioural norms’ will be used interchangeably. Neta Crawford draws attention to the need to differentiate between behavioural norms and normative beliefs.²⁵ Behavioural norms represent “the dominant practice in certain contexts” and vary “in their prevalence, degree of institutionalisation, normativity, and the cost of non-compliance”,²⁶ while normative beliefs are “the beliefs about what it is *right* to do”,²⁷ they are “the ethical arguments we already hold as true”.²⁸ In other words, normative beliefs are similar to the conventional understanding of moral principles and/or ethical principles. They are held by individuals and result from the overall social constructions of good and bad, appropriate and inappropriate, right and wrong. Breaking these principles does not result in an institutionalised punishment, but is condemned and ostracised within the social group. ‘Idea’ is another term that is used in this research and it indicates

²⁴ T. Farrell, “Transnational Norms and Military Development: Constructing Ireland’s Professional Army”, *European Journal of International Relations*. Vol. 7, No. 1, 2001 – pp. 71

²⁵ N. Crawford, *Argument and Change in World Politics – Ethics, Decolonization, and Humanitarian Intervention*. (Cambridge University Press, Cambridge, UK: 2002) – pp. 86

²⁶ *Ibid.* – pp. 91

²⁷ *Ibid.* – pp. 86

²⁸ *Ibid.* – pp. 98

individual perceptions. They result from the interaction between the individual and the social, and political environment, as well as from the interactions among individuals. Ideas can be beliefs held by individuals, normative judgements and proposals for normative change that are not necessarily shared by others.

Theoretical Approaches

Social Constructivism in IR

In general, “constructivists hold the view that the building blocks of international reality are ideational as well as material; that ideational factors have normative as well as instrumental dimensions; that they express not only individual but also collective intentionality; and that the meaning and significance of ideational factors are not independent of time and place”.²⁹ Despite the heated debates within constructivism regarding epistemology and methodology, one thing has been agreed - human action is shaped by ideational constructs and material constraints.³⁰ Research has been conducted not only into how material and ideational factors interact to influence actors’ actions and identities, but also into the logics that drive social action. Finding answers about the driving forces and principles that guide social action will help our understanding of how ideas get established – whether by means of coercion, persuasion, or argumentation.³¹

²⁹ J. Ruggie, “What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge”, *International Organisation*. Vol. 52, No. 4, 1998 – pp. 879

³⁰ A. Wendt, “Anarchy is what states make of it: the social constructions of power politics”, *International Organisation*, Vol. 46, No. 2, 1992; A. Wendt, “Constructing International Politics”, *International Security*. Vol. 20, No.1, 1995; P. Katzenstein, (eds.) *The Culture of National Security*; J. Ruggie, “What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge”; J. Weldes, “Constructing National Interests”, *European Journal of International Relations*. Vol. 2, No. 3, 1996; M. Zehfuss, *Constructivism in International Relations – The Politics of Reality*. (Cambridge University Press. Cambridge: 2002); J. Checkel, “Why Comply? Constructivism, Social Norms and the Study of International Institutions”, 1999 – Available from: http://www.arena.uio.no/publications/wp99_24.htm; E. Adler, “Seizing the Middle Ground: Constructivism in World Politics”, *European Journal of International Relations*. Vol. 3, No. 3, 1997.

³¹ For further discussion of logics of action see: J. March and J. Olsen, “The Institutional Dynamics of International Political Orders”, *International Organisation*, Vol. 52, no. 4, 1998, 943-969; O. Sending,

Constructivists have managed to adopt a unitary stand on the question of ontology. They share the understanding that there is a ‘constructed social reality’³² within which the material environment gains meaning and value and where day-to-day human activities make sense and have a purpose. Alexander Wendt takes this sociological claim and puts it in the context of world politics “... world politics are ‘socially constructed’ [thus] fundamental structures of international politics are social rather than strictly material and these structures shape actors’ identities and interests, rather than just their behaviour”.³³ Adler further engages in a definition of constructivism as a whole (without disregard for its internal divisions) as “the view that *the manner in which the material world shapes and is shaped by human action and interaction depends on dynamic normative and epistemic interpretations of the material world*”.³⁴ What still divides constructivism are the debates over the nature of interaction between agents and structures;³⁵ questions of epistemology – whether there really exists a common intersubjective ideational reality, outside of individuals’ heads that can be studied with the tools of the social sciences.³⁶

“Constitution, Choice and Change: Problems with the ‘Logic of Appropriateness’ and its Use in Constructivist Theory” *European Journal of International Relations*. Vol. 8, no. 4, 2002, 443-470; M. Finnemore, *National Interests in International Society*. (Cornell University Press, Ithaca: 1996) – pp. 29-30.

³² S. Guzzini, “A Reconstruction of Constructivism in International Relations”, *European Journal of International Relations* Vol. 6, No.3, 2000 – pp. 160

³³ A. Wendt, “Constructing International Politics”, *International Security*. Vol. 20, No.1, 1995 - pp. 71-2.

³⁴ E. Adler, “Seizing the Middle Ground: Constructivism in World Politics” – pp. 322

³⁵ J. Dryzek, M. Clark, and G. McKenzie, “Subject and System in International Relations” *International Organization*. Vol. 43, no. 3, 1989, 475-503; D. Dessler, “What is at Stake in the Agent-Structure Debate?”, *International Organization*, Vol. 43, no. 3, 1989, 441-473; A. Wendt, “The Agent-Structure Problem in International Relations Theory” *International Organization*. Vol. 41, no. 3, 1987, 335-370; D. Porpora, “Cultural Rules and Material Relations”, *Sociological Theory*, Vol. 11, no. 2, 1993, 212-229; W. Carlsnaes, “The Agency-Structure Problem in Foreign Policy Analysis”, *International Studies Quarterly*, Vol. 36, no. 3, 1992, 245-270

³⁶ Some constructivists propose to approach the international system from the assumption that there exists a shared, intersubjective reality, which can be measured *see* M. Finnemore, *National Interests in International Society* – pp. 22-3; G. Goertz and P. Diehl, “Toward a Theory of International Norms: Some Conceptual and Measurement Issues” *International Organization*. Vol. 36, no. 4, 1992 – pp. 645; while other constructivists claim that intersubjective meanings are not so important, as they are drowned by the subjectivity of individuals and institutions - J. Dryzek, M. Clark, and G. McKenzie, “Subject and System in International Relations” – pp. 479; G. Raymond, “Problems and Prospects in the Study of International Norms”, *Mershon International Studies Review*, Vol. 41, No. 2, 1997 – pp. 216-9.

The main assumptions of constructivism leave it open to criticism. Some IR theorists envisage constructivism not as a theory, but as a “meta-theoretical framework of analysis”,³⁷ a method,³⁸ which relies on assumptions and variables that are difficult to measure and quantify. Some of these criticisms are handled rather well by constructivists in their discussion of the importance of intersubjectivity and the existence of collective knowledge, shared by the relevant actors.³⁹ Finnemore has argued that “norms make similar behavioural claims on dissimilar actors, [thus creating] coordinated patterns of behaviour, which we can study and about which we can theorise”.⁴⁰ Since evidence of coordinated patterns of behaviour can be found, and the causal link between given norms and state behaviour can be established, it can provide the basis for producing verifiable theoretical claims.

Another criticism directed at constructivists is that they have tended to study concepts/issues that are comparatively stable over time – identities, interests, culture, norm-consistent state behaviour. As Hopf puts it “constructivism is agnostic about change in world politics... change is both possible and difficult”.⁴¹ In the past decade of dynamic international relations constructivists have acknowledged the need to adapt their methods to the study of change⁴². Studying change is not an easy task – a complex system made up of

³⁷ S. Guzzini, “A Reconstruction of Constructivism in International Relations” – pp. 163

³⁸ P. Katzenstein, *The Culture of National Security*; J. Ruggie, “What Makes the World Hang Together?” – pp. 883; M. Zehfuss, *Constructivism in International Relations – The Politics of Reality*, (Cambridge University Press, Cambridge: 2002); J. Checkel, “The Constructivist Turn in International Relations Theory”, *World Politics*. Vol. 50, 1998.

³⁹ E. Adler, “Seizing the Middle Ground: Constructivism in World Politics”, *European Journal of International Relations*. Vol. 3, No. 3, 1997– pp. 327; T. Farrell, “Transnational Norms and Military Development: Constructing Ireland’s Professional Army”. *European Journal of International Relations*, Vol.7, No. 1, 2001 – pp. 71

⁴⁰ M. Finnemore, “Constructing Norms of Humanitarian Intervention” in P. Katzenstein, *The Culture of National Security* – pp. 153-185

⁴¹ T. Hopf, “The Promise of Constructivism in International Relations Theory” *International Security* Vol. 23, No. 1, 1998 – pp. 180-1

⁴² N. Crawford, *Argument and Change in World Politics – Ethics, Decolonization, and Humanitarian Intervention*, (Cambridge University Press, Cambridge, UK:2002)

numerous components, all in flux, is quite a challenge even for the most experienced researchers. The fact that we are studying real-life events where laboratory-style experiments are impossible poses further problems to our understanding of the causal links between these events because they cannot be reproduced or measured. This means that the methodology of conducting research in a dynamic system may need to be further adjusted.

Moving from the more general debates of constructivism to the more specific topic of norm evolution, I will now look at some of the key findings of constructivist analysis, relevant to the problematique of the current research. My inquiry into norm evolution is concerned with several questions – what are the *types of actors* who initiate and promote new norms in the international system? What are the *means* that the former employ in negotiations? And what is the *process* of norm development? I will draw out the answers proposed by constructivists in this review of constructivist literature. Some of the proposals forwarded by the constructivists need to be revised, as this research will show, to reflect more accurately the state of world politics.

Typology of actors

The typology of actors as discussed by the social constructivists of international relations involves a process of categorising actors in groups according to that who gets involved, i.e., scientists work in epistemic communities, individuals get involved in different types non-state civil society organisations, lawyers and advocates form advocacy networks, and so on. While this categorisation is useful in examining the groups of actors who operate in the international system, the current research argues that these typologies take away from a more thorough understanding of social processes and offers a dynamic approach where the contributions of all actors are assessed. Below is an illustration of the constructivist approach to actor classification and a brief discussion of its pitfalls.

The voice of social constructivists in the studies of international relations became more prominent following the end of the Cold War when non-state actors began to be recognised as relevant to IR analysis. These two developments are often merged, resulting in constructivism being related to the study of non-state actors in the international system. Not all constructivists, however, believe in the importance and influence of these actors, some have tended to focus their analysis on states.⁴³ There are also those constructivists who study the development of norms but would only acknowledge nation-states and IGOs as relevant actors.⁴⁴ The largest and growing segment of constructivist thought acknowledges the role and influence of non-state actors in the making of international norms.⁴⁵ Some might argue that the type of actors involved in norm development depends on the types of norms that are being negotiated, for example security norms concern primarily nation-states and economic actors, whereas humanitarian norms will see the involvement of states, civil society, international organisations and in some cases economic actors. This argument may have some merit to it, but it is not relevant to the current inquiry.

Many constructivists have accepted global civil society and non-governmental organisations as relevant and influential actors in the processes of development of

⁴³ Early constructivist articles related to the study of international politics tend to focus their inquiry on the identities and interests of states – Alexander Wendt “Anarchy is what states make of it: the social constructions of power politics”, *International Organisation*, Vol. 46, No. 2, 1992, 391-425; A. Wendt, “Collective Identity Formation and the International State”, *American Political Science Review*, Vol. 88, No. 2, 1994, 384-396; J. Weldes, “Constructing National Interests”, *European Journal of International Relations* Vol. 2, No. 3, 1996, 275-318; P. Katzenstein, “Introduction: Alternative Perspectives on National Security” in P. Katzenstein, *The Culture of National Security*; R. Jepperson, A. Wendt, P. Katzenstein, “Norms, Identity, and Culture in National Security” in P. Katzenstein, *The Culture of National Security*.

⁴⁴ N. Tannenwald, “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use” *International Organization*. Vol. 53, no. 3, 1999 433-468; C. Rudolph, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals” *International Organization*. Vol. 55, no. 3, 2001, 655-691; E. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society”, *International Organisation*, Vol. 44, no. 4, 1990, 479-526.

⁴⁵ Authors include Martha Finnemore, Kathryn Sikkink, Margaret Keck, Emanuel Adler, Audie Klotz, Thomas Risse-Kappen to name but a few.

humanitarian norms.⁴⁶ The classification of non-state actors, however, varies with the increasing number of empirical studies that have been conducted. ‘Civil society’, for example, has been defined by the authors of a study into global citizen action as “the arena in which people come together to advance the interests they hold in common, *not for profit or political power*, but because they care enough about something to take collective action”.⁴⁷ Boli and Thomas have characterized INGOs as actors that “employ limited resources to make rules, set standards, propagate principles, and broadly represent “humanity” vis-à-vis states [who have legal authority to make and enforce law] and other actors [like global corporations commanding economic resources]”.⁴⁸ One can speculate from here that since epistemic communities also work with limited resources towards making rules and setting standards, this makes them INGOs, or otherwise carriers of world culture. Epistemic communities, however, have been distinguished from NGOs, as networks that operate on the basis of different values and use different methods of argument and persuasion. In other words, we need to be careful with definitions because they can blur lines of distinction among different groups of actors, which can in turn affect our understanding of the nature of these groups.

Another categorization of non-state actors is introduced by Keck and Sikkink in their study of transnational advocacy networks – actors with instrumental goals (TNCs and banks), actors who share causal beliefs (scientific groups or epistemic communities) and

⁴⁶ M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Relations*, (Cornell University Press, Ithaca: 1998); J. Boli and G. Thomas, *Constructing World Culture – International Nongovernmental Organisations since 1875*, (Stanford University Press, Stanford: 1999); M. Edwards and J. Gaventa, eds., *Global Citizen Action*, (Earthscan Publications Ltd, London: 2001); A. Colas, *International Civil Society – Social Movements in World Politics*, (Polity Press, Oxford: 2002), etc.

⁴⁷ M. Edwards and J. Gaventa, eds., *Global Citizen Action*. – pp.2 (emphasis added)

⁴⁸ J. Boli and G. Thomas, *Constructing World Culture*, – pp. 14

actors who share principled beliefs or values, namely Transnational Advocacy Networks.⁴⁹ Audie Klotz supports this classification by adding that “scientific knowledge and principled ideas are not the same, and [that] epistemic communities are not moral movements”⁵⁰ thus excluding the role of scientific knowledge in her analysis of the anti-apartheid and anti-slavery movements. The studies of epistemic communities also seem to tacitly distance themselves from the work of NGOs and advocacy networks. An epistemic community is defined by Peter Haas as a “network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge or issue-area”.⁵¹ Epistemic communities are considered to be independent of states and generally neutral, but as it will be shown in the case-studies, this assumption does not always hold true. The expertise of scientific communities is highly valued and their “claim to knowledge accords them influence over policy debates and serves as their primary social power resource”.⁵² The assistance of epistemic communities is most frequently *requested* by governments in situations of uncertainty, following shock or crisis.⁵³ Although Haas points out that the work of epistemic communities is only resorted to in extreme cases, other authors envisage epistemic communities as rather more active agents in the international system who can create an intellectual climate favourable to starting up a

⁴⁹ M. Keck and K. Sikkink, *Activists Beyond Borders*, – pp. 30; Sikkink briefly introduces this idea in an earlier article – K. Sikkink, “Human Rights, Principled Issue-Networks, and Sovereignty in Latin America”, *International Organisation*. Vol. 47, no. 3, 1993 – pp. 412.

⁵⁰ A. Klotz, “Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences” *European Journal of International Relations*. Vol. 8, no. 1, 2002 – pp. 52

⁵¹ P. Haas, “Introduction: Epistemic Communities and International Policy Coordination”, *International Organisation*. Vol. 46, No. 1, 1992 – pp. 3

⁵² *Ibid.* – pp. 15

⁵³ *Ibid.* – pp. 17; also see P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control”, *International Organisation*, Vol. 43, No. 3, 1989 – pp. 380, where Haas provides a practical example of his thesis that expert opinion is sought following a crisis or in situations of uncertainty; Drake, W. and K. Nicolaidis, “Ideas, Interests and Institutionalisation: ‘Trade in Services’ and the Uruguay Round”, *International Organisation*, Vol. 46, No. 1, 1992, – pp. 39.

particular debate.⁵⁴ Some authors add international governmental organisations (IGOs) to the list of non-actors – the IGO most often involved in norm development is the United Nations (UN), along with its numerous agencies.⁵⁵ Finnemore and Barnett argue that IGOs are bureaucracies and as such constitute almost independent rational-legal authorities within their sphere of expertise.⁵⁶ They further argue that the expertise and specialisation of IGOs allows them a degree of autonomy from states, which makes these organisations separate actors in international negotiations with their own interests and agendas⁵⁷.

The above typology of actors involved in the norm development process emphasises a “three-fold bias against the state and state decision-makers. Normatively, elite policy-makers are portrayed as bad; empirically, they are viewed as passive and reactive; ontologically, they are too often viewed solely as calculating agents”.⁵⁸ There seems to be a clear barrier dividing the good and the bad actors and states/policy-making elites are inevitably on the latter side, while non-state actors are perceived as undoubtedly good. Although authors have acknowledged that such perceptions are naive, the IR literature continues to largely operate on basis of these assumptions. “Theoretically... John Ruggie, Emanuel Adler and Ernst Haas within international relations, remind us that politicians and

⁵⁴ E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control”, *International Organisation*, Vol. 46, No. 1, 1992 – pp. 140-1

⁵⁵ K. Sikkink, “Human Rights, Principled Issue-Networks, and Sovereignty in Latin America”, *International Organisation*. Vol. 47, no. 3, 1993 – pp. 419-420; P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control” – the article reveals the active role that UN agencies played in the construction of the Med Plan – pp. 384; M. Finnemore, *National Interests in International Society*, (Cornell University Press, Ithaca: 1996) – UNESCO in particular is examined as a ‘teacher’ of norms – chapter 2; A. Clark, *Diplomacy of Conscience – Amnesty International and Changing Human Rights Norms*, (Princeton University Press, Princeton: 2001) – “the institutional context of the UN is the environment within which human rights principles and norms are being established” – pp. 31; A. Klotz, “Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences” – the UN played an important role in promoting anti-apartheid policies – pp. 66.

⁵⁶ M. Barnett and M. Finnemore, *Rules for the World – International Organisations in Global Politics*, (Cornell University Press: Ithaca: 2004) – pp. 20

⁵⁷ *Ibid.* – pp. 20-9

⁵⁸ J. Checkel, “Why Comply? Constructivism, Social Norms and the Study of International Institutions”, 1999. Available from: http://www.arena.uio.no/publications/wp99_24.htm

elites are not always bad, dumb bureaucrats who only ‘power’, rather they also ‘puzzle’”,⁵⁹ and neither are NGOs and scientists always good. In practice, however, very few of the studies on the work of non-state actors have reflected on NGO biases, on the influence that those who fund scientific research have on scientific findings, on the selectivity of the cases that advocacy networks take on. It is no news to anyone that INGOs or scientific experts are not necessarily politically and financially independent. Money for the study of the effects of secondary smoke are made available to experts by the tobacco industry,⁶⁰ the activities of some NGOs are financed by industries, or governments,⁶¹ which clearly makes the point that labels such as good/bad, legitimate/unlawful – do not assist the analysis of norm-formation and further deconstruction of identities and liaisons is necessary on a case-by-case basis.

Another criticism against the way in which constructivists have distinguished between different types of non-state actors involved in the process of norm evolution was mentioned earlier. Constructivists have tended to differentiate actors with instrumental goals, from actors who share causal beliefs, from actors who share principled beliefs. If epistemic communities are being starkly distinguished from advocacy networks and both are different from economic actors who employ material resources, then clear dividing lines run along the type of power used by these groups in negotiations. I argue throughout my research, however, that we should not differentiate non-state actors along the lines of the perceived means they use in negotiation because the distinction is not instrumental in improving our understanding of the roles that these actors play. TNCs for example can and

⁵⁹ J. Checkel, “International Institutions and Socialisation”, ARENA, University of Oslo, 1999. Available from http://www.arena.uio.no/publications/wp99_5.htm - pp.5

⁶⁰ “Row over Passive Smoking Effect”, *BBC News*, 16 May 2005, available from <http://news.bbc.co.uk/go/pr/fr/-/1/hi/health/3026933.stm>

⁶¹ Terms like BINGOs (Business and Industry NGOs) and GONGOs (Government Organised NGOs) are appearing more often in the analysis of the work of global civil society – International Federation for Human Rights, *Report No. 320/2, The WTO and Human Rights*, Nov. 2001

do employ their own scientific experts and can avail themselves to the bargaining power of scientific knowledge. NGOs can be funded by multinational banks or governments to work on a particular cause and banks/governments can thus make use of their power of social persuasion. What really distinguishes advocacy networks and epistemic communities from economic actors and further from nation-states is the logic of action that these groups of actors follow – logic of argument, logic of consequences and logic of appropriateness. These logics of action will be discussed in more detail later in this chapter. In other words, the dense and interconnected environment of international relations has to be meticulously re-examined because natural sciences have a normative character just like normative prescriptions have scientific explanations and generalisations, even though they simplify the subject of study, are largely unhelpful. Furthermore, we have to be critical of unnecessarily drawing or erasing dividing lines among actors. My research will show that it is important to keep in mind that different types of actors often form coalitions that bring together and multiply their strengths in argumentation, persuasion, and even coercion during the process of negotiating the creation of new norms.

To summarise the discussion of the actors involved, in view of constructivists' findings, an increasing number of non-state actors initiate movements to change existing norms or to introduce new normative ideas in the realm of international relations. Nation-states are both part of the problem of implementation of normative ideas and part of the solution as the only actors in the international arena having the institutional authority to enter international agreements and to legitimise them at the same time. Individuals also have a place in the larger context of norm evolution analysis, as they are in some situations "norm entrepreneurs" bringing their ideas/complaints to the international forum, skilful negotiators who foster agreements even in impossible circumstances, influential leaders

who lead by example.⁶² A useful conclusion following from the constructivist review is to address with care issues of power, intentions, effectiveness and character of both states and non-state actors in international policy-making. As this research will further demonstrate, the current categorisations of actors, although useful in understanding what types of actors partake in international negotiations, is not practical. Actors tend to group according to their vested interests in the early stages of the norm-evolution process. They search for supporters of their ideas, for actors who can provide technical expertise, and actors who can engage the attention of a powerful ally – be that national governments or the wider public.

Constructing a process

In this section I will review the concepts of *process* of norm development proposed by constructivist authors who have built their thesis around certain types of actors as central figures in norm formation processes. Thus, one can recognise at least three distinct propositions about *process*. These propositions about process have only slight differences, as we will see, supporting my thesis that there is a relatively standard logical sequence, according to which norms develop.

Constructivists who focus their attention on nation-states and IGOs tend to explain normative change in terms of the strategic interests and identities of these actors.⁶³ In her study of the changing US attitude towards the use of nuclear weapons (soon to become a taboo) Nina Tannenwald describes a process of strategic calculations, analysis of possible consequences and re-thinking of identity.⁶⁴ “The nuclear taboo has become part of the

⁶² M. Finnemore and K. Sikkink, “International Norm Dynamics and Political Change” - pp. 896-7;

⁶³ T. Farrell, “World Culture and Military Power”, *Security Studies*, Vol. 14, no.3, 2005, 448-488.

⁶⁴ N. Tannenwald, “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use”, *International Organization*. Vol. 53, no. 3, 433-468

contemporary discourse of ‘civilization’”,⁶⁵ the author states, and that in part shaped the US non-use of nuclear weapons after the end of World War II. The study of the construction of an atrocities regime reveals a similar tendency – where humanitarian norms conflicted with strategic interests and where pressure from the domestic public was put on policy-makers to act. Decisions were taken in such a manner as to limit the domestic political cost⁶⁶ and yet to avoid the repetition of the atrocities of World War II, which is an embarrassment for the now ‘civilised’ states.⁶⁷ In the case of prohibition regimes, one can recognise the powerful states of the day being norm entrepreneurs in areas where old norms needed changing due to their conflicting with a changing domestic and international environment.⁶⁸ To summarise, the norm entrepreneur state is perceived to usually be the powerful of the day, at least in the area of the norm in question, and perceives itself as needing to take action of some sort to avoid damage to its reputation both at home and internationally. The entrepreneur state further tries to persuade other states to join a new practice by means of both argument and power.

There has been considerably more research on the scenario in which NGOs and other advocacy networks play the leading role in norm development. Finnemore and Sikkink (1998) present a theoretical model of the process of norm evolution and most of the other authors who have tended to conduct empirical research in this sub-field seem to fit in that framework. The norm life-cycle presented by Finnemore and Sikkink has three main

⁶⁵ Ibid. – pp. 437

⁶⁶ C. Rudolph, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals” *International Organization*. Vol. 55, no. 3, 2001 – pp. 656, 662, 666

⁶⁷ Ibid. – the atrocities in Bosnia “prompted analogies to Nazi-era ‘ethnic cleansing’”, they “recalled memories of the Holocaust and engendered public calls for action” – pp. 661, 665; the genocide in Rwanda prompted “caustic charges that the failure to intervene was yet another example of Western racism” – pp. 666.

⁶⁸ E. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society”, *International Organization*. Vol. 44, no. 4, 1990 – the practice of piracy came into conflict with the changing nature of the nation-state – pp. 487; Britain became the leading opponent to slavery – pp. 492; the changing nature of the nation-state influenced the creation of a regime on fugitives – p. 499.

phases – norm emergence, norm cascade and internationalisation.⁶⁹ The emergence of norms is itself characterised by a process, comprising of three levels – norm initiation, organisational level and institutionalisation or tipping point.

A norm can be initiated by an individual, or organisation. In the case of the norm entrepreneur being an individual, he/she will look for an organisation that will provide the leverage needed to be able to communicate to states. Once organisations working together with norm entrepreneurs have managed to win the support of enough states (preferably the so-called ‘norm-leaders’ who are states considered to have higher moral leverage in the international system), the norm is said to have reached “a tipping/threshold point”.⁷⁰ Finnemore and Sikkink suggest that when a “critical mass of states [have been persuaded] to become norm leaders and adopt new norms”⁷¹ then the norm is ready for adoption. The authors further argue that “the norm tipping rarely occurs before one-third of the total states in the system adopt the norm”.⁷² The difficulties surrounding the issues of measurement are complicated by the fact that there are differences in the “normative weight” of states in the system. The issue of “tipping” thus leaves a niche for further research. Most of the authors conducting empirical studies have altogether omitted the issue of the very transformation of an idea into a normative prescription, jumping straight to the next level of norm cascade and finally institutionalisation.⁷³ There are a lot of issues that still need to be unpacked in the transition from an organizational level to a tipping point, to a norm cascade and this is where my own research will be focused.

The third view on *process* is compiled by the authors who focus attention on the

⁶⁹ M. Finnemore and K. Sikkink, “International Norm Dynamics and Political Change” – pp. 896

⁷⁰ Ibid. – pp.901

⁷¹ Ibid.

⁷² Ibid.

⁷³ R. Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” *International Organisation*. Vol. 52, no. 3, 1998 - pp.618; A. Clark, *Diplomacy of Conscience – Amnesty International and Changing Human Rights Norms*, (Princeton University Press. Princeton: 2001) – pp. 34-5

activities and influence of epistemic communities. Peter Haas delivers useful insights in his study of the development of an environmental regime – the Mediterranean Pollution Control Plan.⁷⁴ Further contributors to this sub-field include the study on the reform of the International Food Aid Regime,⁷⁵ the research on the construction of a regime for trade in services,⁷⁶ the evolution of the idea of nuclear arms control,⁷⁷ Long-Range Transboundary Air Pollution⁷⁸ and many more. The formation of a regime is a complex process of negotiation between technical experts (ecologists, marine scientists, development oriented food aid specialists, etc), economic actors in some cases, and nation-states. Needless to say, the interests of all these actors are often in conflict, with some of them wanting to hold on to the status-quo (mostly the economic actors), others promoting change (usually epistemic communities) and states being heavily lobbied by various groups; not to mention that the interests of nation-states are usually incompatible, due to their differing circumstances - economic status, strategic interests, foreign policy agenda.

The authors studying epistemic communities largely agree that the expertise of these actors is sought when policy-makers face a crisis where scientific knowledge is limited⁷⁹ or in situations where experts have established new causal relationships, which

⁷⁴ P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control”

⁷⁵ R. Hopkins, “Reform in the International Food Regime: The Role of Consensual Knowledge”. *International Organisation*, Vol. 46, No. 1, 1992 225-264

⁷⁶ W. Drake and K. Nicolaidis, “Ideas, Interests and Institutionalisation: ‘Trade in Services’ and the Uruguay Round”, *International Organisation*, Vol. 46, No. 1, 1992, 37-100

⁷⁷ E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control”

⁷⁸ R. Lidskog and G. Sundqvist, “The Role of Science in Environmental Regimes: The Case of LRTAP”, *European Journal of International Relations*, Vol. 8, no. 1, 2002, 77-101

⁷⁹ P. Haas, “Introduction: Epistemic Communities and International Policy Coordination”, *International Organisation*, Vol. 46, No. 1, 1992 – pp. (12-4); P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control”. *International Organisation*. Vol. 43, No. 3, 1989 – pp.384; P. Haas, “Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone”. *International Organisation*. Vol. 46, No. 1, 1992 – pp. 189; R. Hopkins, “Reform in the International Food Regime: The Role of Consensual Knowledge”. *International Organisation*. Vol. 46, No. 1, 1992 – pp. 237,240.

have potential to change day-to-day politics.⁸⁰ In any case, the first crucial stage of norm development is that of *issue formation*, as it defines the interests of the actors involved, and opens a niche for development of regulations and standards.⁸¹ Stage two of the process is the formulation of *collective knowledge and meaning* – Haas sees this as the stage where different epistemic communities form a common “core set of beliefs about cause-effect relationships”⁸² and Adler chooses to examine in more detail the work of scientists in “packaging the units of variation to create collective understandings”.⁸³ Collective knowledge and meaning is further translated into the *definition of state interests* and the *framing of the political controversy*.⁸⁴ Apart from changing the domestic agenda epistemic communities are engaged in *policy diffusion* that is in “diffusing ideas and influencing the positions adopted by a wide range of actors, including domestic and international agencies, government bureaucrats and decision-makers, legislative and corporate bodies, and the

⁸⁰ W. Drake and K. Nicolaidis, “Ideas, Interests and Institutionalisation: ‘Trade in Services’ and the Uruguay Round” – pp.38; R. Lidskog and G. Sundqvist, “The Role of Science in Environmental Regimes: The Case of LRTAP” – pp. 87 (“even if the creation of the Convention must be seen in the context of world politics, science had already had an important role in creating knowledge concerning this problem. As early as October 1967 the Swedish soil scientist Svante Oden presented the hypothesis of acidification of precipitation. Oden argued that acidification should not be seen as a local problem, but as a large-scale regional problem...”)

⁸¹ P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control” – “Jacques Cousteau alerted the world to the potential ‘death’ of the sea, but government officials did not know whether such predictions were valid, nor did they know the extent of the problem... Therefore, they turned to the region’s marine scientists for information” – pp.384; W. Drake and K. Nicolaidis, “Ideas, Interests and Institutionalisation: ‘Trade in Services’ and the Uruguay Round” – “we argue that epistemic community members provided an enticement for negotiators to gather... They framed the issues and specified a range of options in the permissive period when policy-makers were highly uncertain about the issues and their interests” – pp.39; P. Haas, “Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone” – “in 1974, Sherwood Rowland and Mario Molina, two chemists at the University of California at Irvine, argued that the chlorine in CFC emissions reacts with and breaks down ozone molecules in the thin layer of stratospheric ozone and thus hinders the ozone layer’s ability to prevent harmful ultraviolet rays from reaching the earth.” – pp.197; E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control”. – envisages a similar dynamic, which he calls choosing the “units of variation” – pp. 104.

⁸² P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control” – pp. 385 and P. Haas, “Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone” – “the epistemic community members all agreed that the accumulation of physical contaminants necessarily has detrimental consequences for the overall environment because it disrupts natural systems” – pp.190

⁸³ E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control” – pp. 104 and pp. 111-124

⁸⁴ E. Adler and P. Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program”. *International Organisation*. Vol. 46, No. 1, 1992, 367-390 – pp.375-8

public”.⁸⁵ Epistemic communities play an active role in the process of finalisation of a new norm as well,⁸⁶ but as Haas has observed, technical knowledge and expertise might have proved compelling, but the exercise of political power was crucial as well.⁸⁷

The studies of *process* of norm development, as presented by authors with different views on the leading actors in the system, exhibit curious similarities. As I will later propose in a synthetic model, combining findings of social constructivists with those of constructivists dealing with the creation of scientific knowledge and technology, the process of norm development is the same regardless of who the leading actors are envisaged to be. Epistemic communities, advocacy networks and NGOs, economic actors and states, all take part at one stage or another in a process of development of norms, which influence human well-being. In other words, the various cases presented above are only different viewpoints on the same process.

Logic of Action

The term logic of action indicates the type of considerations that actors take into account or act upon, whether consciously or sub-consciously, in the process of making decisions. According to March and Olsen, actors are guided either by calculations of consequences (logic of consequences) or by careful consideration of identities, obligations and rules (logic of appropriateness).⁸⁸ Thomas Risse adds a third logic of action and that is the logic of truth-seeking and argumentation according to which “actors try to challenge the

⁸⁵ Ibid. – pp. 378-9.

⁸⁶ Ibid. – pp.381

⁸⁷ P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control”– pp. 397-8

⁸⁸ J. March and J. Olsen, “The Institutional Dynamics of International Political Orders”. *International Organisation*. Vol. 52, no. 4, 1998, 943-969 – pp. 950-1.

validity claims inherent in any causal or normative statement”.⁸⁹ Most constructivists tend to prioritise the logic of appropriateness⁹⁰ whereas rationalist theorists tend towards a logic of consequences.⁹¹ The logic of consequences drives behaviour when actors “choose among alternatives by evaluating their likely consequences... conscious that other actors are doing likewise”;⁹² the logic of appropriateness is at play when “action involves evoking an identity or role and matching the obligations of that identity or role to a specific situation”.⁹³ In an earlier work March and Olsen have distinguished between the two logics in a slightly different manner. They have stated that within political institutions

having determined what action to take by a logic of appropriateness in our culture, we justify the action by a logic of consequentiality... Reasons are important. It is clear they must be expressed, but their role in affecting outcomes is more obscure... resulting in a kind of healthy charade of hypocrisy in which reasons and actions are not tightly linked but place pressure on each other in a way that strengthens each⁹⁴

In other words, to assume that the functioning of the logics of action is straightforward and easy to track down and understand is, to say the least, naïve. The logics of action influence the participants in international decision making in a competitive and complex manner.

The functioning of the logic of appropriateness is of particular interest to Sending, who shows that counter to the position of some constructivists,⁹⁵ the logic of appropriateness “can hardly account for [normative change because] it cannot convincingly

⁸⁹ T. Risse, “‘Let’s argue!’: Communicative Action in World Politics”. *International Organisation*. No. 54, vol. 1, 2000 – pp.7, for an overall discussion of the logic of argumentation see – pp. 6-11

⁹⁰ O. Sending, “Constitution, Choice and Change: Problems with the ‘Logic of Appropriateness’ and its Use in Constructivist Theory” *European Journal of International Relations*. Vol. 8, no. 4, 2002; M. Finnemore, *National Interests in International Society*. (Cornell University Press, Ithaca: 1996); J. Checkel, “The Constructivist Turn in International Relations Theory”. *World Politics*. Vol. 50, 1998, 324-348; M. Finnemore and K. Sikkink, “International Norm Dynamics and Political Change”

⁹¹ O. Sending, “Constitution, Choice and Change: Problems with the ‘Logic of Appropriateness’ and its Use in Constructivist Theory” – pp. 444-5

⁹² J. March and J. Olsen, “The Institutional Dynamics of International Political Orders”. *International Organisation*, Vol. 52, no. 4, 1998 – pp.949

⁹³ *Ibid.* – pp. 951

⁹⁴ J. March and J. Olsen, *Rediscovering Institutions – The Organisational Basis of Politics*. (The Free Press, New York: 1989) – pp. 162

⁹⁵ M. Finnemore, *National Interests in International Society* – pp. 28-31; H. Mueller, “Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations”, *European Journal of International Relations*, vol. 10, no.3, 2004 – pp. 418-425

account for the process by which changes in norms come about, as it portrays actors as being internally related to prevailing norms as they constitute their very identity”.⁹⁶ In other words, where normative change is occurring or norms are developing in areas where there have not been any norms before, actors cannot rely on a logic of appropriateness, since there are no standards of appropriateness to prescribe action and the conception of identities and interests has no ready answers. This in turn means that only by employing the “logic of truth seeking or arguing” one can begin to understand “the *process* through which *new* norms are internalised”.⁹⁷

The logic of argumentation has been further defined as consisting of two parts – logic of truth-seeking and logic of rhetorical action. The logic of truth-seeking guides the behaviour of actors who are genuinely looking for the solution of a problem where they have no material interests at stake. The logic of truth-seeking is based on normative beliefs. The logic of rhetorical action also involves argumentation, but actors who engage in rhetorical action are looking to protect or advance their material interests and their arguments are aiming to persuade others that this is also in the greater interest.⁹⁸

Neta Crawford further argues that “ethical argument analysis is a way to understand and explain normative change in world politics... [since] the usual understanding of agents and structures as constituting the major forces of world politics is incomplete without an understanding of the *processes* of world politics”.⁹⁹ And if the understanding of process is seen as a dynamic interplay between argument, persuasion, power and interest, then we will need to look for the enactment of the logics of consequences and argumentation in order to

⁹⁶ Sending (2002) – pp. 460

⁹⁷ Ibid. – pp.462

⁹⁸ For a discussion of the logic of argumentation as consisting two separate logics, see F. Schimmelfennig, *The EU, NATO and the Integration of Europe: Rules and Rhetoric*, (Cambridge University Press: Cambridge: 2003)

⁹⁹ N. Crawford, *Argument and Change in World Politics*– p.2

understand actors' behaviour.

The research conducted by social constructivists in the field of international relations is growing by the day. It is multi-layered and encompasses a variety of spheres of international politics that two decades ago seemed irrelevant to our understanding of the world system. The focus on the activities of a range of actors as well as the number of issues being researched means that there are many unresolved puzzles in IR. It has by now become clear that the study of politics cannot be separated from the studies of the other social sciences. Constructivists are even beginning to search for causes and effects of political action beyond the confines of the social sciences, thus involving scientific knowledge in the analysis of political processes.

Theories of the Sociology of Scientific Knowledge (SSK) and the Social Construction of Technology (SCOT)

The sociology of knowledge began evolving as a discipline in the 1970s and the 1980s.¹⁰⁰ “SSK sought to show that knowledge was constitutively social, and in so doing, it raised fundamental questions about taken-for-granted divisions between social versus cognitive, or natural, factors.”¹⁰¹ The theories of the social construction of scientific knowledge focus attention on the study of the relationship between the material and ideational world by revealing the social beginning of scientific facts. One of the main contentions of SSK theorists is that there isn't a single true, material world waiting “out-there” to be discovered; rather, human knowledge and search for facts is socially

¹⁰⁰ S. Shapin, “Here and Everywhere: Sociology of Scientific Knowledge”. *Annual Review of Sociology*. Vol. 21, 1995 – pp.290; D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance*. (The MIT Press. Cambridge, Massachusetts: 1990) – pp. 9; H. Collins, “The Sociology of Scientific Knowledge: Studies of Contemporary Science” *Annual Review of Sociology*. No.9, 1983 – p. 266

¹⁰¹ S. Shapin, “Here and Everywhere: Sociology of Scientific Knowledge” – pp.289

conditioned and socially constructed. The main concern of the sociology of scientific knowledge is the character of “what comes to count as scientific knowledge” and the mechanism that makes facts count as scientific knowledge.¹⁰² I will thus draw attention to the findings of SSK and SCOT regarding the *process* of the construction of scientific knowledge and the *closure* of scientific debates.

The search for consistency of perceptions and convention is a central notion to understanding the way in which facts are established. As Fleck stresses “whatever is known has always seemed systematic, proven, applicable, and evident to the knower. Every alien system of knowledge has likewise seemed contradictory, unproven, inapplicable, fanciful, or mystical”.¹⁰³ The studies of the creation of scientific knowledge thus focus on that particular process of transition from the contradictory, unproven, fanciful to the systematic, logical, evident. This process of fact construction and fact recognition has been studied in different environments and with regards to diverse issues¹⁰⁴ and one general conclusion has emerged – scientific knowledge and technologies are “limited by cultural constraints and the distribution of power, rather than internal technical knowledge or logical possibility”.¹⁰⁵ This is evidence of a larger move to ‘downgrade’ the natural sciences from the pedestal of

¹⁰² H. Collins, “The Sociology of Scientific Knowledge: Studies of Contemporary Science” – pp.267

¹⁰³ L. Fleck, *Genesis and Development of a Scientific Fact*. (University of Chicago Press. Chicago, USA: 1935/1979) – pp. 22

¹⁰⁴ D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance*; G. Spinardi, *From Polaris to Trident: The Development of US Fleet Ballistic Missile Technology*, (Cambridge University Press. Cambridge, UK: 1994); B. Barnes, D.Bloor, and J. Henry, *Scientific Knowledge – A Sociological Analysis*. (Athlone. London: 1996) – the authors presented a study of the controversy surrounding the issue of the charge of tiny particles of metal and wax; H. Collins, “The Sociology of Scientific Knowledge: Studies of Contemporary Science” – a study of the development of a Transversley Excited Atmospheric Pressure Laser; B. Latour and S. Woolgar, *Laboratory Life – The Construction of Scientific Facts*, (Princeton University Press. Princeton, New Jersey: 1979)

¹⁰⁵ H. Collins, “The Sociology of Scientific Knowledge: Studies of Contemporary Science” – pp. 281; similar arguments have been made by J. Golinski, *Making Natural Knowledge – Constructivism and the History of Science*. (Cambridge University Press. New York: 1998) – pp. 2, 6; G. Spinardi, *From Polaris to Trident* – pp. 193; E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control” – pp. 124; D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance* – pp.10.

the holders of the objective truth about the material world – “the treatment of scientific knowledge as a social construction implies that there is nothing epistemologically special about the nature of scientific knowledge: it is merely one in a whole series of knowledge cultures”.¹⁰⁶ The change in the perception of natural sciences means that scientific knowledge does not necessarily uncover a non-controversial, systemic and logical environment, neither is science impartial in its depiction of the material world.

The above change of attitude towards scientific knowledge is reflected in the working assumptions widely accepted by SSK theorists - the relativity of knowledge; the requirement for symmetrical and impartial inquiry regarding scientific theories; the role of the human element in scientific knowledge and the resulting biases and misperceptions.

The significance of relativism in scientific knowledge is that “it assumes neither fixed points in the physical world, nor a fixed realm of logic”.¹⁰⁷ The denial of fixed truths and facts in the material world in essence denies the perceived objective material foundation of natural sciences, revealing their social roots. Collins explains that SSK theorists, using the principles of relativism, call for as little recourse to rationality as possible, so that “beliefs that seem less rational should be explained in the same way as those that seem more rational”,¹⁰⁸ thus translating relativism into the requirement for symmetry and impartiality towards scientific theories.

The concept and necessity of symmetrical and impartial inquiry into scientific knowledge was formulated and highlighted by David Bloor in his book *Knowledge and Social Imagery* (1976/1991). According to Bloor, “the central tenets of the sociology of

¹⁰⁶ T. Pinch and W. Bijker, “The Social Construction of Facts and Artefacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other” *Social Studies of Science*. Vol. 14, no. 3, 1984 – pp. 401

¹⁰⁷ H. Collins, “The Sociology of Scientific Knowledge: Studies of Contemporary Science” – pp.267

¹⁰⁸ *Ibid.* – pp. 272

knowledge are that in investigating the causes of beliefs, sociologists should be impartial to the truth or falsity of the beliefs, and that such beliefs should be explained symmetrically”.¹⁰⁹ The importance of this relativism is most clearly seen in the examination of the relationships between “science” and “pseudoscience”, between “hard” and “soft” scientific facts, which can only be comprehended if the nature of the definitions of both antipodes is objectively examined.¹¹⁰ Equal treatment of both scientific truth and falsity is crucial in social relations that are constantly in flux; according to Fleck, the history of humanity is a history “complete with all [our] errors [the past] survives in accepted concepts, in the presentation of problems, in the syllabus of formal education, as well as in language and institutions”.¹¹¹ Relativity, insecurity, past mistakes and misperceptions, all these are features of the human individual and individuals are human before they are physicists, mathematicians, artists or social scientists. In other words, human agency in itself presupposes that all these imperfections will be passed on to anything that individuals do; which brings me to the third contribution of SSK – the influence of the human element. Human agency is at the centre of the inquiry of the sociology of scientific knowledge in the sense that an individual is motivated in his/her actions, decisions, statements not only by facts but by their environment, education, beliefs about the world and images of the others, cognitive consistency, etc.¹¹² In the words of Barnes and Edge and in the context of SSK, “in controversial situations, the value premises of the disputants colour their findings. The boundaries of the problems to be studied, the alternatives weighed, and the issues regarded as appropriate – all tend to determine which data are selected as important, which facts

¹⁰⁹ W. Bijker, T. Hughes, and T. Pinch (eds.) *The Social Construction of Technological Systems – new directions in the sociology and the history of technology*, (MIT Press, Cambridge, Massachusetts: 1989) – pp. 18

¹¹⁰ J. Golinski, *Making Natural Knowledge* – pp. 7

¹¹¹ L. Fleck, *Genesis and Development of a Scientific Fact* – pp. 20

¹¹² For further discussion of the influences under which individuals function – R. Jervis, *Perception and Misperception in International Politics*. (Princeton University Press. Princeton, New Jersey: 1976).

emerge”.¹¹³ Moreover, individual expectations of what there is to be discovered may also determine what is actually discovered.¹¹⁴

Understanding Process

Keeping these working assumptions in mind, I will now turn to the observations of *process* that authors have recorded and analysed. Process-tracing material will be used both from the field of the social construction of scientific knowledge and that of the social construction of technologies. There have been debates as to whether “science and technology are essentially different and [whether] different approaches to their study [should be] warranted” in the words of Pinch and Bijker.¹¹⁵ But as these authors have shown, “the study of science and the study of technology should, and indeed can, benefit from each other”.¹¹⁶ For the purposes of my research I will assume that they can be studied using the same methods of social construction, since the two fields have much in common – they are studying the development of material facts and technological objects within a social environment, paying special attention to the various types of power at play in the process.

A large part of the studies of SSK and SCOT have been empirical in nature and have focused primarily on demonstrating and pinpointing the influence and bias of the social world and political power on the construction of knowledge and technology rather

¹¹³ B. Barnes and D. Edge, eds, *Science in Context – Readings in the Sociology of Science*. – pp.278

¹¹⁴ Good illustration of this point is provided by Bruner and Posman’s experiment with playing cards (cited in Kuhn’s *Structure of Scientific Knowledge*), in the former, individuals were requested to identify anomalous cards (such as black four of diamonds) in a colonnade of cards. According to the results of the experiment, “individuals expectations, attuned to the conventional format of the cards, appeared to have structured what individuals can and do see” – in B. Barnes, D. Bloor and J. Henry, *Scientific Knowledge – A Sociological Analysis* – pp.5

¹¹⁵ T. Pinch and W. Bijker, “The Social Construction of Facts and Artefacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other” – pp.401, 432.

¹¹⁶ *Ibid.*

than on creating a theoretical model of the process of knowledge construction.¹¹⁷ Some inferences can be made however and one can begin to construct a theoretical model on the basis of these readings. The process of fact and technology construction can roughly be taken to consist of two parts – firstly, there are experiments and debates among experts, which are supplemented by debates between experts, policy-makers and industry, and secondly, there is closure – this is where scientific facts get established and technologies get accepted. The point of closure means that “a fact... loses all temporal qualifications and becomes incorporated into a large body of knowledge drawn upon by others”.¹¹⁸

The process of fact formation begins with research and findings. Findings need to come in the format and with the precision accepted throughout the field of research¹¹⁹ if they are to be recognised as worthy of attention. Format and precision is supplemented by the identity of those who present them – the reputation of scientists in the laboratory, their rank and experience all influence the extent to which their claims to knowledge are taken seriously.¹²⁰ An observation of laboratory discussions concludes that “*who* had made a claim was as important as the claim itself”.¹²¹ Scientists in laboratories as well as groups working on the construction of new technologies all tend to work in networks and these networks in turn confront each other, as well as communicate with government officials

¹¹⁷ B. Barnes, D. Bloor, and J. Henry, *Scientific Knowledge – A Sociological Analysis*; B. Barnes and D. Edge, eds. *Science in Context – Readings in the Sociology of Science*; D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance*; G. Spinardi, *From Polaris to Trident: The Development of US Fleet Ballistic Missile Technology*; J. Golinski, *Making Natural Knowledge – Constructivism and the History of Science*; H. Collins, “The Sociology of Scientific Knowledge: Studies of Contemporary Science”.

¹¹⁸ B. Latour and S. Woolgar, *Laboratory Life – The Construction of Scientific Facts* – pp. 106

¹¹⁹ B. Latour and S. Woolgar discuss a situation where the standards of proof had changed pushing one of the researchers out of the field because he could not afford the expenses of investing in new equipment that would guarantee the precision of results – pp. 119-124; E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control” – members of the epistemic community working to enhance nuclear arms control “knew each other well... they learned from one another and together generated the standards by which they verified the validity of their ideas” – pp.112, see also pp.115.

¹²⁰ Ibid. – pp. 155-160.

¹²¹ Ibid. – pp. 164

and industry representatives.¹²² The process of the construction of facts is one of lengthy discussions and reference to previous research and to the rules of reasoning available in the respective field, but clearly the focus of the findings of Latour and Woolgar remains on the fact that “the epistemological qualities of validity and wrongness cannot be separated from sociological notions of decision-making”.¹²³ In other words, experiments and testing are not the sole determinants of resulting knowledge and/or technologies.

The research into nuclear missile guidance provides ample evidence of the latter. The nature of the subject of study – Intercontinental Ballistic Missiles (ICBMs) - does not allow for this technology to be tested in fully operational conditions, or even if a test is conducted, the latter cannot be used as convincing evidence of the proper functioning of this technology. The proponents of the unmanned ICBMs were confronted by the proponents of the manned bomber “who were inclined to radical doubt as to whether missile accuracies were fact”.¹²⁴ This controversy was not resolved by unequivocal reference to facts and figures; rather, the issue “declined” due to a change in attitudes towards ICBMs and nuclear testing internationally.¹²⁵ Change in the perceptions of nuclear weapons helped the epistemic community working on issues of nuclear arms control to get their agenda to policy-makers and start a process of negotiations between East and West on these issues.¹²⁶ This discussion of how the course of science and technology changes under the influence of both scientific and social factors takes me to the second stage of the

¹²² D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance*; G. Spinardi, *From Polaris to Trident: The Development of US Fleet Ballistic Missile Technology* – pp. 190-3; E. Adler “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control”; B. Latour and S. Woolgar, *Laboratory Life – The Construction of Scientific Facts*; H. Engelhardt and A. Caplan, eds., *Scientific Controversies – Case studies in the resolution and closure of disputes in science and technology*. (Cambridge UP, New York: 1987) – pp. 11-13.

¹²³ *Ibid.* – pp. 121

¹²⁴ D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance* – pp. 342-7, 419.

¹²⁵ *Ibid.* – pp. 346

¹²⁶ E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control” – pp.116, 121

formation of scientific knowledge – the closure of scientific debates.

Closure

The concept of closure as presented by Engelhardt and Caplan (1987) is very similar if not identical to the concept of “stabilisation” of a scientific fact, as discussed by Latour and Woolgar (1986) and both of them resemble the “tipping point” of a moral norm as discussed by Finnemore and Sikkink (1996). The common feature of the three terms is that they signify a moment in which actors with conflicting views and differing roles and positions in the social system agree on a fact or a norm and accept it as an integral part of their understanding of the material environment (in the case of scientific facts) and their own identities (in the case of normative change). I will come back to this discussion in my theoretical model of norm development. The term *closure* “indicates the conclusion, ending or resolution of a controversy”,¹²⁷ which according to the authors inevitably involves ethical and political layers, if not directly then implicitly as a part of the “scientist’s cultural milieu”.¹²⁸ The point of stabilisation “entails the escape of a statement from all reference to the process of construction... Up to a certain point... the inclusion of reference to the conditions of construction is necessary for purposes of persuasion”; after that a fact becomes established and the former is no longer required.¹²⁹ In other words, achieving closure or stabilisation is indicative that a controversy has been resolved and a fact accepted, which is in turn evidence that interests, power, science, ethics have reached a common ground and formulated new knowledge.

Studies of closure have come up with a classification of the types of ending that

¹²⁷ H. Engelhardt and A. Caplan, eds., *Scientific Controversies* – pp. 2

¹²⁸ Ibid. – pp. 3

¹²⁹ B. Latour and S. Woolgar, *Laboratory Life – The Construction of Scientific Facts* – pp. 176.

scientific debates can have. “Scientific controversies are usually seen to be the sort of disputes that are to be resolved by appeal to facts and to rigorous reasoning concerning facts”.¹³⁰ The appeal of facts is that they are perceived as objective, material and can be reported repeatedly by more than one observer. This view however is in complete opposition to the results of the observations summarised above. Engelhardt and Caplan emphasise the findings of SSK and SCOT, as their conclusion is that when a debate has different layers to it, e.g., political, scientific, social, ethical, the political interests prevail and the political rules of closure apply.¹³¹ The types of closure can be broadly summarised in five categories – closure through loss of interest, closure through force, closure through consensus, closure through sound argument, and closure through negotiation.¹³² Having looked at empirical studies of social constructivism in IR, one can easily recognise patterns of closure similar to the ones listed above; the only difference is that the studies of social constructivism have not paid nearly enough attention to that particular part of the norm evolution process. Before I proceed with a discussion of the synthetic model of norm evolution, which is a combination of the findings of constructivism in IR, SSK and SCOT, I would like to briefly review the types of closure proposed by Engelhardt and Caplan, so that further reference to them will be possible.

Closure through loss of interest, also called “natural death closure” or “abandonment”,¹³³ indicates an end to a debate due to loss of its relevance or due to actors losing interest in it. This type of closure is not based on logic or material evidence. An example of this type of closure is found in MacKenzie’s research into the construction of the concept of accuracy of ICBMs, where various factors both political and social brought

¹³⁰ H. Engelhardt and A. Caplan, eds., *Scientific Controversies* – pp.1

¹³¹ *Ibid.* – pp.163

¹³² *Ibid.* – pp. 14-5

¹³³ *Ibid.* – pp.13

about the loss of interest in the further development of this technology.¹³⁴ Closure though force is the termination of debates on “the basis of non-epistemic factors, such as the authority of the state, or the withdrawal of publication facilities”.¹³⁵ This type of closure indicates a situation where governments are, for whatever reason, no longer interested in supporting a debate or financing further research in a controversial field. Closure is again not achieved on the basis of objective knowledge and scientific research and the hunt for answers is suppressed by political influence. Closure through consensus is reached when “the participants embrace a particular view point, not through general rational arguments, negotiation or established procedures but through non-epistemic influences that lead to a community of belief”.¹³⁶ Closure through sound argument is based on rational argument, which follows the laws of scientific inference. In controversies with heavy political content, however, it is highly unlikely that argumentation will be completed by resort to sound argument. As Engelhardt and Caplan have pointed out in such situations, it is the political rules that apply.¹³⁷ Closure through negotiation indicates the reaching of an agreement between the parties involved in a controversy. “[N]egotiation closure creates (as opposed to discovers or discloses) a solution”.¹³⁸ The study of closure and fact-stabilisation provides useful insights, which are not confined to the sphere of scientific knowledge and will be further applied to the study of norm development.

The sociology of scientific knowledge provides a useful theoretical foundation for this research as it calls into question the social processes of scientific knowledge formation. There are two main contributions of SSK theories to the current research. One of them is

¹³⁴ D. MacKenzie, *Inventing Accuracy – A Historical Sociology of Nuclear Missile Guidance* – pp.405

¹³⁵ H. Engelhardt and A. Caplan, eds., *Scientific Controversies* – pp. 6

¹³⁶ *Ibid.* – pp.14

¹³⁷ *Ibid.* – pp. 163.

¹³⁸ *Ibid.* - pp.15

the study of the dynamics of scientific fact creation, which emphasises the interplay among different actors and the use of social and political power. These studies have produced important conclusions that can be applied to the understanding of the process of creating behavioural norms. The other theoretical contribution is the deepening of our understanding of the moment of closure in scientific and other social debates. This social moment and the way in which it is reached, I argue later, plays an important role for determining the character and strength of the behavioural norm that is being created.

The Synthetic Theoretical Model of Norm Evolution

Building on the achievements of social constructivists in IR and the theorists of SSK and SCOT, this research proposes a model for studying in more depth the process of norm development. This synthetic model is an attempt to fine-tune the already existing body of knowledge to reflect more fully the complexity of norm construction and to understand more clearly the social processes involved. The process of establishing new behavioural norms consists of a complex web of relationships of power, influence, knowledge, morality, justice; examining the various stages of this process in greater detail will help give answers to important questions. Why do some norms develop and others do not? Why do norms evolve at certain moments in time, within a specific historical context? How do states agree to amend the standards of appropriateness to higher and more demanding levels? Understanding the way in which norms are negotiated will also help explain norm compliant state behaviour within an anarchical international society – an issue that has often been at the heart of IR debates.

By using original empirical research in different spheres of international policy-making, I am going to compare this model of norm development to the case studies and evaluate the findings emerging from the historical reconstruction of events. One of my

secondary aims is to show that norm compliance is intricately linked to the process of norm development, at least for the states actively involved in this process, because during the process of normative negotiations, state identities are re-defined and normative constructions widened to make room for the new prescriptions for appropriate behaviour.

I begin with a brief classification of the participants involved in the process of norm creation. So far actors have been grouped according to the methods that they are *perceived* to employ in the process of norm construction.¹³⁹ In my view, however, actors should not be classified according to these criteria, as outlined in the review of constructivist literature, because the proposed categories do not match the networks that actors create, but instead overlap in places or draw dividing lines where there are not any. It will be much more productive and informative to study how different actors form negotiating coalitions, what the power dynamics in these coalitions are, what roles different types of actors assume and how the negotiating coalitions influence the policy-making process. Actors form coalitions on the basis of their vested interests and the members of coalitions often follow the same logic of action. The demands of the different logic of action and the aim of the actors involved often pull in opposite directions. When the different logics of action can be reconciled and when actors manage to find common interests, the negotiating coalitions are at their strongest. Actors are usually associated with a particular logic of action. For example, global civil society and scientific communities are perceived to act according to a

¹³⁹ As argued earlier, NGOs and advocacy networks are often perceived to resort to moral persuasion, *see*, A. Klotz, *Norms in International Relations – The Struggle Against Apartheid*. (Cornell University Press. Ithaca: 1995); M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Relations*, M. Finnemore, *National Interests in International Society*; whereas epistemic communities and networks of scientists are seen as resorting to impartial scientific knowledge, *see*, P. Haas, “Introduction: Epistemic Communities and International Policy Coordination”; P. Haas, “Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone”; E. Adler, “The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control” and many others; and TNCs, banks and other economic actors relying primarily on their material resources and capabilities to effectively lobby nation-state governments to adopt policies to the formers’ convenience

logic of argumentation in a context of appropriateness, while corporations and states are viewed as following a logic of consequences. These constructions, however, should not be assumed as they do not always hold true and are heavily value-laden, as discussed earlier. The logics of action and the interests of the actors should be studied on a case-by-case basis, which in turn will only explain the basis of coalition binding.

Constructivist analysis of norm evolution so far has tended to assume that actors participate only in the formulation of norms/policies the character of which corresponds to their sphere of work, that is to say, scientific experts do not take part in the formulation of new international moral norms,¹⁴⁰ epistemic communities are only concerned with issues that are strictly within their expertise,¹⁴¹ and global civil society actors engage mainly in issues with a normative character.¹⁴² I wish to prove in the course of this research that this classification is too rigid. Scientific and technical issues do have a normative side to them (even if that is confined to the normative milieu of scientists), and norms have a technical side, which means that appeal to scientific knowledge does not exclude the discussion of moral issues and vice versa. Moreover, economic actors and states although influenced by the logic of consequences are concerned with the development of a normative framework, because they exist and function within a socially constructed (often backed up by laws) context of appropriateness.¹⁴³

I will proceed here with the discussion of the synthetic model theorising the process of norm development, where I combine the findings of the social constructivist

¹⁴⁰ A. Klotz, "Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences" *European Journal of International Relations*. Vol. 8, no. 1, 2002 – pp. 57

¹⁴¹ P. Haas, "Introduction: Epistemic Communities and International Policy Coordination".

¹⁴² A. Klotz, *Norms in International Relations – The Struggle Against Apartheid*. (Cornell University Press. Ithaca: 1995); M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Relations*, M. Finnemore, *National Interests in International Society*;

¹⁴³ H. Mueller, "Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations" – pp. 410-8

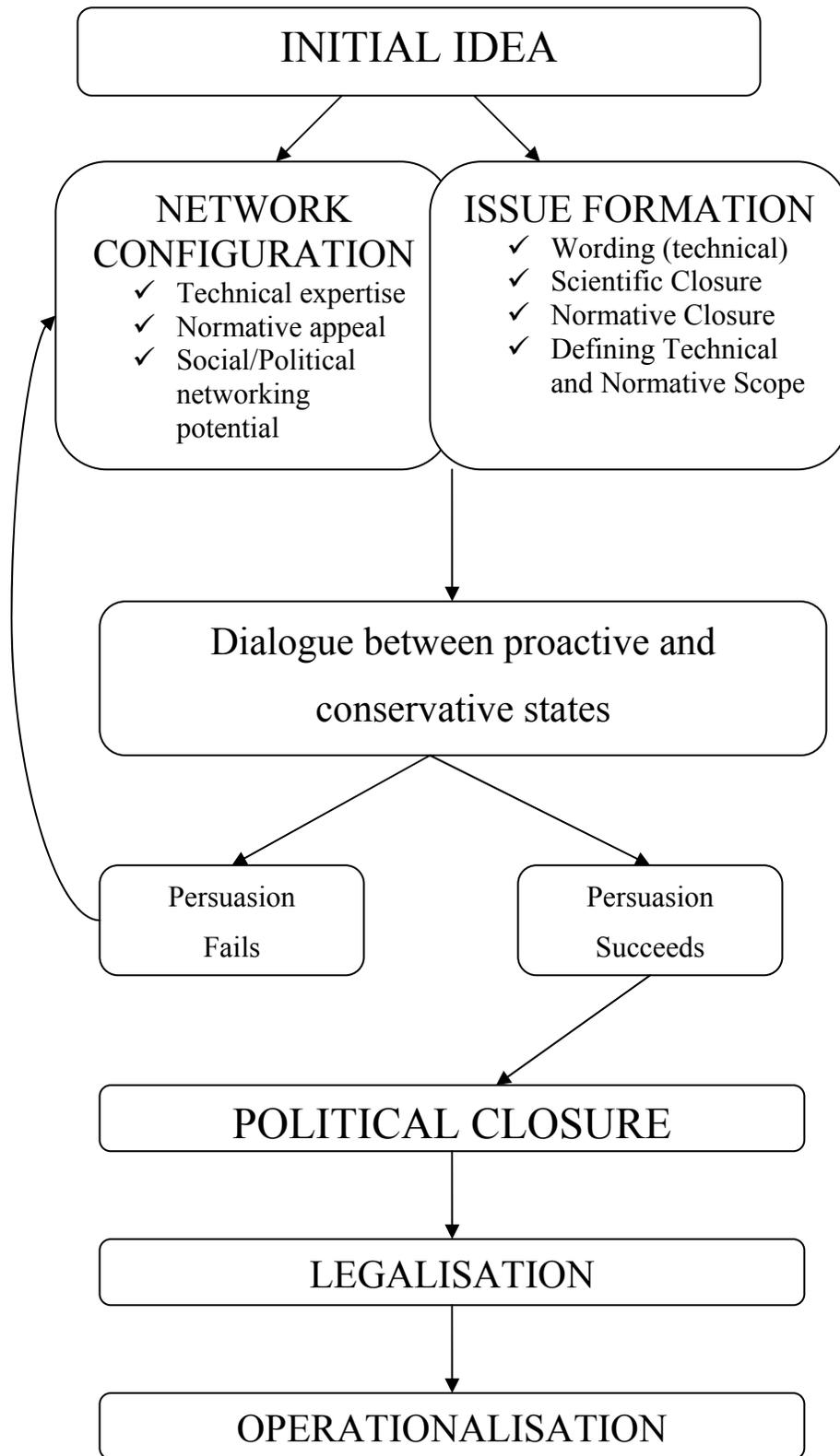
literature in the sphere of international relations and the social construction of scientific knowledge and technology. Constructivists of IR have paid close attention to the social processes related to the creation and implementation of norms and have conducted elaborate empirical studies, which will be useful in my attempt to further theorise the process of norm development. SSK and SCOT researchers, who have studied the processes of scientific fact formation and the creation and establishment of new technologies, have revealed the social beginning of scientific knowledge within a context of power relationships similar to those within any social system. Theorists of SSK have shown that the agenda of scientific research is influenced by demands for further knowledge coming from different actors – advocacy networks, states, industry, social movements, etc. The current research is aimed at deconstructing norms and facts and at showing that what seems today as the only rational, “normal” state of the world, is a social construction that we have built over time, and which is open to re-interpretation, questioning and change. Culture, knowledge, technologies, legal principles are all subject to change and concepts like technological determinism¹⁴⁴ do nothing but distract attention from the human innovation and the ability to individuals to set the direction of change of our social system, preventing us from understanding the causes and effects of the processes of change within this system.

The theoretical model of norm development that I propose has seven stages – formation of the initial idea, network configuration, issue formation, dialogue between proactive and conservative states, reaching political closure, institutionalisation/operationalisation, and legalisation (*Figure 1*). Normative ideas do not always become legal

¹⁴⁴ According to the concept of technological determinism, “the development of technology itself follows a path largely beyond cultural or political influence, and technology in turn has “effects” on societies that are inherent, rather than socially conditioned” - http://en.wikipedia.org/wiki/Technological_determinism ; See also D. Chandler, *Technological or Media Determinism*, Aberyswyth The University of Wales, The media and Communications Studies Site - <http://www.aber.ac.uk/media/Documents/tecdet/tdet12.html>

norms that are effective in governing state behaviour; the process of development can come to an end at any stage and normative ideas may remain undeveloped; some norms can even be discarded and attention to those may wane over time, which makes this model dynamic and open.

Figure 1



Stage 1 – Initial idea

Various factors can create the need for the development of the initial idea for a new norm – a disaster, or a crises, the anticipation of a disaster,¹⁴⁵ shocking revelations of information about large scale human suffering,¹⁴⁶ a need for international regulation where there is none.¹⁴⁷ The initial idea can be formulated by an individual – a norm entrepreneur¹⁴⁸ - or by a group of individuals – communities of experts¹⁴⁹ - by an organisation – a state¹⁵⁰ or an economic actor.¹⁵¹ The identity of the norm entrepreneur will inevitably influence the process of the development of an idea, its chances for success, the time that it takes for the idea to become a norm. There are different theories as to which actors make the most successful norm entrepreneurs – some argue that actors close to the

¹⁴⁵ Anticipated disaster was the reason for the formulation of norms in the case of the use of CFCs – P. Haas, “Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone”, 187-224 and the alert of an environmental crises brought states around the table to discuss the Med Plan – P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control”, 377-403; T. Farrell, “Transnational Norms and Military Development: Constructing Ireland’s Professional Army”, *European Journal of International Relations*. Vol. 7, No. 1, 2001 – Farrell argues that external shock is one of the necessary conditions for radical change in the norms of war – pp. 20-1

¹⁴⁶ Examples here come from different fields – the campaign to ban the use of Land Mines – R. Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines”; the idea for the creation of ad hoc war crime tribunals – C. Rudolph, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals”; campaigns for woman suffrage, campaigns against foot binding in China, human rights campaigns in Latin America, campaigns drawing attention to violence against women – M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Relations*.; movements for the protection of the rights of women – N. Berkovitch, “The Emergence and Transformation of the International Women’s Movement” in J. Boli and G. Thomas, *Constructing World Culture – International Nongovernmental Organisations since 1875*

¹⁴⁷ M. Finnemore, “Rules of War and Wars of Rules: The International Red Cross and the Restraint of State Violence” in J. Boli and G. Thomas, *Constructing World Culture – International Nongovernmental Organisations since 1875*

¹⁴⁸ M. Finnemore and K. Sikkink “International Norm Dynamics and Political Change”, – pp. 897 – discussing the case of the creation of the ICRC, the campaign for women’s suffrage

¹⁴⁹ P. Haas, “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control” – pp. 380; the issue of banning land mine use was also initiated by congresses of experts – R. Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” – pp. 617-23

¹⁵⁰ N. Tannenwald, “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use”, C. Rudolph, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals”, E. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society”, W. Thomas, *The Ethics of Destruction – Norms and Force in International Relations*, (Cornell University Press. Ithaca, New York: 2001)

¹⁵¹ W. Drake and K. Nicolaidis, “Ideas, Interests and Institutionalisation: ‘Trade in Services’ and the Uruguay Round”. *International Organisation*. Vol. 46, No. 1, 1992, 37-100

policy-making elites have the best chance of realising their normative beliefs;¹⁵² others argue that only individuals or organisations who come from the periphery of the political system have not been corrupted by bureaucratic power and thus have undamaged normative ideas that are worth working for.¹⁵³ Theo Farrell summarizes the constructivist position that proximity to authority “can aid norm entrepreneurs” but is not a “condition of success”.¹⁵⁴ Taking into account Checkel’s critique of the constructivists for portraying states as negative characters¹⁵⁵, this research is based on the assumption that all actors are capable of initiating normative ideas, which are not necessarily either good or bad. The closer an actor is to the policy-making circles, however, the easier it is likely to be for an idea to become established, but contacts with politicians are not a sufficient condition for a norm to get established. Although causal relationships will be sought throughout the case studies to which this model is applied, the research hypothesis is that it is not so much the social position of the norm entrepreneur as it is the ability to form an effective normative network that influences the successful norm development process.

The circumstances in which an initial idea has been formulated also influence the following stages of norm development. If an idea is formulated amidst a humanitarian crises or a disaster, there are chances that this idea will evolve quickly and will aim at making a practical difference to those suffering. Instances of human suffering have indeed

¹⁵² This hypothesis is proposed by the studies on military innovation, suggesting that “entrepreneurs’ proximity to the leadership of the target community is critical to success” – T. Farrell, ‘Transnational Norms and Military Development: Constructing Ireland’s Professional Army’. *European Journal of International Relations*. Vol. 7, No. 1, 2001, 63 – 102. The article has taken into account S. Rosen, *Winning The Next War*, (Cornell University Press: Ithaca, NY: 1991); B. Posen, *The Sources of Military Doctrine*, (Cornell University Press, Ithaca, NY: 1984) and M. Evangelista, *Unarmed Forces*, (Cornell University Press, Ithaca, NY: 1999)– pp. 83

¹⁵³ For an in-depth discussion see Frederick Frey, *Survey Research on Comparative Social Change*, (The MIT Press, Boston, MA: 1969)

¹⁵⁴ T. Farrell, “Transnational Norms and Military Development: Constructing Ireland’s Professional Army”– pp. 83

¹⁵⁵ See *Infra Notes* 44, 45, 46

drawn public attention and increased pressure on politicians to take action.¹⁵⁶ The lack of an immediate crisis, normative interest from strong states or public pressure, on the other hand, can protract negotiations or lead to the overall dismissal of the need to develop a particular norm.¹⁵⁷ In other words, the political and normative context within which an initial idea is formulated is quite important for its further development and should be studied where such evidence can be obtained.

Stage 2 – Network Configuration

The norm entrepreneur, whether an individual, a group, or a state, needs to form a network of supporters in order to begin gaining critical mass and voice to initiate change in world politics. I am using the term ‘network configuration’ because networks need not be created from scratch in each instance of norm creation – actors may benefit from existing networks, or look to combine new activists with existing networks. The configuration of an influential network of supporters is one of the decisive moments of a successful campaign for the creation of a new behavioural norm in international relations. The support of a network of actors helps an idea to gain credibility and authority, which adds momentum to the process of lobbying national governments. Network configuration is understudied and the existence of pro-active networks of support is often viewed as a given. If we choose to ignore this process, however, we are missing out on important instances of bargaining and persuasion as well as a careful division of responsibilities among actors who may be very

¹⁵⁶ C. Rudolph, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals” discusses how public pressure and public memory prompted action in Bosnia and Rwanda (ICTY and ICTR) – “The similarity between events in Nazi Germany and contemporary Bosnia served to cultivate close associations with World War II and its lessons. Considerations of the ‘Munich analogy’ necessitated some kind of intervention” – pp. 661

¹⁵⁷ In the case of the construction of atrocities regime, examined by C. Rudolph in “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals”, the above mentioned factors were not at play in Cambodia, Indonesia and East Timor, and although various crimes against humanity were committed an ad hoc criminal court was never set up – pp. 675-8

different in terms of their nature and power capabilities. The success/failure of this stage determines whether an idea will take off or not. In other words, the stronger, more convincing and more authoritative the network, the greater its chances for successful normative persuasion.

Stage 2 is one of information gathering by the norm entrepreneur (individual or group) in which the latter has to convince others to join in a coalition for the creation of a particular norm. In cases where transnational civil society actors have come up with the initial idea, they often look for the support of scientists and technical experts who can help establish in technical, rather than emotional terms, the realm of the problem, its implications, the best way to deal with it, etc.¹⁵⁸ Clearly, technical knowledge does not always have to agree with normative ideas, as the case study of intellectual property rights in the pharmaceutical industry illustrates. The only way out of such a deadlock is negotiation - between the experts and the normative proponents, where both sides search for alternatives that would meet their requirements. Scientists and experts look to expand the existing body of knowledge so that solutions can be found, while social movements assess the implications for those who can potentially suffer. Where states are norm entrepreneurs, one can discern similar processes of negotiations, coalition-building¹⁵⁹ and knowledge-sharing, which have an impact on the bargaining power of the group.

Networks are often consolidated at conferences and workshops where normative and scientific issues are raised and groups sympathetic to the cause begin communicating. Social movements and NGOs seek out scientists – both within the organisations and outside

¹⁵⁸ R. Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” – pp.620. Price presents evidence of a series of conferences being held between NGOs, advocacy networks and experts of many spheres concerned with the production, trade, use of landmines, as well as the effects of landmines on individuals and communities.

¹⁵⁹ N. Tannenwald, “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use”, W. Thomas, *The Ethics of Destruction – Norms and Force in International Relations*.

of them - as scientific knowledge is an important factor for network consolidation and for the formulation of the normative issue.

Stage 3 – Issue Formation

The process of issue formation often takes place at the same time as the configuration of the supportive network. As actors meet to discuss issues that they consider problematic, networks begin to emerge. Work to construct the causal relationships that help problematise certain issues over others is conducted in official and unofficial meetings and conferences. In this process the parameters of the issue at stake are specified and the actors need to reach agreement on the technical and moral scope of the problem that they wish to present policy-makers with. The stage of issue formation comprises a process of information sharing and negotiation. NGOs, charities, advocacy networks, corporations, scientists, professional analysts, inter-governmental organisations, etc., from different fields and with different expertise, participate in conferences and workshops where they communicate their concerns and findings in an attempt to find the common grounds between normative issues, technical concerns and the actors' own interests¹⁶⁰ (which may clash at times¹⁶¹). At this stage, normative issues are clad in scientific terms - as causes and effects, as dependent and independent variables, and as a set of actions needed to remedy human suffering. Scientific findings are in turn evaluated in a normative context where consequences are examined for their justice and equitability.

In the process of issue formation, actors work towards establishing the technical and

¹⁶⁰ The issue of land-mines, for example, had to be re-defined as being not an issue of disarmament, but an international humanitarian disaster, in order for states to agree to participate in negotiations – R. Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” – pp. 639

¹⁶¹ A. Klotz, “Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences”; P. Haas, “Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone”; E. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society”.

moral scope of the future norm. The technical scope includes reaching agreement on cause-and-effect relationships, as well as identifying the problem resulting from these causal relationships and in some cases defining a technical solution to that problem. As discussed previously, however, science is not always unequivocal and when complex issues are at stake, scientists may disagree on different aspects of the technical scope of the new norm. Scientific knowledge is often produced to respond to demands for further clarity. I argue that in the process of formulating the problematic issue, it is crucial that experts reach *scientific closure* on its technical scope, just as it is crucial for civil society actors to reach *normative closure*, that is, to reach agreement on the moral scope of the proposed norm. The lack of closure in the scientific or normative realm does not mean that the norm will not progress further; rather, it means that the political negotiations that are to follow will be more difficult with actors continually referring to scientific or normative uncertainties.

Scientific knowledge is useful in persuading actors of the need to act on a given issue. Scientific closure enhances actors' faith in the success of a developing norm and creates conditions for the realisation of the need for a particular norm. Science, however, is a product of public, political or economic demand and may be tainted to reflect the interests of those who fund scientific research. "[I]n the international arena, neither the processes whereby knowledge becomes more extensive nor the means whereby reflection on knowledge deepens are passive or automatic. They are intensely political."¹⁶² In other words, scientific knowledge is created within a specific social, cultural and political context, which is bound to affect the questions that scientists ask and what scientists discover.

Civil society may also bring in biases towards the interests of the groups that are

¹⁶² F. Kratochwil and J. Ruggie, "International Organization: A State of the Art on an Art of the State" *International Organization*. Vol. 40, no. 4, 1986, – pp. 773

most actively involved in the creation and definition of a particular norm. These interests may not always be benign and social groups are not always concerned with the greater good for the greater number of people.

Issue formation also relates to constructing a problematic issue within a particular context and choosing an institutional forum, which can best address this problem. When the problem of landmines was constructed against the background of conventional weapons disarmament treaties, it was not successful in attracting enough political attention; however, once it was presented as a humanitarian problem with a very high human cost, policy-makers created the Convention Banning the Use of Landmines.¹⁶³ In another example, which will be discussed in more detail in chapter 3, the protection of intellectual property rights in the pharmaceutical industry, was initially part of a one-size-fits-all approach to intellectual property, looking after the interests of innovators, constructed in a context of fair trade practices. When public pressure started to mount and the issue was constructed as one reflecting on the developed world's morality, depriving those in the developing world from access to basic medicines, the norm was reshaped and redefined to cater for those who could not afford expensive patented medicines. Wording and contextualising an issue in the most effective and attention-grabbing way brings norm entrepreneurs a step closer to successful norm creation.

Stage 4 – Dialogue with the Conservative Actors

Some states take an active interest in the processes of network configuration and issue formation on some issues, alongside civil society and epistemic communities. Those governments who are convinced of the need for the creation of a new norm become part of

¹⁶³ R. Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" – pp. 639

the activist network and help raise concerns at the inter-governmental level. The states who support the normative *status quo*, together with other actors who are opposed to the proposed changes constitute the group of conservative actors. The dialogue stage is in essence another stage of negotiations, but this time mainly among states who have the material capabilities, the bargaining power and the administrative authority to effect change in international norms and regulations. This phase is critical because convincing states and other actors of the need for urgent action on a question not on their agenda is not an easy task, and if these negotiations fail a normative idea goes off the international agenda and back to the preparation stages.

The dialogue between pro-active and conservative states is a complex process of balancing of interests, negotiating trade-offs, calculating costs and benefits, threats and opportunities. What makes this process of negotiations even more challenging is the existence of large disparities between the participants in inter-governmental negotiations, as they have different political agendas, strategic positioning within the global system, and perceptions of risk, uncertainty, economic development, etc.

Power dialogues take place between state experts and independent experts who are part of the norm-promoting network; experts working for industries that are directly affected may also join in the discussions.¹⁶⁴ The dialogue with states can lead to their agreement on the need for the creation/change of a norm in the international system or to their declining to deal with the proposed issue. If states are not interested or strongly disagree on the need or feasibility of the creation/change of a norm, this could either end the life of the normative idea or take it back a stage or two in its evolution for the idea to be

¹⁶⁴ P. Haas, "Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone". outlines an interesting turn in the position of DuPont - the company, which was at the time the world leader in the production of CFCs – in support of CFC limitation, which speeded up the process of the rule formation – pp. 205

modified and made more attractive or at least less threatening for states' interests. Once states have agreed in principle to the need of creating a new norm regulating behaviour, we can say that they have reached the point of political closure on the normative issue.

The dialogue between pro-active and conservative states usually takes place over protracted periods of time. It may take years for states to agree even in principle that there is a need for a new norm to further regulate their behaviour. Non-state actors take active part in these negotiations by providing information, expertise, by lobbying national governments, by mobilising public opinion, etc. States, however, are better equipped to complete these negotiations, as they often have leverage against each other in the world system. Government officials can bargain their way through normative negotiations by means of offering and accepting trade-offs, as well as by means of threats and coercion.

Stage 5 – Reaching Political Closure

The concepts of stabilisation, closure, and tipping all denote a social moment in which a scientific fact or a norm becomes accepted as default and as a part of the operational environment of actors. As discussed earlier, the specificity of this point stems from the fact that in one way or another, the differences between scientists, civil society, political actors, industry representatives, which are seemingly irreconcilable, are resolved and they reach an agreement to establish a behavioural norm. This social moment is extremely important even though it remains understudied. Political closure, I argue, similarly to scientific closure, as studied by Engelhardt and Caplan, may come in different forms. Political closure may be a result of genuine consensus; it may be reached by coercion and threat; closure may be a product of political bargaining and trade-offs. The manner in which closure is arrived at affects the creation of more or less effective behavioural norms. When closure is forced, for example, the created norm is likely to be

contested in the future and controversies are likely to re-open closures. Political closure, it must be kept in mind, however, is different from normative and scientific closures in that the former are horizontal closures, reached among like-minded actors, who are willing to find a point of consensus. Political closure, on the other hand, is vertical, involving both states and non-state actors. It is often based on the smallest common denominator among actors' interests, and even on coercion or political pressure by the more powerful. Political closure needs to be studied separately from the former two examples because of the dynamics of power, which are completely different among states and between states and other actors. Political closure is based on normative and scientific closures and in cases where the latter are solid, emerging from genuine consensus, political closure has the likelihood of being more stable, resulting in more effective norms.

State negotiations draw together activists from transnational civil society, independent experts and other organisations interested in the development of the normative idea. Since most negotiations are conducted at the United Nations or one of its agencies, procedures have been put in place, over the years, to involve non-state actors in the processes of norm negotiations.¹⁶⁵ When states discuss changes to the international normative environment the debates attract the attention of economic actors as well. International businesses, TNCs, and industry organisations often choose to set their agendas at the national level where they have better access to policy-makers through established channels of lobbying. Depending on the normative issue, economic actors may choose to build coalitions at the international level, and these often command impressive material resources. In any case, economic power tends to always be represented at international

¹⁶⁵ The United Nations have created a mechanism via which NGOs can gain consultative status with some of its agencies. In 1996, the UN Committee of Non-Governmental Organisations was created (CONGO) to facilitate relationships with NGOs - <http://www.ngocongo.org/ngopart/index.htm>

negotiations.

The point of closure is reached when the majority of states involved in these political negotiations agree on the need to create a new norm. This crucial moment needs to be examined in more depth. According to the sociologists of knowledge, the point of stabilisation is a social moment when the new norm loses its reference to the process of negotiation and the actors involved in its formation, and becomes part of the recognised moral context of international relations.¹⁶⁶ Similarly, constructivists in IR define the tipping point as the point when “the old norms [begin to] produce social disapproval”.¹⁶⁷ Therefore, this is also the moment in time when the need to regulate behaviour with a clear normative prescription is accepted by states. Those states who are normative entrepreneurs tend to internalise the new behavioural norm early during the negotiations. Their governments often create domestic legal norms on the new normative issue to reflect on their conviction on the new normative principles. The states who oppose the need for a new norm may be lured into agreeing by means of persuasion, coercion, or bargaining. But these states are also the ones who avoid compliance where possible.

Proof that political closure has taken place can be found in intergovernmental debates, where discussions move on from the normative negotiations on the need for a new norm to more practical negotiations of how best to achieve the objective of the new norm. Further proof that political closure has taken place is the changing nature of political debates – from normative and scientific (truth-seeking) to more technical, concerned with spelling out clear normative principles. Political closure signifies the beginning of a process of internalisation of a normative prescription. Evidence that closure has taken place can be found in the negotiating records, in political speeches and reviews of governmental

¹⁶⁶ B. Latour and S. Woolgar, *Laboratory Life – The Construction of Scientific Facts* – pp. 176

¹⁶⁷ C. Sunstein, *Free Markets and Social Justice*. (Oxford University Press. New York; 1997) – pp. 38

conferences.

The concepts of closure of a debate, a resolution of a scientific dispute, a norm cascade have been studied only in so far as to identify them as a part of the scientific, historic, political and social processes of truth-seeking. The “closure project”¹⁶⁸ has focused attention primarily on the classification of the existing types of closure and on the historical study of the types of closure applied to issues with different composition of social, political and scientific elements.¹⁶⁹ More research, however, is needed to assist in devising clearer mechanisms of detecting and measuring political closure, as it is a complex and multilayered social event.

Stage 6 – Legalisation

Not all behavioural norms reach the stage of legalisation, as some remain customary practices and tacit understandings. Legalisation is a complex process because states primarily, but also other non-state actors involved in the discussions of legal texts, are particularly meticulous about the use of language and even punctuation. Legalisation can take years to complete and sometimes norms lose the momentum of the negotiations leading up to the decision to legalise and may become meaningless in political terms by the time they are legalised. The process of legalisation can be sped up by demands of industries for efficiency, by strong political personalities, by information of large scale human suffering, by pressure from the public and so on. What is important, however, is that legalisation is effective and not purely superficial. States are careful when they spell out obligations that will be binding them in the future and are likely to affect national interests,

¹⁶⁸ H. Engelhardt and A. Caplan, eds. *Scientific Controversies – Case studies in the resolution and closure of disputes in science and technology*

¹⁶⁹ *Ibid.* – pp. 615

domestic agendas, and strategic calculations. States which have been conservative in the previous stages often see in the process of legalisation a chance to avoid being bound and responsible for their actions in a particular normative area, or a chance to bargain on other normative issues, making their acceptance of one document contingent upon benefits in another sphere of international politics. There has been a growing interest among IR scholars in studying the processes of legalising new and existing standards of behaviour,¹⁷⁰ as the process involves not only political negotiations, but also technical legal knowledge and expertise and reflects a side of international relations that has been largely ignored by the traditional theories.

Stage 7 – Institutionalisation/Operationalisation

There has been an increasing tendency to legalise international norms and to spell out clear rules, parameters to state obligations, and timelines for adopting specified policies. However, the process of legalisation has often not succeeded in producing strong enough mechanisms and clear prescriptions that are sufficient to induce norm-compliant state behaviour. Further legal documents – like specific agreements and protocols – are then negotiated when the initial pressure from public opinion, normative, scientific and business networks has died away. Secondary agreements and protocols provide an opportunity to fine-tune international norms, to improve their effectiveness and further clarify, if needed, their meaning and scope. The process of institutionalisation may take place both in stage six and stage seven, and relates to the creation of institutions to oversee the functioning of and compliance with the new norm. Institutionalisation is a vital part of norm development but is a purely administrative process.

¹⁷⁰ *International Organization* - Special Issue “Legalisation of World Politics” – Vol. 54, no. 3, 2000

This research argues that in its evolution every norm passes through the above stages at least once. The process of norm development does not guarantee that ideas and normative beliefs will always evolve into an institutionalised, operational international norm. However, this theoretical model does provide some clarity on the process of norm development, on the roles of the different actors involved, on the importance of the interplay between scientific knowledge and normative beliefs, and on the way in which these shape a new norm. It also leads to an inquiry into the link between norm-compliance and the process of negotiating new norms.

The research tools of the social constructivists and the sociologists of knowledge will be useful in providing a more holistic and in-depth understanding of the processes leading up to the creation of new norms, as they are sensitive to the influence of such factors as social dynamics, power relationships, and shared understandings.

CHAPTER 3

PROTECTING INDIVIDUALS FROM THE USE OF TORTURE

After centuries of practicing torture in different forms, for various purposes and under the veil of diverse justifications, humankind, indirectly represented by the UN General Assembly, finally decided to draw up a prohibition of the practice of torture in a legal document with more solid standing and weight – the Convention Against Torture (CAT). Why did this process of outlawing the use of torture work in 1984 and not earlier or indeed later? Was there anything specific in the context of the timing? What was the catalyst that triggered off the creation of the new norm? And indeed, how did this catalyst influenced states in proceeding towards further limitations of their sovereignty? My research of the processes leading up to the creation of CAT in 1984 will seek answers to all of these questions.

Some suggest that humankind matures, evolves, becomes civilised and this evolution explains the creation of new norms of state behaviour.¹⁷¹ Studies of torture in medical journals, social and historical accounts, reveal that humankind (or at least some authoritative parts of it) indeed evolves, if only to invent newer and more ingenious ways to break down the human body and spirit without physically killing an individual.¹⁷² Optimism and pessimism about human morality have been in constant flux throughout the process of researching this very grim topic. Sparing the reader gruesome tales of death, survival and the continuation of life of trauma and pain, I will present a review of processes and campaigns by means of which I aim to reconstruct the historical development of the

¹⁷¹ J. Keane, *Violence and Democracy*, (Cambridge University Press, Cambridge: 2004)

¹⁷² J. Glover, *Humanity – A Moral History of the Twentieth Century* (Pimlico, London: 2001)

norm banning the use of physical and psychological torture for whatever purpose, by any authority.

My account of the processes leading up to the creation of the behavioural norm that prohibits the use of torture will begin with a brief examination of the history of the practice of torture. The latter holds clues and recurring themes that are of great importance to our understanding of the underlying nature of torture as well as the type of prohibition needed to make torture as morally unjustifiable and as for example slavery or genocide. The failures of previous campaigns to outlaw the use of torture have the potential to teach us essential lessons of what makes some campaigns successful while others remain insufficient to make the needed difference.

I will track the varying purpose and justification for the use of torture from the dawn of civilisation, through the glorious times of Ancient Greece and Rome and all the way through to the European Enlightenment. I will then draw attention to a period of European history (19th century) when according to various accounts of historians and philosophers, judicial torture came to be outlawed in Europe,¹⁷³ before it was brought back to life during the two world wars, and the post-war world. The end of the Second World War, infamous for its inhuman atrocities, marked the beginning of a new normative era where human dignity and integrity acquired a prominent place and an ever-increasing importance in international politics. Medical and psychological research conducted with concentration camp survivors of WWII in search of appropriate methods of rehabilitation

¹⁷³ “By the 1920s a European scholar could write “that torture was a distant relic of a barbarous past, a practice forever left behind on man’s (*sic*) journey to progress” - Amnesty International, *Report on Torture*. (Duckworth in Association with Amnesty International Publications, London: 1973) – pp. 25; “[i]n 1874, Victor Hugo proclaimed ‘torture has ceased to exist’... [i]n 1929, the *Encyclopaedia Britannica* proclaimed that torture was ‘only of historical interest as far as Europe is concerned’ – J. Conroy, *Unspeakable Acts, Ordinary People – The Dynamics of Torture*, (Vision Paperbacks, London:2001) – pp. 30; “Nineteenth century historians of torture could write with a sense of freedom from institutions and culture of the past...[h]aving identified once and for all the enemies of reason and humanity... [that they] were at last free of them” – Edward Peters, *Torture*, (Basil Blackwell, London: 1985) – pp. 77

and compensation, began to show the width and depth of problems experienced by survivors of torture and other cruel, inhuman, degrading treatment and punishment.¹⁷⁴ Medical experts and researchers were starting to take active interest in examining the effects of torture on individuals and in proving scientifically what type of torture has been applied. In the meantime, political history was unfolding with decolonisation and self-determination of peoples taking place which led to increased violence used by imperial powers and local political groups grasping for political power. A number of authoritarian regimes came to power in Central and South America in the 1970s, during the peak of the Cold War when the Soviets were determined to withstand any political opposition at home, and torture was one way of achieving this political agenda. In this hostile and violent political climate Amnesty International embarked on a world-wide campaign to abolish torture, which eventually led to the creation of CAT.

The core research of this chapter is centred on Amnesty's campaign, which ran during the 1970s and early 1980s. This normative movement was supplemented by other more technical campaigns concerned with the use of torture and the involvement of medical professionals in these inhumane practices. The primary purpose of this case study is to examine how the historical facts and material evidence fit the theoretical model of norm development. A secondary aim is to show how the interplay of normative ideas and scientific knowledge created a solid foundation for a successful normative campaign, which left very little room for manoeuvre to states who were unwilling to bind their behaviour with a new norm. The overview of the history of torture reveals the dynamic of the use of torture and the failures of previous campaigns to outlaw its use, which can provide useful

¹⁷⁴ *Danish Medical Bulletin*, vol. 27, no. 5, 1980 – this issue of the journal included a number of papers on the issue of torture from a medical seminar held in Copenhagen, 1979, under the auspices of Amnesty International.

insights as to what had gone wrong and why. Thus, by the end of this chapter, there will be not one but two types of proof of what circumstances aid and hinder the evolution of behavioural norms.

One of the most complex issues in this campaign is the creation of a comprehensive definition of torture. Defining the working terms is of vital importance to any research. However, since part of this chapter is dedicated to the study of how the legal definition of torture was arrived at, using the current legal definition might result in circular reasoning. Accordingly, I will offer a working definition of torture, which will be employed up until the moment when I come to consider the construction of the current legal definition of this practice. In their first report on torture published in 1973, Amnesty International used the following explanation of what their campaign considered torture to be: “Torture is the systematic and deliberate infliction of acute pain in any form by one person on another, or on a third person, in order to accomplish the purpose of the former against the will of the latter.”¹⁷⁵ Although the above definition is a clear depiction of the contemporary practice of torture, it by no means represents the limits of the use to which torture has been put through the ages. Europeans had indeed come to be a step away from outlawing judicial torture in the 19th century,¹⁷⁶ but the practice became common place again (although under different justification) during the Second World War and was later redesigned in the 1970s to serve the interests of oppressive regimes in power which were prepared to use any means necessary to retain control in politically volatile times.

¹⁷⁵ Amnesty International, *Report on Torture*. (Duckworth in Association with Amnesty International Publications, London: 1973) – pp.31

¹⁷⁶ See *Infra* note 3

Brief History of Torture

From the tribal world to the XVIII century

Torture is a much older practice than we often think. Most historical accounts take us as far back as Ancient Greece and Rome.¹⁷⁷ But George Riley Scott, in his book expressly dedicated to compiling an exhaustive account of the history of the practice of torture, reminds us that there is hardly “a savage or primitive race which does not employ torture either in its religious rites or its code of punishment”.¹⁷⁸ Scott continues to point out that “torture is rarely absent from the theosophic, initiatory and other rites adopted by the savage tribes. The callous attitude of primitive man (*sic*) towards bloodshed, the lack of sympathy for suffering, and the phlegmatic reaction to death itself, are all in accord with the exhibition of stoicism in circumstances of danger or suffering”.¹⁷⁹ In other words, ‘the systematic and deliberate infliction of acute pain’ to fellow individuals for purposes of initiation, punishment, or mere extermination (in the case of prisoners of war) has been an inseparable part of the social life of humans from the dawn of human existence.

Ancient Greece and later the Roman Empire saw the institutionalisation of justice-giving and the centralisation of this power in the hands of a chosen few¹⁸⁰ (VIII-V BC). Torture, some historians say, was a procedure applied only to slaves and only when they had been convicted of a crime, while “torture of the citizen was forbidden”.¹⁸¹ The free-man (*sic*), however, could only be tortured in cases of accusations for treason; in other words, the free citizen should very rarely be subjected to torture. This however was not

¹⁷⁷ Amnesty International, *Report on Torture*. (Duckworth in Association with Amnesty International Publications, London: 1973) – pp.23; J. Langbein, *Torture and the Law of Proof – Europe and England in the Ancien Regime*, (The University of Chicago Press, Chicago: 1976) – pp. 3-4; J. Conroy, *Unspeakable Acts, Ordinary People – The Dynamics of Torture* – pp. 26-8.

¹⁷⁸ George Riley Scott, *A History of Torture*, (T. Werner Laurie, London: 1940) – pp. 35

¹⁷⁹ *Ibid.* – pp.36

¹⁸⁰ Edward Peters *Torture* – pp.12

¹⁸¹ Amnesty International, *Report on Torture* – pp. 23; G.R.Scott, *A History of Torture*, – pp. 44; E. Peter, *Torture*, – pp. 16.

case in practice, as confirmed by the observations of historians - Gibbons indicates that “the extension of legal torture to cases of treason virtually annulled the principle by which the free-man (*sic*) was supposed to be exempt from the *quaestio* except in these supposedly rare cases of treason, because it was a comparatively easy matter to bring a variety of offences into this somewhat elusive category”.¹⁸² Peters notes a similar trend, dated to the period between II –IV centuries: “ [it was] indicated by a rescript of the Emperor Valentinian in 369... that although torture could be routinely applied in the case of treason, and exceptionally by personal command by the emperor, it was, nevertheless, widely and indiscriminately applied to freemen (*sic*) for far less offences”.¹⁸³ What becomes clear from these historical accounts is that the use of torture once authorised is hard to control even when the perimeters of its use are strictly limited.

The following centuries saw the continuing application of torture – “the Christian Church adopted the Roman law of torture in regard to treason, applying it to heresy, which they construed to be ‘treason against God’”.¹⁸⁴ Torture became the natural punishment for anyone accused of heresy. A curious historical finding of Scott is that “[o]nce anyone was suspected of heresy the public waited neither for guidance nor authority from Church or State... They tortured the suspect until a confession was secured, and then without more ado burned him at the stake... The penalty of burning may be said therefore to have been devised in the first place, not by the State, but by the public”.¹⁸⁵ In other words, the spread of torture as punishment for heresy was a bottom-up development, if we are to classify these social dynamics in contemporary terms. While this practice was justified by the

¹⁸² G.R.Scott, *A History of Torture* – pp. 44 citing E. Gibbon *History of the Decline and Fall of the Roman Empire* (London: 1776-88).

¹⁸³ E. Peters, *Torture* – pp. 32

¹⁸⁴ G.R. Scott *A History of Torture*, – pp. 53

¹⁸⁵ *Ibid.* – pp. 54-5

Church, the use of torture for judicial purposes was denounced at a very high level.¹⁸⁶ These double standards of the permissibility of the use of torture indicate that from the early days of the exercise of judicial torture, the practice had its opponents mainly due to the possibility of punishing innocent persons. Historical sources show, however, that regardless of objections by the Church and by philosophers, both religious prosecution and the judicial system in Europe continued to use the methods of torture carried on from Roman times.¹⁸⁷

The Holy Inquisition is clearly the peak of the use of torture as a punishment for heresy - historically spreading from XII to XVIII century, geographically encompassing almost all of today's Western Europe – Germany, Holland, Spain, Portugal, and France.¹⁸⁸ The Catholic Church ruled by means of terrorising the populace and using its unrestrained power over everyone irrespective of political, economic, or social status. Apart from the Holy Inquisition, the secular judicial system became quite fond of torture itself. Torture has been documented as an “irregular police procedure” in the twelfth century.¹⁸⁹ This practice quickly evolved within the legal system that was developing under the political order of the Catholic Church, to become the “queen of proofs”.¹⁹⁰ Torture was not only established as a legitimate part of the legal proceedings in criminal cases, but also as an official instrument for extracting confessions. This instrument was initially quite crude – if a confession under torture was confirmed by a confession away from the torture chambers, this amounted to enough evidence for a judge to give out a guilty verdict. The use of torture as part of the

¹⁸⁶ Scott cites St Augustine in denouncing the use of torture from the view that “should the accused individual be innocent, he will undergo for an uncertain crime a certain punishment, and that not for having committed a crime, but because it is unknown whether he committed it”; Scott further cites Lea (*Superstition and Force*. Philadelphia, 1878) that “In 384 a synod at Roma denounced the use of torture by civil courts” – G.R.Scott, *A History of Torture* – pp. 56

¹⁸⁷ G.R.Scott, *A History of Torture* - pp. 53-85; E.Peters, *Torture* – pp. 40-73

¹⁸⁸ G.R.Scott, *A History of Torture* – pp. 64-85

¹⁸⁹ E.Peters, *Torture* – pp. 54

¹⁹⁰ Ibid.

law of proof was refined by the German law on criminal procedures – *Constitutio Criminalis Carolina* of 1532.¹⁹¹ Further limitations were introduced - for example, a person who is tortured cannot be subjected to ‘suggestive questioning’, he/she is not expected to merely confess guilt but to give out details of the crime, which need to be verified in turn¹⁹² etc. All these rules were “designed to enhance the reliability of the confession of guilt”¹⁹³ and limit false confessions under torture. At this point in the 16th century torture could not have been abolished because there was no other mechanism of judicial proof to replace it, so moral arguments, no matter how strong, stood no chance in producing any practical difference. To sum up, in the period between the 12th and 18th century, torture was an integral part of the criminal branch of the legal system; it was practised openly and supposedly served a clear purpose – to provide sufficient evidence for indictments.

Torture was practiced openly in many other parts of the world – China, Japan, India; America, Africa, the West Indies, and Mauritius were all involved in the slave trade, and slavery was intricately related to torture as the latter was one of the methods of ensuring obedience and control.¹⁹⁴ What all these early accounts of torture have in common, is that torture was used from a position of power to suppress dissent and to ensure obedience and unconditional submission to a certain authority – be it the Church, the slave master, or the social order. And although the Catholic Church denounced judicial torture publicly as early as the 4th century, even though the Church was one of the most influential actors of the day, the moral condemnation alone did not suffice to discontinue the practice.

¹⁹¹ J. Langbein, *Torture and the Law of Proof – Europe and England in the Ancien Regime*. (The University of Chicago Press, Chicago: 1976) - pp.5

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ G.R.Scott, *A History of Torture* - pp. 102-133

Torture in the XVIII and XIX century
Movements to Discontinue the use of Judicial Torture

The 18th century was the time when judicial torture was first outlawed by European rulers – judicial torture was discontinued in England in 1640, in 1740 Frederick the Great abolished torture in Prussia, in 1786 the practice was abolished in Italy, in 1789 France followed suit, then came Russia in 1801, Spain in 1812, Japan in 1873.¹⁹⁵ The abolition of judicial torture, however, was insufficient to rule out torture altogether, since the practice remained an acceptable punishment.

The abolition of judicial torture marked an important normative turning point in the history of outlawing the use of torture. Understanding the dynamics of the process leading up to this abolition will be useful in gaining an insight into the process of changing social constructions. There are two rivalling explanations for the discontinued use of judicial torture. The first one is that the humanitarian spirit of the Enlightenment, along with the powerful rhetoric of respected philosophers, influenced the rulers, who in turn changed the laws¹⁹⁶. The second explanation is that a revolution in the law of proof took place, which was the cause of the abolition of judicial torture, since neither the political authority, nor the judiciary, had any further interest in preserving it.¹⁹⁷ Both these explanations pose important questions that are relevant to the contemporary inquiry into the development of the norm against the use of all types of torture. A question stemming from the first explanation above is whether moral arguments in themselves have the power to change the perception of those who are in a position to alter the social rules. Another question, prompted by the rivalling explanation, is whether norms evolve purely as a result of social

¹⁹⁵ G.R.Scott, *A History of Torture* - pp. 135-6

¹⁹⁶ “The efforts of Beccaria in Italy, leading to the abolition of torture in 1786, and of Voltaire in France... had influence in other countries” who later also abolished the use of judicial torture – G.R.Scott, *A History of Torture* – pp. 136

¹⁹⁷ J. Langbein, *Torture and the Law of Proof* – pp. 55-65

changes – if that is the case, then norms cannot be seen as catalysts for social change, but rather the effects of it. And another question that arises is why the political powers of the day backed up judicial reform and institutionalised it, after they had failed to outlaw judicial torture earlier. The discussion of the outlawing the use of torture will return to these questions and I will begin by examining the above explanations in light of their critics.

As mentioned earlier, the argument to discontinue the use of torture in the judicial process dates as far back as the 4th century and the writings of St Augustine. Philosophical argument only managed to make a difference in the 18th century, according to Scott, when famous names such as Cesare Beccaria in Italy and Voltaire in France published their strong views and justifications against the use of judicial torture. The work of Beccaria is considered particularly influential:

No man (*sic*) can be judged a criminal until he be found guilty; nor can society take from him the public protection, until it have been proved that he has violated the conditions on which it was granted... If guilty, he should only the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If he be not guilty, you torture the innocent; for in the eyes of the law, every man (*sic*) is innocent, whose crime has not been proved... Besides, it is confounding all relations, to expect that a man (*sic*) should be both the accuser and the accused; and that pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture. By this method, the robust will escape, and the feeble be condemned.¹⁹⁸

This carefully constructed argument makes sense in the context of the European Enlightenment when the value and importance of the human individual, along with revised notions of justice had taken centre-stage in the social sciences.

Arguments against the use of torture, however, were not new at this time and there is no evidence of an explicit causal relationship between these arguments and the abolition of torture. According to Langbein, who is the author of the rival explanation for the abolition of judicial torture, argues that the ‘classical explanation’ is not sustainable because philosophers alone could not change the policies that monarchs chose across Europe. “The critique of judicial torture... did little to demonstrate the workability of a

¹⁹⁸ G.R.Scott, *A History of Torture* – pp. 135-6

criminal justice system shorn of the power to investigate under torture”,¹⁹⁹ that is to say, the lack of a mechanism to replace judicial torture has prevented the philosophers from making a change in the past and there was no reason to believe that this should change in the 18th century.

Needless to say, Langbein provides a considerably more solid argument for the abolition of judicial torture in 18th-century Europe. According to his research, there was a revolution of the law of proof, which made torture obsolete²⁰⁰ and an evolution in the methods of punishment, which spared many from death (often preceded by torture).²⁰¹ The 16th and 17th centuries were the time when judges gradually obtained the power to make decisions on the basis of ‘circumstantial evidence’, namely evidence different from a confession or the accounts of two witnesses. This radical move away from the old type of proof is due, in the words of Langbein, to a gradual change in the method of governance, where “judicial discretion could be tolerated because it could be controlled. The centralisation and professionalisation of the judiciary that occurred in the absolutist states of the 16th and 17th centuries was an essential prerequisite for a system of free judicial evaluation of the evidence”.²⁰² The need to secure obedience for the relatively weak governments emerging in the Middle Ages was no longer so pressing.²⁰³

Langbein’s holistic approach to the study of the history of the abolition of torture in the 18th century provides a more solid argument and a clearer scientific explanation. It emphasizes once more that the socio-political context of events may sometimes prove crucial to our analysis of the driving forces behind social change.

¹⁹⁹ J. Langbein, *Torture and the Law of Proof* – pp. 66

²⁰⁰ *Ibid.* – Chapter 3 “The Revolution in the Law of Proof” - pp.45-69

²⁰¹ *Ibid.* – Chapter 2 “The Transformation of Criminal Sanctions” - pp. 27-44

²⁰² *Ibid.* – pp. 56

²⁰³ *Ibid.* – pp. 56

Torture during World War I and II

World War I and II saw the resurrection of unchecked human cruelty – millions died on the battle fields in WWI, while WWII became infamous for the number of civilian deaths, the attempts to exterminate all Jews, the gruesome cruelty of concentration camps and the conduct of scientific research on humans. The end of WWII marked an important watershed in world history – the resolve of ‘never again’ pushed states to develop universal norms for the protection of individual human rights,²⁰⁴ an international organisation was formed that was to represent the coming together of states around the world, the norm of state sovereignty was re-confirmed in the very Charter of the above organisation and the right to self-determination of peoples was established as one of the basic principles of international law.²⁰⁵ The end of WWII marked the beginning of an era, in which human rights were gaining importance and in which gross violations of human rights would incur personal accountability.²⁰⁶ The institutional, legal and social studies of human rights violations were accompanied by medical and psychological studies of concentration camps survivors.²⁰⁷ This is the first instant in human history when scientific knowledge about the consequences of torture, cruel, inhuman and degrading treatment began to evolve. The scientific findings took time to gain importance and to surface in the medical literature and the peak of publications of this sort was not reached until the 1970s.²⁰⁸ One should not,

²⁰⁴ Amnesty International, *Report on Torture*, – pp. 26

²⁰⁵ On the principle of sovereign equality see Art.2, paragraph 1 of the UN Charter and on self determination see Art. 1, paragraph 2 of the UN Charter – <http://www.un.org>

²⁰⁶ S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy* (Clarendon Press, Oxford: 1997) – pp. 6

²⁰⁷ P. Thygesen “The Concentration Camp Syndrome”, *Danish Medical Bulletin*, vol. 27, no. 5, 1980 – pp. 224 – referring to a study of concentration camp survivors in Copenhagen 1947-8, *citing* K. Hermann and P. Thygesen, *KZ-syndromet*. Ugeskr: 1954.

²⁰⁸ *The Times Digital* archive shows that between 1970 and 1985 almost 3000 articles have been published on the issue of torture. The archives of medical specialist journal *The Lancet* show that between 1970 and 1990, there were 22 articles, on the issue, while 26 articles were published between 1990 and 2003. The issue of

however, give these developments more credit than they are worth. Much of the medical research of the period following the end of World War II was not so much philanthropic as practical in character. Medical research of concentration camp and labour camp survivors was meant to provide information on the basis of which governments and local authorities can calculate and give out compensation and social benefits.²⁰⁹ This early research laid the foundations of further studies into the effects of extreme mental and physical suffering, which helped the campaign for the abolition of torture secure solid scientific evidence.

Thygesen cites an important scientific turning point in the late 1940s from Denmark, where “the Medico-Legal Council, when asked, determined that ‘there cannot in [their] opinion be any doubt that the distress described here (namely nervous illness and mental suffering) must be regarded as illness in the normal medical meaning of the word’”.²¹⁰ That is to say, the psychological symptoms and suffering of torture survivors, which cannot be measured in a traditional objective manner, were for the first time recognised as a sufficient basis of monetary compensation,²¹¹ as well as a medical condition in contemporary medicine. These first steps of evolving scientific knowledge supplemented much larger social and political processes in the years leading up to 1984. In the spirit of the holistic approach to social developments, I will now turn to the normative and political context created by the end of WWII.

Normative and Political Context of the Post-War World

The political and normative environment in which an idea is born is closely linked

torture hit the headlines in the 1970s partly as a result of the information that surfaced on the torture campaigns in Latin America and the Soviet Union.

²⁰⁹ P. Thygesen, “The Concentration Camp Syndrome”, *Danish Medical Bulletin*, vol. 27, no. 5, 1980, 224-8; L. Eitinger, “Jewish Concentration Camp Survivors in the Postwar World”, *Danish Medical Bulletin*, vol. 27, 1980, 232-5

²¹⁰ P. Thygesen, “The Concentration Camp Syndrome” – pp. 225-6

²¹¹ *Ibid.* – pp. 226

both to the nature of the idea and to its chances for success. Risse, Ropp and Sikkink talk about the importance of context, which they have named “world time”.²¹² According to these authors, the increase in volume of behavioural norms helps the evolution and success of new norms; that is to say, in a rapidly expanding normative context, new norms ‘cascade’ quicker.²¹³ Therefore, I feel that it is crucial here to examine the political processes and the normative environment in the years preceding the creation of CAT because they are partly responsible for the creation and acceptance of this document.

A number of fundamental political changes took place after the end of the Second World War. The Cold War began, constructing a bipolar international context, with each superpower (the USA and the USSR) forming its own set of allies, supporters, and spheres of influence. This bipolar climate had indirect implications for the revival of the practice of torture because strategic security (or rather insecurity) issues were prevailing over issues of human justice. We can clearly read this in Bull’s account of the international society of states of 1979, who is convinced that “international order is prior to human justice”²¹⁴ and that the current “international order does not provide any general protection of human rights, only a selective protection that is determined not by the merits of the case but by the vagaries of international politics”.²¹⁵

While the use of torture was not limited to either side of the Cold War, Amnesty International observed that “the developing system of the protection of human rights was centred in Western Europe”.²¹⁶ The rest of the world was relatively unconcerned about human rights, or the containment and control of the use of torture, which made the

²¹² T. Risse, S. Ropp, and K. Sikkink (eds.) *The Power of Human Rights – International Norms and Domestic Change*, (Cambridge University Press, Cambridge: 1999) – pp.21

²¹³ Ibid.

²¹⁴ H. Bull, *The Anarchical Society – A Study of Order in World Politics*, (Macmillan Press Ltd, London: 1977, 2nd edn.) – pp.85

²¹⁵ Ibid. – pp. 86

²¹⁶ Amnesty International, *Report on Torture* – pp. 26

normative campaign to outlaw this practice rather challenging. The support of Western European nations, however, became the political foundation of this normative campaign.

In addition to the bipolar climate of the Cold War, there were other powerful political processes that were taking place outside of Western Europe and North America. The 1960s saw the crumbling of colonial empires after “the myth of white supremacy, which had already underpinned colonial rule”²¹⁷ began to erode. Peoples in the colonies were eager to exercise their right to self-determination. The process of decolonisation went peacefully in some parts of the world but not in others – the examples of Algeria as one of the bloodiest self-determination campaigns, which became infamous for its violence and cruelty²¹⁸; and the politics of apartheid in South Africa²¹⁹ - illustrate this.

Violence and terror were brewing in South America as well, where authoritarian regimes came to power in the 1960s and 1970s – Brazil (1964), Chile and Uruguay (1973), Argentina (1976).²²⁰ Following the Cuban revolution and the Cuban missile crisis (1962), the United States were growing fearful that Soviet Communist influence might spread like wild fire on their very doorstep,²²¹ which meant that much effort was put in covert CIA operations to destabilise democratically elected socialist governments across Central and

²¹⁷ J. Young and J. Kent, *International Relations Since 1945 – A Global History*. (Oxford University Press, Oxford: 2004) – pp. 99

²¹⁸ There has been a series of articles in *The Times* regarding the ICRC report, which found that torture was a common practice among French soldiers who were trying to deal with Algerian rebels - “Torture Still Used on Captured Rebels – Red Cross Report on Algeria Prison Camp”, *The Times*, Jan 05, 1960, p.8; “French Paper Seized in Algiers – Issue Containing Torture Report”, *The Times*, Jan 06 1960, pp.9; Rita Maran, *Torture: The Role of Ideology in the French-Algerian War*, (Praeger, London:1989).

²¹⁹ The case of South Africa is examined by E. Peters, *Torture* – 157-8; United Nations General Assembly: Special Committee on Apartheid, *Maltreatment and torture of prisoners in South Africa: report of the Special Committee on Apartheid*. Rapporteur - Barakat Ahmad (United Nations, New York: 1973); Catholic Institute for International Relations, Human Rights Forum (British Council of Churches) and the International Commission of Jurists, *Torture in South Africa* (Catholic Institute for International Relations and the International Commission of Jurists, London: 1982); further historical detail on apartheid in South Africa is available in Calvocoressi (1996) – pp. 692-727

²²⁰ W. Keylor, *The Twentieth Century World – An International History*. (Oxford University Press, Oxford: 2001, 4th edn.) – pp. 403

²²¹ W.Keylor, *The Twentieth Century World – An International History*. – pp. 398-402

South America. The most notable case, which also became one of the catalysts of Amnesty International's campaign to outlaw torture, was the military dictatorship of General Augusto Pinochet of Chile, who "instituted a pitiless campaign of repression against leftist groups in the country... Military governments in Argentina and Brazil also clamped down hard on domestic dissidents during the 1970s, striking out at communist, socialist, and liberal democratic elements alike".²²² Some parts of Europe also witnessed the hard hand of political violence under oppressive regimes – most notable examples are Spain and Greece.²²³ Reports were leaking out of the USSR as well where, following the cruelties of the Stalinist regime, Brezhnev was re-constructing his methods of suppressing opposition by using psychiatry to redefine and 'treat' dissidence as a form of mental illness.²²⁴ Torture, violence, and disappearances were the only way for all these regimes to hold on to power and to terrify their population into obedience. It thus becomes clear that "torture was to be part of political struggle [in the period 1945-1970s] used either by the colonial power as a weapon against national liberation forces, or by local governments against domestic opposition".²²⁵ The common denominator of torture in this period was that it was government-sponsored violence, it was often covert, and governments were reluctant to submit to demands for openness and the protection of human rights.

The normative context of the times was also quite complicated. The principles of human rights protection were hard to ignore following the end of atrocities that took place during WWII. Important precedents had been set – one of those was the principle of

²²² W. Keylor, *The Twentieth Century World – An International History* – pp. 401; See also "Chilean church leaders accuse junta of Torture", *The Times*, Apr 26, 1974, pp.7; "Jurists condemn torture in Uruguay", *The Times*, Jun 17, 1974, pp. 5; "Torture in Brazil", *The Times*, May 28, 1970, pp.11; "Report on Brazil Tortures", *The Times*, Jul 23, 1970, pp. 4;

²²³ Amnesty International (1977) *Torture in Greece: The First Torturers' Trial 1975*, Amnesty International, London; Amnesty International, *Torture In the Eighties*. (Amnesty International Publications, London:1984)

²²⁴ N. Belton, *The Good Listener – Helen Bamber Life Against Cruelty*. (Weidenfeld and Nicolson, London: 1998) – pp. 270-1; M. Knipe "Soviet Camp Tortures Alleged", *The Times*, Jul 29, 1970, pp.4

²²⁵ Amnesty International, *Report on Torture* – pp. 26

individual accountability for participation in gross violations of human rights. The War Crime Tribunals of the Nuernberg and Tokyo established, on the one hand, that “a state’s treatment of its citizens in peacetime was appropriate for general international regulation”,²²⁶ and, on the other hand, that “[there is] a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and individuals... constitute international crimes not only in time of war, but also in time of peace”.²²⁷ These newly established normative ideals clashed with the Cold War normative reality where the principle of sovereignty was still overwhelmingly powerful. The two superpowers were finding it difficult to reach agreements of principle, especially on questions of human rights. The newly formed post-colonial states wanted a different international agenda from the traditional ‘high politics’ of the security and geo-strategic considerations of the Cold War. They needed an agenda concerned with development, human rights and cooperation. The United Nations were trying to balance the conflicting demands of state sovereignty and individual human rights, while ensuring that the Cold War did not turn hot.

Amidst this very unsettled climate of the early 1970s Amnesty International undertook a campaign to ban the use of torture in any circumstances. Before the findings of this research are applied to the theoretical model of norm creation, a timeline of the international and regional developments that prohibit the use of torture is presented in *Figure 2.1*. This timeline represents the processes, actors, and dynamics that shaped and

²²⁶ S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremburg Legacy*. (Clarendon Press, Oxford: 1997) – pp. 6

²²⁷ S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law* – pp.7 citing United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War 192-3* (1948)

formed the idea to ban the use of torture and lead unequivocally to the Convention Against Torture. The timeline focuses exclusively on the historical development of this behavioural norm and is the backbone of the historical reconstruction of events leading up to the creation of CAT in 1984, and the optional protocol that followed.

Figure 2.1

TIMELINE OF THE CREATION OF INTERNATIONAL AND REGIONAL INSTRUMENTS THAT PROHIBIT TORTURE

1946	ECOSOC sets up the Commission on Human Rights, whose first task is to draw up the International Bill of Rights
10-12-1948	Universal Declaration of Human Rights - Art.5 reads “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”
1949	Geneva Conventions – Art. 3 – forbids ‘cruel treatment and torture of persons taking no active part in the hostilities’ and also proscribes ‘outrages upon personal dignity, in particular, humiliating and degrading treatment’
1949/1950	European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome) – Art. 3 – “No one should be subjected to torture or to inhuman or degrading treatment or punishment”
1957	Standard Minimum Rules for the Treatment of Prisoners – adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders – “Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences”.
16-12-1966	International Covenant on Civil and Political Rights – Art. 7: “No one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one should be subjected without his free consent to medical or scientific experimentation”.
1969	The American Convention on Human Rights – signed in San Jose- Costa Rica – under the auspices of the Organization of American States, Art.5, para 2 reads “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.
1973	The delegations of Sweden, Austria, Costa Rica, the Netherlands, and Trinidad and Tobago – submitted a draft resolution according to which the General Assembly would decide to examine the question of torture.
Nov 1974	UNGA resolution 3218 – <i>Torture and other Cruel, Inhuman or Degrading Treatment or</i>

- Punishment in Relation to Detention and Imprisonment* - adopted with 125 votes in favour, 1 abstention and 0 votes against – envisages the development of an international code of ethics for police and the drafting of principles of medical ethics.
- Nov 1974 Resolution 3219 – *Protection and Human Rights in Chile*
- June 1975 AI organised a seminar on an international code of police ethics in the Hague – participants included police authorities and members of policy forces and of national and international police organisations from 8 European countries.
- August 1975 Conference on Security and Cooperation in Europe produced the Helsinki Agreement
- August 1975 A Resolution on the Role of the Nurse in the Care of Detainees and Prisoners – adopted by the International Council of Nurses in Singapore
- October 1975 The World Medical Association adopted the *Tokyo Declaration* – containing Guidelines for Medical Doctors concerning Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment in relation to Detention or Imprisonment
- Dec 1975 UNGA Resolution 3452 – *Declaration on the Protection of all Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* – Art. 3 – “No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”
- Dec 1975 UNGA resolution 3453 – to consider issues of torture, cruel, inhuman and degrading treatment or punishment in relation to detention and imprisonment
- 1977 Jean-Jacques Gautier founded the Swiss Committee against Torture (CSCT)
- 1977 World Psychiatric Association – adopted the *Declaration of Hawaii* – “the psychiatrist must never use his professional possibilities to violate the dignity or human rights of any individual or group... The psychiatrist must on no account utilize the tools of his profession, once the absence of psychiatric illness has been established. If a patient or some third party demands actions contrary to scientific knowledge or ethical principles the psychiatrist must refuse to cooperate”
- 1978 There existed 3 separate drafts of the convention against torture – 1) CSCT – Gautier along with the Henry Dunant Institute; 2) Government of Sweden; 3) International Association of Penal Law
- Dec 1979 UNGA Resolution 34/169 contained an Annex, which spelled out the Code of Conduct for Law Enforcement Officials.
- 1981 African Charter on Human and People’s Rights – signed in Nairobi under the auspices of the Organisation of African Unity – Art. 5 – “All forms of exploitation and degradation of man (*sic*), particularly... torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”.
- 1981 Universal Islamic Declaration of Human Rights – Art. 7 - “No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to

- anyone related to or held dear by him.”
- 1981 The International Conference on Islamic Medicine adopted the *Declaration of Kuwait*
- 1982 UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Principle 2 – “It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment”.
- 1984 Amnesty published its report *Torture in the Eighties*
- Dec 1984 UNGA adopted the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.
- 1985 The UN Centre for Human Rights established the post – Special Rapporteur on Torture - Peter Kooijmans
- Dec 1985 Inter-American Convention to Prevent and Punish Torture
- 1987 ACAT and other national groups formed an International Federation.
- Nov 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- 1988 European Principles of Medical Ethics – adopted by the European medical regulatory associations
- Dec 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Dec 2002 Optional Protocol to the Convention Against Torture is adopted by UN Resolution A/RES/57/199
- June 2006 The Optional Protocol to the UNCAT enters into force after 20 states ratify it

Theoretical Model and Empirical Findings

Formulating the idea

At the end of the Second World War there was a popular resolve to outlaw the purposeful hurting and maiming of the human body for political reasons, which was reflected in the creation of various international declarations and conventions for the protection of human rights. With the advance of the Cold War – the nuclear stand-off between the superpowers, the dividing of the world into spheres of influence, the processes of self-determination and self-governance in the newly independent countries – the political will to make the protection of human rights a top priority faded away. The international political context of the 1970s was one of turbulent change, “industrial militancy, student revolts, neo-nationalist terrorism and shadow armies of the right”.²²⁸ It was this political turmoil that not only gave the initial impetus to the campaign for the abolition of torture but also helped to sustain the determination of its supporters all the way through to 1984.

By the early 1970s it seemed as though the 25 years that had passed since the end of World War II had managed not only to dilute the resolve of nations to cater for individual human rights, but also to obliterate the public memory and revulsion at the large scale atrocities of torture, dictatorship and inhumanity. Dictatorial regimes were employing all possible means to eradicate opposition and political dissent (Algeria, South East Asia, Chile, Argentina, USSR). The United States was more interested in not allowing the spread of Communism than in alleviating the suffering of individuals under authoritarian rulers. The US foreign policy was one of appeasement of political leaders in the name of attracting

²²⁸ N. Belton, *The Good Listener – Helen Bamber Life Against Cruelty*. - pp. 215

their allegiance to the cause of anti-communism and capitalism.²²⁹ Atrocities as gruesome and widespread as those committed by the Nazis in the Second World War were taking place unchecked because the US was more worried about the ‘domino-effect’ of spreading Communism. Western Europe remained the stronghold of human rights protection. Although political violence was not an alien concept (Greece, Spain and Portugal all experienced periods of dictatorial regimes) and the Communist bloc was the next door neighbour, the Western Europeans were the driving force behind the campaign against torture.²³⁰

It was in this unstable and often hostile political climate that Amnesty International highlighted for the first time the magnitude of the problem of the spreading use of torture, declaring in its 1973 Annual Report that the practice had taken “epidemic proportions”.²³¹ Amnesty International was not alone in sounding the alarm – the International Commission of Jurists (ICJ) was conducting independent studies into the legal practices of various countries in the world, acknowledging in its reports that there were breaches of human rights and torture was used on prisoners who were often held without trial.²³² The United Nations were also concerned about the use of political coercion and discrimination, reported from Chile, South Africa, Argentina, Algiers, to name but a few.²³³

²²⁹ This is illustrated by historical sources discussing US foreign policy in relation to the spread of military regimes in Latin America *see cit.* 47

²³⁰ The delegations of Sweden, the Netherlands, the United Kingdom, France, Austria, Belgium, at the United Nations were some of the strongest supporters and most active actors in the creation of the Convention against Torture – J. Burgers and H. Danelius, *The UN Convention Against Torture – A Handbook on the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*. (Martinns Hijhoff Publishers, Norwell, Massachusetts, USA: 1988)– pp. 31-113

²³¹ Amnesty International (1973-4) *Annual Report*, British Section, London – pp. 8

²³² “Human Rights in the World – Torture Continues”, *The Review International Commission of Jurists*. June, 1973, no. 10 – the article cites an ICJ report on the use of torture in Brazil from 1970 (ICJ Review, no.5), allegations of torture in Iran – ICJ Bulletin, No.26, 1966 and ICJ Review, No.8, 1972; Indonesia (ICJ Review, no.4, 1969) and further allegations of torture in Turkey, Uruguay, South and North Vietnam, Spain, Greece, South Africa.

²³³ *See* “Study of Reported Violations of Human Rights in Chile, with Particular Reference to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” in Commission on Human Rights, Report of

While the UN concerned itself only with the most striking cases of gross violations of human rights (focusing mainly on Chile and South Africa), to the ICJ the continued use of torture was a problem of political will, in view of the already existing legal provisions that contained a prohibition on the use of this practice. Amnesty International emerged as the moral entrepreneur of the campaign against torture because the organisation observed the problem of torture in its entirety – as a breakdown of legal procedure, as a political method of coercion and intimidation of the opposition, as a social problem of the morale and ethics of those who participated in torture and other inhuman treatment of fellow individuals.²³⁴ Amnesty began a campaign to establish a new behavioural norm and to effect a comprehensive prohibition on the practice of torture.

The organisation produced a number of country reports aimed at raising awareness of what went on under some military dictatorships.²³⁵ It participated in and organised a number of conferences discussing the use of torture and the possible avenues for its effective prohibition. Amnesty's *Report on Torture* of 1973 highlighted that:

the 32nd Session (2Feb- 5Mar 1976), ECOSOC, Official Records 60th Session, Supplement 3 (UN Doc Index: E/5768, E/CN.4/1213) – pp. 16-19; “Telegram to the Government of Chile” in Commission on Human Rights, Report of the 32nd Session (2Feb- 5Mar 1976) – pp. 71; Summary Records of the 2065th meeting of the 29th Session of the Third Committee of the UNGA held on 15th Oct 1974 (UN Doc Index: A/C.3/SR.2065) – pp. 79; Summary Records of the 2066th meeting of the 29th Session of the Third Committee of the UNGA held on 15th Oct 1974 (UN Doc Index: A/C.3/SR.2066) – pp. 81-3.

²³⁴ The comprehensive approach of Amnesty International becomes obvious from the reports of the early conferences on the issue of torture where participants split between different working groups addressing separate aspects of torture – the legal, the medical, the political, and the socio-economic. See Amnesty International, *Report on Torture*; Amnesty International, *Conference for the Abolition of Torture – Final Report*. Paris, 10-11Dec 1973; Report of the “International Seminar on Torture and Human Rights” – Palais de l’Europe, Strasbourg, 3-5 Oct 1977, published by Amnesty International, London; Amnesty International Publications, London; Amnesty International, *Report on an Amnesty International Medical Seminar “Violations of Human Rights: Torture and the Medical Profession”*, Athens, 10-11 March 1978; N. Rodley, *The Treatment of Prisoners Under International Law*, (Oxford University Press, Oxford: 1999, 2nd edn.) – pp. 20-1.

²³⁵ Amnesty International, *Iran*, (Amnesty International Publications, London: 1976); Amnesty International, *Prisoners of Conscience in the USSR: Their Treatment and Conditions*, (Amnesty International Publications, London: 1976); Amnesty International, *Report of an Enquiry into Allegations of Ill-treatment made against the Security Forces in Northern Ireland by Persons arrested on 9 August 1971*, (Amnesty International Publications, London: 1972); Amnesty International, *Report on allegations of Torture in Brazil*, (Amnesty International Publications, London:1974); Amnesty International, *Tortured to Death in Uruguay: 22 known cases*, (Amnesty International Publications, London: 1976).

The widespread use of torture is alarming in itself, but what is especially alarming is that the consensus against torture is being weakened not only by its constant violation but by the attitude of people in general. Many people are indifferent and some appear ready to accept the practice, and to say so in public.²³⁶

Amnesty began a campaign which was to be different from any other campaign against torture so far, as efforts were concentrated on rendering the practice of torture inexcusable under any circumstances. Torture was to be made, in the words of Amnesty's Chairman Sean MacBride, "as unthinkable as slavery"²³⁷ and this was an important novelty. Historical overviews of the use of torture confirm that what all previous campaigns to prohibit the use of torture had in common was that they were not aiming for a complete ban on the practice.²³⁸ This in turn confirms that the attempt to build an unconditional consensus against torture, as discussed in Amnesty's *Report on Torture*, is one of the most important characteristics of the campaign of 1972.

One argument that seemed to undermine the consensus against torture at the time was a philosophical question presented as a hypothetical scenario.²³⁹ The classical example questioning the permissibility of the use of torture in extreme situations is comparatively simple – it concerns the "ticking bomb" scenario in which the authorities (police, government, judicial authority) can approve the use of torture if they believe that they have in their hands a terrorist who has planted a number of bombs in a big city, where there is no time to evacuate the city and the only way to spare innocent civilian lives is by applying

²³⁶ Amnesty International, *Report on Torture*. – pp. 18

²³⁷ E. Prokosch "Amnesty International's Anti-Torture Campaign" in Forrest, Duncan (eds.) *A Glimpse of Hell – Reports on Torture Worldwide*. (Cassell, London: 1996) – pp. 26

²³⁸ G. R. Scott, *A History of Torture* – pp.44-6 – the author discusses the limitations placed on the use of torture as judicial procedure and juxtaposes that to the lack of such restrictions on the use of torture as punishment

²³⁹ Although formulated as a philosophical hypothetical, the debate over the permissibility of torture under narrowly specified circumstances can be spotted in sociological, medical and political journals, which further confirms the complexity of the issue and the diversity of viewpoints – B. Paskins "What's wrong with Torture?" *British Journal of International Studies*, no.2, 1976 – pp. 140-44; H. Shue "Torture" *Philosophy and Public Policy*, vol.7, no.2, 1978 – pp.141-3.

physical or psychological pressure on that individual.²⁴⁰

The critique of the permissibility of the use of torture is based largely on some of the implicit assumptions in this classical scenario, which undermine its apparent clarity and deprive it of its determinism.²⁴¹ Firstly, there is always the question of whether the authorities have the right person for interrogation – in emergency situations innocent people get dragged into the interrogation process – “the category of victims ripples out into the society catching ‘not only the terrorists but their friends, their neighbours, even strangers whose political views are remotely similar’”.²⁴² Secondly, studies have shown that different individuals respond to physical pain in different ways – in the words of the former chief interrogator for Israel’s General Security Services (Shabak) “in some cases, the more aggressive you get, the more these men [speaking of religious extremists] will withdraw into their own world, until you cannot reach them”;²⁴³ other times physical pain and psychological suffering may cause disorientation, amnesia, hallucinations and one is never certain as to how factually correct the acquired information would be, not to mention the possible situation where the subject of interrogation makes false confessions or gives out incorrect information in order to make torture stop.²⁴⁴ Thirdly, “in desperate situations punishment for terrorist crimes can often become retaliation, readily inflicted by acts of torture”,²⁴⁵ without convictions and due process of law. Fourthly, “as [interrogators] become more reliant on torture they are less likely to use other methods of interrogation,

²⁴⁰ This example is cited in all publications quoted in *op.cite* 67, 68, 69, 70.

²⁴¹ Amnesty’s Report on Torture claims that the classical apology for torture does not fit the facts - Amnesty International, *Torture in the Eighties* – pp.6

²⁴² G. Jones “On the permissibility of Torture” *Journal of Medical Ethics*, vol. 6, 1980, pp.11 - citing Jonsen and Sagan(1978) *Man and Medicine*, 3

²⁴³ M. Bowden, “Now Let’s Talk” *The Sunday Telegraph – Review*, Dec.7, 2003

²⁴⁴ N. Gordon and R. Marton (eds.) *Torture – Human Rights, Medical Ethics and the Case of Israel*. (Zed Books in association with the Association of Israeli-Palestinian Physicians for Human Rights, Tel Aviv. London: 1995) – pp. 4

²⁴⁵ G. Jones “On the Permissibility of Torture” – pp. 11

and their ability to assess the effectiveness of torture diminishes”.²⁴⁶ The classical apology for the use of torture becomes the “just once” excuse that turns into an institutionalised practice and “erodes the moral and legal principles that stand against a form of violence that could affect all of society”²⁴⁷ and this could not be more clearly illustrated than the history of torture in Ancient Greece and Rome. Shue draws an analogy between a saying in jurisprudence which holds that “hard cases make bad law” and the hypothetical philosophical case where “artificial cases make bad ethics”.²⁴⁸

Amnesty International, working closely with the International Commission of Jurists and other regional and local human rights NGOs, accumulated information about the atrocities and human rights violations that political regimes were committing worldwide and that helped the coalition formulate the need for a new international norm that would help prevent such acts of violence and cruelty. Amnesty exposed the scale of the problem in its first report against torture, indicating that torture was widespread in more than 60 countries around the world.²⁴⁹ The original focus of Amnesty’s activities to support and care for prisoners of conscience explains the interest of Amnesty in matters concerning the rights of prisoners, their well-being in custody along with issues of freedom of political opinion. In other words, the continued interest of the organisation in these issues coupled with the political climate in which state interests came prior to individual rights and the growing awareness of the widespread use of torture by governments, made Amnesty International one of the main moral entrepreneurs on this campaign. The Campaign Against Torture began with a petition to the UN General Assembly, which had more than one million individual signatures from all over the world and requested the UN ‘to outlaw

²⁴⁶ Amnesty International, *Torture in the Eighties* – pp.7

²⁴⁷ Ibid.

²⁴⁸ H. Shue, “Torture” *Philosophy and Public Policy*, vol.7, no.2,1978 – pp. 141

²⁴⁹ Amnesty International, *Report on Torture*, – “World Survey of Torture”- pp.109-218

immediately the torture of prisoners around the world'.²⁵⁰

In conclusion, the identity and specific characteristics of the actors who initiated this normative campaign influenced the seriousness with which their claim was received by the society of states. Amnesty International is an influential NGO, and a trusted network partner with consultative status in ECOSOC, the ILO, UNESCO; the International Commission of Jurists is made up of highly qualified professionals, closely networked with government circles and awarded consultative status by ECOSOC and other UN agencies; the interest of UN agencies provided a vital normative and institutional impetus too. The novel approach that Amnesty adopted – campaigning for a total ban on the use of torture – was, as we will see, a significant characteristic of this campaign, which helped it become stronger from the start.

Network Configuration

Network configuration and issue formation in the case of the Convention Against Torture took place simultaneously at a number of conferences that brought together very different actors, as will be demonstrated later. The two processes are examined separately because they have distinct dynamics. Whereas network configuration involved a process of finding the commonalities between the actors from the different fields drawn in the campaign, the process of issue formation focused on the definition of the nature and scope of the problem.

The Campaign Against Torture involved a large array of states and non-state actors. For purposes of manageability, I focus my study only on those actors who were most influential in developing the norm prohibiting the use of torture. Non-state actors who

²⁵⁰ E. Prokosch “Amnesty International’s Anti-Torture Campaign” – pp. 27

seemed to have a direct impact on the development of the new behavioural norm included professional organisations from the legal and medical fields whose efforts were linked by Amnesty International and the International Committee of the Red Cross to form a strong coalition (*Figure 2.2*). Smaller social groups such as the Swiss Committee Against Torture, the World Council of Churches, the International Association of Penal Law and other grass-roots and professional organisations also played a role by adding their voice to the campaign but, as we shall see, the most pressure was exerted by a handful of powerful non-state organisations and communities of experts. The network of support for the outlawing of torture began to materialise out of a much larger network of actors involved with the strengthening of the human rights regime. Expert groups such as the British Medical Association,²⁵¹ or the International Commission of Jurists,²⁵² the Council for International Organisations of Medical Sciences (CIOMS)²⁵³ and many more, have all been involved in campaigns to persuade governments to create more rigorous standards for the protection of human rights, prior to their involvement in support of Amnesty's campaign.

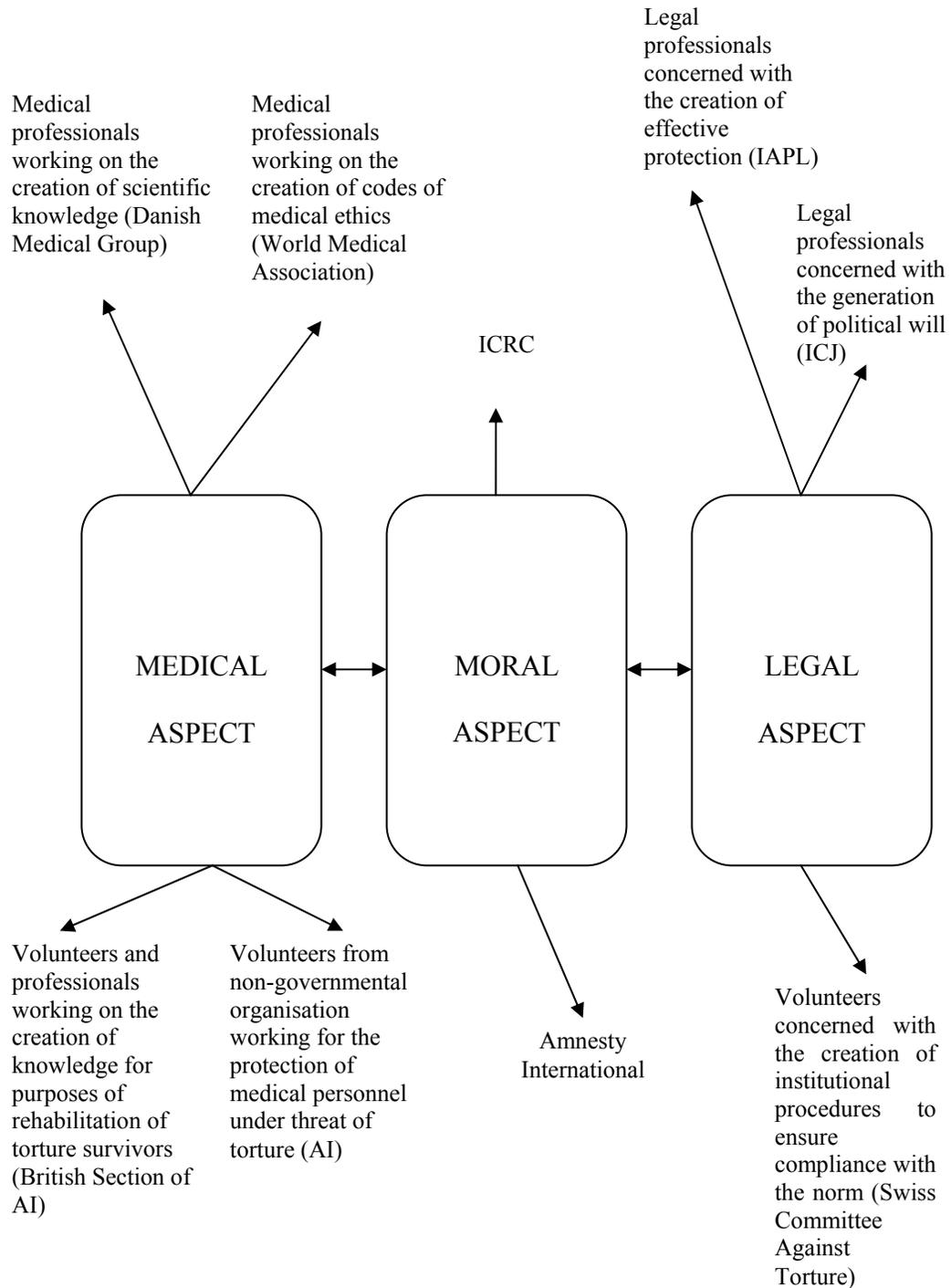
Figure 2.2

²⁵¹ <http://www.bma.org/ap.nsf/Content/About+the+BMA+-+An+outline+history+of+the+BMA> – visited on 19th June 2004.

²⁵² http://www.icj.org/article.php3?id_article=2957&id_rubrique=11&lang=en ; and H. Tolley, *The International Commission of Jurists – Global Advocates for Human Rights*. (University of Pennsylvania Press, Philadelphia, USA: 1994) – pp. 31-45 and 79-113

²⁵³ http://www.cioms.ch/what_is_cioms.htm

NETWORK CONFIGURATION



At the time when Amnesty International began their campaign, scientific knowledge about the effects of torture, and other cruel, inhuman and degrading treatment was limited and scattered,²⁵⁴ the ethical segment of the campaign had the broad support of public opinion but that was not enough to impress policy makers, and the legal campaign, while well supported by international human rights legislation (*See* the timeline in *Figure 2.1*), had yet to yield practical results. The network of support emerged with the task of consolidating knowledge, expertise and ethics in order to communicate persuasively the need for action against torture.

To understand more clearly the configuration of this complex network of support, I will start by examining the make up of the two professional segments of the campaign – the medical and the legal, and will then show how these were drawn closer together by organisations that committed themselves to the protection of human rights and dignity. It is important to note here that some states were very supportive of the campaign for the prohibition of torture and were to a large degree responsible for the discussions and work done at the United Nations General Assembly. The role of these states will be discussed in more detail in the following stages of the campaign, as at this stage most of the work was done by non-state actors.

The medical segment of the normative network is interesting not only in terms of its configuration but also in terms of the interplay between the forces of demand and supply of technical knowledge, which have had an enormous impact on the creation of the actual

²⁵⁴ “It was not until after the end of World War II that general opinion and the medical world became interested in the suffering by those maltreated by torture and their chronic pathological reactions – or rather, their normal reactions to pathological treatment” (L. Eitinger, “Torture – a perspective on the past” *Journal of Medical Ethics*, vol.17, 1991, Supplement – Proceedings of the International Symposium on “Torture and the Medical Profession” – University of Tromsø, Norway, June 5-7, 1990 – pp. 9) and it was certainly not until the mid-1970s that knowledge began to amass on the physical and psychological sequelae of torture victims (*See – Danish Medical Journal*, Vol. 27, no. 5, Nov. 1980)

Convention Against Torture. Medical professionals, as members of various scientific associations, approached the issue of torture from different angles, which produced unequivocal scientific consensus. Four distinct areas of interest for scientific communities developed over time – one group of medical professionals focused attention on the acquisition of medical knowledge of the sequelae (both physical and psychological) of torture and ill-treatment for the purposes of rehabilitation and medical treatment of torture survivors. These medical professionals will be designated as Medical Theme 1 (MT1). A second cluster of experts were concerned with studying the sequelae of torture and ill-treatment as a source of scientific proof for purposes of obtaining compensation and social benefits for torture survivors, as well as for purposes of participation in judicial proceedings to provide conclusive evidence for those who suffered ill-treatment – Medical Theme 2 (MT2). A third grouping of both doctors and nurses were concerned with the issue of medical ethics in general and the participation of doctors, both directly and indirectly, in torture and ill-treatment, which includes resuscitation of patients for more torture, medical exams declaring patients fit for torture, the provision of false information on patients' records that conceals or undermines the torture applied, the participation of doctors in the invention of new methods of torture, and, last but not least, experimentation on humans – Medical Theme 3 (MT3). And the last theme – Medical Theme 4 (MT4) – was the concern of doctors and nurses for colleagues who may be under threat of being tortured themselves. The efforts of all these medical professionals assisted the realisation of the complexity and the seriousness of the implications of the use of torture. They were compounding scientific knowledge, which was very influential in this normative campaign. Some medical groups were working on more than one of the above themes, but as we will see, with time they tended to focus on obtaining specialist and in-depth knowledge on one of the aspects presented above.

MT1 is most clearly reflected in the work of the British and Danish Medical Sections of Amnesty International. It was the British Medical Group, however, that found its focus on this medical theme, as it provided the context out of which the Medical Foundation for the Care of Victims of Torture was born.²⁵⁵ The Danish Medical Group slowly shifted attention to issues under MT2 in the late 1970s and early 1980s.²⁵⁶

Observations of the work done under MT1 are based on two major sources – the biography of Helen Bamber and publications of Amnesty’s medical groups in medical journals. Helen Bamber was an exceptional individual who managed to form a power node within a large normative network due to her strong beliefs, will-power and determination. Her efforts towards easing the suffering of those affected by torture have been truly remarkable and have contributed much towards understanding the experiences of torture victims. The involvement of Bamber with the treatment and rehabilitation of torture victims and concentration camp survivors began as early as the immediate aftermath of World War II when she joined the Jewish Relief Unit and worked under the auspices of the UN Relief and Rehabilitation Association.²⁵⁷ In the early years of the Campaign Against Torture, Bamber became a member of Amnesty International and soon came to assume an executive position (a chair of the Hampstead group, later elected to the Executive Council of the British Section of Amnesty). Bamber worked directly with torture survivors and in the mid-1980s she felt that the urgent actions of Amnesty did not fulfil the needs for rehabilitation, care and socialisation of those who were rescued from the torture chambers.²⁵⁸ This led in

²⁵⁵ <http://www.torturecare.org.uk/about/aboutHistory.htm>

²⁵⁶ <http://www.rct.dk/usr/rct/webuk.nsf>

²⁵⁷ N. Belton, *The Good Listener – Helen Bamber Life Against Cruelty*. – pp. 74-5;

<http://www.torturecare.org.uk/about/aboutHistoryHelen.htm>

²⁵⁸ *Ibid.* – pp. 275 – “The intimacy of the linkage between torture and cure had never seemed so obvious... it was no longer simply about writing letters and demanding the end of individual imprisonment, but about ending a whole set of practices and habits. Three strands were weaving together in [Helen Bamber’s] life: the

1985 to the creation of the Medical Foundation for the Care of Victims of Torture. The Foundation began to function initially under the auspices of the Medical Section of Amnesty International and with the professional support of three Royal Colleges, of Surgeons, Physicians and Psychiatrists.²⁵⁹ The work of this remarkable individual shows the connections that are built between issues, organisations, and individuals in the process of network configuration and issue formation. Individuals are the building blocks of these social networks, and the moral standards of these individuals are the glue that holds these networks together.

The focus of Medical Theme 1 is intricately related to that of Medical Theme 2. Nowhere was this more obvious than in the work of the Danish Medical Group of Amnesty International. It was formed in 1974 by Dr. Inge Kemp Genefke, shortly after Amnesty began its worldwide Campaign Against Torture.²⁶⁰ The medical group was engaged with active scientific research into the sequelae of torture and ill-treatment and its primary concern was with the accumulation of knowledge of the after-effects of torture, which would then allow medical professionals to treat survivors and legal professionals to use medical evidence in a court of law. The Danish Medical Group participated in and organised professional seminars specifically focused on torture, in an attempt to popularise their concern and to gather more knowledge from professionals with similar experience. Attention was focused on the study of Greek torture victims in 1975 and 1976,²⁶¹ exiled

urge to campaign for human rights; the belief that medical ethics were poorly understood and vulnerable to abuse; and the need to pay attention to the victims”

²⁵⁹ <http://www.torturecare.org.uk/about/aboutHistory.htm>

²⁶⁰ O. V. Rasmussen and I. Lunde, “Evaluation of investigation of 200 torture victims”. *Danish Medical Bulletin*, vol. 27, no.5, 1980 – pp. 241; A. Gellhorn, “Violations of Human Rights: Torture and the Medical Profession”. *The New England Journal of Medicine*, vol. 299, no. 7, 1978 – pp. 358; O.V. Rasmussen, “Medical Aspects of Torture”. *Danish Medical Bulletin*, Supplement 1, January 1990 – pp. 2

²⁶¹ U. Abildgaard, G. Daugaard, H. Marcussen, P. Jess, H. Draminsky Petersen, and M. Wallach, “Chronic Organic Psycho-Syndrome in Greek Torture Victims”. *Danish Medical Bulletin*, Vol.31, no.3, 1984 – pp. 239.

Chileans in Denmark, exiled Uruguayans in France, Argentinians in Italy, missions were sent to Northern Ireland and Spain, all in the period between 1975 and 1982.²⁶² The majority of publications revealing the findings of the Danish Medical Group were in the *Danish Medical Bulletin*, which is a renowned professional journal published in English. In other words, the Danish Medical Group was actively working to both produce and diffuse scientific knowledge. There have been many difficulties in the process because so little was known about the psychological after-effects of physical abuse and not many people were willing to come forward and be subjects of such research. The physical sequelae of torture presented their own set of problems, as the human body often heals, leaving little proof of ill-treatment.

In 1982, the Amnesty International Danish Medical Group managed to extend its activities and reach the conventional professionals – doctors and nurses who worked in hospitals. Dr Inge Kemp Genefke initiated the creation of the Rehabilitation and Research Centre for Torture Victims (RCT), which was housed at the National Hospital of Denmark.²⁶³ Alongside the medical examinations, which were leading to the creation of knowledge on physical and psychological sequelae of torture and ill-treatment, patients were given highly skilled professional care aimed at their rehabilitation and the handling of any emergency situations.²⁶⁴ The RCT marked a moment when more marginal, unconventional research was accepted and taken into the conventional medical profession, which gave more weight and authority to the former's findings.

The concern of MT3 (medical ethics) is not new but has been subdued for some time before it was brought to the attention of the profession in the 1970s. One of the first

²⁶² O.V. Rasmussen, "Medical Aspects of Torture". *Danish Medical Bulletin*, Supplement 1, Jan 1990 – pp. 3

²⁶³ <http://www.rct.dk/usr/rct/webuk.nsf/fWEB?ReadForm&Load=RTIG-4L5JTU>

²⁶⁴ Ibid.

works to stir the medical profession with its revelations was Maurice Pappworth's book *Human Guinea Pigs*, which came out in 1967. Pappworth, a British doctor, described in detail 205 experiments with patients on the British wards of the National Health Service, naming the doctors who had conducted the experiments. Bamber, who was his assistant at the time, recalled that the reaction to the book both from the public and the profession was one of criticism and denial.²⁶⁵ This illustrates how unwritten codes of medical ethics had not sufficed to protect patients at the time. Although the general reaction towards the publication had been negative, the theme had been picked up by the *British Medical Journal* and distinguished professors began to side with Pappworth.²⁶⁶ This move amongst the British medical circles laid the foundations of the creation of codes of professional ethics. According to the historical overview of the activities of the World Medical Association (WMA), the latter has been heavily influenced by the British Medical Association in the process of the construction of the Code of Medical Ethics.²⁶⁷

The World Medical Association became the focal point of international discussion of medical ethics, which was one of the first concerns of the organisation in the immediate aftermath of World War II.²⁶⁸ The practices in concentration camps, the medical experimentation that turned into torture and the use of medical expertise for the extermination of people, outraged the world and raised many questions about the moral norms that were influencing doctors and other medical personnel.²⁶⁹ The WMA denounced "the violations of medical ethics and the crimes committed by doctors in times of war...

²⁶⁵ N. Belton, *The Good Listener* – pp. 204-6

²⁶⁶ *Ibid.* – pp. 206

²⁶⁷ <http://www.wma.net/e/history/tokio.htm>

²⁶⁸ http://www.wma.net/e/history/golden_years.htm

²⁶⁹ Amnesty International, the French Medical Commission and Valery Marange, *Doctors and Torture – Collaboration or Resistance?* (Bellew Publishing. London: 1989) – pp. 7

[and recognised the] need to implement safeguards in human experimentation.”²⁷⁰ These concerns were re-enforced by the practices of dictatorships and military regimes around the world which made use of doctors and medical knowledge in appalling ways. In 1952 the WMA created a permanent Committee on Medical Ethics. A request for help was taken to the Committee by the British Medical Association in 1974 with regards to the growing crisis in Northern Ireland and the mounting concern of the doctors of the armed forces involved.²⁷¹ With the help of BMA and other national medical organisations and the Committee on Medical Ethics, in 1975 the WMA drew up the ethical guidelines for medical practices concerning torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment. These are known as the *Declaration of Tokyo*.²⁷² The Declaration of Tokyo inspired the United Nations, which requested the World Health Organisation to compile a code of professional ethics for medical staff as early as 1975.²⁷³ The final version of the Draft Code of Medical Ethics was approved by the UN General Assembly in 1979.²⁷⁴ These events reveal the complex interactions between various actors on a number of different aspects of the norm outlawing the use of torture. The cooperation among them ensured that the medical community presented a thorough evaluation of the problem of torture, which was evidence that could not be ignored.

Medical Theme 4 relates to the protection and assistance to doctors who have become victims of torture themselves. Amnesty has reported that in some instances health

²⁷⁰ http://www.wma.net/e/history/golden_years.htm

²⁷¹ <http://www.wma.net/e/history/tokio.htm>

²⁷² Ibid.

²⁷³ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 21; Amnesty International, *Annual Report 1974-1975*. (Amnesty International Publications, London: 1975) – “Campaign for the Abolition of Torture” – pp. 21

²⁷⁴ The Draft Code of Medical Ethics was the result of the joint efforts of the World Health Organisation and the Council for International Organisations of the Medical Sciences (CIOMS), in consultation with the World Medical Association and other non-state epistemic communities – A. Gellhorn, “Medicine, Torture and the United Nations”, *The Lancet*, vol.315, issue 8165, 1980 – pp. 428

professionals may be subjected to human rights violations and has provided details of individual cases of doctors who have been under threat of imprisonment or torture and have had to flee their countries.²⁷⁵ MT4 has thus become part of the larger concern for individuals under threat of torture.

The legal aspect of the network of supporters was represented mainly by the International Commission of Jurists – an organisation of professionals which sustained the interest and support of its members throughout the campaign for the creation of a norm prohibiting the use of torture and the consequent instrument for the safeguarding of this norm - the Optional Protocol of the Convention against Torture. The ICJ comprises both individual jurists and other national organisations²⁷⁶ and cooperates closely with a wide range of NGOs and IGOs.²⁷⁷ According to the historian of the ICJ, during the seven years between 1963 and 1970, when Sean MacBride²⁷⁸ was elected Secretary-General, the commission acquired an interest in international legal reform and standards setting.²⁷⁹ Since the ICJ was primarily concerned with the creation and the improvement of legal instruments for the protection of human rights, MacBride's relations with Amnesty

²⁷⁵ Amnesty International Health Professional Network – <http://www.web.amnesty.org/web/web.nsf/print/health-index-eng> ; Amnesty International, the French Medical Commission and Valery Marange, *Doctors and Torture – Collaboration or Resistance?* (Bellew Publishing. London: 1989) – pp. 73-80

²⁷⁶ H. Tolley, *The International Commission of Jurists – Global Advocates for Human Rights*. (University of Pennsylvania Press, Philadelphia, USA: 1994) - pp.38

²⁷⁷ The ICJ had consultative status with UNESCO, and maintained close cooperation with ECOSOC, the ILO, the UN Human Rights Commission, the Organisation of American States, the Organisation of African Unity, the Arab League, the ICRC, Amnesty International, the World Council of Churches, etc. – S. MacBride, "Meeting of the International Commission of Jurists". *Bulletin of the International Commission of Jurists*, vol. 28, 1966 – pp. 27

²⁷⁸ MacBride had an impressive political career – he was the Minister for External Affairs for Ireland between 1948 and 1951, President of the Committee of Ministers of the Council of Europe in 1950, one of the co-founders of Amnesty International (together with Peter Benenson) and was also elected a Chairman of the Executive Committee of Amnesty between 1961 and 1975, Secretary General of the ICJ (1963-1970), Chairman of the International Peace Bureau (1968-1974), Assistant Secretary General of the UN (1973-1977), Nobel Peace Prize winner in 1974 - <http://www.nobel.se/peace/laureates/1974/macbride-cv.html>

²⁷⁹ H. Tolley, *The International Commission of Jurists – Global Advocates for Human Rights* – pp. 98.

International meant that the two organisations could combine their efforts and expertise.²⁸⁰ MacBride was thus another one of the links between the moral campaign and the expert campaign for the creation of an effective ban on torture.

In the international campaign against torture, the ICJ “used their technical expertise and elite contacts to lobby public officials for limits on state power”.²⁸¹ The organisation took an active part in the creation and adoption of various standards of professional ethics and the Standard Minimum Rules for the Treatment of Prisoners and Offenders. The ICJ was also an important participant in the discussions of the Draft Convention Against Torture and took part in the drafting of other regional documents dealing with the issue.²⁸² The ICJ cooperated closely with a couple of organisations that have greatly contributed to the campaign with their enthusiasm, expertise and practical ideas. One of these organisations is the Swiss Committee Against Torture (CSCT). It was founded by Jean Jacques Gautier in 1975.²⁸³ Gautier was a banker and a lawyer, but above all a deeply religious man and that was the source of inspiration for his philanthropic actions.²⁸⁴ The CSCT was very active in drawing attention and support for the campaign against torture. Gautier began his work with a very specific idea – to produce an effective legal norm against torture, which will have provisions to avoid impunity.²⁸⁵ It was only due to the close cooperation between Gautier, De Vargas and MacDermot (the Secretary General of the ICJ at the time) that this idea materialised and later became the foundation of the

²⁸⁰ Ibid. – pp. 106

²⁸¹ Ibid. - pp. 165

²⁸² Ibid. – pp. 167;

²⁸³ F. De Vargas, “History of a Campaign” in International Commission of Jurists and Swiss Committee Against Torture (eds.) *Torture: How to Make the International Convention Effective – A Draft Optional Protocol*. (International Commission of Jurists, Geneva: 1979) – pp. 41-3

²⁸⁴ Personal correspondence with Françoise De Vargas – Secretary General of the CSCT during the years preceding the adoption of the Convention Against Torture in 1984.

²⁸⁵ F. De Vargas “History of a Campaign” in International Commission of Jurists and Swiss Committee Against Torture (eds), *Torture: How to Make the International Convention Effective* – pp. 42-3.

Optional Protocol to the CAT.²⁸⁶

Another organisation that deserves attention is the World Council of Churches in International Affairs – it too became involved in the efforts to prohibit the use of torture in close cooperation with AI and the ICJ. The actions of Churches against torture have been documented in various publications – the Catholic Institute for International Relations, for example, published a report on torture in South West Africa, which was banned prior to publication by the South African Authorities. The report included a number of letters by priests to the authorities expressing concerns about the use of torture by police and the negligence of medical staff towards torture victims; it further demanded that torture be condemned “without any qualifications or relativization”.²⁸⁷ US Churchmen who visited Uruguay in 1972 reported the widespread use of physical and psychological torture on political prisoners in the country.²⁸⁸ The CSCT reported on their joint activities with the World Council of Churches in the campaign against torture²⁸⁹ and the ICJ published a report from the 30th Meeting of the World Council of Churches’ Central Committee, which discussed the need to celebrate the 30th Anniversary of the Universal Declaration of Human Rights by taking special actions to eliminate torture.²⁹⁰

The International Association of Penal Law (IAPL) was an integral part of the campaign against torture, as it submitted a Draft Convention Against Torture to the UN General Assembly. IAPL had been working closely with the ICJ, Amnesty International,

²⁸⁶ Personal correspondence with Françoise De Vargas

²⁸⁷ H. Hunke and J. Ellis, *Torture – A Cancer of Our Society*, (Catholic Institute of International Relations, London: 1980). This report on Torture in South West Africa/Namibia was banned prior to publication by the South African authorities on 20th January, 1978 – pp. 11, 13-6.

²⁸⁸ “Human Rights in the World – Torture Continues”, *The Review International Commission of Jurists*. June, 1973 – pp. 11

²⁸⁹ International Commission of Jurists and Swiss Committee Against Torture, *Torture: How to Make the International Convention Effective – A Draft Optional Protocol*. (International Commission of Jurists, Geneva: 1979) – pp. 49

²⁹⁰ H. Thoolen, Thirty Years After the Universal Declaration of Human Rights – the need for and International Convention Against Torture, (Commission of the Churches on International Affairs, Geneva: 1978) – pp. 1-2

the CSCT, and the ICRC to prepare the draft, which, as became known later, was very close in substance to the proposal submitted by the government of Sweden.²⁹¹ The activities of the organisation, however, have not been expressly focused on the fight against torture and this is why IAPL is only considered here as a marginal actor.

The medical and the legal aspects of the campaign against torture were drawn together by two powerful moral entrepreneurs - Amnesty International and the International Committee of the Red Cross. These two organisations worked to enhance the cohesion needed for a better chance for the campaigners to lobby nation-states. AI and the ICRC fused the ethical, medical and legal aspects of torture to form an authoritative network for the protection of individuals against the excesses of secret state activities or anyone else.

For its part, Amnesty International organised a number of conferences bringing together the representatives of the legal and medical professions. The Conference for the Abolition of Torture in Paris 1973 was split into four commissions dealing, in turn, with issues of individual and institutional responsibility, of the social and political factors affecting torture, of the international, regional, and national legal factors affecting torture and with the medical aspects of the latter.²⁹² The Conference ended with a list of recommendations for action by the legal profession, the medical experts, trade unions, business enterprises, educational and religious organisations, etc.²⁹³ Another seminar, organised by Amnesty International in Strasbourg, emphasised the need for the creation of codes of professional conduct, especially in spheres that are prone to abuse, such as medical ethics, police ethics, military ethics, and legal ethics. This seminar was attended by more

²⁹¹ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 26; H. Thoolen, *Thirty Years After the Universal Declaration of Human Rights – the need for and International Convention Against Torture* – p.14

²⁹² Amnesty International, *Conference for the Abolition of Torture – Final Report*. Paris, 10-11Dec 1973. (Amnesty International Publications, London: 1973) – pp. 12-14

²⁹³ *Ibid.* – pp. 14-15

than 90 participants, representing nation states and organisations such as the WMA, the World Psychological Association, the International Commission of Jurists, the ICRC, and the International Association of Lawyers.²⁹⁴

The International Committee of the Red Cross played an important role as well, acting as a bridge between the medical and the legal aspects of the issue of torture. On the one hand, the organisation had extensive first-hand experience with torture victims, as the ICRC is the only organisation which can visit prisoners both in peace-time and war, even behind enemy lines.²⁹⁵ On the other hand, the ICRC has the trust of and some influence over national governments due to its high professionalism and continued political neutrality. The ICRC has played an important role in constructing the principles of the Geneva Conventions and consequently in successfully lobbying states to accept them, making it an organisation with ample experience of norm creation and persuasion.

Normative closure was easily reached in the campaign against torture, as is illustrated by the widespread consensus that this practice should be made illegal. Since there was little disagreement that torture is wrong, most of the negotiations among non-state actors were centred on discussions of how best to formulate the issue so that policy-makers have limited room to wiggle out of their responsibilities to uphold human rights.

Several important conclusions stem from this discussion of network configuration. Firstly, normative networks can be in a perpetual state of flux. They may be unstable as the configuration of the participating actors changes with the progress of norm evolution. Some actors leave the campaign – like Helen Bamber, who after years of working with Amnesty International became the founder of the Medical Foundation for the Care of Torture

²⁹⁴ Report of the “International Seminar on Torture and Human Rights” – Palais de l’Europe, Strasbourg, 3-5 Oct 1977, published by Amnesty International, London

²⁹⁵ Report on the 23rd International Red Cross Conference “Action of the Red Cross Against Torture”, held in Manila, Nov 1981 – pp. 5

Victims and shifted her humanitarian efforts to the field of care and rehabilitation of survivors. The World Medical Association and other regional or national medical associations also left the overall campaign against torture after the Codes of Medical Ethics were agreed upon by the UN General Assembly. There were also actors who became active partners in the campaign at a later stage. In the case of CAT, these actors were national governments (such as Sweden, the Netherlands, Austria, Costa Rica and Paraguay) who were in favour of the normative idea to prohibit the use of torture.

The second concluding point is that the various themes advanced by the network of supporters are interdependent. The medical and ethical aspects of the campaign, for example, are so closely interrelated that their separation is artificial. Medical knowledge influenced moral norms and vice versa to the extent that it is hard to say which influence is stronger and which influence came first.²⁹⁶ Legality and morality too are inseparable as legal norms are not merely technical scripts - they reflect the morality and sense of justice of the society that they govern.

The normative network against the use of torture became very strong and influential. Medical research of the sequelae of torture provided solid scientific proof that torture is a very cruel practice that leaves behind physically and psychologically broken individuals. The information-gathering by doctors and legal professionals that took place independently in the 1960s and 1970s helped the issue of torture surface on the international agenda. In this case, scientific knowledge not only sided with the normative idea but also provided a strong impetus for its evolution. Global civil society represented by

²⁹⁶ As the exchanges of opinion on the pages of some medical journals reflected, some professionals believe that the ethics of society determine the ethics of the medical profession – S. Jonas, “Doctors and Torture”, *The Lancet* – Nov. 24, 1973 - pp.1212 and A. Smith, “The Ethics of Society rather than Medical Ethics” *Journal of Medical Ethics*, vol. 8, 1982, 120-1; whereas other trust that professional knowledge carries the obligation of humaneness, compassion and altogether higher morale – M. Shokeir, “Doctors and Torture”, *The Lancet* – Dec. 22, 1973 – pp. 1439; “Torture and Philosophy – Editorial”, *Journal of Medical Ethics*, Vol. 6, 1980, 3

Amnesty, the World Council of Churches, the Swiss Committee Against Torture and other NGOs, supported by the accumulated knowledge and expertise, became a normative network that was hard to ignore even in the climate of the Cold War. The social demand for the development of medical knowledge soon became political (when nation-states got involved in the campaign) and the issue began to gather vital momentum.

Issue Formation

Setting the limits of what exactly constitutes torture, cruel, inhuman, and degrading treatment or punishment is central to outlawing these practices. Issue formation is the stage at which the network of support for the new norm determines the substance and limits to the new norm. Issue formation is most influential when based on scientific closure and consensus, and this campaign was successful in reaching consensus and gaining overwhelming support.

The historical records of previous unsuccessful campaigns to reject the use of torture display a striking similarity at this particular stage. Previously, the practice of torture had not been discarded in its entirety; instead, tentative lines had been drawn between the circumstances in which its use was permitted. While torturing slaves, for example, was acceptable in Ancient Greece and Rome, torturing the free citizen was not.²⁹⁷ And while torturing the free citizen was generally not acceptable, torturing the free citizen in cases of treason was. In the Middle Ages – the Church disapproved of and denounced the use of torture by the courts, but lynching atheists, followers of other faiths, suspected witches or even scientists was perceived as normal.²⁹⁸ Even when most European kingdoms had denounced the use of torture to extract confessions in a trial, torture as punishment, no

²⁹⁷ G. R. Scott, *A History of Torture*, – pp.44-50

²⁹⁸ *Ibid.* – pp.55-6

matter how cruel and grim, was acceptable.²⁹⁹ Even in the 18th century when the number of the polemics written against the use of torture was growing, the problem of the utility of torture in some circumstances was difficult to refute. Even Bentham, a disciple of Beccaria (one of the firmest opponents to the use of torture), conceded that “under certain circumstances [torture may] contribute to utility and therefore deserve consideration”.³⁰⁰ The tactics of setting limits on the circumstances under which torture was permitted backfired every time, as the limits of the permissible use were stretched to the extent where torture became uncontrollable, which Bentham did not fail to foresee in his thesis.³⁰¹

The stage of issue formation thus includes not only the formulation of a norm in technical terms but also incorporates an agreement on its parameters and normative scope, i.e., whether the norm applies in all circumstances or only in some, whether there are exceptions to it or not, and so on. Defining torture is no easy task as the experience of physical or psychological ill-treatment is different for every individual. Moreover, the practice itself has deep political, legal, medical, social roots and all these need to be addressed for a solid norm to come into existence. Amnesty International, as the moral leader of the campaign to support this newly evolving norm, discussed the problem of definition in its first comprehensive *Report on Torture* (1973). The authors commented on the short-comings of some of the already existing legal texts before they proceeded to propose a more comprehensive definition. The Geneva Conventions, for example, take torture to mean: “suffering inflicted on a person to obtain from him or a third person confessions or information”.³⁰² Here Amnesty emphasises the lack of reference to degree,

²⁹⁹ Ibid. – pp.91-4

³⁰⁰ M. Ruthven, *Torture – The Grand Conspiracy*, (Weidenfeld and Nicolson, London: 1978) – pp. 18

³⁰¹ Bentham anticipated the difficulty of separating the use of torture from its abuse, but failed to propose any solution to this problem – P.E. Twining, “Bentham on Torture”, *Northern Ireland Legal Quarterly*, vol. 3, 1973, 305-56 cited in M. Ruthven, *Torture – The Grand Conspiracy*, – pp. 21-2

³⁰² Amnesty International, *Report on Torture – citing* First Geneva Convention 1949, Art. 12 (2) – pp. 31

which is covered by the term ‘suffering’ and the latter is not sufficient to safeguard individuals. On the other hand, as earlier noted in Gardiner’s Report on interrogation methods for detainees in Northern Ireland, “what people can stand in relation to both physical exhaustion and mental disorientation [varies greatly]... [and] no precise limits for interrogators... can safely be specified”.³⁰³ If the term ‘suffering’ was too broad and individual resistance to pain was impossible to establish universally, Amnesty had a difficult task of coming up with wording that would both not compromise the individual’s well-being and not allow perpetrators to avoid justice by denying they have caused suffering.

Amnesty also expressed disapproval with the wording provided by the European Commission of Human Rights, which said that “torture is...generally an aggravated form of inhuman treatment... [where] the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable”.³⁰⁴ The issue of justifiability is one to which Amnesty draws special attention as a possible slippery slope.³⁰⁵ Justifiability often rests on the concept of effectiveness, which means that if torture is found to be effective, then it could be recognised as justifiable, becoming an easy case in favour of the use of torture, without even compromising the recommendations of the European Commission of Human Rights. Amnesty International has made it clear in its discussion of the pitfalls of existing definitions that it is irrelevant whether torture is used for extracting information, or for political repression, whether the practice is effective in achieving its aims or not: “no act is

³⁰³ Lord Gardiner’s Report, “Interrogation Procedures – Minor Report of the Committee of Privy Counsellors” *The Review - International Commission of Jurists*, Vol. 8, June 1972, 17-22

³⁰⁴ Amnesty International, *Report on Torture – citing Council of Europe, European Commission of Human Rights, The Greek Case: Report of the Commission*, Vol. 2, part 1, page 1 – pp. 31

³⁰⁵ Amnesty International, *Report on Torture* – pp. 31-3

more a contradiction of our humanity than the deliberate infliction of pain by one human being on another, the deliberate attempt over a period of time to kill a man [*sic*] without his dying... it is the ultimate human corruption".³⁰⁶

The definition arrived at by Amnesty International in its first comprehensive report on torture is the following: "Torture is the systematic and deliberate infliction of acute pain in any form by one person on another, or on a third person, in order to accomplish the purpose of the former against the will of the latter".³⁰⁷

The medical professionals, who were concerned with the problem of torture, concentrated their efforts, as previously discussed, around four distinct medical themes, which helped produce a more comprehensive understanding of the practice that needed to be outlawed. Scientific knowledge regarding the after-effects of torture began to evolve tentatively after the end of World War II when concentration camp and labour camp survivors were in desperate need of both medical and psychological treatment and care.³⁰⁸ What began as a scientific study to establish a medical basis for disability compensation,³⁰⁹ consequently extended to the comparison of the sequelae exhibited by concentration camp and torture survivors and thus the basis of medical knowledge in this sphere.³¹⁰ In-depth scientific knowledge took time to evolve – it was not until the late 1960s and the 1970s that specialised medical discussions emerged on the pages of medical journals and other specialised publications. The publications of Amnesty International and medical journals allow us to begin to examine and understand this complex process of knowledge

³⁰⁶ Ibid. – pp. 21-2

³⁰⁷ Amnesty International, *Report on Torture* – pp. 31

³⁰⁸ P. Thygesen, "The Concentration Camp Syndrome", *Danish Medical Bulletin*, vol. 27, no. 5, 1980 – pp. 224-7 – provides details of a study of concentration camp survivors conducted as early as 1946-7.

³⁰⁹ R. Daly, "Compensation and Rehabilitation of Victims of Torture"; P. Thygesen, "The Concentration Camp Syndrome", *Danish Medical Bulletin*, vol. 27, no. 5, 1980 – pp. 224-232

³¹⁰ P. Thygesen, "The Concentration Camp Syndrome"

development.³¹¹

Medical research and scientific debates on the pages of professional journals were one way of building a structured understanding of the consequences of torture and other cruel treatment. A multitude of medical conferences have dealt not only with the creation and establishment of scientific facts, but also with the problem of drawing up unified guidelines about the ethical norms binding doctors and other medical personnel.

A number of important conclusions have been reached by medical professionals, which have helped define the technical and moral scope of this problem. These conclusions have been supplemented by the independent findings of other non-state actors, which points towards closing the scientific debate on the need to regulate behaviour in such a way as to make torture unjustifiable. Firstly, it was established that the effects of torture constitute “a disease of a traumatic nature... This means that torture should be studied in regard to symptoms and diagnosis to gain insight into etiology, treatment and profylaxis”.³¹² This conclusion has been supplemented by the resolve of doctors participating in the Medical Conference in Athens in 1978 to produce systematic clinical studies that meet the criteria of clinical science in order to improve the care for patients while creating knowledge that could be passed to other doctors.³¹³ Secondly, medical research over the years has shown that there are sequelae that are explicitly related to particular kinds of torture (allowing this type of structured knowledge to be used in the legal system) but also that humans react

³¹¹ Amnesty International, *Conference for the Abolition of Torture – Final Report*. Paris, 10-11 Dec 1973. (Amnesty International Publications, London: 1973) – pp. 35-65; Amnesty International, *Evidence of Torture: Studies by the Amnesty International Danish Medical Group*. (Amnesty International Publications, London: 1977); Amnesty International, *Amnesty International Report* (Amnesty International Publications, London: 1977) – pp. 34-39; Report of an Amnesty International Medical Seminar “Violations of Human Rights: Torture and the Medical Profession”, Athens, 10-11 Mar 1978, AI Index: CAT 02/03/78 – Report of Working Party III – pp. 22-3; O.V.Rasmussen, “Medical Aspects of Torture”; *Danish Medical Bulletin* – Vol. 27, No. 5, 1980 – containing a report of the seminar “Sequelae and Rehabilitation of Concentration Camp Victims, Sailors from the Second World War, Hostages and Torture Victims” held in Copenhagen, Dec 8-9, 1979.

³¹² Report of an Amnesty International Medical Seminar “Violations of Human Rights: Torture and the Medical Profession”, Athens, 10-11 Mar 1978, AI Index: CAT 02/03/78 – pp. 18

³¹³ *Ibid.* – pp. 22

differently to the type of extreme stress that torture and ill-treatment cause.³¹⁴ The continuing scientific research into the after-effects of torture echoes a statement made by Amnesty International experts in 1971 – interrogations procedures aimed at “causing malfunction or breakdown of a man’s [*sic*] mental processes... constitute as great an assault on the inherent dignity of the human person as more traditional techniques of physical torture”.³¹⁵ It is widely accepted in medical circles today that when people are subjected to imprisonment and continuous extreme stress related to the anticipation of or indeed to suffering physical or mental damage, they “develop long-lasting physical and mental sequelae”.³¹⁶

The growing understanding of the after-effects of torture and the outrage at human experimentation signalled the need for the creation of unified principles of medical ethics. At its very first conference on the abolition of torture, Amnesty International made recommendations to the medical profession to safeguard their research against the possibility of it being used for torture or other forms of ill-treatment, and to refuse participation in torture and in training others for the use of medical knowledge to harm individual humans.³¹⁷ The principle efforts towards the creation of these codes have been expended by the members of the WMA in the *Declaration of Tokyo*,

It is the privilege of the medical doctor to practise medicine in the service of humanity, to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease the suffering of his or her patients. The utmost respect for human life is to be maintained even under threat, and no use made of any medical knowledge contrary to the laws of humanity.

1. The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedures

³¹⁴ O. V. Rasmussen, “Medical Aspects of Torture”

³¹⁵ Amnesty International, Report of an Enquiry into Allegations of Ill-treatment made against the Security Forces in Northern Ireland by Persons arrested on 9 August 1971 (Amnesty International Publications, London : 1972)– pp. 38

³¹⁶ U. Abildgaard, G. Daugaard, H. Marcussen, P. Jess, H. Draminsky Petersen, and M. Wallach, “Chronic Organic Psycho-Syndrome in Greek Torture Victims”. *Danish Medical Bulletin*, Vol. 31, no. 3, 1984 – pp. 239; P. Riis, “The many face of inhumanity and the few faces of its psychic and somatic sequelae”, *Danish Medical Bulletin*, Vol. 27, no.5, 1980 – pp. 213

³¹⁷ Amnesty International, Conference for the Abolition of Torture – Final Report - pp. 15

is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife³¹⁸

This declaration, along with the *Resolution on the role of the nurse in the care of detainees and prisoners* (1975) and the *Declaration of Hawaii* (1977) signalled the resolve of medical professionals to uphold their moral principles in their work and to protect their colleagues under regimes hostile to the principles of freedom, the protection of human rights and the well-being of their citizens. The declaration of the WMA and WPA inspired the UN General Assembly to further institutionalise such normative principles as another safeguard against the sovereign powers of oppressive regimes.³¹⁹ These ethical guidelines helped construct the use of torture as unethical and unacceptable, and thus promoted scientific closure to the political plane, planting the above principles into the general social normative context.

Although the acceptance of the principles of medical ethics go some way towards defining the scope of torture and creating some individual safeguards, effective change in the attitudes and actions of states can better be achieved by establishing firmer international legal standards. There are two major methods to establish and define principles of law, and thus two sources of issue formation – the legal professionals, concerned with the construction of new principles which are then proposed to policy-makers; and the courts of law, which in the process of interpreting the law and making decisions lay the foundations of new principles.

The efforts of the legal profession were reflected most clearly in the efforts of the

³¹⁸ Appendix B – Codes of Medical Ethics Concerning Torture – Declaration of Tokyo in N. Gordon and R. Marton, (eds.) *Torture – Human Rights, Medical Ethics and the Case of Israel*. (Zed Books in association with the Association of Israeli-Palestinian Physicians for Human Rights, Tel Aviv. London: 1995)

³¹⁹ The UNGA accepted the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – J. Burgers and H. Danelius, *The UN Convention Against Torture – A Handbook on the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*. – pp. 21-2

ICJ. The organisation has been particularly active in terms of liaising with other non-governmental organisations, as well as with international governmental organisations, including UN agencies, to work on the general principle of upholding the rule of law, protecting human rights and protecting individuals.³²⁰ The ICJ used various tactics to influence nation-states, such as sending trial observers, producing country reports, organising public protests and committees of inquiry, applying diplomacy or outright negative publicity.³²¹ Pressure on nation-states was seen as one of the ways to change the attitudes of governments towards the issue of torture. A report of the Secretary General of the ICJ confirmed that the practice of torture was not only contrary to the laws of almost any nation but also that there existed explicit prohibition of torture in a number of international legal instruments.³²² Hence, the problem as formulated by the ICJ was the lack of political will on the side of states to implement these regulations and to abide by them.³²³ The solution was to generate the necessary political will and to ensure that if more legal provisions were created, they would be effective in directing states to avoid the use of torture, cruel, inhuman or degrading treatment or punishment.

Various courts of law adjudicated issues relating to victims of torture and other ill-treatment. As early as 1969, the European Court of Human Rights examined the issue of torture in the *Greek Case*, finding for the first time that particular methods of extracting

³²⁰ H. Tolley, *The International Commission of Jurists – Global Advocates for Human Rights*. (University of Pennsylvania Press, Philadelphia, USA: 1994) – pp. 97-113

³²¹ *Ibid.* – pp. 80

³²² International instruments include – the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the European Convention on Human Rights, the American Declaration of Rights and Duties of Man, the American Convention on Human Rights - “Law and the Prevention of Torture” *The Review – International Commission of Jurists*, vol. 11, Dec 1973 – pp. 23

³²³ “Law and the Prevention of Torture” *The Review – International Commission of Jurists*, vol. 11, Dec 1973 – pp. 27; “Human Rights in the World – Torture Continues”, *The Review International Commission of Jurists*. June, 1973, no. 10 – pp. 10; “Lawyers Against Torture” *The Review – International Commission of Jurists*, vol. 16, June 1976 – pp. 30

information constituted torture.³²⁴ The report of the European Commission of Human Rights in these proceedings addressed two important aspects of torture – its definition and its justifiability. In its Article 3, the European Convention on Human Rights prohibited the use of torture, and other inhuman or degrading treatment or punishment in similar words as the Universal Declaration of Human Rights (Article 5),³²⁵ thus the elaborate discussion of the meaning of these terms had implications that reached far beyond the borders of the European Union. The European Commission on Human Rights stated:

‘All torture must be inhuman and degrading treatment, and inhuman treatment also degrading.’

Inhuman treatment covers ‘at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable’

Torture connotes inhuman treatment ‘which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment’

‘Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience’³²⁶

The minority report of Lord Gardiner on “the five techniques” of in-depth interrogation (keeping detainees hooded, depriving them of sleep, food and water, subjecting them to continuous monotonous noise, keeping them standing against the wall in a required posture) that were used by the British Government in Northern Ireland, clearly placed these techniques in the realm of the cruel, inhuman and degrading treatment³²⁷. Although Lord Gardiner commented that these proceedings were strictly within the domain of domestic jurisdiction and hence *sub judice* before the European Court on Human Rights, the impact of this report was significant in that it clearly distinguished between acceptable

³²⁴ N. Rodley, *The Treatment of Prisoners Under International Law*, (Oxford University Press, Oxford: 1999, 2nd edn) – pp. 76-7; *European Court of Human Rights Yearbook: The Greek Case 72* (1969)

³²⁵ The only term omitted in the European Convention is the term “cruel”, referring to treatment or punishment – M. O’Boyle “Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. United Kingdom” *American Journal of International Law*, No.71, 1977– pp. 685

³²⁶ *Yearbook of the European Convention on Human Rights – the Greek Case* (1969) cited in M. O’Boyle, “Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. United Kingdom” – pp. 685

³²⁷ Lord Gardiner’s Report “Interrogation Procedures – Minor Report of the Committee of Privy Counsellors” *The Review - International Commission of Jurists*, Vol. 8, June 1972, 17-22

and unacceptable, moral and immoral treatment of prisoners. The report also declared that emergency conditions were not a sufficient reason to justify the use of secret and illegal interrogation methods.³²⁸ The question of whether the use of torture, cruel, inhuman and degrading treatment could be justified by emergency situations was discussed by the European Court in the *Greek Case*, where some believe that the Court left the question open to interpretation.³²⁹ In the case of *Ireland v. United Kingdom* (1976) the European Commission of Human Rights corrected this misunderstanding by concluding that “The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. Article 3 makes no provision for exceptions and... there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation”.³³⁰

The process of legally formulating the problem of torture benefited greatly from the growing medical understanding of the consequences that torture survivors experience. Although it is very rarely that a direct link is drawn between the advancement of medical knowledge and the development of the law, this link exists and legal professionals have made good use of it. The findings of medical experiments on the effects of solitary confinement, the exposure to noise and the anticipation of ill-treatment have provided the basis on which lawyers claimed that the use of such techniques amounts to ill-treatment. Hence, the findings of Lord Gardiner’s report and the conclusions of the court in the *Irish Case* have not been reached independent of the development of scientific knowledge. The existence of the network of supporters who have concentrated their efforts on accumulating evidence that torture should be prohibited has thus made it easier for actors from different

³²⁸ Ibid. – pp. 22

³²⁹ N. Rodley, *The Treatment of Prisoners Under International Law*, – pp. 78

³³⁰ Ibid. – pp. 79 citing *Ireland v. United Kingdom*, 19 Yearbook 512, 750 (1976); M. O’Boyle, “Torture and Emergency Powers under the European Convention on Human Rights: *Ireland v. United Kingdom*”.

fields to work in unison and in the name of the same cause.

Closure on the technical parameters of the proposed norm to outlaw the use of torture was reached gradually, not so much due to conflicting views of the actors involved, as due to the complexity and multilayered character of the norm. Technical knowledge and standards were created in more than one professional field in a sustained effort to prevent torture perpetrators from avoiding justice. Evidence of technical closure can be found in the unified position of non-state actors in their attempt to persuade states to adopt a new norm, and also in the lack of debate over the technical parameters of the norm. Professional ethical principles emerged and were agreed on at the international level; legal decisions at the national and regional levels signalled the acceptance of the prohibition to use torture; medical professionals agreed that the consequences of torture were of a traumatic nature and rendered the practice unacceptable in the ‘civilised world’. All of these developments indicated an expanding agreement, which was becoming so solid, as to not allow states much room for political manoeuvre.

Dialogue with the Conservative Actors

The study of network configuration and issue formation has drawn attention mainly to the work of non-state actors – NGOs, epistemic communities, professional organisations. It was ultimately down to states, however, to create instruments that can effectively guide and regulate the behaviour of national governments. The existing research on the Campaign Against Torture has tended to consider separately the work done by non-state actors and the activities of states who supported the need of a prohibition on the use of torture.³³¹ Reports

³³¹ J. Burgers and H. Danelius, *The UN Convention Against Torture – Chapters 2 and 3*; C. Ingelse, *The UN Committee Against Torture – An Assessment* (Kluwer Law International, The Hague, Netherlands: 2001) –

from various conferences organised by Amnesty International show, however, that delegations from some states have participated in the discussions along with non-state actors.³³² In other words, the distinction between non-state and state actors is not sufficient to classify the position of the actors in favour or against the development of this norm.

When reports of non-state conferences and work-shops on the issue of torture and other forms of ill-treatment are examined in conjunction with the records of the discussions that have taken place at the UN General Assembly and its Third Committee,³³³ it becomes obvious that the governments whose representatives had taken part in the conferences, were also the ones who initiated and played a leading role in UN discussions of state attitudes and actions regarding the problem of torture.³³⁴ These states, which linked the activities and efforts of non-state actors to the influence of the UN, played the role of moral leaders among the member-states. Those states that attempted to downplay the problem of torture or in any other way deny the need for an effective international instrument to ban its use will be considered here as the conservative actors. In this campaign there were no states that explicitly defended the use of torture, even though there was ample evidence that many

Chapters 2 and 3 – these two publications consider primarily the work of states on CAT and give only marginal attention to the work and influence of non-state actors.

³³² Amnesty International, *Conference for the Abolition of Torture – Final Report*. – pp. 15; Resolution adopted by the Inter-Parliamentary Union “Amnesty International Campaign Against Torture – The Problem of Torture in the World”, 11th Oct 1974, Tokyo; Report of the “International Seminar on Torture and Human Rights” – Palais de l’Europe, Strasbourg, 3-5 Oct 1977, published by Amnesty International, London – to name but a few. Some of the delegations which have been present at all conferences include – Austria, Belgium, Canada, Greece, Germany (FR), Ireland, the Netherlands, Norway, Sweden, Switzerland, the UK and the USA.

³³³ The Committee on Social, Humanitarian and Cultural Affairs, more often referred to as the Third Committee is one of the subsidiary organs of the UN General Assembly. It is one of 6 main committees. The UNGA refers to the Third Committee “agenda items relating to a range of social, humanitarian affairs and human rights issues that affect peoples all over the world” – <http://www.un.org/ga/61/third/third.shtml>

³³⁴ Verbatim Records of the 2065th Meeting of the Third Committee of the UNGA – 29th Session, 15th Oct 1974 – paragraphs 20, 22, 29; Verbatim Records of the 2066th Meeting of the Third Committee of the UNGA – 29th Session, 15th Oct 1974 – para. 1,3, 28; Verbatim Records of the 2067th Meeting of the Third Committee of the UNGA – 29th Session, 16th Oct 1974 – para 18, 31

governments had authorised its practice.³³⁵ Open support for torture as state policy was made unthinkable by the Universal Declaration of Human Rights, in which states had at least in principle agreed on the individual's right to be free from torture and other cruel, inhuman or degrading treatment or punishment. The normative context of the 1970s had fundamentally changed with the coming into force of the International Covenant of Civil and Political Rights (1966). The task of the moral leaders in the beginning of the campaign against torture was thus to generate consensus for the creation of an *effective* instrument banning the use of torture and other forms of ill-treatment. The records of the discussions on this issue can be found in the meetings of the Third Committee of the UNGA.

The problem of torture was raised at the United Nations by Amnesty's petition which carried more than a million signatures.³³⁶ In November 1973, the delegations of Sweden, the Netherlands, Austria, Costa Rica and Trinidad and Tobago prepared a draft resolution, which stated that the General Assembly will examine the issue of "torture, and other inhuman, cruel and degrading treatment or punishment in relation to detention and imprisonment in a future session".³³⁷ Apart from being the moral entrepreneur in the campaign against torture, Amnesty International, along with other NGOs - ICJ, the World Council of Churches, Amnesty's medical groups, etc. managed to influence the attitude of the states, which were the moral leaders in the UNGA. Amnesty's neutral reports on tortured individuals worldwide³³⁸ provided the backbone of the campaign;³³⁹ the

³³⁵ Amnesty International published country reports implicating governments that authorised the use of torture; the International Commission of Jurists published articles on the human rights situation in general and on the use of torture in particular from various regions of the world

³³⁶ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 13; N. Rodley, *The Treatment of Prisoners Under International Law* – pp. 20-1

³³⁷ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 13;

<http://www.un.org/documents/resga.htm> - Resolution 3059 "Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" – GA 28th Session, 2163rd plenary meeting, 2nd Nov 1973.

³³⁸ Amnesty International, *Report on Torture*, citing more than 60 countries, which use torture at home

³³⁹ N. Rodley, *The Treatment of Prisoners Under International Law* – pp. 21

conferences of NGOs and professional organisations came up with practical proposals for effective measures that could ease the suffering of individuals;³⁴⁰ the reports of the ICJ heralded the weaknesses of legal systems to address problems stemming from torture and other ill-treatment.³⁴¹ The influence of the work of Amnesty, ICJ, IAPL has been acknowledged by nation states at the UNGA meetings,³⁴² as well as by authors who have provided detailed accounts of the historical development of the Convention Against Torture.³⁴³ The basis of the relationship between states and the non-state actors has been the provision of information. Securing a constant flow of professional advice and information of atrocities, as well as possessing a fast-flowing channel for disseminating information, made these non-state actors valuable allies in a coalition to create a new behavioural norm. Although much of the background work for the creation of the new norm was done primarily by these non-state actors, the political effort committed to the cause by the supportive states was undoubtedly critical.

The discussions of torture followed closely the situation in some Latin American

³⁴⁰ Amnesty International proposed two approaches to the eradication of torture – firstly, there were proposals for the creation of codes of professional ethics – see Amnesty International, *Conference for the Abolition of Torture – Final Report*. Paris, 10-11 Dec 1973. (Amnesty International Publications, London: 1973); Report of the “International Seminar on Torture and Human Rights” – Palais de l’Europe, Strasbourg, 3-5 Oct 1977, published by Amnesty International, London; Amnesty International, *Report on an Amnesty International Medical Seminar “Violations of Human Rights: Torture and the Medical Profession”*, Athens, 10-11 March 1978, AI Index: CAT 02/03/78; Amnesty International, *Codes of Professional Ethics*. (Amnesty International Publications, London: 1984); secondly, there were practical proposals made to governments to change state behaviour on the issue - Resolution adopted by the Inter-Parliamentary Union “Amnesty International Campaign Against Torture – The Problem of Torture in the World”, 11th Oct 1974, Tokyo

³⁴¹ See, H. Tolley, *The International Commission of Jurists* – pp. 82-92; “Human Rights in the World – Torture Continues”, *The Review International Commission of Jurists*. June, 1973, no. 10, 10-33; C. Yeo, “Psychiatry, the Law and Dissent in the Soviet Union” *The Review – International Commission of Jurists*, Vol. 14, June 1975, 34-41; “Lawyers Against Torture” *The Review – International Commission of Jurists*, vol. 16, June 1976, 29-41

³⁴² Verbatim Records of the 2066th Meeting of the Third Committee of the UNGA – 29th Session, 15 Oct 1974 – paragraph 25; Summary Records No. 35 from the 32nd Session of the Third Committee of the UNGA held on 1 Nov 1977 (UN Doc Index A/C.3/32/SR/35) – para. 14, 17; Summary Records No. 38 from the 32nd Session of the Third Committee of the UNGA held on 3 Nov 1977 (UN Doc Index A/C.3/32/SR/38) – para. 20

³⁴³ J. Burgers and H. Danelius, *UN Convention Against Torture* – pp. 13, 19-20; N. Rodley, *The Treatment of Prisoners Under International Law* – pp. 21, 23-4; C. Ingelse, *The UN Committee Against Torture – An Assessment*, (Kluwer Law International, The Hague, Netherlands: 2001) – pp. 67-8

countries and other authoritarian regimes worldwide, with special attention being paid to the large-scale atrocities unfolding in Chile. Hence, it is safe to say that the norm prohibiting the use of torture and other ill-treatment was elaborated in direct response to a humanitarian disaster taking place at the same time. This context of an increased sense of urgency speeded up negotiations and decision-making in the international context.

The discussions at the Third Committee of the UNGA in 1973 and 1974, following resolution 3059, which outlined the concerns of the UN General Assembly with the question of torture, and other cruel, inhuman and degrading treatment or punishment and the resolve of the organisation to examine this issue further,³⁴⁴ were entirely engaged with the situation in Chile – representatives of states from different parts of the world expressed their concerns about the scale of the use of torture.³⁴⁵ The representative of Chile used three lines of defence – that torture was not a governmental practice, although there might have been isolated incidents; that other states, in particular the USSR, was using torture against its own citizens; and that, in any case, the concern with the domestic affairs of Chile ran counter to the principle of sovereignty laid out in Art.2 (7) of the UN Charter.³⁴⁶ Although the coalition against the practice of torture seemed quite strong, the growing cohesion of the non-aligned movement and the increasing concern to uphold the principle of sovereignty against attempts to meddle with the domestic policies of states stood in its way.³⁴⁷ The conservative actors attempted to change the agenda by downplaying the

³⁴⁴ General Assembly 28th Session, 2163 Plenary Meeting, 2nd November 1973

³⁴⁵ Verbatim Records of the 2065th Meeting of the Third Committee of the UNGA – 29th Session, 15th Oct 1974; Verbatim Records of the 2066th Meeting of the Third Committee of the UNGA – 29th Session, 15th Oct 1974; Verbatim Records of the 2067th Meeting of the Third Committee of the UNGA – 29th Session, 16th Oct 1974; Verbatim Records of the 2068th Meeting of the Third Committee of the UNGA – 29th Session, 18th Oct 1974

³⁴⁶ Verbatim Records of the 2067th Meeting of the Third Committee of the UNGA – 29th Session, 16th Oct 1974 – pp. 86-7, 92

³⁴⁷ Verbatim Records of the Plenary Meeting of the UNGA – 29th Session, 2244th Meeting, 26th Sept 1974 – pp. 193-7

problem of torture and by emphasising the importance of the principles of sovereignty, non-intervention and self-determination.³⁴⁸ The normative leaders, however, were not prepared to let the discussion of torture slip away. Delegates from Sweden, the Netherlands, UK, France, Norway, Austria, the Federal Republic of Germany focused on persuading the other delegations of the need to establish an international norm that effectively outlawed the use of torture, cruel, inhuman and degrading treatment.³⁴⁹ The pro-active delegations not only vigorously advocated policy-creation, they were engaged in constructing and supporting the texts of various resolutions for action, codes of professional ethics and the drafts of the very Convention Against Torture.³⁵⁰

The dialogues at the Third Committee of the UNGA were making slow progress but through extensive discussions the list of supporters for the new norm was growing (for the dynamics of the international negotiations, see *Figure 2.3* below). Poland declared its full support for all draft resolutions condemning torture,³⁵¹ as did Denmark,³⁵² Romania,³⁵³ Pakistan,³⁵⁴ and Yugoslavia.³⁵⁵ The campaign against torture continued with small,

³⁴⁸ Summary Records of the 2067th meeting of the 29th Session of the Third Committee of the UNGA held on 16th Oct 1974 (UN Doc Index: A/C.3/SR.2067) – pp.86-88 – records from the speech of the Chilean delegate; Verbatim Records of the Plenary Meeting of the UNGA – 29th Session, 2244th Meeting, 26th Sept 1974 – pp. 193-197 – the delegate from Yugoslavia was trying to change the focus of discussion to issues related to the concerns of the non-aligned movement – namely, apartheid, the New International Economic Order, demilitarisation.

³⁴⁹ Verbatim Records of the 2065th Meeting of the Third Committee of the UNGA – 29th Session, 15th Oct 1974 – paragraphs 20, 22, 29; Verbatim Records of the 2066th Meeting of the Third Committee of the UNGA – 29th Session, 15th Oct 1974 – para. 1,3, 28; Verbatim Records of the 2067th Meeting of the Third Committee of the UNGA – 29th Session, 16th Oct 1974 – para 18, 31

³⁵⁰ N. Rodley, *The Treatment of Prisoners Under International Law* - pp. 28-9 - The Netherlands prepared the draft of what became UNGA Resolution 3218 (pp.25-6); at the 5th UN Congress on the prevention of crime and the treatment of offenders, the Swedish and Dutch delegations submitted a draft declaration for the protection of all persons from being subjected to torture and other cruel, inhuman, or degrading treatment or punishment.

³⁵¹ Verbatim Records of the 2066th Meeting of the Third Committee of the UNGA – 29th Session, 15th Oct 1974 – para. 10

³⁵² Ibid – para 15, 16, 17;

³⁵³ Ibid. – para 18

³⁵⁴ Verbatim Records of the 2067th Meeting of the Third Committee of the UNGA – 29th Session, 16th Oct 1974 – para 4

³⁵⁵ Ibid. – para 48

tentative steps, which were not running against the concerns of Chile and the other non-aligned states (including African and Middle Eastern states who disagreed with the development of the new norm).

Figure 2.3

DIALOGUE WITH THE CONSERVATIVE ACTORS

	States not in opposition to the creation of the new norm	States openly expressing support for current status quo	States that do not participate actively in the creation of the new norm	States expressing open opposition
1973	Sweden, the Netherlands, Austria, Trinidad and Tobago (normative entrepreneurs)	Chile, USSR, South Africa, Yugoslavia	Poland, Romania, Denmark, Pakistan	none
1974	Sweden, the Netherlands, UK, France, Norway, Austria, the Federal Republic of Germany, USA	Chile, South Africa, USSR	Portugal, Mexico, Greece, Australia, Belgium, Saudi Arabia, Syrian Arab emirates, Costa Rica, Lesotho, Spain, Ireland	none
1976-7	Same as above, Poland, Romania, Denmark, Pakistan			none
1978	All of the above			none

The information included in the above table is based on the Discussions and the opinions voiced at the Third Committee of the UN General Assembly.

In November 1974 the UNGA adopted Resolution 3218, which indicated the need to develop codes of professional ethics for police and other law-enforcement officials, requested the WHO to take into account the work of the WMA and draft an outline of the principles of medical ethics, and decided that the General Assembly would deal with the

issue of torture and other inhuman, cruel, degrading treatment or punishment in its next session.³⁵⁶ In 1975, the 5th UN Congress on the Prevention of Crime and the Treatment of Offenders took place and gave a further impetus to the campaign. The Congress was attended by “representatives from 101 states, [many of whom] were at the highest level of influence and competence”.³⁵⁷ The Congress’s General Rapporteur noted that the heated discussions reflected “passionate concern over the use of torture”.³⁵⁸ The adoption of resolutions 3452 and 3453 in December 1975 is evidence of the building up of normative momentum. Resolution 3452 contained the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.³⁵⁹ This declaration was an important stepping stone in the evolution of the norm outlawing the use of torture. Mr. Schreiber, who was at the time the Director of the Division of Human Rights, commented that the ease and swiftness with which this declaration was adopted was indicative of the importance that the organisation attached to the problem of torture and other forms of ill-treatment.³⁶⁰ However, the American representative found the voting unanimity suspicious in that governments seemed to adopt the resolution too easily, while the problem of torture persisted around the world.³⁶¹ Indeed, some conservative actors might have acted in the hope of adopting a weak document, while wishing to continue their unrestrained domestic powers. Another possible explanation is

³⁵⁶ <http://www.un.org/documents/resga.htm> - Resolution 3218 - Torture and Other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment - GA 29th Session, 2278th plenary meeting, 6th Nov 1974.

³⁵⁷ Summary Records No. 62 from the 31st Session of the Third Committee of the UNGA held in 1976 (UN Doc Index: A/C.3/31/SR.62) – Mr Schreiber (Director, Division of Human Rights), para. 38

³⁵⁸ N. Rodley, *The Treatment of Prisoners Under International Law* – pp. 34, citing Fifth UN Crime Congress Report – para. 379.

³⁵⁹ <http://www.un.org/documents/resga.htm> - Resolution 3452 - GA 30th Session, 2433rd plenary meeting, 9th Dec 1975

³⁶⁰ Summary Records No. 62 from the 31st Session of the Third Committee of the UNGA held in 1976 (UN Doc Index: A/C.3/31/SR.62) – para. 38

³⁶¹ Summary Records No. 67 from the 31st Session of the Third Committee of the UNGA held in 1976 (UN Doc Index: A/C.3/31/SR.67) – para. 7, 11, 11a

that some states might have hoped that a speedy adoption of a resolution would side-line the discussions of torture and the issue could then be quickly forgotten. This might account for the rigorous discussions that followed in 1977 when Sweden advocated the need for the creation of a binding convention against torture, to which I will return in the next stage.

Resolution 3453 of 1975 requested the Commission on Human Rights to “study the question of torture and any necessary steps for: ensuring effective observance of the Declaration... and the formulation of a body of principles for the protection of all persons under any form of detention or imprisonment”.³⁶² The discussions at the Third Committee continued throughout 1976 without any practical outcomes. Many states continued to express their support for the evolving new norm.³⁶³ Delegates often turned their attention to the situation in Chile, which made the Chilean representatives uneasy and defensive. They used the previously discussed tactics – accusing other governments of using torture as well, claiming that their own government is falsely accused of practicing torture and hiding behind the principle of sovereignty and freedom from intervention in internal affairs.³⁶⁴ This impasse needed to be overcome for the norm to continue to evolve.

In this stage of norm development the logic of persuasion and argumentation played a more effective role than the logic of consequences in the debates. Since the issue of torture had no direct strategic consequences to the national security of states, governments could not use the logic of consequences as a reason to discontinue or hinder negotiations in

³⁶² <http://www.un.org/documents/resga.htm> - Resolution 3453 - GA 30th Session, 2433rd plenary meeting, 9th Dec 1975.

³⁶³ Summary Records No. 63 from the 31st Session of the Third Committee of the UNGA held in 1976 (UN Doc Index: A/C.3/31/SR.63) – Portugal (para 23-6); Mexico (para 28-32); USSR (para 33-36); Greece (para 42-4); Australia (para 45-7); Belgium (para 48). Summary Records No. 64 from the 31st Session of the Third Committee of the UNGA held in 1976 (UN Doc Index: A/C.3/31/SR.64) –Sweden (para 1-4); Netherlands (para 5-9); USSR (para 13-5); Saudi Arabia (para 15-17)

³⁶⁴ Summary Records No. 65 from the 31st Session of the Third Committee of the UNGA held in 1976 (UN Doc Index: A/C.3/31/SR.65) – Chile (para 36-41; 43-5); Summary Records No. 66 from the 31st Session of the Third Committee of the UNGA held in 1976 (UN Doc Index: A/C.3/31/SR.66) – Chile (para. 92-4).

this particular issue area.³⁶⁵ Without these hidden breaks that states use to exit discussions and within a context of appropriateness created by the Universal Declaration of Human Rights, conservative actors did not have much space to manoeuvre, not least because they did not wish to stand out of the community of ‘civilised nations’.

The work of non-governmental and professional organisations outside the UN was very useful and influential too. In the years of the Cold War, governments distrusted each other (this shows in the defensive statements of the Chilean delegates at the UN) and the only possible way of collecting information about atrocities was through organisations that are not related to governments. Grass-roots organisations have been more effective in accumulating information about individual cases of torture and other forms of ill-treatment. In some Latin American and African countries, for example, where the Church is an active social institution, the clergy and bishops have often been the first people to sound the alarm about ill-treatment of prisoners.³⁶⁶ The International Commission of Jurists has on a number of occasions sent lawyers to oversee political trials where human rights violations were suspected to have taken place.³⁶⁷ Doctors of the Danish Medical Group under Amnesty International have visited countries to meet with torture survivors and have helped

³⁶⁵ Strategic negotiations particularly in the realm of de-militarization – land mines, nuclear weapons, chemical and biological weapons – often find deadlock because of the high stakes in national security that some states find unsurpassable.

³⁶⁶ H. Hunke and J. Ellis, *Torture – A Cancer of Our Society*, – the authors point out the concern of the Catholic church, dating back as far as 1967 and provides an account of some of the actions that they Church has undertaken; H. Thoolen, *Thirty Years After the Universal Declaration of Human Rights – the need for and International Convention Against Torture*, (Commission of the Churches on International Affairs, Geneva: 1978); Country Report – Paraguay (1979) *The Review – International Commission of Jurists*, No. 22, June 1979 – pp. 11-13 – the report discusses the role and achievements of the Paraguayan Conference of Bishops.

³⁶⁷ The history of the activities of the ICJ – H. Tolley, *The International Commission of Jurists – Global Advocates for Human Rights* – dedicates a chapter to the work of the ICJ to protect victims – pp. 79-94; “Human Rights in the World – Torture Continues”, *The Review International Commission of Jurists*, June, 1973, no. 10, 10-33; C. Yeo, “Psychiatry, the Law and Dissent in the Soviet Union”, *The Review – International Commission of Jurists*, Vol. 14, June 1975, 34-41; “Lawyers Against Torture” *The Review – International Commission of Jurists*, vol. 16, June 1976, 29-41; Country Report – Malaysia (1979) *The Review – International Commission of Jurists*, No. 22, June 1979 – pp. 6-10; Country Report – Paraguay (1979) *The Review – International Commission of Jurists*, No. 22, June 1979 – pp. 11-13

survivors who have managed to flee their country, collecting information and providing medical care.³⁶⁸ These are only a few examples of the valuable contributions that non-state actors have made to different segments of the campaign against torture. Another aspect of the input of non-state actors is the multitude of conferences that they have organised. As discussed earlier, many of the conferences organised or co-sponsored by Amnesty International have been a meeting point of experts, professionals and state delegations.³⁶⁹ Much of the information exchanged at these conferences was reflecting the current scientific debates on the medical, psychological and social consequences of torture experienced by the victims, by their families, by the torturers and the administrative personnel involved. Conferences and workshops were thus some of the mechanisms that ensured the flow of information from the civil society and scientific communities to the policy-makers.

The stage of bargaining and persuasion in the evolution of this particular norm passed rather smoothly and without too much public attention (apart from that of the non-state actors who were directly involved). The pressure on the conservative states was mounting and there seemed to be no good reason to back out of negotiations (or in this case the process of persuasion). It was also difficult to find a sufficient reason to oppose the development of the new norm, which was established almost unexpectedly in 1977.

³⁶⁸ O.V. Rasmussen, "Medical Aspects of Torture"; N. Gordon and R. Marton, (eds.) *Torture – Human Rights, Medical Ethics and the Case of Israel*. (Zed Books in association with the Association of Israeli-Palestinian Physicians for Human Rights, Tel Aviv. London: 1995); P. Berger "Documentation of Physical Sequelae" *Danish Medical Bulletin*, Vol. 27, No. 5, Nov 1980 – pp. 215-6; O.V. Rasmussen, and I. Lunde (1980) "Evaluation of investigation of 200 torture victims". *Danish Medical Bulletin*, vol. 27, no.5, 241-3.

³⁶⁹ See lists of participants and contents of discussions - Amnesty International, Conference for the Abolition of Torture – Final Report. Paris, 10-11 Dec 1973.; Amnesty International, Report on an Amnesty International Medical Seminar "Violations of Human Rights: Torture and the Medical Profession", Athens, 10-11 March 1978, AI Index: CAT 02/03/78; Report of the "International Seminar on Torture and Human Rights" – Palais de l'Europe, Strasbourg, 3-5 Oct 1977; Report on the International Meeting "Doctors, Ethics and Torture", Copenhagen, 23 Aug 1986. *Danish Medical Bulletin*, Vol. 34, no. 4, Aug 1987, 185-216

Political Closure

Closure on the norm prohibiting the use of torture and other cruel, inhuman and degrading treatment or punishment was reached with Resolution 32/62 of the UNGA, which requested the Commission on Human Rights to prepare a draft convention against torture and other cruel, inhuman or degrading treatment or punishment.³⁷⁰ Closing the debate on the permissibility of the use of torture was due partly to the search for a solution to the problem of how to make the Declaration against torture effective and partly to the mounting reports from various NGOs of continuing atrocities committed by governments around the world. AI, the ICJ and the CSCT strongly advocated the creation of a convention against torture.³⁷¹ The debates at the UNGA, which preceded the political closure, were focused on the question of whether there was a need for yet another legal instrument prohibiting the use of torture.³⁷² On 28th Oct 1977, Sweden, one of the most active states on this issue, submitted a draft resolution (A/C.3/32/L.13) to the General Assembly requesting that work on the creation of a convention against torture begin.³⁷³ The discussions that followed at the meetings of the Third Committee took the form more of praise of the effort and commitment of support than of a debate between opponents. No opposition was raised in all four sessions of the Committee, which examined this question.³⁷⁴ Forty delegations became sponsors and co-sponsors to the draft resolution; the

³⁷⁰ <http://www.un.org/documents/resga.htm>, A/RES/32/62 adopted on the reports of the Third Committee, in the 98th plenary meeting of the UNGA, 8th Dec 1977.

³⁷¹ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 33

³⁷² *Ibid*

³⁷³ *Ibid.* – pp. 34

³⁷⁴ Summary Records No. 34 from the 32nd Session of the Third Committee of the UNGA held on 31st Oct 1977 (UN Doc Index A/C.3/32/SR/34); Summary Records No. 35 from the 32nd Session of the Third Committee of the UNGA held on 1st Nov 1977 (UN Doc Index A/C.3/32/SR/35); Summary Records No. 36 from the 32nd Session of the Third Committee of the UNGA held on 1st Nov 1977 (UN Doc Index A/C.3/32/SR/36); Summary Records No. 38 from the 32nd Session of the Third Committee of the UNGA held on 3rd Nov 1977 (UN Doc Index A/C.3/32/SR/38)

latter was adopted without a vote by the Third Committee and then by the UNGA.³⁷⁵

The discussions at the Third Committee were quite revealing of the intentions and concerns of the participating states. The delegations of Sweden and the Netherlands pointed out that although an agreement on the moral issue was achieved, their work was not complete until a legally binding international instrument was put in place.³⁷⁶ Other delegations expressed their support, emphasising their deep regrets that torture was still taking place around the world, expressing concerns for some of the most striking cases of torture, which came to the attention of the world community (Chile, Steve Biko in South Africa, the conflict in the Middle East) and commenting on the need for an effective instrument that would induce urgent action.³⁷⁷

The point of closure in the case of the convention against torture was reached smoothly and without much commotion. The build-up to it was a lengthy process of arduous persuasion, but all the preliminary work done by NGOs, epistemic communities and professional organisations, along with the pro-active states, paid off in this crucial stage. The historical records reflecting the progression of the efforts of the normative campaign against torture make it appear as a natural evolution. However, the norm prohibiting the use of torture under any circumstances, by any authority or individual was established and affirmed in the international normative context by the agreement of the members of the UNGA on the need to create a convention that would entail legal

³⁷⁵ J. Burgers and H. Danelius *The UN Convention Against Torture* – pp. 3

³⁷⁶ Summary Records No. 35 from the 32nd Session of the Third Committee of the UNGA held on 1st Nov 1977 (UN Doc Index A/C.3/32/SR/35) – Sweden (para. 22-4); the Netherlands (para. 25-32)

³⁷⁷ Summary Records No. 35 from the 32nd Session of the Third Committee of the UNGA held on 1st Nov 1977 (UN Doc Index A/C.3/32/SR/35) – Denmark (para. 14-5); Austria (para. 16-7); Syrian Arab Republic (para. 18); Costa Rica (para. 32-7); Summary Records No. 36 from the 32nd Session of the Third Committee of the UNGA held on 1st Nov 1977 (UN Doc Index A/C.3/32/SR/36) – Lesotho (1-3); German Democratic Republic (4-5); France (6-10); Saudi Arabia (11-18); Italy (19-29); Greece (30-38); Spain (39-43); Ireland (44-46); Australia (47-50) – these were only some of the delegations who expressed their support for the creation of the Convention Against Torture and as one can see, they more or less represent all geographic regions in the world.

obligations.

The case of *Filartiga v. Pena*, in the US, made legal history in 1980, but also re-confirmed that political closure had taken place. The case was adjudicated by a US Court under the Alien Tort Claims Statute, which allows US Federal Courts “to take original jurisdiction over tort actions brought by aliens ‘committed in violation of the law of nations or a treaty of the United Nations’”.³⁷⁸ Both Dr Filartiga (the plaintiff – whose son was killed in police custody) and Pena (the defendant – a member of the police department) were from Paraguay where the events unfolded. Since the Paraguayan legal system failed to charge the police department with the murder of Filartiga’s son, Filartiga and his daughter decided to try and use the Alien Tort Act against Pena who was temporarily in the United States.³⁷⁹ The Court of the Second Circuit confirmed its jurisdiction over the proceedings, stating:

Among the rights universally proclaimed by all nations... is the right to be free from physical torture. Indeed,... the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all humankind.³⁸⁰

This historical decision of the Second Circuit Court of the United States confirmed officially that the norm prohibiting the use of torture has become part of the body of customary international law.

Once it was agreed that an effective prohibition of torture should be created, all efforts and discussions were concentrated on the wording and the construction of the convention, confirming that negotiations have reached a point of no return. The agreement on the existence of the norm prohibiting the use of torture was no longer questionable; derogation from the norm would incur public criticism.

³⁷⁸ N. Chandrasanan, “Freedom from Torture and the Jurisdiction of Municipal Courts: Sri Lanka and United States Perspective” *Human Rights Quarterly*. Vol. 5, no. 1, 1983 – pp. 65

³⁷⁹ *Ibid*

³⁸⁰ N. Chandrasanan, “Freedom from Torture and the Jurisdiction of Municipal Courts: Sri Lanka and United States Perspective”, *citing Filartiga*, 630 F.2d at 890 – pp. 67

Legalisation

The Swiss Committee Against Torture forwarded a proposal for a convention similar to the Geneva Conventions, allowing a set international body to visit places of detention without requiring initial approval by the governments so as to produce reliable and precise reports.³⁸¹ The ICJ, as discussed previously, however, proposed that all efforts be concentrated on the creation of the strongest possible convention and attempts for improving its effectiveness be preserved for a later stage.³⁸²

Resolution 32/62 requested the Commission on Human Rights (CHR) to prepare a draft convention. Since discussions were foreseen to be prolonged and difficult, the CHR proposed that an open-ended working group be created to draw up the first draft of the convention.³⁸³ The working group was to meet prior to the annual meeting of the Commission and then report on the progress made. Sweden and IAPL both submitted draft conventions. The proposal of IAPL reflected the work of NGOs and specialist organisations and was prepared at a Conference in Syracuse in 1977. IAPL worked closely with the ICJ, Amnesty International, and the ICRC and later sought the opinion of a large number of experts.³⁸⁴ Consequently it became clear that IAPL's draft differed very little from the Swedish draft.³⁸⁵ It is worth noting here that representatives of Sweden had attended almost all conferences organised or sponsored by Amnesty.³⁸⁶ Moreover, Amnesty International, the ICJ, and the ICRC were represented at all meetings of the working group, preparing the

³⁸¹ International Commission of Jurists and Swiss Committee Against Torture, *Torture: How to Make the International Convention Effective – A Draft Optional Protocol*. (International Commission of Jurists, Geneva: 1979); Private communications with Francoise de Vargas

³⁸² International Commission of Jurists and Swiss Committee Against Torture *Torture: How to Make the International Convention Effective* – pp. 44-5

³⁸³ Commission on Human Rights, Report of the 34th Session (6Feb-10Mar 1978), ECOSOC, Official Records 1978, Supplement 4 (UN Doc Index: E/1978/34 E/CN.4/1292) – pp. 29

³⁸⁴ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 26 and 36

³⁸⁵ International Commission of Jurists and Swiss Committee Against Torture, *Torture: How to Make the International Convention Effective* – the book contains both drafts, which can be further compared – pp. 50-60; J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 26

³⁸⁶ See footnote 212

draft convention under the Commission on Human Rights. This is yet another example of the close cooperation among state and non-state actors in this normative campaign.

The Swedish draft convention was an elaboration of the already existing declaration against torture. The discussions that took place in the working group of the CHR are available from the official records of ECOSOC – 34th to the 40th session of the Commission on Human Rights (1976 to 1984). The Swedish jurist, Justice Hans Danelius and the Dutch delegate to the UN, Herman Burgers, compiled a handbook on the Convention against Torture in which they describe in intricate detail the deliberations of the working group under the CHR.³⁸⁷ Here, I will focus only on those parts of the convention that have been influenced by the field work of the non-state actors and the scientific knowledge obtained by the professional groups.

In 1978, the CHR was concerned mainly with procedure for preparing the draft convention and with the presentation of the proposed drafts.³⁸⁸ It was not until the working group met in 1979 that substantive discussions on the text of the convention began. Article 1 of both the Declaration against torture and the draft convention contain the definition of torture (and other cruel, inhuman or degrading treatment or punishment).³⁸⁹ Needless to say, these were some of the longest discussions. The Swedish draft proposed that article one be identical in the declaration and the convention. The delegations of the US, Portugal, Switzerland, Denmark, and the UK all proposed that changes be introduced and the definition made both more elaborate and less open to interpretation (because interpretation can open the door for undermining the definition).³⁹⁰ The suggestions of Portugal and

³⁸⁷ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 34-113

³⁸⁸ Commission on Human Rights, Report of the 34th Session (6Feb-10Mar 1978), ECOSOC, Official Records 1978, Supplement 4 (UN Doc Index: E/1978/34 E/CN.4/1292) – pp. 29-35

³⁸⁹ for the text of the declaration against torture see <http://www.un.org/documents/resga.htm> - Resolution 3452

³⁹⁰ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 41-7

Switzerland were both in the sphere of the use of medical knowledge: Portugal proposed that the “abuse of psychiatry” had to be included as a form of torture, while Switzerland insisted that “medical or scientific experiments, if not serving any therapeutic purpose”, also form part of torture.³⁹¹ It is impossible to deny that continuous reports of the abuse of psychiatry in the USSR,³⁹² the discussion of human experimentation³⁹³ and the growing volume of medical knowledge regarding the after-effects of torture, all contributed to the concerns that these states voiced. The US representative raised the question whether a difference should be made if torture is practiced by public officials, and proposed that the term public official should be further specified.³⁹⁴ Amnesty has commented on the role of public officials in the practice of torture in a number of its reports.³⁹⁵

The Swedish delegation took into account the discussions and proposals discussed above and finalised article 1, which was later adopted without a vote by the UNGA and became the opening article of the Convention:

For the purposes of this Convention, the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating him or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³⁹⁶

The discussion within the working group moved on to the question of the

³⁹¹ Ibid. – pp. 42

³⁹² “Human Rights in the World – Torture Continues”, *The Review International Commission of Jurists*. June, 1973, no. 10 – “USSR – Repression of Dissidents” - pp. 30-3; C. Yeo, “Psychiatry, the Law and Dissent in the Soviet Union” *The Review – International Commission of Jurists*, Vol. 14, June 1975, 34-41.

³⁹³ See the report of Working Group III at the AI Medical Seminar held in Athens (1978); British Medical Association (1982) *The Handbook of Medical Ethics*. BMA, London – pp. 59-62; P. McNeill, *The Ethics and Politics of Human Experimentation*, (Cambridge University Press, Cambridge: 1993)

³⁹⁴ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 41-2

³⁹⁵ See Amnesty International, Report of an Enquiry into Allegations of Ill-treatment made against the Security Forces in Northern Ireland by Persons arrested on 9 August 1971, (Amnesty International Publications, London: 1972); See also The Recommendations of the AI Conference in Paris (1973); M. Jempson, “The Agencies Involved” in Duncan Forrest (ed.) *A Glimpse of Hell – Reports on Torture Worldwide*, (Cassell, London: 1996) – pp. 122-36.

³⁹⁶ Commission on Human Rights, Report of the 35th Session (12Feb-16Mar 1979), ECOSOC, Official Records 1979, Supplement 6 (UN Doc Index: E/1979/36, E/CN.4/1347) – para. 24

obligations of states, which are contained in articles 2 and 3 of the original draft. While Article 2 of the Swedish draft obliged states to “ensure that torture and other cruel, inhuman or degrading treatment or punishment does not take place within [their] jurisdiction”,³⁹⁷ other delegations pointed out that while states can “adopt measures to prevent torture”, they could not “undertake to ensure that torture would never occur”.³⁹⁸ The final version of this article, adopted by the Working Group, reads as follows: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”³⁹⁹ (this is also the text of the paragraph as included in the Convention of 1984). Article 2, paragraph 2, put an end to the deliberations as to whether torture could be justified in emergency circumstances, thus incorporating the decision of the European Court of Human Rights in the *Greek Case* and the *Irish Case*.⁴⁰⁰ The lessons of the Nuremberg and Tokyo War Crime Tribunals are echoed in Article 2, paragraph 3, which announced that “an order from a superior officer or a public authority may not be invoked as a justification of torture”.⁴⁰¹

The discussions at the working group continued by article and topic, including issues such as expulsion and extradition,⁴⁰² punishment for torture,⁴⁰³ jurisdiction over the

³⁹⁷ Ibid. – para. 30

³⁹⁸ Ibid. – para 31

³⁹⁹ Ibid. – para 36

⁴⁰⁰ Article 2, paragraph 2 states: “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture” – Ibid.

⁴⁰¹ Ibid.

⁴⁰² J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 49-52 and 54-6; Commission on Human Rights, Report of the 36th Session (4Feb-14Mar 1980), ECOSOC, Official Records 1980, Supplement 3 (UN Doc Index: E/1980/13 E/CN.4/1408) – para 13-32

⁴⁰³ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 56-7; Commission on Human Rights, Report of the 36th Session (4Feb-14Mar 1980), ECOSOC, Official Records 1980, Supplement 3 (UN Doc Index: E/1980/13 E/CN.4/1408) – para 33-37

offence of torture⁴⁰⁴ and further procedural issues, which concerned more the implementation of the norm than its substance. Some of the longest discussions concerned the issues of implementation⁴⁰⁵ and universal jurisdiction,⁴⁰⁶ both clashing with the principle of state sovereignty. The draft convention was ready by 1981, when only minor corrections were discussed,⁴⁰⁷ and the issue of torture was only briefly touched on until 1984.⁴⁰⁸

The stage of legalisation was completed by the adoption of the Convention against Torture by the UNGA on 10th December 1984. The General Assembly considered only the texts left in brackets by the Commission on Human Rights and ECOSOC and adopted the text almost as prepared by the working group.

Operationalisation

The Convention against Torture entered into force in 1987,⁴⁰⁹ however, concerns with the operationalisation of the norm remained. One particular proposal for operationalisation was formulated by Jean Jacques Gautier and put forward to the Swiss government as early as 1976.⁴¹⁰ Gautier's idea was based on the notion of creating a system

⁴⁰⁴ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 57-60; Commission on Human Rights, Report of the 36th Session (4Feb-14Mar 1980), ECOSOC, Official Records 1980, Supplement 3 (UN Doc Index: E/1980/13 E/CN.4/1408) – para 38-53

⁴⁰⁵ J. Burgers and H. Danelius, *The UN Convention Against Torture* – pp. 74-7, 80-4, 96-8

⁴⁰⁶ *Ibid.* – pp. 78-80

⁴⁰⁷ See Commission on Human Rights, Report of the 37th Session (2Feb-13Mar 1981), ECOSOC, Official Records 1981 (UN Doc Index: E/1981/25, E/CN.4/1475) – pp. 50-70, 226-7

⁴⁰⁸ Commission on Human Rights, Report of the 38th Session (1Feb-12Mar 1982), ECOSOC, Official Records 1982, Supplement 2 (UN Doc Index: E/1982/12, E/CN.4/1982/30) – pp. 45-9, 139; Commission on Human Rights, Report of the 39th Session (31Jan-11Mar 1983), ECOSOC, Official Records 1983, Supplement 3 (UN Doc Index: E/1983/13 E/CN.4/1983/60) – pp. 51-3

⁴⁰⁹ Inter-American Institute of Human Rights and the Association for the Prevention of Torture, *Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – A Manual for Prevention* (IIHR and APT, New York: 2002) – pp. 38

⁴¹⁰ International Commission of Jurists and Swiss Committee Against Torture, *Torture: How to Make the International Convention Effective – A Draft Optional Protocol*. (International Commission of Jurists, Geneva: 1979) – pp. 42

of international visits to places of detention where torture often takes place in secrecy, which would disrupt the use of torture.⁴¹¹ The Secretary General of the ICJ, Niall McDermot, who thoroughly supported Gautier's project, proposed that negotiations on this particular mechanism be included in an optional protocol instead of in the main text of the convention. There were fears that state disapproval of an international visiting mechanism would slow down the already difficult negotiations on the text of the actual convention.⁴¹²

Effective operationalisation of the norm outlawing the use of torture was indeed very slow, as the Optional Protocol of the Convention Against Torture took ten years to negotiate and was successfully adopted only in 2002.⁴¹³ In 1984 Amnesty International published its report *Torture in the Eighties*, which drew attention to the fact that while states were working on the creation and adoption of the convention against torture, some governments still made use of this gruesome practice.⁴¹⁴ Amnesty, the Swiss Committee Against Torture, the ICJ and the ICRC sponsored a colloquium in 1983 on "How to Combat Torture", which marked the beginning of the campaign in favour of an Optional Protocol against Torture. The Colloquium was attended by representatives of governments who were in support of such mechanism.⁴¹⁵ In the next year, Amnesty, CSCT, and other NGOs formed a coalition against torture – The Coalition of International NGOs Against Torture (CINAT),⁴¹⁶ which was going to keep the attention on the issue and demand the continued efforts of states to make the convention effective. The efforts of NGOs towards

⁴¹¹ Ibid. - pp.43; Inter-American Institute of Human Rights and the Association for the Prevention of Torture, *Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* – pp. 34

⁴¹² Ibid. – pp. 35

⁴¹³ The first proposal for such an optional protocol was submitted by the delegation of Costa Rica to the UN Commission on Human Rights on 3rd March 1992.- ibid. – pp. 39

⁴¹⁴ Amnesty International, *Torture in the Eighties* – the report contains information about the use of torture in 98 countries around the world, and "about the lack of any will to stop it by many others"-pp.2

⁴¹⁵ Personal correspondence with Francois de Vargas, former Secretary General of the APT, Lausanne

⁴¹⁶ <http://www.cinat.org>

the creation and adoption of the Optional Protocol has been praised by the report of the Inter-American Institute of Human Rights and the Association for the Prevention of Torture.⁴¹⁷ Regional conventions against torture developed but those did not eradicate the need for an international mechanism to effectively monitor the ban on torture. The most proactive states in the negotiations of the Optional Protocol were Costa Rica, Barbados, Nicaragua and Panama, supported by the countries of the European Union.

In June 2006 the Optional Protocol to the UN Convention Against Torture finally received enough number of ratifications and entered into force, which marked a historic moment for the prohibition against torture.⁴¹⁸

Conclusions

The development of the norm prohibiting the use of torture maps very closely the theoretical model proposed in Chapter 1. The development of scientific knowledge required by the moral campaigners and the legal professionals induced increasing concerns over the use of torture and growing interest by many states (especially in Western Europe, which remained the stronghold of human rights during the Cold War) to take meaningful actions to curb the use of this barbarian practice. Normative demands generated scientific knowledge, which coupled with the principles of universal human rights and pressure applied by some states and many non-state actors, created a new behavioural norm. It was constructed in such a persuasive manner that even states who opposed the change of the normative *status quo* found it hard to exit the negotiations for the establishment of this

⁴¹⁷ Inter-American Institute of Human Rights and the Association for the Prevention of Torture, *Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* – pp. 47

⁴¹⁸ See CINAT's press release statement from 22 June 2006 – http://www.apth.ch/cinat/CINAT_Statement_22.06.06.pdf

norm. In the case of the prohibition of the use of torture, the components of the successful new norm included a strong and engaging ethical proposal, medical knowledge, which satisfied the requirements of scientific knowledge, legal expertise, which sided with the normative proposal backed up by the emerging scientific knowledge, and political support initially by a group of strong and affluent states, which grew in membership to such size that it became hard to ignore.

The creation of the norm banning the use of torture attests to the role and power of non-state actors in international policy-making. The former also emphasises the importance of scientific knowledge even in areas that seem to be purely ethical in nature. This study provides further evidence of the effectiveness of combining the theoretical achievements of the social constructivists of international relations and the social constructivists of scientific knowledge – a connection worth exploring in further depth.

The political events in the last five years, following the 9/11 terrorist attacks on New York, have brought the problem of torture back into the social and political spot light. Shortly after the attacks, the United States began a ‘War on Terror’, which resulted in some changes of domestic legislation and curbing civil liberties in some Western countries, as well as direct military action in Afghanistan and Iraq. The search of the leaders of the Al-Qaeda terrorist network renewed the normative debate on the ‘ticking bomb’ scenario and once more brought into question the utilisation of torture methods in situations and on individuals who are perceived to threaten national security.⁴¹⁹ Organisations like Amnesty International and Human Rights First continually expressed fears about individuals held

⁴¹⁹ J. Mayer, “Outsourcing Torture – the secret history of America’s ‘extraordinary rendition’ programme”, *The New Yorker*, 14 Feb 2005, available from: <http://www.newyorker.com>

without trial and about the treatment of prisoners in Iraq and Guantanamo Bay.⁴²⁰ US policy-makers maintained that the methods of interrogation used did not constitute torture, although some of them caused stress, and anxiety, and included hooding, isolation, sleep deprivation, etc. It is important to note here that the use of ‘torture light’ or ‘non-lethal torture’ has consistently been denied by the US government, which signals that the Bush administration accepts the normative principle that torture is illegal, while looking for technical loopholes. Another high-profile US breach of the CAT convention has been the interpretation offered by the Bush administration to the effect that “the ban on cruel, inhuman and degrading treatment under the UN Convention Against Torture did not apply to Americans working overseas”,⁴²¹ resulting in a policy of ‘rendition’, whereby CIA employees were allowed to use methods of interrogation in foreign prisons, which would not be allowed in the United States.⁴²²

The United States came under sustained pressure from the EU countries and civil society groups for the policy of rendition and during her visit to Europe in December 2005, Secretary of State Condoleezza Rice signalled a shift the US policy on this question. Analysts are still trying to determine whether this is a real shift in US policy, as Rice declared that “US interrogators were barred from using cruel or degrading practices

⁴²⁰ Amnesty International, AI Public Statement: “Commission on Human Rights, 60th Session (15 Mar – 23 Apr 2004) – The Human Rights Scandal of Guantanamo Bay”, AI Index IOR 41/024/2004, Apr 2004; Amnesty International, AI Press Release: “End Human Rights Scandal in Guantanamo Bay”, AI Index POL 30/017/2004, 11th April 2004; Amnesty International, AI Press Release: “USA: Pattern of brutality and cruelty – war crimes and Abu Ghraib”, AI Index AMR 51/077/2004, 7 May 2004; Amnesty International, (2005) AI Press Release: “USA/ Iraq: Abuses without accountability a year after Abu Ghraib”, AI Index AMR 51/064/2005, 28 April 2005; Human Rights First, HRF Press Release: “Human Rights First Condemns Use of Torture Tactics at Guantanamo Bay”, 30 November 2005, available from: <http://www.humanrightsfirst.org> ; Human Rights First, “One Year After the Abu Ghraib Torture Photos: US Government Reponse ‘Grossly Inadequate’”, 26 April 2005, available from <http://www.humanrightsfirst.org>

⁴²¹ “US ‘shifts’ position on torture”, *BBC News*, 7 December 2005

⁴²² P. Naughton, “Rice Signals shift on US Torture Policy”, *Times Online*, Dec 7th 2005, available from: <http://www.timesonline.co.uk/article/0,,11069-1914318,00.html>

wherever in the world they were”.⁴²³ A further development in US domestic politics is the successful vote in the US House of Representatives to ban cruel, inhuman, or degrading treatment of foreign terrorist suspects, proposed by Senator John McCain.⁴²⁴ How successful this policy would be in practice remains to be seen.

The principles of the CAT were reinforced even further by the decision of seven UK Law Lords on 8th Dec 2005 that evidence obtained by torture carried out abroad is inadmissible in court.⁴²⁵ One of the members of the panel, Lord Carswell, stated that “allowing torture to be used would involve the state in moral defilement”.⁴²⁶ This decision, although expected, has far-reaching consequences, because it not only re-states the UK position on the issue regarding the use of torture, but also imposes a normative and technical obligation on other governments not to use torture on detainees, because evidence obtained under torture will not be acceptable to the legal process.

These developments, although displaying some of the weaknesses of the Convention Against Torture, have also emphasised its strength as a guiding principle on the issue of the use of torture.

⁴²³ Ibid.

⁴²⁴ “Congress presses for torture ban”, *BBC News*, 15 December 2005; “House supports Ban on Torture – Measure would limit interrogation tactics”, *Washington Post*, 15 December 2005; Human Rights First, (2005) HRF Press Release: “Human Rights First Applauds Agreement Banning Abuse of Detainees – Urges Congress to Secure Victory by Keeping Torture Evidence Out of Court”, 15 December 2005

⁴²⁵ “Law Lords rule Against Use of Torture Evidence”, *The Times*, 8 December 2005

⁴²⁶ “Lords Reject Torture Evidence Use”, *BBC News*, 8th December 2005, available from: <http://newsbbc.co.uk>

CHAPTER 4

PROTECTING INTELLECTUAL PROPERTY RIGHTS IN THE PHARMACEUTICAL INDUSTRY

Norms prescribing the protection of inventions, innovations, products and technologies have existed for more than five centuries, the oldest ones dating as far back as Renaissance Italy. The protection of intellectual property (IP) has, however been considered an issue of domestic politics in the same way as the protection of physical property until the 20th century. Although the first international conventions on intellectual property were signed in the 19th century (the Paris and the Berne Conventions), they only established general guidelines of international standards of IP protection, and provided no enforcement mechanisms. With the growth of knowledge-intensive industries such as the chemical and pharmaceutical industries, information technologies, computer software, and with the globalisation of trade and services, businesses began to demand higher levels of intellectual property protection and international safeguards for their scientific and technological breakthroughs.

In 1994 the member states of the General Agreement on Tariffs and Trade (GATT) signed an agreement on trade-related aspects of intellectual property (TRIPs), which established international norms for the protection of intellectual property rights under the mandate of the newly created World Trade Organisation (WTO).⁴²⁷ The TRIPs agreement regulates such diverse areas as the protection of patents, copyright, trademarks, utility models, industrial designs, geographical indicators, collective marks, certification marks

⁴²⁷ M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*, (Sweet and Maxwell, London: 1996) – pp. v

and trade secrets.⁴²⁸ One of the industries covered by the agreement is the pharmaceutical industry, which has attracted a lot of public attention in relation to the effects of TRIPs on the availability and affordability of essential medicines. The application and effects of the norm protecting all knowledge created in the pharmaceutical sphere has raised a number of issues of ethical, social, political, economic and legal character and has since 1994 not been completely implemented due to the constant opposition from developing countries and various civil society organisations.

Several controversies are at the heart of the debate over international protection of intellectual property rights in general and IP rights in the pharmaceutical industry in particular. Firstly, there is the issue of definition and the question of what exactly constitutes intellectual property rights, and the controversy on whether intellectual property should they be considered in the same way as individual physical property. It is one thing protecting trademarks, technologies, paintings, computer software, since all of these are tangible products; but it is a completely different matter protecting knowledge and ideas – establishing when they occurred or were created, their degree of novelty and who should own them. Knowledge and ideas may be said to have a communal character, i.e. they are not exhausted by public usage and can be utilized by many simultaneously,⁴²⁹ which makes the question of ownership and the regulation of use even harder to resolve.

Secondly, granting ownership over knowledge and ideas raises the question whether knowledge is a public or private good. Since knowledge is contextual and most new ideas are born in an already existing framework of knowledge, this would suggest that the

⁴²⁸ UNCTAD – ICTSD Project on IPRs and Sustainable Development, *Intellectual Property Rights: Implications for Development*, Policy Discussion Paper, (Published by UNCTAD and ICTSD: 2003) – pp. 28

⁴²⁹ E. Mansfield, “Intellectual Property, Technology and Economic Growth” in F. Rushing and C. Brown, eds. *Intellectual Property Rights in Science, Technology and Economic Performance – International Comparison*, (Westview Press, London: 1990) – pp. 23; K. Maskus *Intellectual Property Rights in the Global Economy*, (Institute for International Economics, Washington: 2000) – pp. 28-9

products of the human mind are public rather than private goods,⁴³⁰ entitling societies to share them instead of granting their owners monopolistic rights. In other words, if new ideas are grounded in existing knowledge, then individuals or organisations should not be entitled to claim ownership over them. The matter is further complicated by the availability of public funding for research in some areas now protected by TRIPs. Universities and government-owned laboratories often pass crude knowledge to private companies who then develop and market various products and patent this knowledge. Critics are outraged that societies are often made to pay for knowledge once through general taxation and a second time for the use of patent-protected knowledge.

Thirdly, there is the controversy over whose interests should come first – the interest of innovators who are looking to recoup their costs of innovation or the interests societies who cannot always afford access to new knowledge. Intellectual property rights should be about finding a balance between rewarding the innovators by allowing them some form of protection, while disseminating the new technology, knowledge or ideas, among members of society, which is not simply a matter of economic calculations, but has an inherently political character.⁴³¹ If the former takes precedence over the latter, society will end up with monopolistic owners of knowledge and technologies who may abuse their position in the name of profit maximisation. If, however, new information is shared without regulation, then inventors are not rewarded for their effort and innovation and this, industries argue, is a disincentive for creativity, which is to the detriment of society.⁴³²

⁴³⁰ V. Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, (Zed Books, London; 2001) – the author argues that knowledge is a collective, cumulative enterprise, and not capital or a commodity – pp.21

⁴³¹ UNCTAD – ICTSD Project on IPRs and Sustainable Development, *Intellectual Property Rights: Implications for Development* – pp. 32

⁴³² L. Gillespie-White, *Health and Patents: The Rights Issue – A Presentation to an Audience Convened by the World Intellectual Property Organisation*, (International Intellectual Property Institute: 2002) – pp. 3; B.

According to some development specialists, such arguments forwarded by industries are unreasonable and “a negation of creativity...generated by non-profit motives in both industrial and non-industrial societies”.⁴³³ Constantine Vaitsos proposes that the introduction of property rights in the sphere of knowledge and ideas creates an artificial scarcity that is aimed at generating an economic rent and securing control over markets and not at creating incentives for inventive activity.⁴³⁴ In economic terms, scarcity exists when “needs and wants exceed the resources available to meet them... and where the price mechanism usually offers the most efficient way to allocate scarce resources”.⁴³⁵ When knowledge and ideas are socially constructed as scarce resources, consumers will learn to ‘value’ them,⁴³⁶ thus avoiding the trap of non-scarce resources, which are usually free. In other words, Vaitsos argues that the proponents of IPRs are merely after increasing their profits and not so concerned with incentives for inventions.

The protection of intellectual property in the case of the pharmaceutical industry extends beyond the public vs. private ownership of knowledge debate, because the products of the pharmaceutical industry have a direct impact on human life and health. The right to health is a fundamental human right⁴³⁷ and access to medicines is closely linked to this matter. When medicines are patented and the generic competition eliminated,⁴³⁸ drugs will

Lehman, *Patents and Health – A Presentation to the Policy Advisory Commission of the World Intellectual Property Organisation*, (International Intellectual Property Institute: 2002) – pp. 4-9

⁴³³ V. Shiva, *Protect or Plunder?* – pp. 23

⁴³⁴ C.Vaitsos, “Patents Revisited: Their Function in Developing Countries”, *The Journal of Development*, Vol. 9, no.1, 1972 – pp. 72; V. Shiva, *Protect or Plunder?* – pp. 21

⁴³⁵ <http://www.economist.com/research/economics> - The Economist’s A-Z of economic terms

⁴³⁶ C. May, *A Global Political Economy of Intellectual Property Rights – the New Enclosures?* (Routledge, London: 2000) – pp. 49

⁴³⁷ As stated in the Preamble to the WHO Constitution: “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition” - World Health Organisation, *Constitution of the World Health Organization*, 1946, available from: <http://www.who.int/about/en/>; see also, World Health Organisation (2002) *25 Questions and Answers on Health and Human Rights*, WHO: Geneva

⁴³⁸ “The TRIPS Agreement requires Member countries to make patents available for any inventions, whether **products or processes**, in all fields of technology without discrimination, subject to the normal tests of

become more expensive, and while multinational drug companies will begin recouping their research and development (R&D) costs, more medicines will be put out of reach of those in the underdeveloped world or indeed those without health insurance. Thus, a further problem specific to the pharmaceutical case is the reconciliation of the conflicting priorities of private business and public health.

This chapter examines the complex interplay between economic power, social concerns, technical knowledge and moral beliefs and the search for a common ground between them. I discuss how the economic might of international corporations backed up by the political influence of major developed states managed to offset the concerns and determination of developing countries to oppose trade policies that would hurt their populations. Further I discuss how the normative campaigners who drew attention to the ethical concerns for individual health and life managed to form coalitions with developing countries that were successful in securing changes to limit the scope of TRIPs in specific circumstances.

The development of the international norm for the protection of intellectual property needs to be examined in its specific historical, political and economic context, as the latter have further relevance for our understanding of the interplay of various factors that influence norm creation. Events that may seem unrelated to the new norm because of their character – such as the end of the Cold War, the terrorist attacks on the US, the changing image and relevance of the UN in world governance – have all had an impact on the creation, the modification and implementation of the TRIPs agreement as it stands today.

novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced” - http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm . When both the product and the process is covered by intellectual property rights, generic producers are banned from inventing other methods of reproducing medical substances, and generic competition is excluded. (emphasis added)

These political events have been a catalyst for political dynamics, which have changed the pace and final outcome of the TRIPs negotiations.

Brief History of Intellectual Property Protection

Exclusive rights to practice a certain craft, privileges, monopolies and grants of authors' rights to limit the publication of books were awarded by the sovereign rulers in Florence and Venice as early as the 15th century.⁴³⁹ Up until the 19th century the protection of intellectual property was confined to the domestic jurisdiction of nation-states.⁴⁴⁰ Although international instruments existed prior to the Agreement on TRIPs, these were only statements of principle and contained no enforcement mechanisms. Even the organisation that was created to overlook the application of the IP conventions, the World Intellectual Property Organisation (WIPO), was relatively powerless either to change any of the existing rules or indeed to insure their implementation.⁴⁴¹ Intellectual property protection in the pharmaceutical industry was also limited to individual states' discretion, which many states chose to exercise negatively by prohibiting patents in this industry, due to the social implications that those might have.⁴⁴² The German Patent Act of 1877, for example, prohibited the patenting of inventions regarding medicines.⁴⁴³ Many of today's developed countries only introduced pharmaceutical patents in the 1960s and 1970s, some

⁴³⁹ V. Shiva, *Protect or Plunder?* – pp.14; R. Sherwood, *Intellectual Property and Economic Development*, (Westview Press, Oxford: 1990) – pp. 17; S. Sell and C. May, “Moments in Law: Contestation and Settlement in the History of Intellectual Property”, *Review of International Political Economy*, vol. 8, no. 3, 2001 – pp. 477

⁴⁴⁰ S. Sell and C. May, “Moments in Law: Contestation and Settlement in the History of Intellectual Property” – pp. 482

⁴⁴¹ J. Watal, (ed.) *Intellectual Property Rights in the WTO and Developing Countries*, (Kluwer Law International, The Hague: 2001) – pp. 15-7.

⁴⁴² C. Bellmann, G. Dutfield, R. Melendez-Ortiz (eds.) *Trading in Knowledge – Development Perspectives on TRIPs, Trade and Sustainability*, (Earthscan Publications, International Centre for Trade and Sustainable Development, London: 2003) – pp. 6

⁴⁴³ UNCTAD-ICTSD, *Intellectual Property Rights: Implications for Development*, – pp. 34;

as late as the 1990s.⁴⁴⁴ In 1988 WIPO undertook a study for the negotiating group dealing with TRIPs in the Uruguay Round, which revealed that 49 of the 98 member states of the Paris Convention excluded pharmaceutical products from patent protection.⁴⁴⁵ It is worth noting that the members of the Paris Convention include both developed and developing countries. In other words, there is a long history of keeping medicines and products of pharmaceutical research out of the reach of patent provisions, both domestically and internationally, and this is due partially, if not entirely, to the high social price of such protection.

The earliest instruments for the protection of intellectual property are traced back to Renaissance Italy: the first general patent law was passed by the Venetian Senate in 1474.⁴⁴⁶ Another early system of patent law was set up in England in 1624.⁴⁴⁷ The purpose of patent laws at that time was not to reward invention but to encourage new businesses to set in and to limit monopolies,⁴⁴⁸ which is the opposite of the rationale for contemporary patent legislation. Patents up to the 18th century granted privileges and rights and were a symbol of approval by the sovereign.⁴⁴⁹ In Europe these privileges mainly had to do with the right to print books, as they were considered threatening the authority of monarchs and the Church alike.⁴⁵⁰

Growing industrialisation led to the improvement of the domestic machinery for the

⁴⁴⁴ France introduced pharmaceutical patents in 1960, Ireland in 1964, Switzerland in 1977, Italy and Sweden in 1978, Spain in 1992 – C. Bellmann, G. Dutfield, R. Melendez-Ortiz (eds.) *Trading in Knowledge* – pp. 6

⁴⁴⁵ P. Drahos, *Developing Countries and International Intellectual Property Standard-Setting*. Study Paper 8 Commissioned by the Commission on Intellectual Property Rights: 2003. Available from http://www.iprcommission.org/graphic/documents/study_papers.htm - pp. 9 citing WIPO (1988) “Existence, scope and form of generally internationally accepted and applied standards/norms for the protection of intellectual property” WO/INF/29 Sep 1988.

⁴⁴⁶ V. Shiva, *Protect or Plunder?* – pp.14

⁴⁴⁷ UNCTAD – ICTSD, *Intellectual Property Rights* – pp.33

⁴⁴⁸ V. Shiva, *Protect or Plunder?* – pp.17; UNCTAD – ICTSD, *Intellectual Property Rights* – pp.33

⁴⁴⁹ V. Shiva, *Protect or Plunder?* – pp.12; P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* (Earthscan Publications Ltd, London: 2002) – pp. 29-35.

⁴⁵⁰ *Ibid.* – pp.29-35

protection of copyright, patents, and trademarks, while increasing volumes of foreign trade meant that in the absence of any international agreements, states had to work out bilateral mechanisms to protect intellectual property. When invited to the International Exhibition in Vienna in 1873, German and American inventors declined to participate due to fears that their inventions might be copied by other participating delegations and exploited commercially in other countries.⁴⁵¹ These fears, coupled with the growing concerns for the protection of domestic industries from increasingly successful foreign counter-parts, led to the creation of the first international convention for the protection of inventions, trademarks and industrial designs – the Paris Convention of 1883.⁴⁵² In 1886 another international convention was created for the protection of literary and artistic works – the Berne Convention.⁴⁵³

The development of new knowledge-intensive industries such as the chemical and pharmaceutical industry, and agricultural research, which were all particularly strong in pre-World War I Germany, required the expertise of a large number of scientists.⁴⁵⁴ Big industrial cartels developed in the US after the war as well,⁴⁵⁵ as it was becoming clear that the basis of the economy was shifting from industrial design to the creation of scientific knowledge and information. The cartels relied on their ample resources to attract scientists and thus gain a competitive advantage. Since these organisations were primarily profit-oriented, they became interested in the protection of their industrial secrets and newly

⁴⁵¹ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 33-4; S. Sell, *Private Power, Public Law – The Globalisation of Intellectual Property Rights*, (Cambridge University Press, Cambridge: 2003) – pp. 11; <http://www.wipo.int/about-wipo/en/gib.htm>

⁴⁵² R. Sherwood, *Intellectual Property and Economic Development*, (Westview Press, Oxford: 1990) – pp. 17-8 and 24-6; P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 35; <http://www.wipo.int/about-wipo/en/gib.htm>

⁴⁵³ R. Sherwood, *Intellectual Property and Economic Development* – pp. 22-4; <http://www.wipo.int/about-wipo/en/gib.htm>

⁴⁵⁴ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 40; for developments in the sphere of pharmaceuticals see G. Duffield, *Intellectual Property Rights and the Life Science Industries – A Twentieth Century History*, (Ashgate Publishing, Aldershot: 2003) – pp. 89-128.

⁴⁵⁵ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 40-2

created knowledge, as that was the basis of increased profits and competitiveness.

The First World War, coupled with the Great Depression of 1929 brought about two important changes in the attitude of the US towards intellectual property protection. After US companies came to regret their heavy reliance on the German chemical industry,⁴⁵⁶ they had a vested interest in developing both their own knowledge and technologies and their own standards of intellectual property protection. The 1930s were also a time of growing suspicion for international liberal economics (to which many attributed the economic depression), which led to “greater government involvement in economic affairs and the vigorous assertion of economic nationalism in the interwar years”.⁴⁵⁷ This signalled that as early as the inter-war years industries and government held the same position on standards of intellectual property protection.

Following the end of World War II, the US emerged as the predominant economic and technological power, which gave US corporations greater freedom to impose their terms of trade and to use their growing expertise in intellectual property rights to the best of their advantage.⁴⁵⁸ Reconstruction funds, technology and knowledge started to flow from the US to Western Europe, Canada, South America and Asia.⁴⁵⁹ When setting up subsidiaries abroad, companies were careful not to disperse too much knowledge where they could use their own specialists: for example, instead of training local workers, which might have provided them with ‘expensive’ technical knowledge, companies sent their native manager, in order to avoid opening possibilities for free-riding.⁴⁶⁰ For many newly

⁴⁵⁶ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp.57

⁴⁵⁷ S. Sell, *Power and Ideas – North-South Politics of Intellectual Property and Antitrust*, (State University of New York Press, New York: 1998)– pp. 50

⁴⁵⁸ S. Sell, *Power and Ideas – North-South Politics of Intellectual Property and Antitrust* – pp. 51-2

⁴⁵⁹ *Ibid.* – pp. 51-66

⁴⁶⁰ According to McIntyre and Papp, “multinational corporations would establish an enterprise in a developing country with its own capital and technology... control the firm with imported management and technical expertise, would not share technical know-how or invest in local R&D” from J. McIntyre, and D.

independent countries (mainly South America and some parts of Asia) this was the start of a cycle of dependency in which the US corporations managed to withhold knowledge and technological know-how while reaping high profits on the back of low-cost labour and natural resources.⁴⁶¹

At the international level, the organisation in charge of administering the Paris and Berne Conventions – the United International Bureaux for the Protection of Intellectual Property (BIRPI) - was reformed and relocated from Berne to Geneva in 1960 in order to be closer to the United Nations and other international organisations based in Geneva.⁴⁶² The growing importance of IP protection in the 20th century required a larger organisation with an ever-expanding agenda. The Convention creating the World Intellectual Property Organisation (WIPO) was signed in Stockholm 1967⁴⁶³ and in 1974 the organisation became part of the UN system with a mandate to administer intellectual property matters.⁴⁶⁴ WIPO inherited the work of BIRPI, administering the Paris and Berne conventions, and was also in charge of managing the work of other UN agencies in relation to intellectual property (UNCTAD, UNESCO). Currently WIPO has 182 member states. Prior to the Uruguay Round of trade negotiations, WIPO, together with UNCTAD, were the only organisations administering IP issues at the international level. WIPO reached the capacity of its potential at the Diplomatic Conference to revise the Protection of Industrial Property.⁴⁶⁵ The organisation hosted the negotiations regarding the revision of the Paris Convention, which ended in a deadlock. The developing countries led by the Andean

Papp, *The Political Economy of International Technology Transfer*, (Quorum, New York:1986) – pp. 86-8, cited in S. Sell, *Power and Ideas – North-South Politics of Intellectual Property and Antitrust* – pp. 56

⁴⁶¹ Ibid.

⁴⁶² <http://www.wipo.int/about-wipo/en/gib.htm>

⁴⁶³ http://www.wipo.int/about-wipo/en/gib.htm#P29_4637

⁴⁶⁴ <http://www.wipo.int/about-wipo/en/gib.htm>

⁴⁶⁵ S. Sell, *Power and Ideas – North-South Politics of Intellectual Property and Antitrust* – pp. 107-141; M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*. (Brookings Institution Press. Washington, DC: 1998) – pp. 68

Group,⁴⁶⁶ Brazil and India tabled a proposal that demanded the Paris Convention to be revised in such a way as to “cater more effectively to the special needs of developing countries”.⁴⁶⁷ Their intentions were simply to lower the standards of IP protection applicable to them⁴⁶⁸ and thus to gain a more equal start in the process of their own industrialisation and economic development. The OECD countries, influenced by the opinion of various national industry associations, were opposed⁴⁶⁹ on the grounds that the demands of the developing countries were unreasonable and such a revision would not improve their development opportunities.⁴⁷⁰ In a forum such as WIPO, where every country has one vote, the united front of the Group of 77 (G77)⁴⁷¹ and the total opposition of the OECD countries created a stalemate that could not be resolved. In view of the inability of WIPO to settle disputes between developed and developing countries, to resolve negotiations that had reached a stalemate, or to enforce international agreements and under the influence of the industrial sectors of the US, Europe and Japan, the US government proposed a different solution to the problem of how to raise the international standards of IP protection.⁴⁷² They sought to change the forum and focus of the discussion in a way that might yield better results. This change was based on redefining the issue of IP protection as closely related to international trade, and thus bringing the discussions to a forum where the

⁴⁶⁶ The Andean Group comprised Chile, Colombia, Bolivia, Ecuador and Peru. The countries united in 1969 “in a common front to minimise the negative effects of foreign investment and technology transfer” – S. Sell, *Power and Ideas – North-South Politics of Intellectual Property and Antitrust*, (State University of New York Press, New York: 1998)– pp. 112

⁴⁶⁷ Ibid. – pp. 117

⁴⁶⁸ J. Watal, (ed.) *Intellectual Property Rights in the WTO and Developing Countries*, – pp. 16

⁴⁶⁹ The Intellectual Property Committee (IPC) in the US began a campaign to mobilise industry representatives in Europe (the Union of Industrial and Employers’ Confederations in Europe – UNICE) and Japan (the Japan Federation of Economic Organisations – Keidanren) in order to gain support for the IPC initiative to present IP issues as issues of international trade – S. Sell, *Private Power, Public Law – The Globalisation of Intellectual Property Rights*, (Cambridge University Press, Cambridge: 2003) – pp. 104-5

⁴⁷⁰ Ibid – pp. 117-8

⁴⁷¹ The Group of 77 was created in June 1964 by seventy-seven developing countries. Its membership has now grown to 132 countries but the name was retained for its historical significance - <http://www.g77.org/main/main.htm>

⁴⁷² S. Sell, *Private Power, Public Law* – pp. 131-139

G-7 states could exert more effective influence.

The economic crisis of the 1970s, fuelled by the rising prices of crude oil and falling prices of foodstuffs, helped developing states unite under a common agenda and attempt to shake up the international system with proposals for a New International Economic Order (NIEO) presented to the United Nations.⁴⁷³ US industries were hurt by the raising fuel prices created by OPEC and felt further pressure from the increasing technological production capabilities of Japan and South East Asia. Western Europe and Canada were concerned by the amount of influence US corporations had in their home economies, which led to debates with the US on issues of competition.⁴⁷⁴ The developing countries were engaged in a concerted effort to negotiate new economic rules,⁴⁷⁵ while the economies of East Asia (the ‘Asian tigers’) and, most importantly, Japan were experiencing unforeseen growth.⁴⁷⁶

The campaign to create new rules for the international protection of intellectual property can be said to have begun with the failed attempt to create a code for the trade in counterfeit goods at the Tokyo Round of the GATT trade negotiations (1973-1979), where a conglomerate of US industries managed to persuade the US and the European Economic Community delegations that international rules needed to be established to limit the effects of trade in counterfeit goods.⁴⁷⁷ This undertaking failed due to lack of broader support for the issue, but it left a significant mark on the GATT agenda. It sent a signal to the corporate world that trade negotiations can be used to deal with questions of counterfeit goods and other issues of intellectual property and that the US and EEC governments were conducive

⁴⁷³ W. Keylor, *The Twentieth Century World – An International History*, (Oxford University Press, New York: 2001, 4th edn.) – pp. 418; J. Young, and J. Kent, *International Relations since 1945 – A Global History*, (Oxford University Press, Oxford: 2004) – pp. 433.

⁴⁷⁴ *Ibid.* – pp. 66

⁴⁷⁵ P. Drahos, and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 63

⁴⁷⁶ *Ibid.* – pp.63

⁴⁷⁷ *Supra note 44*

to persuasion to address such questions. Issues of intellectual property were dealt with by the World Intellectual Property Organisation, which had limited enforcement mechanisms and hardly any power at all.

In 1982 an article entitled “Stealing from the Mind” appeared in the *New York Times*, marking the determination of US corporations to stop what they called the theft of US knowledge and invention.⁴⁷⁸ The campaign that US industry initially began was to limit the trade in counterfeit goods.⁴⁷⁹ Their approach towards the US government included lobbying and creating reports on lost revenues to countries that produce and trade in counterfeit products. Drahos and Braithwaite argue that in the context of the early 1980s, the article written by the president and chairman of Pfizer was a risky move, as there was no certainty what the reaction from the US government would be, nor was it clear how WIPO and the developing countries (many of which important markets for Pfizer) would respond to these accusations.⁴⁸⁰

The Uruguay Round of the Ministerial meetings of GATT began in 1986 and took almost eight years to close.⁴⁸¹ In those years important political changes took place in the international system. The Cold war, and thus the ideological opposition between East and West, ended in 1989. The triumphant liberal political ideology, with a strong emphasis on liberal economics, brought about an increased drive to liberalise international trade. The end of the standoff between the superpowers created a favourable environment for an increased role of international institutions, as well as an air of widening international

⁴⁷⁸ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 61

⁴⁷⁹ G. Dutfield, *Intellectual Property Rights and the Life Science Industries* – pp.197; J. Watal, (ed.) *Intellectual Property Rights in the WTO and Developing Countries* – pp. 15; A. O. Adede, “Origins and History of the TRIPS Negotiations” in C. Bellmann, G. Dutfield, R. Melendez-Ortiz (ed.) *Trading in Knowledge* – pp. 25

⁴⁸⁰ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 61

⁴⁸¹ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm - “Understanding the WTO: Uruguay Round”

cooperation. We have been experiencing a rapid legalisation at the international level, where states have been creating more legal principles and aiming at improving the effectiveness of international law.⁴⁸² The international normative context was extending to take account of the individual and his/her human rights. Liberal norms similar to the ones advocated in American domestic politics – the right to protect private property, fairness, the support for innovation, and so on - were becoming the basis of the developing new international norm for the protection of intellectual property.

The concept of intellectual property rights has dramatically changed its meaning over the centuries, reflecting the command of the sovereign at one point, the needs of industries at another, and the need for protection of the vulnerable at yet another stage of economic development. The norm requiring the recognition of and respect for intellectual property rights has not been normatively consistent over the years, unlike in the case of the norm prohibiting the use of torture, where a steady progression towards the same goal had taken place. In the case of the norm prohibiting the use of torture, the historical struggle for the establishment of the norm was mainly concerned with tightening the legal instruments, whereas in the case of the intellectual property norm the same uniformity of meaning seems to be lacking. Meanings changed with the requirements of the various stages of economic, social and political developments in different countries. We seem to be coming to a stage, however, where the construction of IP protection has taken a more stable form, since only the scope of the protection awarded and the mechanisms of administering IPRs seems to have changed considerably over the past century.

The campaign for the creation and modification of the international norm protecting intellectual property rights in general and the case of the pharmaceutical industry in

⁴⁸² J. Goldstein, M. Kahler, R. Keohane, and Anne-Marie Slaughter, "Introduction: Legalisation of World Politics", *International Organisation*, Vol. 54, no. 3, Summer 2000, 385-399

particular will be examined in further historical detail here in the context of the theoretical model of norm development proposed in Chapter 1. *Figure 3.1* below provides a timeline of events and agreements that have contributed to or influenced the process of norm development in this case study.

Figure 3.1

TIMELINE OF THE CREATION OF INTERNATIONAL AND REGIONAL INSTRUMENTS THAT PROVIDE INTELLECTUAL PROPERTY PROTECTION FOR INDUSTRIAL PATENTS AND PATENTS IN THE PHARMACEUTICAL INDUSTRY

1474	Venetian Senate passed the first general patent law
1557	Queen Mary grants printing privileges to a craft guild known as the Stationers
1623	English Statute of Monopolies – England’s early attempts to limit the scope of patent law in such a way as to add to the public wealth
1711	First design patent statute passed in France to encourage creativity in the silk manufacturing guild in Lyons
1793	US Congress passed the original Patent Act
1836	New United States Patent Act entitled “An Act to promote the Progress of Useful Arts, and to repeal all Acts and parts of Acts heretofore made for that purpose”
1873	International Exposition in Vienna
1883	Paris Convention for the Protection of Industrial Property
1886	Berne Convention for the Protection of Literary and Artistic works
1893	Bureaux for the Protection of Intellectual Property – established in Berne, Switzerland to overlook the Paris and Berne Conventions
1952	The Universal Copyright Convention was drafted under the auspices of UNESCO in an attempt to include the US and other countries in South America in international treaties
1967	The World Intellectual Property Organisation is established as one of the UN specialised agencies
1973	European Patent Convention
1973-1979	Tokyo Round of GATT Negotiations – the US and EEC put forward a proposal for an Anti-

	Counterfeit Code, which recommended that measures be taken internationally to curb trade in counterfeit goods.
1974	US Trade Act Section 301
1978	The European Patent Convention created a European Patent Office in Munich to confer patents recognised throughout the EU (except Denmark and Ireland).
1979	The Advisory Committee on Trade Policy and Negotiation is created to institutionalise business advice to the president
1980 – 1984	Diplomatic Conference for the Protection of Industrial Property – held under the auspices of WIPO and aimed at the revision of the Paris Convention
1982	Harare Protocol on Patent and Industrial Designs within the Framework of the African Regional Industrial Property Organisation.
Sep 1986	Punta Del Este Meeting of Trade ministers, culminating in the Ministerial Declaration opening the Uruguay Round of negotiations.
1986-1994	General Agreement on Tariffs and Trade – Uruguay Round of negotiations to establish the World Trade Organisation along with the creation of an Agreement on Trade Related Intellectual Property Rights (TRIPs)
Apr 1994	TRIPs agreement adopted at Marrakech as Annex C of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
Jan 1995	WTO Agreement including the Agreement on TRIPs entered into force
1995	Ralph Nader and James Love create the Consumer Project on Technology (CPT)
Jan 1996	United Nations Programme on HIV/AIDS (UNAIDS) was developed
Oct 1996	Health Action International organised the first major NGO meeting on health care and TRIPs in Bielefeld, Germany
Jul 1998	“Bridging the Gap” – 12 th International AIDS Conference, Geneva
Jan 1999	Health GAP (Global Access Project) Coalition is created in the US
Mar 1999	<i>AIDS and Essential Medicines and Compulsory Licensing</i> , Meeting sponsored by Medecins Sans Frontiers (MSF), Health Action International (HAI) and Consumer Project on Technology (CPT). Geneva, 25-27 Mar.
Oct 1999	MSF is awarded the Nobel Peace Prize, the money from which, the organisation decides to

- spend on creating the Neglected Disease Fund.
- Nov 1999 *Increasing Access to Essential Drugs in a Globalised Economy Working Towards Solutions*
– Conference organised by HAI, MSF, and CPT, Amsterdam, 25-26 Nov.
- May 2000 53rd World Health Assembly – meeting of the World Health Organisation, which was
attended by MSF, CPT and HAI – Geneva, 15-21 May.
- July 2000 World AIDS Conference in Durban, South Africa, July 9-14
- 2000 Andean Community Common Regime on Industrial Property
- Feb 2001 Oxfam, UK launches the ‘Cut the Cost’ campaign
- Nov 2001 Doha Ministerial Conference – Doha Declaration on TRIPs and Public Health
- Mar 2002 *The Crisis of Neglected Diseases: Developing Treatments and Ensuring Access*, Mar 12-14,
New York – organised by MSF, CPT, Oxfam and HAI
- Jul 2002 14th International AIDS Conference, Barcelona

Theoretical Model and Empirical Findings

Formulating the idea

The initial idea for introducing international standards of intellectual property (IP) protection to all industries (including pharmaceuticals) was formulated by a select group of some of the biggest US corporations in the early 1980s.⁴⁸³ IP issues have been on the agenda of US business for the whole of the 20th century,⁴⁸⁴ but their application had been hampered by strong anti-trust and monopoly legislation. It was a combination of changing domestic legislation, the changing US economic position in the world and developments within the international economic environment that assisted US businesses in persuading the US government of the importance of international intellectual property protection. Although the position of the US government on any particular issue is extremely important, one still needs to keep the importance of power alone in perspective. According to Graham Dutfield, “TRIPs was achieved against the odds... it was a remarkable accomplishment to persuade 100 countries who were net importers of intellectual property to sign an agreement to dramatically increase the cost of intellectual property imports”.⁴⁸⁵ In other words, although US domestic political and economic dynamics provide a preview of future normative developments, one should be careful not to jump to conclusions, since the international environment is not always unreservedly open to these suggestions.

The move towards setting international standards of IP protection began within the US domestic legal system. It is useful to keep in mind that the principle of intellectual property protection was in continual competition with the anti-trust policies of the 19th and

⁴⁸³ M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*. – pp. 69

⁴⁸⁴ Mergers indicates that in the early part of the XIX century in the US, a decision was taken that in view of the ‘stage of economic development, the best policy for the US was lax enforcement of foreign intellectual property’ – See S. Sell, *Private Power, Public Law*, – pp. 64

⁴⁸⁵ G. Dutfield, *Intellectual Property Rights and the Life Science Industries*, – pp. 201

20th centuries.⁴⁸⁶ One can identify periods in US legal history where the importance of patents was considered superior to concerns about monopolies,⁴⁸⁷ followed by periods where this superiority was overturned.⁴⁸⁸ The decisions of the US Supreme Court are a good indicator of changing social perceptions at the domestic level, as the task of the Supreme Court is to adjudicate cases and controversies that arise under US constitutional law. The Supreme Court is a part of the system of checks and balances of US politics, which ensures that neither the executive, nor the legislature can usurp political power.⁴⁸⁹ One of its functions is that of judicial review – that is, it is in a position to invalidate legislation or executive actions if those are considered in conflict with the Constitution.⁴⁹⁰ As Chief Justice Charles Evans Hughes (US Supreme Court Judge) remarked, “We are under the Constitution but the Constitution is what the judges say it is”.⁴⁹¹

Lobbying is an essential part of the policy-making process in US domestic politics. There are various industrial lobbying organisations whose primary purpose is to get the demands of the interested parties through to the members of the legislature. Lobby groups exercise influence through the provision of technical knowledge and election campaign funds to members of Congress. The disadvantaged groups in the US, which are unable to pursue their causes through lobbying politicians, often rely on the Supreme Court as their

⁴⁸⁶ G. Dutfield, *Intellectual Property Rights and the Life Science Industries*, – pp. 113

⁴⁸⁷ In *Henry v. A.B.Dick Co.* (224 US 1, 1912) – the Supreme Court of the United States indicated that if conditions imposed by a patent holder upon a patent buyer are too limiting, then the patented article will not find a market – pp.34; and further that “[a]n attack upon the rights under a patent because it secures a monopoly to make, to sell, and to use, is an attack upon the whole patent system. We (the SC) are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor’s exclusive right to use” - pp.35

⁴⁸⁸ See US Supreme Court – *Motion Picture Patents Co. v. Universal Film Mfg Co.* (243 US 502, 1917) and *Morton Salt Co. v. G.S. Suppiger Co.* (314 US 488, 1942) – in both cases the Supreme Court upheld the opinion that patent holders may not use their patent rights to impose conditions of use of patented articles that include non-patented consumables – 243 US 502, pp. 512 and 518; 314 US 488, pp.494.

⁴⁸⁹ See <http://www.supremecourtus.gov>

⁴⁹⁰ Ibid.

⁴⁹¹ David O’Brien, *Storm Center – The Supreme Court in American Politics*, (W.W. Norton and Co., New York: 2000) – pp. 171

“sole practicable avenue open to a minority to petition for redress of grievances”.⁴⁹² The Supreme Court agenda and attitudes to particular issues can easily change as a result of the interplay of several factors – changes in the composition of the bench, for example, led to periods in which the Court pursued alternatively conservative or liberal economic policies.⁴⁹³ The agenda also changes due to the issues brought by litigants, as well as due to broader socio-economic processes.⁴⁹⁴ This is why the changes in the attitude of the Supreme Court to issues of patent law in the 1980s were seen as a very significant development. The Court has since the 1980s not reversed the direction of this change, which makes it all the more profound.

In *Dawson Chemical Co. v. Rohm & Haas Co.* (448 US 176, 1980) the Supreme Court upheld the right to protection of patent holders against free-riding by denying allegations of patent misuse in the context of anti-trust legislation, on the grounds that “[t]he incentive to await the discoveries of others might well prove sweeter than the incentive to take the initiative oneself”. The Supreme Court’s decision endorsed the crucial importance of intellectual property over anti-trust concerns and put the protection of the rights of inventors and/or patent holders above competition concerns.⁴⁹⁵ In the words of Susan Sell, there was a “dramatically improved domestic environment for IP owners and a noteworthy redefinition of US interests in IP protection”.⁴⁹⁶ These domestic developments were reinforced by a change in the US economic position in international markets. During the 1970s and the 1980s a “policy discourse of a US in decline” developed among domestic

⁴⁹² D. O’Brien, *Storm Center – The Supreme Court in American Politics*, – pp. 228

⁴⁹³ *Ibid.* – pp. 232

⁴⁹⁴ *Ibid.*

⁴⁹⁵ See US Supreme Court – *Dawson Chemical Co. v. Rohm & Haas Co.* (448 US 176, 1980) - pp. 223; also in the case of *General Motors Corp. v. Devex Corp.* (461 US 648, 1983) the SC confirmed the right of patent holders to receive *prejudgement interest* in cases of patent infringement – pp. 658

⁴⁹⁶ S. Sell, *Private Power, Public Law*, – pp. 60

political elites⁴⁹⁷ due to a growing trade deficit. The private sector's move towards closer cooperation on IP issues across industries in the 1970s⁴⁹⁸ helped industrial lobbying groups take advantage of this widespread concern that the US economy is not doing well. These groups managed to persuade policy-makers that the decline in the US economy is partly triggered by the losses suffered as a result of piracy, counterfeiting and free-riding on US knowledge.⁴⁹⁹ These were the first steps towards linking intellectual property protection to trade issues, which later paved the way for the creation of the TRIPs Agreement. It was primarily research intensive sectors such as pharmaceuticals, computer software, semiconductors,⁵⁰⁰ and the agricultural chemical industry⁵⁰¹ that were directly involved in lobbying the US government, as they felt that large proportions of their revenues were lost to piracy.⁵⁰² The success stories of developing economies and the rapid growth in India, Brazil and some states in South East Asia, including Japan, fed into these fears and allegations.⁵⁰³ These economies were expanding swiftly, while the US economy seemed to be slowing down. Some of these trends were reversed following the oil crisis of the 1970s, but US industries were determined to hold on to their supremacy. One way of doing this was to try and protect their most precious assets – new knowledge and technologies.⁵⁰⁴

⁴⁹⁷ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 63; G. Dutfield, *Intellectual Property Rights and the Life Science Industries* - pp. 199

⁴⁹⁸ S. Sell, *Private Power, Public Law*, – pp. 78-9

⁴⁹⁹ F. Weiss, “TRIPS in Search of an Itinerary: Trade Related Intellectual Property Rights and the Uruguay Round Negotiations” in G. Sacerdoti, *Liberalisation of Services and Intellectual Property in the Uruguay Round of GATT*, (University Press Fribourg, Switzerland: 1990) – pp. 89; P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 63

⁵⁰⁰ F. Weiss, “TRIPS in Search of an Itinerary: Trade Related Intellectual Property Rights and the Uruguay Round Negotiations” – pp. 89

⁵⁰¹ S. Sell, *Private Power, Public Law* – pp. 79

⁵⁰² J. MacLaughlin, T. Richards, and L. Kenny, “The Economic Significance of Piracy” in R. Gadbaw, and T. Richards, (eds.) *Intellectual Property Rights: Global Consensus, Global Conflict?*, (Westview Press, Boulder, USA: 1988) – pp. 94

⁵⁰³ P. Drahos and J. Braithwaite, *Information Feudalism – Who owns the Knowledge Economy?* – pp. 63

⁵⁰⁴ P. Almeida, “The ‘New’ Intellectual Property Regime and its Economic Impact on Developing Countries” in G. Sacerdoti, *Liberalisation of Services and Intellectual Property in the Uruguay Round of GATT*, (University Press Fribourg, Switzerland: 1990) – pp. 74

The transformations in the world trading system that took place in the 1970s meant that the competitive advantage of companies was no longer determined simply by cheaper natural resources and labour, but rather by the possession of cutting-edge knowledge and technologies. However, while research and development is an expensive undertaking, the increased speed of communications and technology transfer meant that information was dispersed more quickly and, while R&D costs grew disproportionately higher,⁵⁰⁵ product life-cycles in knowledge-based industries became shorter, thus impairing the ability of innovators to recoup their R&D costs.⁵⁰⁶ Globalisation of trade, transport and communications was undermining the ability of industries to protect their innovations from free-riders, while the cost of free-riding was becoming insignificant.

The changing international environment, the pessimistic view of US policy makers about the state of their economy, the new position adopted by the Supreme Court on the importance of intellectual property protection, and the determination with which US companies worked to prove the need for increased IP protection, all contributed to the creation of a receptive audience in the US administration for this new idea of internationally enforceable IP rights across industrial sectors. Businesses realised, however, that getting the US government on their side was only going to be the first step towards ensuring international protection. Money started to flow towards top lawyers in this highly technical and complex field, towards social science organisations to produce justification of the importance of IP principles, and towards professional lobbyists to persuade the US government of the need to press for international standards of intellectual property

⁵⁰⁵ C. Correa, and A. Yusuf, (eds) *Intellectual Property and International Trade – The TRIPs Agreement*, (Kluwer Law International, London: 1998) – pp. 23; B. Doern, *Global Change and Intellectual Property Agencies*, (Pinter, London: 1999) – pp. 1

⁵⁰⁶ M. Wallerstein, M. Mogege, and R. Schoen, (eds) *Global Dimensions of Intellectual Property Rights in Science and Technology*, (National Academy Press, Washington; 1993) – pp. 6

protection.⁵⁰⁷ The foundations for the development of the norm protecting products of the mind were successfully laid, not just by means of the sheer size of the business resources committed to it, but also by investments in the creation of technical knowledge to back up the argument in favour of this norm.

Network Configuration

Similar to the case of creating the norm prohibiting the use of torture, network configuration and issue formulation (defining IP protection as a trade-related issue) occurred simultaneously. The difference in the process of network configuration in the case of IP protection was that the aim of the participants in the campaign was to stay out of the public eye as much as possible and to selectively engage only such actors who were likely to assist in pushing the trade agenda forward. Companies were striving to protect their chances of maximising profits and this was an aim that would not attract the support or sympathy of the public.

Studies of the negotiations preceding the TRIPs Agreement suggest that the idea for the creation of internationally binding intellectual property rules across industries came from the US private industrial sector.⁵⁰⁸ As discussed earlier, the first unsuccessful attempt to introduce IPR concerns to the GATT was at the Tokyo Round of Ministerial Negotiations (1973-1979).⁵⁰⁹ The issue was formulated as a need to curb the trade in counterfeit products, which was affecting trade-mark products. Although the coalition of

⁵⁰⁷ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 90-9 and pp. 114-9

⁵⁰⁸ S. Sell, *Private Power, Public Law*, – pp. 78-86; P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 61-73; R. Gadbow and T. Richards, (eds.) *Intellectual Property Rights: Global Consensus, Global Conflict?*, (Westview Press, Boulder, USA: 1988) – pp. 39-40. J. Watal, (ed.) *Intellectual Property Rights in the WTO and Developing Countries*, – pp. 17; G. Dutfield, “Introduction” in C. Bellmann, G. Dutfield, R. Melendez-Ortiz (eds.) *Trading in Knowledge – Development Perspectives on TRIPs, Trade and Sustainability*, (Earthscan Publications, London; 2003) – pp. 2.

⁵⁰⁹ *Supra* note 44

brand producing companies was quite strong (comprising around 100 multinationals)⁵¹⁰ it only managed to persuade the US and the EEC to support their proposal; the much needed further agreement from other nation states could not be generated before the end of the Tokyo Round.⁵¹¹

An increasing number of US corporations were beginning to realise that their profits were being eroded by free-riders in the developing world who would use established trademarks or would copy products, and designs for commercial gain. The technologies to copy products were generally many times cheaper than the investment in R&D, which compromised companies' ability to recoup R&D costs. It was becoming clear that significant reform of the Paris Convention under WIPO⁵¹² was not going to materialise due to the deadlock resulting from the completely opposing demands of the developed and developing countries. Multinational corporations like Pfizer and IBM realised that WIPO could no longer help developed countries regulate the 'knowledge game'.⁵¹³ Companies combined their efforts in an attempt to influence directly the policies of the US government by linking intellectual property protection to trade.⁵¹⁴ The chief officers of Pfizer and IBM were represented on the Advisory Committee on Trade Policy and Negotiation (ACTPN),⁵¹⁵ which is part of the office of the US Trade Representative.⁵¹⁶ Pfizer, IBM,

⁵¹⁰ T. P. Stewart, (ed.) *The GATT Uruguay Round – A Negotiating History (1986-1992)*. Vol. 2 – Commentary. (Kluwer Law and Taxation Publishers. Deventer, the Netherlands: 1993) – citing James Bikoff, President, International Anti-Counterfeiting Coalition – *Possible Renewal of the Generalised System of Preferences – Part I: Hearing Before the Subcommittee on Trade of the U.S. House of Rep. Comm. on Ways and Means*, 98th Congress, 1st Session (1983) – pp. 2259

⁵¹¹ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 15; T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2260

⁵¹² The international negotiations to revise the Paris Convention began in 1980 and ended in 1984 without any decision being reached – see “International Negotiations to Revise the Paris Convention on the Protection of Intellectual Property” in S. Sell, *Power and Ideas*

⁵¹³ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp.81

⁵¹⁴ M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*. – pp. 68; S. Sell, *Power and Ideas*, – pp. 132-3

⁵¹⁵ M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*. – pp. 68;

Monsanto, and DuPont had a history of lobbying the US government and this time, combining forces with the International Anti-Counterfeiting Coalition and the Copyright Alliance, they seemed to make a breakthrough.⁵¹⁷ Pfizer “worked in Washington to multiply the [Advisory Committee’s] efforts and strengthen its capacity to influence the multilateral policy agenda by calling on the membership of the Pharmaceutical Research and Manufacturers of America (PhRMA)⁵¹⁸ to put the protection of intellectual property high on its lobbying agenda”.⁵¹⁹ The Chemical Manufacturers Association also had an interest in increasing the protection of trade secrets.⁵²⁰ In 1984 the International Intellectual Property Alliance (IIPA) was created to represent US copyright industries.⁵²¹ Although the copyright industries were initially satisfied with the protection provided by the Berne Convention, the IIPA raised the issue of pirating and weak enforcement of the principles of the convention in the developing countries and thus became a strong ally in the coalition to increase IP protection.⁵²² A broad and very loose alliance was emerging among groups that lobbied separately for the protection of patents, trademarks, copyrights, software, music, movies, and so on. The line of complaint was similar: heavy losses were incurred by companies working in various fields because of free-riders abroad. Industries’ reports

⁵¹⁶ The Advisory Committee on Trade Policy and Negotiation (ACTPN) was created by the Trade Act of 1974 to provide the USTR and the US President with policy advice on trade issues. The ACTPN comprises representatives of various companies and industries. See <http://www.ustr.gov>; The committee is “a pipeline for US business to the US executive on trade issues. Its function was to advise the USTR on where, in the eyes of the private sector, US economic interests really lay” – P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* – pp. 72

⁵¹⁷ S. Sell, *Power and Ideas*, – pp. 79

⁵¹⁸ Pharmaceutical Research and Manufacturers of America (PhRMA) is one of the biggest, most influential lobbying organisations in Washington DC. PhRMA represents 48 pharmaceutical companies and is notorious for hiding its lobbying and PR activities behind PhRMA-funded nonprofit groups – in *Pharmaceutical Research and Manufacturers of America*, Centre for Media and Democracy. Available at: <http://prwatch.org/node/308/trackback> last accessed on 08/01/2005; J. Borger, “USA: The Pharmaceutical Industry Stalks the Corridors of Power”, *Guardian Unlimited*, Feb 13, 2001. Available at <http://www.corpwatch.org> last accessed on 08/01/2005

⁵¹⁹ M. Ryan, *Knowledge Diplomacy*, – pp. 69

⁵²⁰ Ibid.

⁵²¹ <http://www.iipa.com>

⁵²² M. Ryan, *Knowledge Diplomacy*, – pp. 70

released figures of projected losses that echoed the need for universal norms that would help innovators and creators in any field recuperate their investments.⁵²³

In 1986, several months before the opening of the Uruguay Round of GATT negotiations, the executives of some of the biggest US-based corporations created the Intellectual Property Committee (IPC)⁵²⁴ to seek international support and provide governments with advice for the creation of rules governing worldwide protection for intellectual property rights.⁵²⁵ The IPC exerted its influence abroad through the CEOs of US companies, who were members to the committee. They would contact their counterparts in Europe and Japan to get them to pressure their governments into supporting the intellectual property agenda.⁵²⁶ The governments of the European Communities, Japan and Canada were lobbied separately by the chairman of the United States Trade Representative (USTR). This group of countries became known as the Quad and consensus between them on the trade round agenda was crucial.⁵²⁷

The process of network formation in the case of the international protection of intellectual property rights consisted of various industry-specific coalitions joining forces on a single issue affecting them in a similar way. The network spread across borders,

⁵²³ US International Trade Commission, *The Effects of Foreign Product Counterfeiting on US Industry*, Washington: 1984, USITC cited in R. Gadbow and T. Richards, (eds.) *Intellectual Property Rights: Global Consensus, Global Conflict?*, – pp.96; International Intellectual Property Alliance, *Piracy of U.S. Copyrighted Works in Ten Selected Countries*, Washington: 1985, cited in M. Ryan, *Knowledge Diplomacy* – pp. 71-2; Jacques Gorlin (1985) “A Trade-based Approach for the International Copyright Protection for Computer Software” cited in S. Sell, *Private Power, Public Law*, – pp. 101; *Unfair Foreign Trade Practices, Stealing American Intellectual Property: Imitation is not Flattery*, 98th Congress, 2nd Session 1-3 (1984) cited in T. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2254 and M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*, (Sweet and Maxwell, London; 1996) – pp. 2;

⁵²⁴ The Intellectual Property Committee was created by Pratt (Pfizer) and Opel (IBM). The initial members of the committee were Pfizer, IBM, Merck, General Electric, DuPont, Warner Communications, Hewlett-Packard, Bristol-Myers, FMC Corporation, General Motors, Johnson& Johnson, Monsanto and Rockwell International – M. Ryan, *Knowledge Diplomacy*, – pp. 69

⁵²⁵ S. Sell, *Private Power and Public Law*, – pp. 96

⁵²⁶ P. Drahos and J. Braithwaite, *Information Feudalism* – pp. 118

⁵²⁷ *Ibid.* – pp. 117

mainly between the governments of the most advanced economies in the world, shortly before the new round of trade negotiations opened in Uruguay.

The support network for the creation of an international norm for intellectual property protection that would be valid across industries has some specific characteristics. The aims of the organisations of multinational corporations and lobbyists were instrumental and concentrated on creating technical norms that would allow industries to increase their returns. These actors were not aiming explicitly to change any normative structures; rather, their efforts were put towards producing more effective rules that would bring about the desired results. Some normative arguments regarding the moral rights of entrepreneurs and creators were advanced, but corporations knew from experience that, unless there were stringent mechanisms to ensure compliance, normative structures would be ineffective.⁵²⁸

The actions of corporations were guided by a logic of consequences, which justifies the choice of avenues and allies that corporations sought to achieve their goal. US corporations were more than happy to share the expertise of their IP lawyers with various government agencies, but, unsurprisingly, were not as helpful towards the governments of developing countries. According to a study conducted by Susan Sell, “the government relied upon IP experts, who were also advocates, to translate the complexities into political discourse... therefore in this context, there [was] no neutral or objective group of civil servants in a position to counter-balance private demands”.⁵²⁹ Sell further discusses the phenomenon of the “revolving door” between government and private sector where specialists went from being employed by the government to being employed by private companies and vice versa,⁵³⁰ thus strengthening the ties of industries and policy makers

⁵²⁸ The lack of implementation procedures of the Paris Convention was a case in point

⁵²⁹ S. Sell, *Private Power, Public Law*, – pp. 99

⁵³⁰ *Ibid.* – pp. 83

while ensuring expertise and shared knowledge. The success of the campaign was dependent neither on the number of supporters nor on the ability of corporations to get the public to back their position. Instead, success had to do with the level of economic and political influence that these companies could master. This campaign was not a public one; campaign records are limited and much information remains undisclosed. Large corporations with experience in lobbying employed all possible methods to engage policy-makers with their agenda. Corporations built networks among themselves, CEOs chaired advisory committees, organisations were created to liaise with the government and so on, until the message was heard loud and clear in the corridors of power. The message was carefully constructed in terms that were likely to engage the attention of policy-makers, which will be discussed in the next section.

Issue Formation

Actors who have expressed the need to create a new norm have to define and delimit its scope. In order for this process to be completed, agreement needs to be reached on the technical, legal, and normative parameters of the proposed norm. Reaching scientific (technical) and normative closure is crucial for the normative campaign, as it lays a solid foundation for political negotiations. The proposed norm needs to be formulated in such a way as to be able to rectify the problem singled out in stage one, while at the same time remaining reasonable so that it would be easier to get conservative actors to support the new norm. The network promoting the development of universal norms of intellectual property protection provides a show-case example of how issue formation is done most effectively.

The process of issue formulation involves constructing a problem and creating a solution for it. Constructing the problem involves the choice of context in which to position

the issue,⁵³¹ the choice of an institutional forum in which best to address the problem, establishing the cause and effect of the problem, and proposing solutions for its elimination.

“Conditions become defined as problems when we come to believe that we should do something about them”.⁵³² As discussed earlier, issues of intellectual property were strictly a national matter until the 19th century⁵³³ and even the United States disregarded them when the government felt that a fledgling economy needed all the knowledge and technologies available to develop.⁵³⁴ The issue of intellectual property protection was formulated as a problem when large US businesses saw that copycats were making money at the expense of business investment in research and development and decided to limit this practice. Pfizer’s *New York Times* article “Stealing from the Mind” outlined the concerns of many industries, not just the pharmaceutical, that they were losing profits because there were no rules to protect their intellectual property abroad.⁵³⁵ Economists constructed the “appropriability problem”⁵³⁶ – copying of inventions is cheap but there needs to be a way to recoup expenses for industrial R&D, otherwise incentives for innovation will disappear, resulting in a “suboptimal level of innovation”.⁵³⁷ A campaign had begun to persuade policy-makers that this was an issue not only worthy of their attention but also calling for

⁵³¹ The choice of technical and normative context is crucial as the Price’s study of the creation of the Convention Banning the use of Landmines shows. When presented as part of the debate on the usefulness of some conventional weapons, the issue of landmines did not attract any political attention, let alone solutions. When presented as a humanitarian concern of maiming and harming innocent civilians, then a campaign to ban the use of landmines gained momentum and led to technical and normative change. See Richard Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” *International Organisation*, Vol. 52, no. 3, 1998, 613-644

⁵³² M. Ryan, *Knowledge Diplomacy*, – pp. 9 citing John Kingdon 84) *Agendas, Alternatives and Public Policies*, (Little Brown, Boston: 1984) - p.54

⁵³³ S. Sell and C. May, “Moments in Law: Contestation and Settlement in the History of Intellectual Property” – pp. 482

⁵³⁴ S. Mathur, “Trade-Related Aspects of Intellectual Property Rights and Copyright Provisions – Some Issues with Special Reference to Developing Countries”, *Journal of World Intellectual Property – Law, Economics, Politics*, Vol. 6, no. 1, 2003 – pp. 69; P. Drahos and J. Braithwaite, *Information Feudalism* – pp. 32-6

⁵³⁵ P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 61

⁵³⁶ M. Ryan, *Knowledge Diplomacy* – pp. 27

⁵³⁷ The appropriability problem was a major concern for industries whose R&D required a lot of investment – such as the pharmaceutical industry, the chemical industry and agriculture, to name but a few, where costs of copying are relatively low as well. - M. Ryan, *Knowledge Diplomacy* – pp. 27

decisive political action that would impact the welfare of many. Initially, the problem of intellectual property protection was constructed within the domestic economic context of the US. The support network formulated the issue as one of rights related to property ownership, fair rewards for labour and innovation.⁵³⁸ Since these concerns are part of the foundational principles of liberal economics, it was hard for the American government to disregard them.

Concerns for the state of the US economy were growing and this was a good time to present statistics that could explain why the trade deficit was soaring and propose solutions to how corporations can do better in the future. Apart from knowing who to talk to and how to get through to policy-makers, multinational corporations knew how to make a persuasive case of their concerns. They used technical knowledge and expertise, which gave their arguments legitimacy and weight. A number of official studies (mostly industry-sponsored) were published to show that companies were incurring sizeable losses abroad due to foreign trade in pirated and counterfeit goods. The Automotive Parts and Accessories Association informed the Sub-committee on Trade of the United States House of Representatives that estimated losses of revenue that the industry had incurred due to international trade in counterfeit automobile parts were as high as \$12 billion for 1984.⁵³⁹ In 1985, the IIPA published a report estimating that copyright industries lost over \$1.3 billion to international piracy.⁵⁴⁰ In 1986, the Intellectual Property Committee cited statistics prepared by the US

⁵³⁸ P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 70

⁵³⁹ T. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2254 and M. Blakeney, *Trade Related Aspects of Intellectual Property Rights*, – pp. 2. Both citing *Unfair Foreign Trade Practices, Stealing American Intellectual Property: Imitation is not Flattery*, 98th Congress, 2nd Session 1-3 (1984).

⁵⁴⁰ The study was conducted with regards to only 10 countries – Brazil, Egypt, Indonesia, Korea, Malaysia, Nigeria, Philippines, Singapore, Taiwan, and Thailand – T. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2254 citing International Intellectual Property Alliance (1985) *Piracy of U.S. Counterfeited Works in Ten Countries*.

International Trade Commission (USITC),⁵⁴¹ according to which US firms had lost \$23.8 billion due to lack of international IP protection.⁵⁴² Other organisations such as the Office of International Affairs of the National Research Council also undertook studies into the global dimensions of IPRs in science and technology in response to concerns raised by US industry and US universities.⁵⁴³

Framed in this way, the issue of failing protection of intellectual property rights became a major explanation for the ailing US economy. The US trade deficit had, according to some, experienced a staggering increase of 309 per cent between 1980 and 1985.⁵⁴⁴ Using standard methods of economic analysis, the advocates of strong international IP protection produced evidence that short term losses due to strengthened protection would be outweighed by long term benefits of increased innovation.⁵⁴⁵ This economic analysis assisted the lobbyists in making a strong case in favour of improved world-side protection. Once IP protection was constructed in technical terms as an issue not only of stolen knowledge and unfair enrichment, but also as a possible cause of future

⁵⁴¹ The US International Trade Commission is an independent quasi-legal federal agency, established by Congress in 1916. The organisation provides trade expertise to the legislative and executive branches of government; determines the impact of imports on US industries; and directs actions against certain unfair practices such as patent, trademark and copyright infringement -

http://www.usitc.gov/ext_relations/about_its/index.htm

⁵⁴² S. Sell, *Private power, Public Law*, – pp. 105; M. Wallerstein, M. Mogege, and R. Schoen, (eds.) *Global Dimensions of Intellectual Property Rights in Science and Technology*, (National Academy Press, Washington: 1993) – pp. 4; similar figures were cited by Edward Finn Jr. “That’s the \$60 billion Question”, *Forbes*, 7th Nov 1986 – p. 40

⁵⁴³ See M. Wallerstein, M. Mogege, and R. Schoen, (eds.) *Global Dimensions of Intellectual Property Rights in Science and Technology*

⁵⁴⁴ According to D. Hughes, US trade deficit grew from \$36.3 to \$148.5 billion – D. Hughes, “Opening up trade barriers with Section 301 – a critical assessment”, *Wisconsin International Law Journal*, 17, 1991, 393-410, and S. Sell, *Private Power, Public Law*, – pp. 80

⁵⁴⁵ Critical analysis of this seemingly solid causal relationship later proved that such correlation between trade deficit and global trade in pirated and counterfeit goods is not as strong as authors argue. Others may find curious the fact that those who conducted these studies were individuals with strong bias in favour of US industries and vested interests in the advance of IP protection – the authors of *Intellectual Property Rights: Global Consensus, Global Conflict?* R. Gadbow and T. Richards are both economists for Dewey Ballantine. Gadbow has served as a Deputy General Counsel for the USTR – R. Gadbow and T. Richards, (eds.) *Intellectual Property Rights: Global Consensus, Global Conflict?* – pp. 413

economic decline, it became much easier to mobilise US policy makers to take some form of international action. Technical closure was reached among the economic experts of multinational corporations, who were all of the same opinion. There were no actors with an opposing view to challenge this closure on any level and it became the basis of the campaign to regulate the use of products of the mind.

The sustained pressure from various industrial associations and the information coming from a variety of advisory committees and think tanks prompted US policy-makers to take action. Steps were initially taken at the domestic level to amend legislation and enable companies, through the IPC, to reach beyond US borders and enforce protection of information and know-how. Amendments to the 1974 Trade Act – in particular Section 301 - enabled the president to impose bilateral trade sanctions and undertake retaliatory trade action against nation-states whose legal system was considered inadequate to protect the IP interests of US corporations (these changes will be discussed in more detail at a later point). The changes implemented by the US government were a catalyst for policy change at the international level.

Constructing the problem of IP rights as an issue of unfair trade helped US corporations make the case for their preference for the GATT as the appropriate institutional context for the new norms. Developing countries insisted that the organisation, which should be in charge of setting standards of IP protection was the World Intellectual Property Organisation (WIPO). However, WIPO's failure, to negotiate changes to the Paris Convention in three successive conferences between 1980 and 1982⁵⁴⁶ convinced the US government and multinational corporations that this was one channel through which change

⁵⁴⁶ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2249 citing Kunz-Hallstein, “The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property”, *Vanderbilt Journal of Transnational Law*, 22, 1989 265.

was going to be slow and possibly ineffective, as WIPO had no enforcement mechanisms at its disposal.⁵⁴⁷ As discussed earlier, while the developing countries were attempting to persuade other WIPO members that IP protection needed to be relaxed, the developed countries (under pressure from industries) were concentrating on creating proposals for minimum standards of intellectual property protection.⁵⁴⁸ Constructing IP issues as trade issues was crucial, as the GATT had established enforcement procedures and a more solid organisational structure.

To conclude, in this case US industries set an example of how to effectively mobilise support for the creation of a new norm. A few leading norm entrepreneurs, namely Pfizer, IBM and Monsanto, began working together to attract the support of multinational corporations across industries. They also used all possible routes to interact with policy-makers on Capitol Hill – via advisory committees, industry associations, lobbying groups in Congress, think tanks, etc. - to get their message across. The message was that US industries were losing out and as a result the whole US economy was suffering because there were no international standards of intellectual property protection to safeguard US knowledge and technologies. The message was skilfully woven into academic studies, reports from various associations, briefings with industries in Congress, the advice coming from organisations that facilitated the communications between industries and government, e.g., the Advisory Committee on Trade Policy and Negotiations.⁵⁴⁹ As so many sources confirmed the same information and as politicians were concerned with the state of the US economy, practical actions were taken. Although these actions were initially at the domestic

⁵⁴⁷ P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 111

⁵⁴⁸ M. Ryan, *Knowledge Diplomacy* – pp. 68; T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*. – pp. 2253

⁵⁴⁹ See *supra* notes 96, 112, 113, 115

level,⁵⁵⁰ they had global implications through the bilateral trade agreements that the US government was negotiating with developing countries.

Dialogue with the Conservative Actors

The dialogue over the inclusion of norms regarding the protection of intellectual property rights in the framework of the World Trade Organisation (WTO) was not a simple matter. The discussions were part of a larger framework of trade talks⁵⁵¹ and as such the outcome was a product of linkage bargaining.⁵⁵² This in turn means that the creation of the TRIPs agreement is not a product of an equal bargaining and genuine consensus. It would otherwise be hard to explain why in an international context where most countries were net-importers of knowledge and technologies, rules protecting the exporting countries were accepted and turned into international legal principles. Legal rules favouring developed states emerged even though significant rifts existed among the developed countries.⁵⁵³ The developing countries were unable to mobilise in a coalition that spoke with one voice either, largely due to the fact that they had different interests⁵⁵⁴ and did not take the issue of intellectual property protection very seriously.⁵⁵⁵

⁵⁵⁰ Changes included the amendments of the 1974 Trade Act (Section 301), which empowered the President to initiate sanctions to protect US industries.

⁵⁵¹ The inclusion of the issue of intellectual property protection on the agenda of the Uruguay Round was a last minute political compromise; the TRIPs item figured almost like a footnote on the crowded agenda of the next round of trade talks – A. O. Adede, “Origins and History of the TRIPS Negotiations” in C. Bellmann, G. Dutfield, R. Melendez-Ortiz (ed.) *Trading in Knowledge*, – pp. 25

⁵⁵² M. Ryan, *Knowledge Diplomacy*, – pp. 92 – “linkage bargaining diplomacy can be exploited to achieve treaties in diplomatically and politically difficult areas in which agreement would otherwise be elusive”

⁵⁵³ The EU and the US opinions clashed over issues related to the protection of geographical indicators and appellations of origin, while Japan and the US disagreed over borrowing rights related to copyright – P. Drahos and J. Braithwaite, *Information Feudalism*, - pp. 144-5

⁵⁵⁴ The developing countries had varying expectations of possible gains in other areas of the Uruguay Round – mainly agriculture and textiles; their level of expertise on these highly technical issues was also diverse, and last but not least, developing countries suffered to a different degree from the effective use of Section 301 of US intellectual property legislation - J. Watal, (ed.) *Intellectual Property Rights in the WTO and Developing Countries*, (Kluwer Law International, The Hague: 2001) – pp. 43-4

⁵⁵⁵ *Ibid* – pp. 19-35

The unfolding Uruguay Round of trade negotiations will be examined in separate historical stages, which will assist in identifying the conservative actors and the changes in their attitudes. As early as 1982, a ministerial meeting was held to begin putting together an agenda for the next round of trade negotiations.⁵⁵⁶ By this time, US industry, led by Pfizer, had clearly indicated that WIPO was not the appropriate forum for international negotiations on IP issues, in view of the failed attempt to revise the Paris Convention.⁵⁵⁷ The US submitted a proposal to include negotiations on anti-counterfeiting practices in the next round of trade negotiations, which it was hoped would eventually lead to the creation of a Code regarding actions on this matter.⁵⁵⁸ The response of the developing countries was not encouraging – Brazil and India argued that “GATT’s jurisdiction was limited to tangible goods, and therefore, the GATT lacked legal competence to address an issue with the intellectual property area”.⁵⁵⁹ This signalled the opening of a rift between developing and developed countries similar to the one experienced in the WIPO forum. Initially, the developing countries were unified in their position that IP issues were better dealt with by WIPO, but that consensus was not long lived.

Two major developments occurred in 1984 - one international and the second one intra-national, which helped move IP issues forward on the GATT agenda. In the international context, GATT appointed an Expert Group to examine the effects of counterfeit trade-mark goods on international trade and in this way practically admitting

⁵⁵⁶ T. P. Stewart, (ed.) *The GATT Uruguay Round – A Negotiating History (1986-1992)*, – pp. 2260.

⁵⁵⁷ See P. Drahos, *Developing Countries and International Intellectual Property Standard-Setting*. Study Paper 8 Commissioned by the Commission on Intellectual Property Rights: 2002. Available from http://www.iprcommission.org/graphic/documents/study_papers.htm - pp. 9

⁵⁵⁸ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*– pp. 2260-1

⁵⁵⁹ Ibid. – pp. 2261 citing US General Accounting Office, *Strengthening Worldwide Protection of Intellectual Property Rights*, GAO Doc. No. GAO/NSIAD-87-65 (1987)

that there is a chance for these issues to be able to make the GATT agenda.⁵⁶⁰ The Expert Group was to work closely with WIPO representatives. In the next year, the Expert Group presented its findings and indicated that since some issues had remained unresolved, the GATT should decide whether a new round of multilateral negotiations was appropriate.⁵⁶¹

In the meantime, the persistent pressure on US policy-makers, substantiated by various industries' reports that billions of dollars were lost to free-riders, theft of intellectual property and trade in counterfeit goods, proved successful in persuading Congress to take action. The 1984 Trade Act was passed which adapted Section 301 of the 1974 Trade Act⁵⁶² and made it actionable by the President of the United States.⁵⁶³ These developments sent a clear signal to the business community – their efforts had paid off and the government had confirmed in legal terms their support for the proposition that IP protection was indeed an issue intricately related to trade.⁵⁶⁴ Unilateral action meant that the US government, backed by the knowledge and information supplied by its industries had the green light to take effective measures against any country that did not abide by the new American rules. The US government quickly demonstrated their readiness to use the mechanisms provided by Section 301 and the first countries that fell victim were South Korea⁵⁶⁵ and Brazil⁵⁶⁶ in 1985.

⁵⁶⁰ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2262 citing GATT, *GATT Activities in 1985* (1986)

⁵⁶¹ Ibid. – pp. 2262

⁵⁶² Section 301 of the 1974 Trade Act is a national trade enforcement tool that allows the US to withdraw the benefits of trade agreements or impose duties on goods from foreign countries – See P. Drahos, *Developing Countries and International Intellectual Property Standard-Setting* – pp. 13

⁵⁶³ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2256 citing Trade and Tariff Act of 1984, Pub. L. No. 98-573, 304 (f) (2).

⁵⁶⁴ S. Sell, *Private Power, Public Law*, – pp. 85-6; M. Ryan, *Knowledge Diplomacy*, – pp. 72-9; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 93-9

⁵⁶⁵ South Korea was selected for action under Section 301 following continuous complaints from American pharmaceutical and chemical companies, as well as from the IIPA. This was also a smart US government strategy to begin isolating developing countries and targeting them with stringent bilateral action, which affected local developing economies – M. Ryan, *Knowledge Diplomacy*, – pp. 73-9; S. Sell, *Private Power*,

In 1986 events were starting to move very quickly towards a new round of trade negotiations. The Preparatory Committee appointed by the GATT had a broad mandate to determine the issues that were going to be discussed in the Uruguay Round.⁵⁶⁷ The US delegation submitted a proposal to include all intellectual property issues, which largely reflected the US attitude to this matter. Japan backed the US proposal, while Brazil, India and Argentina expressed open opposition once again on the grounds that IP issues were outside of GATT's competence.⁵⁶⁸ Since negotiations even on the agenda of future talks looked like they were going to end up in deadlock, the Swiss and Colombian delegates who were chairing the meeting of the Preparatory Committee put together a compromise proposal including the issue of intellectual property in the agenda for the future trade talks, as agreed by the US, the EC, Japan, and some developing countries, which was later supported by more than 40 delegations. The Brazilian delegation submitted another proposal to exclude both services and intellectual property from the future negotiations, while an Argentinean proposal approved of IP issues but not of services being included in the GATT agenda. The Brazilian proposal was supported by about 10 delegations⁵⁶⁹ but was outweighed by the Swiss-Colombian one, which became the basis of the Punta del Este

Public Law – pp. 90; T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2256; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 102-4

⁵⁶⁶ Procedures against Brazil were initiated primarily on the grounds of complaints by the US pharmaceutical industry and computer software companies – M. Ryan, *Knowledge Diplomacy*, – pp. 79; S. Sell, *Private Power, Public Law*, – pp. 90; T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2256; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 104-5

⁵⁶⁷ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*, – pp. 2262 citing GATT Doc No. L/5925 *Decision of 28 November 1985 on Establishment of the Preparatory Committee*.

⁵⁶⁸ *Ibid.* – pp. 2262-3.

⁵⁶⁹ This became known as the Group of Ten, including Brazil, India, Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia – See M. Ryan, *Knowledge Diplomacy*, –pp. 108; S. Sell, *Private Power, Public Law*, – pp. 108; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 133; J. Watal, (ed.) *Intellectual Property Rights in the WTO and Developing Countries*, – pp. 19, according to the author, the group of hard-line opposition had shrunk from 25 countries – named as Argentina, Bangladesh, Brazil, Burma, Cameroon, Colombia, Ivory Coast, Cuba, Cyprus, Egypt, Ghana, India, Jamaica, Nicaragua, Nigeria, Pakistan, Peru, Romania, Sri Lanka, Tanzania, Trinidad and Tobago, Uruguay, Yugoslavia, Zaire – J. Ford, “A Social Theory of Trade Regime Change: GATT to WTO”, *International Studies Review*, Vol. 4, no. 3, 2001 – pp. 125, citing GATT, BISD, 28S.

Ministerial Declaration.⁵⁷⁰ The historical account of events so far begins to outline the group of the conservative actors whose opposition was partially successful in its attempts to bring to a halt the development of the new IP protection norm and which had to be overcome if the norm was to become a practical reality. The Group of Ten was the core active opposition, which had the support of many other developing countries.

The Punta del Este ministerial declaration seemed relatively harmless in itself, aiming “to clarify GATT provisions and elaborate as appropriate new rules and disciplines”.⁵⁷¹ However, in the context of the increased determination of US industries to get results, these words should have rung ‘danger’, because of the broad spectrum of meanings that the term ‘appropriate’ can have. Developing countries failed to detect the actual scope of the mandate granted by the 1986 Ministerial declaration. Their opposition to the creation of international norms for IP protection was undermined by the lack of unity among them. Some developing countries saw negotiating opportunities in areas where they needed to improve the existing terms of trade with their economically advanced counterparts, namely, textiles and clothing, agriculture, tropical products.⁵⁷² In 1987 the start of the Uruguay Round negotiations saw the developing countries still hanging on to the hope that they could limit the discussions of IP protection to trade in counterfeit goods.⁵⁷³ At the same time, the US, backed up by Japan and Switzerland, made it clear from the start that they were willing “to discuss substantive standards of IPRs such as copyright, patents, trademarks, designs, geographical indications, lay-out designs of

⁵⁷⁰ T. P. Stewart *The GATT Uruguay Round – A Negotiating History (1986-1992)*, – pp. 2264-5

⁵⁷¹ D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, (Sweet and Maxwell, London; 2003, 2nd edn) – pp. 11

⁵⁷² A. O. Adede, “Origins and History of the TRIPS Negotiations” in C. Bellmann, G. Dufield, R. Melendez-Ortiz (ed.) *Trading in Knowledge – Development Perspectives on TRIPS, Trade and Sustainability*, – pp. 26

⁵⁷³ M. Ryan, *Knowledge Diplomacy*, – pp. 109; J. Watal, *Intellectual Property Rights in the WTO and Developing Countries*, – pp. 21; Carlos Alberto Primo Braga, “The Economics of Intellectual Property Rights and the GATT: A View from the South”, Symposium: Trade Related Aspects of Intellectual Property, Part 1. *Vanderbilt Journal of Transnational Law*, Vol. 22, 1989 – pp. 249-250.

semiconductor chips and trade secrets, by making detailed submissions on these issues”.⁵⁷⁴

In 1988 the negotiating group on TRIPs began to address specific proposals by various nation-states – the Nordic countries, Switzerland, the European communities, Thailand, Mexico, Brazil, etc.⁵⁷⁵ The developing countries expressed concerns that intellectual property could be overprotected, which would slow down the transfer of technologies and increase the cost of agricultural and pharmaceutical products.⁵⁷⁶ In the meantime, communications and trade-offs between the US, Japan and the EC continued. Corporations from these countries were also liaising closely across borders, which culminated in the industry position paper on IPRs, entitled “Basic Framework of GATT Provisions on Intellectual Property, Statement of Views of the European, Japanese and United States Business Communities”.⁵⁷⁷

This basic framework was most notably opposed by India and Brazil on the grounds that developing countries should be allowed to exclude pharmaceuticals, food and chemicals from patent protection.⁵⁷⁸ In the mean time, the United States government was working on its domestic IPR protection agenda by enacting the 1988 Omnibus Trade and Competitiveness Act, which included the Special 301 obliging the USTR “to provide an annual report on unfair trade practices in foreign countries... where investigations with regard to IPR infringements were to be launched and action completed within statutory time limits... [t]his annual listing by the USTR follows detailed submissions by interested

⁵⁷⁴ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 23

⁵⁷⁵ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2267. Although the World Trade Organisation de-restricted many documents from the Uruguay Round negotiations on TRIPs, available at http://www.wto.org/english/tratop_e/trips_e/trips_e.htm these documents exclude any specific discussions that indicate the positions of different states, as well as any particular proposals made by states.

⁵⁷⁶ D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* – pp. 14, citing documents MTN.GNG/NG11/W/27; MTN.GNG/NG11/W/28; MTN.GNG/NG11/W/30.

⁵⁷⁷ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 23; M. Ryan, *Knowledge Diplomacy*, – pp. 109

⁵⁷⁸ M. Ryan, *Knowledge Diplomacy*, – pp. 110

US industry associations”.⁵⁷⁹ The strengthening of bilateral actions under Special 301 began to break down the foundation of the consensus between the G-10 because more and more countries could not meet US national IP protection rules and as a result faced the threat or the actual use of retaliatory trade measures.⁵⁸⁰

The mid-term review of the progress in the TRIPs negotiating group of the Uruguay Round took place in April 1989 and the only agreement that was achieved was on a “general framework for future negotiations to cover standards concerning the scope and use of intellectual property rights and the means of enforcing them”.⁵⁸¹ The meetings of the Negotiating Group that followed in 1989 consisted of proposals and counter-proposals by the delegations who were actively participating in the negotiations.⁵⁸² These, however, produced limited substantive agreements, namely, that additional time should be provided for less developed countries to comply fully with the regulations of the new agreement.⁵⁸³ It was becoming obvious that developing countries envisaged TRIPs negotiations as a threat and unless this perception changed, agreement was going to be very hard to achieve.⁵⁸⁴ At this point, however, pressure exercised outside of the negotiating group and primarily by the bilateral trade actions of the US government proved very effective in bringing the negotiations closer to an end.

Developing countries began to signal their acceptance of the jurisdiction of GATT

⁵⁷⁹ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 23-4; T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*. – pp. 2257-8; S. Sell, *Public Power, Private Law* – pp. 91-5; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 89-90.

⁵⁸⁰ Special 301 proceedings were initiated against Argentina, Thailand, India, China, Chile, Mexico – see S. Sell, “Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion and Choice” *International Organisation*, Vol.49, no.2, 1995 – pp. 327-332

⁵⁸¹ T. P. Stewart *The GATT Uruguay Round – A Negotiating History (1986-1992)*. – pp. 2269, citing *Mid-Term Meeting*, GATT Doc. No. MTN.TNC/11 (Apr. 21, 1989)

⁵⁸² T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*. – pp. 2270-2272 – drafts regarding the scope and application of intellectual property rights were submitted by Australia, India, the Nordic countries, Switzerland, Korea, Hong Kong, Austria, Brazil, Canada, New Zealand, Peru, Bangladesh

⁵⁸³ See *GATT Summary of TRIPs Talks*, reprinted in 7 *Inside U.S. Trade*, Dec. 22, 1989 – pp. 10-11

⁵⁸⁴ A. O. Adede, “Origins and History of the TRIPS Negotiations” – pp. 31

over the protection of intellectual property.⁵⁸⁵ The most important breakthrough in the months to come was the announcement made by India in September 1989 that they accepted “in principle the international enforcement of the trade-related aspects of intellectual property rights within the framework of the Uruguay Round negotiations”.⁵⁸⁶ This, in turn, led to more developing countries adopting more flexible positions on the future of this agreement.⁵⁸⁷ The dialogue between the governments in favour and against the new norm turned into a discussion of the parameters of this new norm where division lines multiplied. The persuasion campaign on the need for such norm, however, was complete. The coalition of developing countries had lost its major leaders – India had backed down, while Brazil was heavily pressured into compromise by the sanctions used by the US government under Special 301. According to one author, “developing countries came to realise that in reality [their] choice was between GATT and USTR”.⁵⁸⁸ Left with this option and in view of possible gains from preferential regional agreements, many developing countries chose to support an IP protection norm in favour of broadened market access.⁵⁸⁹ The dialogue with the conservative actors gradually evolved into the bargaining over the content of the legal agreement. Although the pressure between developed and developing countries remained, new chasms were beginning to open among the industrialised countries – the US, Japan, the EC, Canada.

⁵⁸⁵ S. Sell, *Private Power, Public Law*, – pp. 109

⁵⁸⁶ G. Evans, “Intellectual property rights as a trade issue – the making of the agreement on trade-related aspects of intellectual property rights”, *World Competition: Law and Economics Review*, vol. 18, no. 2, 1994 – pp. 170 citing 3WIPR 1989, 244-5

⁵⁸⁷ Ibid. – Argentina, Brazil, Chile, Colombia, Indonesia, Malaysia, Mexico, Peru, Thailand and Uruguay

⁵⁸⁸ Developing countries opposed GATT as the appropriate forum for IP protection, as they believed that WIPO was the institution best equipped to deal with such issues. The irony of the quoted statement is that in practice developing countries did not have a choice between two international forums because the US government was determined to uphold IPRs internationally. S. Sell, *Private Power, Public Law*, – pp. 110 citing M. Ryan, “The function specific and linkage bargain diplomacy of international intellectual property lawmaking”, *University of Pennsylvania Journal of International Economic Law* (Summer 1998):553-586

⁵⁸⁹ S. Sell, *Private Power, Public Law*, – pp. 110 citing J. Whalley, “Developing countries and system strengthening in the Uruguay Round” in Martin and Winters (eds) *The Uruguay Round and Developing Economies*, (The World Bank, Washington DC: 1995).

Political Closure

When the states leading the opposition campaign against the creation of a particular norm signal their willingness to cooperate and negotiate the provisions of this new norm, one can conclude that political closure has been reached. Discussions at international political forums are quite revealing about the stage of development of new norms. Debates on the normative and technical need to create a regulative instrument is typical for the stage of norm development discussed above – the dialogue with conservative actors. When political negotiations turn to the scope and wording of a new norm, then political closure has been reached and a broad consensus exists on the need to create an international norm to regulate behaviour. Closure on the debate regarding the creation of a new and effective international norm protecting intellectual property rights did not mean an end to the disagreements among the negotiating parties, however. Rather, it signalled a new phase in the development of the norm. An agreement on the need for an international IPR norm was reached as a result of the interplay between economic logic, technical knowledge, persuasion, coercion and argumentation. All these elements played a part in a process of constructing the need for the protection of all products of the mind and in turning this need into an obvious problem that required a swift and adequate response.

The economic logic and technical knowledge needed to justify the new norm were generated mainly by US corporations and their European and Japanese counterparts.⁵⁹⁰ The unilateral policies and actions undertaken by the US government increased the strain on

⁵⁹⁰ See The Intellectual Property Committee, Keidanren, UNICE, *Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities*, June, 1998

already volatile developing economies.⁵⁹¹ Many developing states that had experienced the determination of the US government to uphold its position on IPR protection by means of unilateral retaliatory trade measures were of the opinion that a multilateral solution could be less harmful and more flexible than bilateral talks with the US government.⁵⁹²

Some authors have argued, however, that coercion alone could not explain the whole process of creating this norm.⁵⁹³ Coercion played a large role, but other issues made closure possible. Many developing country governments lacked a clear understanding of this highly technical and complicated subject matter, which led them to make commitments the scale of which they did not fully comprehend.⁵⁹⁴ The opposition to TRIPs – coming from public health agencies, consumer groups and NGOs - was not nearly as well organised as the proponents of the new norm.⁵⁹⁵ As discussed earlier, linkage bargaining meant that states, especially the members of the Cairns Group, were more interested in the immediate gains to be achieved in the sphere of agriculture and the textile industries than the long-term commitments that they were making.⁵⁹⁶ In other words, the closure reached at the TRIPs negotiating committee was neither a result of genuine consensus on a plan of action regarding IPRs, nor of fair persuasion in which the best solution prevailed.

⁵⁹¹ Susan Sell argues that linking trade and intellectual property protection were a very effective way for US government and businesses to achieve the desired results – S. Sell, “Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion and Choice” *International Organisation*, Vol.49, no.2, 1995 – pp. 321-2

⁵⁹² S. Sell, *Private Power, Public Law*, - pp. 109-110. The effects of the US power of retaliation for slowing down international negotiations on TRIPs were felt through the actions authorised by Section 301, which were hitting Brazil and South Korea very hard.

⁵⁹³ S. Sell, “Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion and Choice” – in this study of the crisis, coercion and choice related to IP protection, the author emphasises that although *Section 301* was useful in coercing developing states into changing their national policies, there is evidence that the sanctions against Brazil, India, Mexico, and Thailand still failed to ensure compliance with domestic legislation, as the profits from piracy and free-riding on others’ IP outweigh the costs – pp. 332, 348; G. Dutfield, *Trade, Intellectual Property and Biogenetic Resources: A Guide to the International Regulatory Landscape* – pp. 201-4;

⁵⁹⁴ See *Supra Note 127*

⁵⁹⁵ See P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 192-4;

⁵⁹⁶ P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 193; A. O. Adede, “Origins and History of the TRIPS Negotiations” – pp. 30

Although a consensus was reached on the need to create an international norm protecting IPRs, many fundamental disagreements remained among the negotiating parties, concerning the scope, nature, and enforcement of the new rights. These disagreements were not removed by the negotiations over the treaty language and thus the final agreement, as we will see, better reflected the interests of private companies within the developed countries than of anyone else. This in turn meant that the foundations on which the IP protection norm was built were not solid enough to endure the test of time and public pressure. Closure, at least with regard to the intellectual property provisions protecting the developments in the pharmaceutical industry, was later challenged and reformulated to incorporate concerns about public health.

Legalisation

The discussions with the conservative actors over the need for a new norm gradually turned into a debate over the form of the agreement and the institutional arrangements. This was not going to be an easy discussion as there were major differences still to be resolved between developed and developing countries as well as among developed countries, as discussed earlier.

Dramatic progress in the TRIPs negotiations was made in March 1990 when the EC tabled a draft agreement⁵⁹⁷ in treaty language that covered standards, principles and enforcement issues and marked the beginning of the process of legalisation.⁵⁹⁸ By May, four more proposals were on the table authored, respectively, by the United States, Japan,

⁵⁹⁷ GATT (1990) MTN.GNG/NG11/W/68 – cited in T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2273; G. Evans, “Intellectual property rights as a trade issue – the making of the agreement on trade-related aspects of intellectual property rights”, *World Competition: Law and Economics Review*, vol. 18, no. 2, 1994 – pp. 171

⁵⁹⁸ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 29; D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, – pp. 16

Switzerland and India (the latter was backed up Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania, and Uruguay).⁵⁹⁹ The proposal submitted by the developing countries still demanded that the issues of trade in counterfeit goods should be separate from other intellectual property protection issues.⁶⁰⁰ As it became obvious that compromise was going to be difficult to achieve, the Chairman of the TRIPS negotiating group, Ambassador Lars Anell of Sweden, presented the Chairman's draft.⁶⁰¹ The draft was basically a report summarising the positions of the negotiating parties and comprised of two parts, reflecting, respectively, the proposals of the developed and the developing countries.⁶⁰² Ambassador Anell's draft signalled that some agreement was in sight. According to Jayashree Watal,⁶⁰³ the most important and effective negotiations took place in the second half of 1990 in informal meetings.⁶⁰⁴ Drahos and Braithwaite point out that membership in the informal groups was chosen on the basis of the expertise of the delegates and most important decisions were often taken in the smallest groups.⁶⁰⁵ Since these meetings were informal, they left no record and this hinders further studies of the changing positions of different governments. The proposals that were put forward have no

⁵⁹⁹ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2273; G. Evans, “Intellectual property rights as a trade issue – the making of the agreement on trade-related aspects of intellectual property rights”, – pp. 171; M. Blakeney, *Trade Related Aspects of Intellectual Property Rights* – pp. 7; M. Ryan, *Knowledge Diplomacy*, – pp. 111; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 139; D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* – pp. 16

⁶⁰⁰ G. Evans, “Intellectual property rights as a trade issue – the making of the agreement on trade-related aspects of intellectual property rights”, – pp. 171 *citing* GATT (1990): MTN.GNG/NG11/W/71; J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 30; Gervais (2003) – pp. 16

⁶⁰¹ Stewart (1993) – pp. 2274 *citing* *Meeting of Negotiating Group of 20th July 1990, Note by the Secretariat*, GATT Doc No MTN.GNG/NG11/24; Evans (1994) – pp. 171; D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* – pp. 21

⁶⁰² T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2274-5; D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* – pp. 17-8; J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – 31-2; M. Blakeney, *Trade Related Aspects of Intellectual Property Rights* – pp. 6;

⁶⁰³ Jayashree Watal was a trade negotiator for India in the TRIPs negotiating group and is currently an intellectual property expert at the WTO – “The Right to Good Ideas” (2001) *The Economist*, June 21, 2001.

⁶⁰⁴ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 32

⁶⁰⁵ P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 142 – the authors conducted a series of interviews at the GATT Secretariat in 1993, which revealed the careful selection of the states that were appropriate to attend the small group sessions.

recognised source and this impedes a better understanding of the dynamics of the negotiations – of how and why certain provisions were adopted or, indeed, discarded.⁶⁰⁶

Although hopes were high that the Uruguay Round could come to a close at the Ministerial Meeting in Brussels in December 1990, they quickly disintegrated as negotiations broke down due to deadlock over agricultural subsidies between the European Community, the Cairns Group⁶⁰⁷ and the United States.⁶⁰⁸ Disagreements existed among all actors – between North and South, among the industrialised North, among the developing South. Economic might, although not irrelevant, became insufficient to resolve differences; the way forward for the negotiations' progress was the weight of numbers.⁶⁰⁹ As Jane Ford discusses, the role of developing countries was changing - they became negotiators rather than just passive receivers of policies.⁶¹⁰ Once the Ministerial meeting in Brussels failed to reach its objective of concluding the Uruguay Round, it became clear that even states with relatively little economic power were in a position to derail the negotiations by adopting an uncompromising attitude on key issues. This development dispels the conventional understanding that economic might and political pressures alone can push a large number of unwilling members of the international community into signing agreements that run counter to their interests. The reasons why many developing countries agreed to sign TRIPs will be discussed in more detail later in this section.

The Uruguay Round of trade negotiations was restarted in February 1991 and the

⁶⁰⁶ South Centre, *The TRIPs Agreement – A Guide for the South. The Uruguay Round Agreement on Trade-Related Intellectual Property Rights*, (South Centre, Geneva: 1997) – pp. 9

⁶⁰⁷ The Cairns Group represented agricultural exporters from developed and developing countries alike and comprised Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, the Philippines, New Zealand, Thailand, and Uruguay – J. Ford, “A Social Theory of Trade Regime Change: GATT to WTO”, – pp. 127

⁶⁰⁸ G. Evans, “Intellectual property rights as a trade issue – the making of the agreement on trade-related aspects of intellectual property rights”, – pp. 173 *citing* 4 WIPR, 1990; J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 35; M. Ryan, *Knowledge Diplomacy*, – pp. 111

⁶⁰⁹ J. Ford, “A Social Theory of Trade Regime Change: GATT to WTO”, – pp. 126

⁶¹⁰ See J. Ford, “A Social Theory of Trade Regime Change: GATT to WTO”

GATT was looking for more flexible approaches as it became clear that that was to be the only way towards closing the negotiations. The initial fifteen negotiating groups were restructured into seven groups.⁶¹¹ The negotiating committees sought effectiveness by “keeping the negotiating process constantly under review and supervision”⁶¹² and by introducing informal meetings to foster consensus. The Director General Arthur Dunkel recognised that states were not finalising their positions and were not pushing on with the negotiations on TRIPs because they were waiting for the outcomes in two other spheres of trade negotiations – agriculture and textiles.⁶¹³ Director General Dunkel, in his final attempt to salvage the Uruguay Round, put together the Dunkel Draft, which compiled the results of negotiations and “provided an arbitrated resolution to issues undecided by the negotiators”.⁶¹⁴ Negotiations continued throughout 1992 and 1993 with the US and India tabling proposals for changes to the Dunkel Draft.⁶¹⁵ Once the conflict over agriculture was settled, however, the member states agreed to the whole package of the newly created World Trade Organisation, one part of which was the Agreement on TRIPs.⁶¹⁶ The Uruguay Round of trade negotiations was concluded on 15th December 1993, the final act was signed in Marrakech on 15th April 1994 and the WTO Agreement was scheduled to

⁶¹¹ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*– pp. 2276

⁶¹² *Ibid.* – pp. 2277 citing GATT, *Uruguay Round Poised to Enter Decisive Phase*, *Focus*, 1, 11 (Aug, 1991)

⁶¹³ *Ibid.* – pp.2280 citing *Progress of Work in Negotiating Groups: Stock Taking*, GATT Doc. No. MTN.TNC/W/89/Add.1 (Nov. 1991)

⁶¹⁴ T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*– pp. 2282

⁶¹⁵ India had concerns about transitional periods and compulsory licensing, while the US government was under criticism from the pharmaceutical and motion picture industry, both of which thought that transitional periods are too long – for further discussion, see T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)*– pp.2284-5; S. Sell, *Private Power, Public Law* – pp. 114-20.

⁶¹⁶ The final form of the Agreement on TRIPs does not differ substantially from the Dunkel Draft – very few changes were implemented, leaving out demands made by developed and developing countries alike - Evans – pp. 175 citing Agreement on Trade-Related Aspects of Intellectual Property Rights, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, Annex 1C; M. Ryan, *Knowledge Diplomacy*, – pp. 112; T. P. Stewart, *The GATT Uruguay Round – A Negotiating History (1986-1992)* – pp. 2284; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 145-6; D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* – pp. 26; M. Blakeney, *Trade Related Aspects of Intellectual Property Rights* – pp. 7

come into force on 1st January 1995.⁶¹⁷

The conclusion of the Uruguay Round is not entirely logical if we examine only what was happening in the negotiating groups; neither was the agreement on TRIPs. External factors and the state of the international economy contributed to the conclusion of this round of trade negotiations, while the completion of the TRIPs agreement was almost entirely circumstantial. According to Gail Evans, the Round of trade negotiations had become too costly to let agreements slip away; furthermore, the slowing down of the world economy increased fears of protectionism and raising levels of national debt,⁶¹⁸ which pushed nation states into signing the final WTO agreement. Jayashree Watal argues instead that it was political events – the collapse of the Berlin wall, the crumbling of the Soviet Union, and the success achieved in the first Gulf War – which influenced the closing of the Uruguay Round. According to Watal, the US emerged as the undisputed hegemon in the world, and that made developing and developed states alike unwilling to oppose the global superpower when so near to reaching an agreement at the end of the negotiating round.⁶¹⁹ In other words, Watal proposes that political factors were the catalyst for the completion of the Uruguay Round, and not the consensus reached in the other sphere of trade, discussed at the trade round.

The completion of the TRIPs agreement is a conundrum, the explanation of which is not readily apparent. The US, EC, Canada and Japan needed the support of the developing states to create this agreement and simple economic logic shows that it was not in the interest of developing states to create international norms of intellectual property

⁶¹⁷ P. Drahos, *Developing Countries and International Intellectual Property Standard-Setting* – pp. 16; P. Drahos and J. Braithwaite, *Information Feudalism*, – pp. 149; Watal (2001) – pp. 41

⁶¹⁸ G. Evans, “Intellectual property rights as a trade issue – the making of the agreement on trade-related aspects of intellectual property rights”, – pp. 174-5

⁶¹⁹ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries* – pp. 41

protection. The success of the TRIPs agreement is partly based on the disproportionate power of US government, which was further supported by the lack of a strong unified position on the part of the developing countries. The US industries successfully employed rhetorical action, which persuaded the US government to protect their interests worldwide. The US government made good use of Section 301 of its trade act, thus breaking up a relatively strong group of developing countries who dared to stand for their interests.⁶²⁰ The developing countries' actions were further limited by the lack of expertise and a clear understanding of the full scale of consequences stemming from this new international norm. Furthermore, the package offered at the end of the Uruguay Round negotiations – including concessions on trade in agricultural and textiles products, was too good to miss. The possibility of future gains in areas that deeply concerned the developing countries, coupled with the prospects of having to deal with the unilateral pressure exercised by the USTR,⁶²¹ were incentives to vote in favour of international minimum rules for the protection of intellectual property rights.⁶²² Citing a US trade negotiator in his study of the developing countries and their position in the international IP standard-setting process, Drahos observes that TRIPs was less of a negotiation and more of a “convergence of processes”, as the opposition of the developing countries was not met by argumentation and reasoning, but was instead diluted through bilateral negotiations and unilateral trade sanctions.⁶²³ The position of the developing countries was further undermined by the fact that African states were not significant players in these trade negotiations even though their development prospects and the welfare of their citizens was going to be inevitably affected

⁶²⁰ P. Drahos, *Developing Countries and Intellectual Property Standard-setting* – pp. 13-4

⁶²¹ Ryan cites a GATT Secretariat official, who pointed out to developing states that they were acting as if they had a choice of forum between GATT and WIPO, while their real choice was between GATT and the USTR – M. Ryan, *Knowledge Diplomacy* – pp. 110

⁶²² M. Ryan, *Knowledge Diplomacy* – pp. 112; also see *supra* note 127

⁶²³ P. Drahos, *Developing Countries and Intellectual Property Standard-setting* – pp. 14

by the decisions of other states.⁶²⁴ NGOs were also marginalised, as the position of the GATT was that if any actors other than nation-states wanted to put their agenda forward, they should do so through their respective governments,⁶²⁵ many of whom were disinclined to pay heed to civil society activists.

The above overview of events shows that the closure and agreement reached at the end of the Uruguay Round of trade negotiations were not the result of genuine consensus and persuasion. There was no agreement on the way in which TRIPs will be implemented and many developing states lacked the expertise and resources to make IP provisions a part of their domestic legal context. The TRIPs agreement was a rather shaky foundation for the creation of a functional international intellectual property regime and that showed in the years to follow.

Operationalisation

Operationalisation of a norm refers to the stage at which the actions of states become norm-compliant and any behaviour that is not consistent with the norm is condemned or punished by administrative measures. The TRIPs agreement came into force on 1st Jan 1995, giving developing countries until the end of the year 2000 to comply, while the least developed countries (LDCs) received an initial extension until the end of the year 2005, which was further postponed until 2016 by the Doha Declaration on TRIPs and

⁶²⁴ Ibid. – pp. 26

⁶²⁵ The South-North Development Monitor published a GATT discussion of the follow up to the United Nations Conference on Environment and Development, where the GATT agreed that “While the GATT or the future WTO, should remain open to inputs from non-governmental actors, this was seen essentially and only in terms of country-specific national actions, and not be injecting the NGOs into what was an intergovernmental processes of the WTO based on a contract among governments”, available from: <http://www.sunonline.org/trade/areas/environm/02230294.htm>

Public Health (2001).⁶²⁶ This analysis will continue with a focus on the developments to the IPR regime in the pharmaceutical industry, as this industrial sector was affected in a very specific way. The political closure on TRIPs in the pharmaceutical sector became undone, due to normative issues raised by the developing countries and global civil society.

The actors who were most eager to operationalise the norm protecting intellectual property rights in the pharmaceutical industry were the large corporations like Pfizer, Bristol-Myers, Glaxo Smith Klein, along with the other members of PhRMA, who initiated the campaign to create internationally enforceable intellectual property rules. The US government had vested interests in enforcing IPRs, which was perceived as one way of decreasing the trade deficit. Both industry and the government were in favour of much stricter minimum rules of IP protection at the Uruguay Round, and while developing countries believed that the TRIPs agreement was the lesser evil compared to unilateral trade sanctions by the US, their hopes that the USTR would lessen the pressure on their fragile economies were in vain. The US government continued to pursue higher standards of intellectual property protection with the same vigour⁶²⁷ and by using the same methods. Since the late 1980s, the United States had included requirements for the provision of adequate IP protection as a pre-requisite to the conclusion of Bilateral Investment Treaties (BITs) and by 1987 BITs were signed with eleven developing countries.⁶²⁸ Peter Drahos discusses in some detail the complementary use of BITs and Section 301 in the case of Nicaragua (1995), which resulted in Nicaragua implementing IP protection policies in 1998

⁶²⁶ *Declaration on TRIPs Agreement and Public Health* (2001) World Trade Organisation, Ministerial Conference, 4th Session, Doha 9-14 Nov 2001. Doc No. WT/MN(01)/DEC/2

⁶²⁷ P. Drahos, "BITs and BIPs – Bilateralism in Intellectual Property", *Journal of World Intellectual Property – Law, Economics, Politics*, Vol. 4, no.6, 2001 – pp. 791

⁶²⁸ P. Drahos, "BITs and BIPs – Bilateralism in Intellectual Property", – pp. 793 *citing* F. Abbott, "Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, Symposium: Trade-Related Aspects of Intellectual Property", *Vanderbilt Journal of Transnational Law*, 1989, vol. 22

prior to its TRIPs deadline in the year 2000.⁶²⁹ The US continued to use extensively the provisions of its domestic legal principles, while taking full advantage of the WTO dispute-settlement mechanisms. The US filed the first six complaints for TRIPs violations in 1996 against Japan, India, Pakistan, Portugal, Turkey and Indonesia, followed in 1997 by dispute settlement procedures against Denmark, Sweden, Ireland and Ecuador.⁶³⁰

Discontent with the increasing demands of the pharmaceutical industry and the actions of the US government was brewing in the late 1990s. There were several overlapping concerns, which formed the foundation of a relatively powerful opposition to IPRs for pharmaceutical products. Firstly, many developing countries felt they did not get a fair deal out of the TRIPs negotiation process to start with (due to its lack of transparency, asymmetries of power and the isolation of African countries, as discussed earlier). Secondly, developing countries were not fully availing themselves of the transitional provisions, compulsory licensing provisions and parallel imports provisions granted by the TRIPs agreement. Moreover developing countries were often sanctioned by the US government, which sought the speedy implementation of the new agreement. Thirdly, NGOs were beginning to actively pursue the issue of access to essential medicines (the case of HIV/AIDS is a particularly strong example) and the problem of the creation of drugs for neglected diseases (tuberculosis, malaria, etc.). All three of these campaigns benefited from the attention that each of them attracted, and that helped in gaining critical mass and wider public support. Although a norm had already been created, there was growing pressure for the revision of this norm in a way that would allow it to cover issues of social justice, the right to health, sustainable economic development and so on. A coalition was growing among various partners, including developing country governments, NGOs, civil society

⁶²⁹ Ibid. – pp. 794-6

⁶³⁰ S. Sell, *Private Power, Public Law*, – pp. 129-132

activists, medical professionals, lawyers and economists. The political closure regarding the need for and effectiveness of an IP norm protecting pharmaceutical products came undone and the issue was re-opened for discussion because normative concerns had been completely disregarded in the process of previous negotiations. It should be kept in mind that the process of renegotiating the parameters of this norm began only as a result of sustained pressure and well-calculated political action by the partners of the coalition against this norm.

Since resistance towards the implementation of IPRs in the pharmaceutical industry grew, not without the help of the public in the industrialised world, policy-makers were forced to reconsider and renegotiate the TRIPs provisions in relation to public health. A norm-revision process was set in motion when non-governmental organisations revealed the negative consequences of TRIPs on the already poor state of health care in developing countries and in the context of worsening HIV/AIDS pandemic.⁶³¹

Configuration of the Network of Normative Opposition

There is a history of domestic campaigning within the United States for affordable treatment for HIV/AIDS. The ACT UP campaign, which officially began in 1987 with the creation of the First Working Document setting out its objectives and structure, was continuously drawing attention to the “drug development bottleneck” and the greed of pharmaceutical companies when creating treatments for AIDS.⁶³² In 1993 Ralph Nader and James Love (who started the Consumer Project on Technology in 1995)⁶³³ in testimony

⁶³¹ Susan Sell argues that the HIV/AIDS pandemic was “a contingency that sped up the revelation of the negative consequences of TRIPs” – S. Sell, *Private Power, Public Law*, - pp. 181

⁶³² <http://www.actupny.org/documents/firstworkingdoc.html> - Original Working Document (1987)

⁶³³ <http://www.cptech.org/about.html>

before the Special Committee on Aging of the US Senate,⁶³⁴ drew attention to the fact that pharmaceutical companies in general and Bristol-Myers Squibb (BMS) in particular were benefiting from government-sponsored R&D. These two activists opened the debate on fair pricing of and access to medicines, which have been discovered with tax-payers money.⁶³⁵ US NGOs were further concerned with the availability of medicines to the marginalised groups in society.⁶³⁶ The traditions in campaigning on these issues were useful when similar concerns were raised at the international level.

New and existing international organisations were getting involved with normative issues stemming from IPRs in the pharmaceutical industry, the availability and affordability of drugs not only for HIV/AIDS, but also for a list of the ‘neglected diseases’⁶³⁷ that are affecting primarily developing countries. The Consumer Project on Technology was created in 1995 to address the issue of the high cost of pharmaceuticals.⁶³⁸ In 1996 the Amsterdam group Health Action International⁶³⁹ organised the first major conference for NGOs regarding issues of health care and TRIPs.⁶⁴⁰ In 1998 the highly-influential Medecines Sans Frontiers sought the acquiescence of CPT and HAI to join their campaign for access to medicines.⁶⁴¹ The support of MSF was even more important in 1999 when the

⁶³⁴ Ralph Nader and James Love 993) “Federally Funded Pharmaceutical Inventions”, *Testimony before the Special Committee on the Aging of the US Senate*, Feb 24, 1993. Available from:

<http://www.cptech.org/pharm/pryor.html>

⁶³⁵ Ibid.

⁶³⁶ Stanya Kahn, “The whole world is watching – US AIDS Activists Go Global”, *HIV Plus*, no.5, Sept 1999; The ACT UP campaign for access to AIDS drugs has working documents dating as far back as 1987 see <http://www.actupny.org/documents/firstworkingdoc.html>

⁶³⁷ Some of the neglected diseases are tuberculosis, sleeping sickness, leishmaniasis, malaria and AIDS – see <http://www.accessmed-msf.org>. Most neglected diseases are found in the developing countries – some are climate-specific, while others are eradicated in the industrialised countries. Part of the problem of neglected diseases is evolution of drug-resistant strands, which may threaten the health and life of many.

⁶³⁸ S. Sell, *Private Power, Public Law* – pp. 146-7

⁶³⁹ Health Action International is a coalition of NGOs in 70 countries. HAI is supported by powerful NGOs, consumer, health and development groups, as well as by isolated health workers and concerned individuals. See <http://www.haiweb.org/pubs/hailights/may99.html>

⁶⁴⁰ S. Sell, *Private Power, Public Law* – pp. 147-8

⁶⁴¹ Ibid. – pp. 149

organisation was awarded the Nobel Peace Prize, the money from which MSF donated to the *Neglected Disease Fund*, which was set up to fund projects related to neglected diseases and access to medicines.⁶⁴² Another very active coalition of NGOs was consolidated in March 1999 – the Health GAP (Global Access Project) Coalition. Health GAP was started by a New York physician who treated low-income and formerly homeless persons with AIDS.⁶⁴³ The organisation is a meeting point of human rights activists, people living with HIV/AIDS, public health experts, fair trade advocates, and so on and their activities are centred on campaigning for access to affordable, life-saving medicines as a way to control the AIDS pandemic.⁶⁴⁴

NGO activities were bolstered by political events and social research, which made the claims of the advocates of civil society all the more persuasive. Ever since the coming into force of the TRIPs agreement in 1995, the developing countries have been under pressure to stop importing generic drugs that can combat widespread and growing epidemics of curable diseases.⁶⁴⁵ In late 1998, a high profile lawsuit was filed by 39 of the biggest pharmaceutical companies against the government of South Africa. The South African government had passed the African Medicines and Medical Devices Regulatory Authority Act, which allowed it to revoke patents and to use compulsory licensing for purposes of averting a health crisis due to the high number of HIV/AIDS patients in the country.⁶⁴⁶ This case, which was dropped by the pharmaceutical giants in 2001,⁶⁴⁷

⁶⁴² <http://www.msf.org>

⁶⁴³ “Health GAP International – New Group for International Treatment Access”, published Mar 15 1999. See <http://www.aids.org/atn/a-315-03.html>

⁶⁴⁴ <http://www.healthgap.org/hgap/about.html>

⁶⁴⁵ “Modification of WTO Rules on Protection of Pharmaceuticals”, *The American Journal of International Law*, vol. 97, no. 4, Oct 2003 – pp. 981

⁶⁴⁶ <http://www.cptech.org/ip/health/sa/pharma-v-sa.html>; <http://www.tralac.org/scripts/content.php?id=20> – The Trade Law Centre for South Africa provides an in-depth legal brief on the development of this case together with a legal discussion of the underlying South African legislation. See also, P. Drahos and J. Braithwaite, *Information Feudalism* – pp. 7

generated negative publicity for the pharmaceutical industry, turning into a terrible PR disaster; but it also helped NGOs and developing countries mobilise public opinion in favour of their cause.

The network of opposition was most clearly delineated at the Geneva Meeting in March 1999, which was organised by MSF, HAI and CPT and comprised more than 120 delegations from 30 countries.⁶⁴⁸ The meeting brought together representatives of national governments, NGOs, international organisations and industry delegates. Attention was focused on the issue of compulsory licensing as a means of making drugs more affordable in poor countries.⁶⁴⁹ The Access to Essential Medicines Campaign continued to grow, with Oxfam UK joining it in 1999⁶⁵⁰, thus contributing to increased civic activism. The interests of otherwise separate campaigns overlapped in their constructive opposition to the TRIPs agreement. Less powerful actors found strength in numbers and were able to make their concerns heard by the governments and the industries of the developed countries alike.

Formulation of the issues raised by the Opposition

The need to revise the TRIPs agreement in such a way as to address public health concerns was formulated by NGOs and developing countries, against the backdrop of claims by pharmaceutical companies that without full compliance with TRIPs they would go out of business.⁶⁵¹ NGOs and developing countries organised a number of conferences

⁶⁴⁷ <http://news.bbc.co.uk/1/hi/world/africa/1285097.stm>

⁶⁴⁸ D. Berman, and Nathan Ford, *AIDS and Essential Medicines and Compulsory Licensing*, Summary of the March 25-27, 1999; Geneva Meeting. Available from <http://www.accessmed-msf.org>

⁶⁴⁹ Ibid

⁶⁵⁰ http://www.oxfam.org.uk/what_we_do/issues/health/worldtrade_drugs.htm - "World Trade Rules and Poor People's Access to Essential Drugs", Nov 1999.

⁶⁵¹ See P.R. Vagelos, "Are Prescription Drug Prices High?" *Science*, vol. 252, no. 5009, 1991 1080-1084. The author P. Roy Vagelos is the Chairman and Chief Executive Officer at Merck & Co., Inc. This message was echoed in later articles as well – A. Attaran and L. Gillespie-White, "Do Patents for Antiretroviral Drugs Constrain Access to AIDS Treatment in Africa?" *Journal of the American Medical Association*, Vol.286, No.

to discuss issues of access to and availability of essential medicines and medicines for the neglected diseases. They used a number of tactics to negotiate a modification to the TRIPs agreement, as discussed below.

Concerns of a medical character along with ethical questions were juxtaposed to economic interests, within a political and judicial context, which was not sympathetic to the needs of the poor. Science was accused of following markets and money in setting research agendas and not catering for the greater good of the greater number of people.

How we phrase the problem defines the solutions we seek... AIDS, the TB, the malaria, the sleeping sickness epidemics are not simply global public health crises – they are obscene acts of political negligence that cannot go on... Trade law around intellectual property rights for pharmaceuticals, the political process around their application, the deification of profit over people, and the fact that trade has become a barrier to health of literally billions of people is nothing short of the most profound obscenity.⁶⁵²

These succinct but powerful words of Dr James Orbinski – the functioning president of MSF International in 1999 - summarised the way in which the opposition to full-scale TRIPs rules for pharmaceutical products defined the issues that they were trying to resolve.

The scale of the problem, as highlighted by the opponents to TRIPs, was indeed daunting. According to UN estimates from 1998, twenty six of the estimated 33 million people infected with AIDS live in sub-Saharan Africa and approximately 95% of the worldwide cases of HIV are in the developing world.⁶⁵³ According to MSF, most of the patients with HIV in Africa have no access to antiretrovirals at all, while only about 1 in 100 patients in South East Asia can afford the drug cocktails.⁶⁵⁴ Communicable diseases killed 14 million people around the world in 1999 and most deaths were in developing

15, Oct 17 2001, 1886-1892; L. Gillespie-White, *Health and Patents: The Rights Issue – A Presentation to an Audience Convened by the World Intellectual Property Organisation*, (International Intellectual Property Institute: 2002)

⁶⁵² James Orbinski, *MSF Speech to Health Forum*, Jun 14 2000, available from <http://www.msf.org>

⁶⁵³ The information is cited in D. Berman and Nathan Ford, *AIDS and Essential Medicines and Compulsory Licensing*, Summary of the March 25-27 1999 Geneva Meeting; and Jeffrey Sachs, “Helping the World’s Poorest”, *The Economist*, Aug 12 1999.

⁶⁵⁴ D. Berman and Nathan Ford *AIDS and Essential Medicines and Compulsory Licensing*, Summary of the March 25-27, 1999 Geneva Meeting.

countries.⁶⁵⁵ More than 90% of all death and suffering from infectious diseases occurs in the developing world, while around 0.2% of pharmaceutical research is devoted to infectious diseases like acute respiratory infections, tuberculosis (TB) and diarrhoea.⁶⁵⁶ Malaria exists in 91 countries, which puts around 40% of the world's population at risk – from the 500 million cases that are recorded, around 90% are in Africa where up to 2.7 million die from the disease.⁶⁵⁷ And while one third of the world's population has no access to pharmaceutical drugs, the industrialised countries hold 97% of all pharmaceutical patents worldwide.⁶⁵⁸ These medical statistics compiled by various IGO agencies and NGOs paint a completely different picture to the one presented by the pharmaceutical giants, which had simply chosen to ignore the state of the health of individuals in developing and least developed countries (LDCs).

Serious ethical issues relating to access to essential medicines, neglected diseases, and social justice were raised by the civil society campaigns. In 1996 the World Health Assembly Report pointed out that “poverty exposes hundreds of millions of people to the hazard of infectious diseases in their everyday lives... half the world's population lacks regular access to the most needed essential drugs”.⁶⁵⁹ In developing countries, according to Oxfam, more than 60% of the cost of medicines is covered by the patients, compared to the industrialised world where more than 50% of drug costs are not paid directly by the

⁶⁵⁵ *Fatal Imbalance – The Crisis in Research and Development for Neglected Diseases* (2001), DND Working Group, Medicines Sans Frontiers – “Campaign for Access to Essential Medicines”, Sept 2001. – pp. 10 *citing* World Health Organisation *The World Health Report 2000* (Geneva, World Health Organisation, 2000).

⁶⁵⁶ *Amsterdam Statement to WTO Member States on Access to Medicines*, 25-26 Nov 1999. http://www.haiweb.org/campaign/novseminar/amsterdam_statement.html

⁶⁵⁷ World Health Organisation, *World Health Report 1996 – Fighting Disease, Fostering Development*, 49th World Health Assembly, Provisional Agenda Item 10, Doc No A49/3, 1996, available from <http://policy.who.int>

⁶⁵⁸ Oxfam, *World Trade Rules and Poor People's Access to Essential Drugs*, available from http://www.oxfam.org.uk/what_we_do/issues/health/worldtrade_drugs.htm. Last accessed on 01-Nov-04

⁶⁵⁹ World Health Organisation, *World Health Report 1996 – Fighting Disease, Fostering Development*, 49th World Health Assembly, Provisional Agenda Item 10, Doc No A49/3, 1996, available from <http://policy.who.int>

consumers.⁶⁶⁰ Once the TRIPs agreement is fully operational generic drug producers, which have been supplying affordable drugs to their own and other developing countries' governments, will not be allowed to export their products to countries which do not have the capabilities to produce their own pharmaceutical products.

This ethical concern of people in developing countries dying from curable diseases because medicines are priced out of their reach is deepened by the foreign trade policies of the US government. Its bilateral agreements in the form of BITs and Free Trade Agreements (FTAs)⁶⁶¹ are eroding the ability of developing countries' governments to set standards that meet the needs of their citizens.⁶⁶² The campaigners for revising the TRIPs agreement have, by means of publicising the decisions and policies of the US government, constructed an ethical problem. They question the morality of policy-makers and businesses alike and seek to "reveal injustice, to provoke change, and to locate and insist on political responsibility", in the words of James Orbinski.⁶⁶³ To tackle the problem with access to medicines, Oxfam initiated the *Cut The Cost Campaign* in February 2001. While making the case for affordable drugs, Oxfam together with other NGOs such as MSF, HAI, CPT, ACT UP began to deconstruct the argument made by the pharmaceutical companies that "without patents, [some drugs] would not even exist".⁶⁶⁴

Pharmaceutical companies initially constructed their concern with IPRs as an economic issue of life or death for the industry: "innovative pharmaceutical companies are

⁶⁶⁰ Oxfam, *World Trade Rules and Poor People's Access to Essential Drugs*, available from http://www.oxfam.org.uk/what_we_do/issues/health/worldtrade_drugs.htm. Last accessed on 01-Nov-04

⁶⁶¹ A Free Trade Agreements was signed with Jordan in the year 2000 and according to Peter Drahos contains TRIPs-Plus feature, narrowing grounds for exclusion from patentability, introducing conditions on compulsory licensing and requiring Jordan to implement the TRIPs agreement before it is required to do so by the WTO. Similar agreements are said to be negotiated with Chile and Singapore – P. Drahos, "BITs and BIPs – Bilateralism in Intellectual Property", *Journal of World Intellectual Property – Law, Economics, Politics*, Vol. 4, no.6, 2001 – pp. 797-8.

⁶⁶² Ibid. – pp. 803

⁶⁶³ James Orbinski, *MSF Speech to Health Forum*, Jun 14 2000, available from <http://www.msf.org>

⁶⁶⁴ "A War over Drugs and Patents - Johannesburg", *The Economist*, Mar 8th 2001.

in business to make money, as well as to market new medicines, and, unless they do both, they would be out of business, and the flow of new medicines would be reduced”, said the CEO of Merck &Co Inc.⁶⁶⁵ Lee Gillespie-White from the International Intellectual Property Institute stated along this line of argument that “[i]t is only from the protection of the intellectual property invested in new drug development that the incentive to innovate arises. And without this incentive, new drugs will not be produced and the right to health care will be increasingly insecure”⁶⁶⁶ and further “IP is being asked to shoulder too much of the burden of the right to health care. [And since the system is unable to do this] new drugs will not be produced and future advances in health care will be jeopardised”.⁶⁶⁷ The estimated cost of discovering a new medicine and bringing it to the market, according to studies within the pharmaceutical industry, has been estimated to rise from around \$54 million in 1979, to \$231 million in 1987 US dollars, and to as much as \$802 million in 2001, which, after being supplemented by the cost of failed projects (\$114 million) and the inflation figures, has been put up even higher.⁶⁶⁸ Furthermore, the pharmaceutical industry argues that there is no causal link between relaxed intellectual property rules and improved access to medicines.⁶⁶⁹ Patents are not considered to be the principle impediments to supplying patients with medicines because the impediments are more practical, such as lack of

⁶⁶⁵ P. R. Vagelos, “Are Prescription Drug Prices High?” *Science*, vol. 252, no. 5009, 1991 - pp. 1083

⁶⁶⁶ L. Gillespie-White, *Health and Patents: The Rights Issue – A Presentation to an Audience Convened by the World Intellectual Property Organisation*, (International Intellectual Property Institute: 2002). This view is further supported by PhRMA – its opinion is quoted in Stanya Kahn, “The whole world is watching – US AIDS Activists Go Global”, *HIV Plus*, no.5, Sept 1999

⁶⁶⁷ *Ibid.* – pp. 5;

⁶⁶⁸ P. R. Vagelos, “Are Prescription Drug Prices High?” – pp.1080; G. Dutfield, *Intellectual Property Rights and the Life Science Industries*, – pp. 106 citing a study conducted by the Tufts Centre for the Study of Drug Development (2001).

⁶⁶⁹ L. Gillespie-White, *Patent Protection and Patients’ Access to HIV/AIDS Drugs in Sub-Saharan Africa*, (International Intellectual Property Institute: 2001) – pp.7

“refrigerators and clean water, needed for administering complicated anti-HIV regimes”.⁶⁷⁰

NGOs and developing agencies have been working hard to produce evidence that countered the reports of industries, aiming to show that these are manipulative and one-sided, and disregard the needs of the poor in search for higher profit margins. According to Oxfam, the pharmaceutical industry has some of the highest operating profits already, standing at around 20-23% on investment;⁶⁷¹ moreover, the whole of sub-Saharan Africa accounts for only a minute fraction of the global market for medicines - \$1 billion of a \$343 billion US industry.⁶⁷² If the markets of the developing countries are so small, then even more lax IPR rules in these parts of the world would not profoundly affect the R&D capacity of the pharmaceutical industry. On the question of the causal link between IPRs and innovation, various authors have argued that it does not exist. According to the UNDP *Human Development Report*, “studies have found that the competitive markets are the biggest influence on research and development, not patents”.⁶⁷³ Research and development seemed to be influenced by the prospect for profits and the size of the market for new products and not by the availability of patent rights.⁶⁷⁴ According to the Commission on Intellectual Property Rights (set by the Department for International Development in the

⁶⁷⁰ Stanya Kahn, “The whole world is watching – US AIDS Activists Go Global”; similar point was made by B. Lehman, *Patents and Health – A Presentation to the Policy Advisory Commission of the World Intellectual Property Organisation*, (International Intellectual Property Institute: 2002). – pp. 12-3.

⁶⁷¹ Oxfam, *Cutting the Cost of Global Health*, Oxfam Parliamentary Briefing 16, Oxfam GB: 2001 – pp.3; Oxfam, *Implausible Denial: Why the Drug Giants’ Arguments on Patents do not Stack Up*, 2001 available from http://www.oxfam.org.uk/what_we_do/issues/health/implausible_denial.htm - the article quotes profit margins for Pfizer in the year 2000 at 30%, Glaxo-Smith Kline – 28%, where R&D costs amount to around 15% of the production costs.

⁶⁷² Oxfam, *Implausible Denial: Why the Drug Giants’ Arguments on Patents do not Stack Up*, 2001, available from http://www.oxfam.org.uk/what_we_do/issues/health/implausible_denial.htm

⁶⁷³ United Nations Development Programme, *Human Development Report*, 1999, available from <http://www.un.org> – pp. 73

⁶⁷⁴ S. Mathur, “Trade-Related Aspects of Intellectual Property Rights and Copyright Provisions – Some Issues with Special Reference to Developing Countries”, *Journal of World Intellectual Property – Law, Economics, Politics*, Vol. 6, no. 1, 2003 – the author quotes econometric analysis of US and Japanese firms, conducted in 2000, which concluded that there was no evidence of an increase in R&D spending or innovative output that could plausibly be attributed to patent reform” – pp. 93

UK), “stronger patent protection in poor countries is unlikely to lead to significant increases in *global* innovation for neglected diseases. This is because the key disincentive for international companies to develop intellectual property of use to developing countries is not the lack of patent protection in those countries but the lack of market demand and profitability”.⁶⁷⁵ This argument is at the centre of the campaign to modify the trade rules of TRIPs in such a way as to make them more responsive to the needs of the poor.

The NGO campaign brought attention to another ethical concern in relation to the modification of the TRIPs agreement, namely, the treatment of neglected diseases and the direction of scientific research. “Science follows the market”, claims Jeffrey Sachs in his article about the state of world’s poorest populations.⁶⁷⁶ There is nothing wrong with a mutually beneficial relationship between science and the market, as long as it does not compromise the life and wellbeing of the populations of entire continents. The latter, however, is just what is happening in the research departments of large pharmaceutical companies – “money talks louder than need”.⁶⁷⁷ According to the UNDP report of 1999, “tighter control of innovation in the hands of multinational corporations ignores the needs of millions”.⁶⁷⁸ Medecines Sans Frontiers conducted a survey in 2001 that included the 20 largest pharmaceutical companies in the world and some of these findings have helped to further outline the ethical problem of neglected diseases. None of the companies that responded to the survey had for the past 5 years brought to the market a drug for the most

⁶⁷⁵ Ruth Mayne, “The TRIPs Agreement and Access to Medicines: an NGO Perspective” in Homi Katrak and Roger Strange (eds.) *The WTO and Developing Countries*, (Pgrave Macmillan, New York: 2004) – pp. 155 citing Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (Commission on Intellectual Property, London: 2002)

⁶⁷⁶ Jeffrey Sachs, “Helping the World’s Poorest”, *The Economist*, Aug 12 1999

⁶⁷⁷ United Nations Development Programme, *Human Development Report*, 1999 available from <http://www.un.org> – pp. 68

⁶⁷⁸ *Ibid.*

neglected diseases.⁶⁷⁹ Furthermore, for 25 years only 15 new drugs for tropical diseases and tuberculosis were brought to the market, compared to 179 new drugs for cardiovascular diseases, where tropical diseases and TB make up 12% of the global disease burden and cardiovascular conditions make up 11%.⁶⁸⁰ These figures help raise awareness about the disproportionate burden of disease in many developing countries, which is worsened by the fact that pharmaceutical companies are not interested in consumers who cannot afford to pay. Non-governmental organisations worked to mobilise governments to take action and resolve the conflicting rights to private property and to live and health.⁶⁸¹

Oxfam constructed the problem of access to medicines as an issue influencing economic development as well. The organisation drew attention to the global health divide, where “widespread sickness acts as a brake on economic growth”.⁶⁸² The HIV/AIDS epidemic combined with the Asian Economic crisis in the late 1990s is said to have had a detrimental impact on development in the region since it hit the most productive members of society and began to reverse the development gains.⁶⁸³ The problem of HIV/AIDS and access to medicines for neglected diseases is even worse in Africa, where, according to the World Bank, “AIDS has already reversed 30 years of hard-won social progress in some countries”.⁶⁸⁴ Jeffrey Sachs also warned that disease and short life expectancy in the developing countries are not “just a result of poverty, but also a powerful cause of

⁶⁷⁹ *Fatal Imbalance – The Crisis in Research and Development for Neglected Diseases*, DND Working Group, Medicines Sans Frontiers – “Campaign for Access to Essential Medicines”, Sept 2001 – pp. 9

⁶⁸⁰ *Ibid.* – pp. 10

⁶⁸¹ Oxfam, *Implausible Denial: Why the Drug Giants’ Arguments on Patents do not Stack Up*, 2001 available from http://www.oxfam.org.uk/what_we_do/issues/health/implausible_denial.htm

⁶⁸² Oxfam, *Patent Injustice: How World Trade Rules Threaten the Health of Poor People*, Oxfam GB: 2001 – pp. 12

⁶⁸³ Martha Ainsworth, “AIDS, Development, and the East Asian Crisis”, Plenary Address to the 5th International Conference on AIDS in Asia and the Pacific, Oct 25, 1999, Development Research Group, The World Bank – pp. 3

⁶⁸⁴ A. Attaran and J. Sachs, “Defining and Refining International Donor Support for Combating the AIDS pandemic”, *The Lancet*, Vol. 357, 2001 – pp. 57 citing World Bank, *Intensifying Action Against HIV/AIDS in Africa: Responding to a development crisis*, (World Bank, Washington: 1999).

impoverishment”.⁶⁸⁵ In other words, non-state actors have attached the issues of access to and availability of medicines to economic development, which has been on government and international institutional agendas since the call for a New International Economic Order of 1974.

The network of normative opposition to the newly legalised norm of IPR protection has managed to reveal a multilayered normative problem in its vast complexity by publicising and problematising various aspects of this new norm – such as human health, access to medicines, affordability of medicines, economics development, and weighing individual rights to health and life against the rights of companies to exclude individuals and governments from the advances of pharmacology in the name of higher profits. The underlying normative theme, however, has been centred on the issue of social justice. Initially, TRIPs was created under the influence and with the assistance of experts from various industries and this is reflected in the inflexible character of the agreement, which aims at ensuring that royalties flow to the patent-holders and free-riding on registered patents is kept to a minimum. The powerful normative message constructed by the opposition campaign and developing countries, however, managed to effectively mobilise public opinion worldwide.

Re-opening of the debate between the proponents and opponents of full-scale implementation of the TRIPS Treaty with regards to the sphere of pharmaceutical research

NGOs and developing countries formed the network of normative opposition, formulated their issue of concern and led a dialogue with those actors who supported the full scale implementation of the TRIPs Treaty in the years between 1999 and the present (as the efforts to achieve the best deal for those suffering in the developing world are ongoing).

⁶⁸⁵ Jeffrey Sachs, “Helping the World’s Poorest”, *The Economist*, Aug 12 1999

In this section, I analyse the key events that brought about a change in the provisions of the TRIPs Agreement relating to the products of the pharmaceutical industry.

As discussed earlier, campaigns for access to HIV/AIDS medicines were well-under way in the US in 1996 with CPT and ACT UP leading the way. In March 1996, the World Health Organisation published a report of the World Health Assembly, entitled “The State of World Health – A fatal complacency”.⁶⁸⁶ The report drew attention to problems related to the struggle for control over infectious diseases such as malaria, respiratory diseases, AIDS, hepatitis, some cancers caused by viruses.⁶⁸⁷ In January 1996, UNAIDS was created to manage and coordinate the work of six other UN agencies – UNESCO, UNDP, UNFPA, UNICEF, WHO and WB⁶⁸⁸. Also in 1996, HAI International, organised the first conference on public health and TRIPs, held in Germany.⁶⁸⁹

The actual dialogue between non-state activists, developing countries, the pharmaceutical industries and the governments of the Quad countries (US, EU, Japan and Canada)⁶⁹⁰ did not become visible to the public until 1997. In 1997, the South African case discussed previously outraged many and drew attention to the issue of IP protection. In 1999 NGOs began to mobilise for the upcoming 3rd WTO Ministerial Conference in Seattle, as this was a chance to get the issue of access to medicines on the governmental agenda. A number of NGO conferences were held, including *AIDS and Essential Medicines and Compulsory Licensing* – held in Geneva, 25-27 March, and sponsored by Medecins

⁶⁸⁶ Available from <http://policy.who.int>

⁶⁸⁷ The problem with infectious diseases is that with ever-increasing levels of international air-travel they can easily turn into international epidemics, moreover, the improper use of medicines to cure these diseases often leads to the development of drug-resistant strands, which poses serious problems. See footnote 253.

⁶⁸⁸ Peter Piot, “Human Rights and HIV/AIDS”, Statement by the Executive Director of the Joint United Nations Programme on HIV/AIDS (UNAIDS), April, 1996. Available from <http://www.unaids.org/EN/other/functionalities/search.asp>

⁶⁸⁹ S. Sell, *Private Power, Public Law*, – pp. 147-8

⁶⁹⁰ “The Quad” is the name used at the WTO to describe the four major industrialised countries – EU, Japan, US and Canada - http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto02/wto2_50.htm#note3; <http://www.maketrade.com/en/index.php?file=08042002224228.htm&cat=2&subcat=6&select=22>

Sans Frontiers (MSF), Health Action International (HAI) and Consumer Project on Technology (CPT),⁶⁹¹ and *Increasing Access to Essential Drugs in a Globalised Economy Working Towards Solutions* (conference organised by HAI, MSF, and CPT, in Amsterdam, 25-26 Nov).⁶⁹² These brought together not only NGOs but health professionals and governmental officials from developing countries.

In 2000, UNAIDS reached an agreement with five of the biggest pharmaceutical companies to supply cheaper AIDS drugs to some African countries.⁶⁹³ The 53rd meeting of the World Health Assembly attracted trade and IP experts representing states and international organisations.⁶⁹⁴ The meeting was focused on confronting the HIV/AIDS epidemic and on taking swift actions to match the political commitments that many developed countries had made.⁶⁹⁵ President Clinton issued an executive order to make AIDS drugs available far more cheaply throughout sub-Saharan Africa.⁶⁹⁶ In other words, although NGOs and developing countries were not negotiating directly with pharmaceutical giants and developed-country governments, the dialogue between them was taking place on the pages of academic journals, in the discussion forums of various UN agencies, at international conferences, and in the eyes of the larger public. The debate was made very public and pharmaceutical companies were trying to keep the image of “caring and sharing” members of society, while holding on to their demands for the strict application of the TRIPs agreement, but that was impossible. Companies began to make concessions by means of donating drugs to developing countries and by selling medicines at discounted

⁶⁹¹ <http://www.accessmed-msf.org/prod/publications.asp>

⁶⁹² http://www.haiweb.org/campaign/novseminar/amsterdam_statement.html

⁶⁹³ S. Sell, *Private Power, Public Law*, – pp. 154

⁶⁹⁴ Medecines Sans Frontiers, *Summary of the 53rd World Health Assembly*, 15-21 May 2000, available from <http://www.accessmed-msf.org>

⁶⁹⁵ Ibid.

⁶⁹⁶ N. Lewis, “Clinton Issues Order to Ease Availability of AIDS Drugs in Africa”, *The New York Times*, May 11, 2000; see also S. Sell, *Private Power, Public Law*, – pp. 154

prices.⁶⁹⁷ NGOs pointed out that such *ad hoc* measures were not a solution to the problem of access to medicines, nor to the implementation of the TRIPs Agreement, which is rather rigid in its provisions and disregards the needs of many in the developing world.⁶⁹⁸

The next year, 2001, was one of fast developments and changes in the dialogue between the actors on issues of public health and access to medicines. Oxfam, UK launched its campaign “Cut The Cost”, joining MSF, CPT, HAI, VSO in their efforts to generate enough public attention to influence policy-makers into taking practical actions and commitments on these issues.⁶⁹⁹ Public pressure was mounting and the continued court case between the South African government and the pharmaceutical companies was in the public eye. MSF launched an internet petition to collect signatures asking drug companies to drop the case.⁷⁰⁰ Under increasingly negative public exposure and in view of the commitments made by President Clinton in 2000, the companies dropped the lawsuit. This was an important moment for the campaigners because it confirmed that their tactics were useful in this dialogue. Campaigners realised, however, that in order for their arguments to be taken seriously and have some persuasive power they needed to be supported by expert knowledge.

The group of NGOs and developing countries began attracting its own pool of experts – legal scholars, economists, medical personnel. They provided technical analysis, which showed that in many situations the arguments provided by the experts of the pharmaceutical industry were only aimed at protecting the economic interests of the industry. Legal scholars such as Frederick Abbott and Peter Drahos, medical experts like

⁶⁹⁷ S. Sell, *Private Power, Public Law*, – pp. 154-6

⁶⁹⁸ Oxfam calls these corporate moves “islands of philanthropy” amidst industry’s continued efforts to “promote a global patent system which would enhance profitability, but which could also consign millions to unnecessary suffering” – Oxfam, *Cutting the Cost of Global Health*, Oxfam Parliamentary Briefing 16, Oxfam GB: 2001 – pp. 3

⁶⁹⁹ <http://www.maketradefair.com/en/index.php?file=05092003155328.htm>

⁷⁰⁰ S. Sell, *Private Power, Public Law*, – pp. 157

Nathan Ford (MSF), and economists like Carlos Correa solidified the arguments put forward by the activists of civil society.⁷⁰¹ The dialogue among experts revealed the complexity of the problems posed by the current intellectual property legislation - including ethical issues of access to medicines and profit levels of pharmaceutical companies, legal issues of whose rights should take precedence – individual rights or rights to intellectual property, political issues between developing states and most often the US with its practice of bilateral trade agreements. The actors in this case study were of different economic calibre – volunteer NGOs vs. the top pharmaceutical companies,⁷⁰² but they were equally unified around their arguments, which makes the success of the civil society campaign all the more interesting.

The dialogue between the supporters of full-scale enforcement of the TRIPs agreement and the supporters of changes to the agreement met at the 4th WTO Ministerial Conference in Doha, Qatar (Nov 2001). The conference was preceded by intense political and social activities. The World Health Organisation together with the WTO, the Ministry of Foreign Affairs of Norway and the Global Health Council organised a workshop on differential pricing and financing essential drugs.⁷⁰³ The African countries, which were

⁷⁰¹ See, F. Abbott, *Compulsory Licensing for Public Health Needs: The TRIPs Agenda at the WTO after the Doha Declaration on Public Health*, Quaker United Nations Office, Occasional Paper 9, 2002; P. Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, Study Paper 8, 2002, Commissioned by the Commission on Intellectual Property Rights. Available from http://www.iprcommission.org/graphic/documents/study_papers.htm; P. Drahos and R. Mayne, eds. *Global Intellectual Property Rights – Knowledge, Access and Development*, (Oxfam, Palgrave Macmillan, London: 2002); Nathan Ford, “Patents, Access to Medicines and the Role of Non-Governmental Organisations”, *Journal of Generic medicines*, Vol. 1, no. 2, 2004, 137-145; Nathan Ford and Daniel Berman, “Essential Medicines and Compulsory Licensing”, *HAI-Lights*, Special Issue for the 52nd World Health Assembly, vol. 3, no.1, 1999, available from <http://www.haiweb.org/pubs/hailights/may99.html> accessed on 25 Mar 2005; C. Correa, “Public Health and Intellectual Property Rights”, *Global Social Policy*, vol. 2, no.3, 2002, 261-278.

⁷⁰² According to a 1998 estimate of the UNDP, the top 10 pharmaceutical corporations controlled 35% of a \$297 billion market - United Nations Development Programme, *Human Development Report*, 1999, available from <http://www.un.org> – pp. 67

⁷⁰³ See Report of the Workshop on “Differential Pricing and Financing of Essential Drugs” – World Health Organisation and World Trade Organisation Secretariats, Norwegian Foreign Affairs Ministry, Global Health Council, 8-11 Apr 2001

virtually left out of the TRIPs negotiations, became united in their demands for the revision of the agreement and submitted a proposal to the TRIPs Council requesting that the issue of IPR protection be examined in conjunction with the problem of access to medicines.⁷⁰⁴ The Council accepted this proposal, which was later examined in the meetings of the TRIPs negotiating group. The dialogue between North and South at the Doha Ministerial Conference was influenced by a number of external factors. The unsuccessful lawsuit of the 39 pharmaceutical companies against the government of South Africa gave more power to Western NGOs and caught the attention of Western media and public opinion. The increasing amount of scientific research on the influence of patents over the availability and affordability of various drugs,⁷⁰⁵ which was conducted independent of industrial groups like PhRMA, took the sting out of an otherwise highly influential study by Amir Attaran and Lee Gillespie-White,⁷⁰⁶ undermining its “aura of scientific objectivity”.⁷⁰⁷ The anthrax attack in the US immediately following the 9/11 attacks on the World Trade Centre in New York had made the US government consider compulsory licensing in case of a public emergency, which was the same move that the US was trying to deny to the developing world.⁷⁰⁸ Moreover, the NGO campaign had influenced public opinion so much that the OECD governments could not afford to disregard public demands for concerted actions to

⁷⁰⁴ P. Drahos, *Developing Countries and International Intellectual Property Standard-Setting*. Study Paper 8 Commissioned by the Commission on Intellectual Property Rights: 2002. Available from http://www.iprcommission.org/graphic/documents/study_papers.htm - pp. 26

⁷⁰⁵ See for example C. Correa, *Some Assumptions on Patent Law and Pharmaceutical R&D*, Quaker United Nations Office, Occasional Paper 6, Geneva: 2001; P. Drahos, “BITs and BIPs – Bilateralism in Intellectual Property”; Oxfam, *Patent Injustice: How World Trade Rules Threaten the Health of Poor People*, Oxfam GB: 2000; Oxfam, *Cutting the Cost of Global Health*, Oxfam Parliamentary Briefing 16, Oxfam GB: 2001; Oxfam, *Implausible Denial: Why the Drug Giants’ Arguments on Patents do not Stack Up*, 2001, available from http://www.oxfam.org.uk/what_we_do/issues/health/implausible_denial.htm; A. Guilloux and S. Moon, *Hidden Price Tags: Disease-Specific Drug Donations: Costs and Alternatives*, (Access to Essential Medicines Campaign, Medecins Sans Frontieres, Geneva: 2001)

⁷⁰⁶ See A. Attaran and L. Gillespie-White, “Do Patents for Antiretroviral Drugs Constrain Access to AIDS Treatment in Africa?” *Journal of the American Medical Association*, Vol.286, No. 15, Oct 17 2001, 1886-1892

⁷⁰⁷ S. Sell, *Private Power, Public Law*, – pp. 159

⁷⁰⁸ *Ibid.* – pp. 160

improve the availability of medicines in developing countries and afford their governments the right to look after the health of their citizens in situations of public health crisis.⁷⁰⁹

Discussions at the Doha Ministerial Conference were by no means easy, but governments had agreed that “TRIPs should not be part of the problem but part of the solution... and that countries should not be put under pressure bilaterally or in the WTO to limit their use of the flexibilities built into the TRIPs Agreement”.⁷¹⁰ After prolonged discussions in Doha, the TRIPs Council produced the Declaration on the TRIPs Agreement and Public Health⁷¹¹ (hereafter referred to as the Doha Declaration).

The Doha Declaration represents a limited *political closure* in a debate, which continues even today. The declaration signals closure on the issue of the need for action on the HIV/AIDS pandemic, on government responsibility to address this problem together with the issue of neglected diseases. Attention was also drawn to the disproportionate public health burden on developing countries’ governments and agreement was reached that concerted government action should be taken.⁷¹² Developed countries recognised the problems of developing countries without production capabilities for generic medicines, which will be unable to import cheap generic drugs after the agreement is fully in force and requested the Council for TRIPs to find an expeditious solution.⁷¹³ The declaration postponed the entry into force of the agreement for the least-developed countries until 1

⁷⁰⁹ The change of attitude among developed countries towards the possibility of granting more rights to the governments of developing countries was signalled when the US and EU withdrew their initial support for the 39 pharmaceutical companies in their lawsuit against the SA government.

⁷¹⁰ “Governments share interpretations on TRIPs and Public Health”, WTO News, TRIPs Council, Wed 20 June, 2001. Available from <http://www.wto.org>

⁷¹¹ Doc. No. WT/MIN(01)/DEC/2

⁷¹² Paragraph 1 of the Doha Declaration reads “We recognise the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics” – See Doc. No. WT/MIN(01)/DEC/2, available from <http://www.wto.org>

⁷¹³ Paragraph 6 of the Doha Declaration - See Doc. No. WT/MIN(01)/DEC/2, available from <http://www.wto.org>

January 2016.⁷¹⁴

The Doha Declaration did not completely close the debate over TRIPs between industry and civil society. It may have partially moderated the TRIPs-related foreign policies of the US towards the rest of the world, but it neither resolved problems of public health, nor established any long-term mechanisms that would ensure that TRIPs would not get in the way of any possible solutions to problems of access to medicines, availability of R&D for neglected diseases and the treatment of HIV/AIDS. The debates over the best possible policies continue on the pages of academic journals,⁷¹⁵ in various conferences and workshops,⁷¹⁶ and by different civil society actors.⁷¹⁷ One last development that took place in August 2003 seem to have concluded, at least for the moment, the legal and political battle over the permissibility and the extent of IPR protection of pharmaceutical products. A decision was taken by the Council on TRIPs to make it easier for developing countries to import cheap generics made under compulsory licensing if they were unable to manufacture

⁷¹⁴ Paragraph 7 of the Doha Declaration - See Doc. No. WT/MIN(01)/DEC/2, available from <http://www.wto.org>

⁷¹⁵ See for example P. Trouiller, P. Olliario, E. Torreele, J.Orbinski, R. Laing, and N. Ford, “Drug Development for neglected diseases: a deficient market and a public-health policy failure”, *The Lancet*, Vo. 359, 2002, 2188-2194; C. M. Correa, “Public Health and Intellectual Property Rights”, *Global Social Policy*, vol. 2, no.3, 2002, 261-278; T. Kongolo, “Towards a New Fashion of Protecting Pharmaceutical Patents in Africa – Legal Approach”, *International Review of Industrial Property and Copyright Law*, Vol. 33, no.2, 2002, 185-211; T. Kongolo, “TRIPs, the Doha Declaration and Public Health”, *Journal of World Intellectual Property – Law, Economics, Politics*, vol.6, no. 2, 2003, 373-388; D. Henry and J. Lexchin “The Pharmaceutical Industry as a Medicines Provider”, *The Lancet*, Vol. 360, 2002, 1590-1595.

⁷¹⁶ *The Crisis of Neglected Diseases: Developing Treatments and Ensuring Access*, Workshop and Conference, New York, March 12-14, 2002. Organised by MSF; Alan Berkman, *The Global AIDS Crisis: Human Rights, International Pharmaceutical Markets and Intellectual Property Symposium*. 2002. Available from http://www.healthgap.org/press_releases/02/031402_HGAP_ALAN_PP_IPR.pdf; *Conference Report – Implementation of the Doha Declaration on the TRIPs Agreement and Public Health: Technical Assistance – How to Get it Right?*, 28th March, 2002. International Conference Centre of Geneva

⁷¹⁷ Oxfam, *US Bullying on Drug Patents: One Year After Doha*, Oxfam Briefing Paper 33, Oxfam GB: 2002; Oxfam, *TRIPs and Public Health – The Next Battle*, Oxfam Briefing Paper 15, Oxfam GB: 2002; K. Bluestone (VSO), A. Heaton (Save the Children UK), C. Lewis (Oxfam, GB), *Beyond Philanthropy: The Pharmaceutical Industry, Corporate Social Responsibility and the Developing World – Joint Report*, (Oxfam, Oxford: 2002)

the medicines themselves.⁷¹⁸ The member states of the WTO had planned to reach an agreement on permanently incorporating the Doha Declaration on Public Health-waiver into the TRIPs Agreement by the end of June 2004; however, this has not yet been achieved, as negotiations have been stuck in details.⁷¹⁹ This issue is likely to remain unresolved until the next WTO Ministerial Meeting in Hong Kong in December 2005.

Conclusions

This chapter applied the model of norm development and knowledge creation to the norm protecting intellectual property rights in the pharmaceutical industry. The empirical evidence that was obtained shows that the process of norm creation is not necessarily a linear one. When consensus among key actors becomes unattainable, the processes of normative network configuration and issue formulation may take place anew to frame the normative issue in a way consistent with state interests and public normative demands. It has further become apparent that reaching political closure does not always signify the end of normative, scientific, and political negotiations. The process of creating a norm is a dynamic one, and it continually interacts with the normative, scientific, and political context of the time. It is this interaction that can lead to unpredictable results – such as the opening and closing of controversies, reaching swift agreements, or prolonging negotiations.

The case study of IPRs in the pharmaceutical industry is particularly interesting because of the interplay among political, normative, and economic power. The outcome of these negotiations defies the conventional wisdom that ‘might makes right’. Economic interests although prevailing at first have had to give way to more important normative

⁷¹⁸ *Decision Removes Final Patent Obstacle to Cheap Drug Imports* (2003) WTO News Press Release Doc. Press/350/Rev.1. Available from http://www.wto.org/english/news_e/pres03_e/pr350_e.htm

⁷¹⁹ http://www.wto.org/english/tratop_e/trips_e/health_background_e.htm - “TRIPs and Public Health: the situation in late 2005”

concerns and developed countries have had to give in to the demands of the developing ones, for more lax principles of intellectual property protection of pharmaceuticals.

Economic power and political power are very important determinants of the direction in which international norms evolve; however, these alone may not always determine the direction of normative change, because moral campaigns have the potential and ability to overshadow economic and political power. Scientific knowledge is another influential resource in the creation of norms and is useful in backing up practical and ethical arguments alike. Public opinion is an understudied force in international norm creation because when mobilised, it may speak louder than economic power, especially in cases when the price of economic progress in one part of the world costs human lives in another. This is certainly not the case in every situation and there are still numerous examples of economic actors abusing their power, but this case study shows the potential of public opinion even against some of the largest corporations in the world. The number of actors and the strength of their union are also crucial in the negotiations of the parameters of a norm. Although developing countries, for example, do not have influential economic leverage they can sometimes accumulate political leverage in international negotiations when they stand together in difficult negotiations.

An important conclusion stemming from this historical reconstruction of the events leading up to the current norm of IPR protection of pharmaceutical products is related to the nature of closure in international politics. Initially, political closure leading to the TRIPs agreement was reached via coercion and was based on partial scientific closure, which was based on the reports of Northern industries. The normative closure was also one-sided in that it only took account of the normative concerns of fairness that industries put forward. Political closure was based on rhetorical action and coercion, and proved to be unstable as a result. Since the industrialised states were faced with difficulties and strong normative

uproar from civil society networks and developing states, political closure was reversed and the debate over the scope and character of the new norm re-opened. This empirical study, thus shows that coercion is not always effective and that when political closure is based on one-sided technical knowledge and normative concerns, it may become unstable and open to breaking up.

The developments leading up to the creation of the TRIPs Agreement and the negotiations that followed it fit well into the negotiating stages proposed in the theoretical model of norm creation. Although the normative process was specific to this norm (with the reopening of political debates), the negotiations' dynamics were characteristic of the same theoretical stages. Studying the negotiating processes in more detail clearly reveals the different types of power at play in the international system and shows that more traditional theoretical approaches, which limit their understanding of power to that of state power are missing out on vital developments in the international system. The negotiating networks develop their own methods of cooperation and lines of agreement, which become the foundation of more peaceful coexistence and regional collaboration. The interaction between governments and scientific communities, lobby groups, civil society organisations, advocacy networks paves the way to more transparent and democratic international governance. This case study shows that normative concerns play a large part in international policy-making and that the general public is capable of applying political pressure on moral grounds if when properly mobilised. The developments post-Doha also raise hopes that the international community can address issues in a way that is sensitive to the needs of individuals in the developing world. They also raise the question whether individual human rights are taking centre stage in the politics of the global village, or if they still come second to what is perceived as the 'strategic interests' of states.

CHAPTER 5

PROTECTING THE ATMOSPHERE TO AVOID CLIMATE CHANGE

“Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁷²⁰ The norm of sustainable development in harmony with our natural environment was first spelt out in the Report of the World Commission on Environment and Development in 1987 and became the normative foundation for continuous legislation in the realm of international environmental politics. The Chairman of the Commission, Gro Harlem Brundtland, emphasised that while until the 1980s humanity has been concerned with the effects of economic growth on the environment, “we are now forced to concern ourselves with the impacts of ecological stress – degradation of soils, water regimes, atmosphere and forests upon our economic prospects... Ecology and economy are becoming ever more interwoven... into a seamless net of causes and effects”.⁷²¹ This report, submitted to the UN General Assembly, marked the entry of environmental issues on to the international political agenda, which was an important first step towards generating international environmental norms in the future.

The sphere of international environmental politics is very broad, comprising every aspect of our natural environment – the atmosphere, biosphere, hydrosphere, etc. - and very complex – due to the high degree of interconnectedness between all natural elements and our insufficient understanding of these links. Legalising environmental politics is a difficult task as it involves numerous actors whose interests often collide irreconcilably or pull in

⁷²⁰ Report of the World Commission on Environment and Development, *Our Common Future*, Forty-Second Session of the UN General Assembly, 4 August 1987, Doc. No. A/42/427 – pp. 24

⁷²¹ *Ibid.* – pp. 21

different directions. Among the multitude of issues that one could choose to study in relation to environmental norm creation, I have focused my attention on the emerging norm for the protection of the atmosphere in light of the increasing greenhouse gas concentrations, which have been perceived to lead to the warming of the global climate. The process of constructing the problem of global warming is interesting because it involves continuous scientific debate, strong normative beliefs that society has a responsibility towards future generations as well as to those less fortunate in the underdeveloped world, and the powerful economic interests of the energy producing industry. This case-study provides abundant material for the study of the interplay between technical knowledge, normative ideas, economic and political power; as well as for our understanding of the actors who partake in international decision-making and the powers that they exercise. The problem of global warming is of great magnitude and importance because of the scale of the possible consequences that it might have on all activities of humanity and its natural habitat.

There has been a continual debate regarding the core causal relationships in the global warming issue, which has been characterised by scientific uncertainty and high political and economic stakes. Scientific opinion has varied widely and some authors have attributed this variation to the interests of the sources of research funding. The politicisation of science has had a negative impact on the confidence of the users of scientific knowledge in its neutrality and objectivity. The issue of scientific uncertainty is another impediment in the process of norm development, which results from the complexity and interconnectedness of our natural environment. The elements of our environment are interdependent and influence each other in ways not yet completely clear to scientists. There are many causal relationships between these elements that are still to be uncovered, while some argue that more science may not necessarily lead us to the right answers if such

exist at all, or even if it does, that it might not necessarily result in better policy.⁷²² The complexity of nature and the interplay between its parts stands in the way of understanding whether there is a problem of global warming at all, what the direction of climate fluctuation is,⁷²³ what consequences we can expect, and if there is anything that can be done to modify these consequences. The scientific community seems unable to reach an unequivocal agreement on any of these issues. The lack of scientific closure has affected political negotiations and thus political closure as it allowed actors to make sustained arguments against political action on the basis of scientific uncertainty.

The economic sector has been divided on the issue of climate change and on the need for immediate action to avert possible environmental crisis. The industries that are directly implicated in fostering climate change – the fossil fuel industries, as well as those who use their products - are in direct opposition to any meaningful action being taken at present, as any action is likely to come at a great cost. At the same time, the insurance sector and the green technologies sector have seen a window of opportunity to unite their efforts and counter the actions of energy producers in order to improve their market positions. Insurers are increasingly worried about the rising costs of the aftermath of natural disasters, which are predicted to increase in both frequency and intensity,⁷²⁴ while the green

⁷²² Sonja Boehmer-Christiansen, “Global Climate Protection Policy: The Limits of Scientific Advice – Part 1”, *Global Environmental Change*, Vol.4, no. 2, 1994 – pp. 141; Ian Rowlands, *The Politics of Global Atmospheric Change*, (Manchester University Press: Manchester: 1995) – pp. 92

⁷²³ Hypothesis in the 1970s spoke of a new ice age, while scientists at the moment discuss hypothesis about regional cooling – P. Damon, and S. Kunen, “Global Cooling? No, Southern Hemisphere warming trends may indicate the onset of the CO₂ ‘greenhouse’ effect”, *Science*, vol.193, no.4252, Aug 1976 – pp. 451-2; Walton, M. (2005) “Changes in Gulf Stream could Chill Europe”, 10 May, 2005 – <http://www.cnn.com/2005/TECH/science/05/10/gulfstream/index.html>

⁷²⁴ P. Newell, *Climate for Change – Non-state Actors and the Global Politics of the Greenhouse*, (Cambridge University Press; Cambridge: 2000) – pp. 135; Sonja Boehmer-Christiansen, “Uncertainty in the Service of Science: Between Science Policy and the Politics of Power” in G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, (Scandinavian University Press: Oslo: 1997) – pp. 137; B. Arts and J. Cozijnsen, “Between ‘curbing the trends’ and ‘business-as-usual’: NGOs in international climate change policies” in E. Ierland, J. Gupta, M. Kok (eds.) *Issues in International Climate Policy – Theory and Policy*, (Edward Elgar: Cheltenham, UK: 2003) – pp. 254-5

energy lobby has an opportunity to offer an alternative to the energy producing practices of the oil-economy and attract finance and interest to its products.⁷²⁵

Among states, the North- South debate has been magnified by the climate change negotiations because of debates about allocation of costs and responsibilities. The G-77 countries, although very different in many aspects, managed to stand firmly on the position that the developed world should take the lead in lowering emissions and should furthermore pledge resources and technologies to assist the developing world in fulfilling its obligations towards future generations, because the consumption and life-style patterns in developed countries are perceived as the main cause of current environmental problems.⁷²⁶ There is also the principled issue of responsibility. While OECD countries predict that China, India, and the rest of the developing world will comprise 60% of Greenhouse Gas (GHG) emissions by the year 2050,⁷²⁷ the developing countries insist that they should be given an equal opportunity to develop economically and should not be held responsible for the pollution that developed countries have inflicted on the environment so far.⁷²⁸ Environmental degradation in general and climate change in particular are predicted to have a most notable impact on developing countries, affecting patterns of agriculture, and food production, sources of fresh water etc. and thus would influence the prospects of future economic development of these parts of the world.⁷²⁹

⁷²⁵ L. Elliot (2004) *The Global Politics of the Environment*, Palgrave Macmillan: Basingstoke – pp. 117; Sonja Boehmer-Christiansen (1997) “Uncertainty in the Service of Science: Between Science Policy and the Politics of Power” in G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, Scandinavian University Press: Oslo – pp. 138-140.

⁷²⁶ F. Yamin and J. Depledge (2004) *The International Climate Change Regime – A Guide to Rules, Institutions and Procedures*, Cambridge University Press: Cambridge – pp. 35

⁷²⁷ “The Economics of Climate Change”, *OECD Economic Outlook*, No. 63, 1998, available from <http://www.oecd.org> - pp. 197

⁷²⁸ J. Gupta and R. Tol “Why Reduce Greenhouse Gas Emissions? Reasons, Issue-Linkages and Dilemmas” in E. Ierland, J. Gupta, M. Kok (eds.) *Issues in International Climate Policy*, – pp. 33

⁷²⁹ J. Walter and A. Simms, *The End of Development? – Global Warming, Disasters and the Great Reversal of Human Progress*, (New Economic Foundation (NEF) and Bangladesh Centre for Advanced Studies (BCAS), London: 2002)

Climate change is an issue of global magnitude, which has the potential to affect humans across the world. Since the earth's atmosphere is one whole, the consequences of the enhanced greenhouse effect will not be confined to those states that produce higher emissions. An international response, however, is not easy to achieve in a political world of sovereign nation-states that still justify their actions with national interests in the context of an anarchical international system,⁷³⁰ are worried about free-riders and are striving to minimise their costs of compliance.⁷³¹ Between scientific uncertainty and national interests is also the problem of the lack of urgency. When unusual climate conditions were affecting the US and other parts of the world in the late 1980s, environmental issues were swiftly brought onto the international agenda, but since climate has generally returned to a more stable, familiar state, meaningful action and decision-making have been delayed and even postponed. Examples of effective environmental agreements do exist, but one of the underlying features of those was the immediacy of international action required – in the case of acid rain, the ozone layer, biodiversity, and so on. The effects of the build-up of greenhouse gases in the atmosphere “may take decades to manifest themselves”,⁷³² while action to combat increasing levels of greenhouse gases is likely to be costly and with unpredictable effects. Some scientists have emphasised the need to take decisive action on climate change before it is too late, because according to some predictions the effects of climate change may develop and strike the most vulnerable nations with unforeseen speed.⁷³³ The evidence provided has so far been insufficient to induce resolute international political action.

⁷³⁰ G. Fermann, (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, (Scandinavian University Press: Oslo: 1997) – pp.29-30

⁷³¹ Ibid. – pp. 30-32.

⁷³² W. Nitze, *The Greenhouse Effect: Formulating a Convention*, (The Royal Institute of International Affairs: London: 1990) – pp. 1

⁷³³ W. Nitze, *The Greenhouse Effect: Formulating a Convention*, – pp. 1; add more sources!!!

The study of environmental politics is probably the one area where the need to bridge the social constructivisms of IR and SSK is becoming fairly obvious. Analysis of the practice of knowledge creation with regards to the norm for the protection of the atmosphere has been much more extensive than in other fields of international politics. The natural sciences, in this case, have been heavily criticised for their subjectivity and accused of constructing knowledge in search of continued attention and funding.⁷³⁴ Politicians have been seen as adopting short-term positions to ensure their re-election, while missing out on the big picture of the detrimental effects that result from the lack of action to prevent intense global warming. The aim of this chapter is to begin untangling the complex web of processes leading to the construction of a norm to control climate change. To do this, it is important to examine the identity of the actors involved in the creation of this norm, their normative positions, and the tactics that they use to achieve their goals. Close attention will be paid to the methods of argument and persuasion that actors have used to get this issue on the international agenda, to sustain the interest in it and to persuade states to produce binding legal principles that will change the parameters of appropriate behaviour. One must not assume that this process of norm creation is a natural progression of human ethics, because as we will later see, the parties in this issue have taken and defended positions based on self-interest and so the resulting norms are not always benign and there to secure the well-being of the greatest number of people.

The issue of global warming is related to the growing concentration of so-called greenhouse gases in the earth's atmosphere. Relative scientific consensus has been reached that industrialisation, deforestation, and the increased use of agricultural fertilisers raise the

⁷³⁴ Sonja Boehmer-Christiansen, "Global Climate Protection Policy: The Limits of Scientific Advice – Part 1", *Global Environmental Change*, Vol.4, no. 2, 1994 – pp. 142-3; C. Boettcher, "The use and misuse of science in policy making" in T. Gerholm (ed.) *Climate Policy After Kyoto*, (Multiscience Publishing Co Ltd: Brentwood: 1999) – pp.40-49

amount of certain chemical compounds in the atmosphere.⁷³⁵ These compounds trap the heat reflected from the earth's surface and thus produce an effect similar to a greenhouse. The greenhouse gases, however, are essential in keeping the earth inhabitable, as it has been estimated that if those were not in the atmosphere, the earth's surface would be approximately 33°C colder.⁷³⁶ Sceptical scientists believe that there isn't enough evidence to prove that human activity is capable of upsetting the natural balance of the greenhouse gases because there are natural mechanisms in place to regulate the greenhouse effect – some of these mechanisms are natural, the so called CO₂ 'sinks',⁷³⁷ and some are man-made, such as sulphur, soot, ash, dust, which reflect heat back into space and thus create a cooling effect.⁷³⁸

The problem of global warming is of great magnitude because it is likely to affect not only our natural environment, but also almost all activities of humanity, as well as the availability of food and some natural resources. Although it is difficult to predict the exact scale of the problem and thus its exact consequences, some scientists have argued that increasing the temperature of the Earth's surface will change the plant life, agricultural activity and food production, precipitation patterns and climatic zones, thus uprooting

⁷³⁵ See Table 2 in Sujata Gupta and K. Kumar, "The Science and Economics of Climate Change", in *Climate Change: Post-Kyoto Perspectives from the South*, Centre for Global Environmental Research, (Tata Energy Research Institute: New Delhi: 1998) – pp. 7; J. Houghton, "The Case for the Greenhouse Effect" in P. Thompson (ed.) *Global Warming – The Debate*, (John Wiley and Sons: Chichester: 1991) – pp. 8

⁷³⁶ John Houghton, "The Case for the Greenhouse Effect" in P. Thompson (ed.) *Global Warming – The Debate*, (John Wiley and Sons: Chichester, UK: 1991) – pp. 8

⁷³⁷ There are a number of mechanisms that offset the effects of increased concentrations of carbon dioxide in the atmosphere – examples of these are clouds, intensified biological processes that lead to the creation of more clouds, increased plant-growth and resulting organic matter in the soil produces sulphur gases, which also have a cooling effect – S. Idso, "Real-World Constraints on Global Warming" in L. Jones (ed), *Global Warming - The Science and the Politics*, (The Fraser Institute, Vancouver: 1997) – pp. 92-7; S. Schneider, "The Greenhouse Effect: Science and Policy", *Science*, vol. 243, no. 4892, 1989 – pp. 773-4

⁷³⁸ House of Lords, Select Committee on Economic Affairs, *The Economics of Climate Change*, Vol. 1: Report, 2nd Report of Session 2005-6; (The Stationery Office: London: 2005) – pp. 12

established patterns of human existence.⁷³⁹ Scientists have further suggested that climate changes will affect developing countries worst because of the high financial and technological costs of adapting to the new conditions.⁷⁴⁰ Ecological imbalance and stress can swiftly become the leading cause of violent conflict in politically volatile areas, which has further engaged the interest of policy-makers at the international level.⁷⁴¹

A Brief History of Climate Change Research

One can be justified in saying that the inception of climate change research was almost entirely accidental – global warming was discovered in the process of searching for the causes of the Ice Age.⁷⁴² Although theories about the warming of the temperature at the earth's surface were available as early as the 19th century, the issue was not problematised until much later. Global warming was discovered by scientists and it was scientists who constructed it as a problem, and this has inevitably affected the way in which the politics of this problem progressed.

It was not until the 18th century that some European scientific societies began keeping a more structured and standardised record of weather and weather fluctuations.⁷⁴³ A series of international conferences and publications of climatologists and meteorologists established the need for standardised record of temperatures, precipitations and general weather conditions, which later became one of the requirements of the scientific approach

⁷³⁹ T. Wigley, "The Science of Climate Change" in E. Claussen, V. Cochran, D. Davies (2001) (eds.) *Climate Change – Science Strategies and Solutions*, (The Pew Centre on Global Climate Change: Virginia, USA: 2001) – pp. 12-22

⁷⁴⁰ C. Thomas, *The Environment in International Relations*, (Royal Institute of International Affairs: London: 1992) – pp. 125

⁷⁴¹ Ibid. – "The Environment on the Security Agenda" – pp. 115-153.

⁷⁴² S. Weart, *The Discovery of Global Warming*, (Harvard University Press: Cambridge, MA: 2003) – pp. 11-12

⁷⁴³ James R. Fleming, *Historical Perspectives on Climate Change*, (Oxford University Press: New York: 1998) – pp. 34-43

to climate issues, to ensure consistency across the world.⁷⁴⁴ Consistent climate monitoring records have only been compiled over the last two centuries, which leaves contemporary scientists without direct historical data and this impinges their chances of recreating a reliable picture of the climate changes that the earth has experienced.⁷⁴⁵ Although two hundred years may seem like a long period, some climate change occurs in long cycles and the lack of older records leaves scientific hypothesis without solid evidence to prove either the lack or the imminence of global warming.

In the 19th century, scientists and people with general interest in the natural world were researching the causes of the Ice Age when experiments and calculations pointed to the fact that not only is the Earth atmosphere retaining heat from the sun, but that the atmosphere is warming up. Jean Baptist Joseph Fourier is considered the first author to compare the function of the Earth's atmosphere to that of "glass in a greenhouse" as early as 1824.⁷⁴⁶ Later, John Tyndall studied the transparency of the gases of the atmosphere and discovered that while oxygen and nitrogen were transparent, the gases produced by the burning of coal, like CO₂ and methane were, opaque and able to absorb heat.⁷⁴⁷ Tyndall was concerned with the scenario where the concentration of the opaque gases drops and the surface of the Earth cools down, leading to another Ice Age.⁷⁴⁸ So, although he is considered to have coined the term "greenhouse effect" in his 1859 publication, his work

⁷⁴⁴ Ibid. – pp. 42 and pp. 53

⁷⁴⁵ W. Karlen, "Is the temperature increase of the last 100 years unique?" in T. Gerholm (ed.) *Climate Policy After Kyoto*, (Multiscience Publishing Co Ltd: Brentwood: 1999) – pp. 52

⁷⁴⁶ James Fleming, *Historical Perspectives on Climate Change* – pp.56; Gale Christianson, *Greenhouse – The 200-year Story of Global Warming*, (Constable and Company Ltd: London: 1999) – pp. 33; Stephen Weart, *The Discovery of Global Warming*, (Harvard University Press: Cambridge, MA; 1999) – pp. 2-3

⁷⁴⁷ Stephen Weart, *The Discovery of Global Warming* - pp.3; J. Fleming, *Historical Perspectives on Climate Change* – pp. 65

⁷⁴⁸ G. Christianson, *Greenhouse – The 200-year Story of Global Warming* – pp. 110; J. Fleming, *Historical Perspectives on Climate Change* – pp.67

was not concerned with global warming.⁷⁴⁹ Further research on the greenhouse effect and the possibility of a new Ice Age was conducted by Svante August Arrhenius. He produced a mathematical model to reflect and predict the amount of temperature change related to the change of the atmospheric concentration of CO₂ and conducted extensive calculations. Arrhenius' calculations were partly prompted by a natural phenomenon - the eruption of the Krakatau volcano on the island of Palau in Indonesia.⁷⁵⁰ The volcanic dust was spread around the world by winds, prompting scientists to predict the possibility of dropping temperatures and a new Ice Age.⁷⁵¹ One of Arrhenius' most popular publications is entitled "On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground",⁷⁵² and is often cited as the inception of the climate change discussion.

Unlike scientists today, the early scholars of climate change believed global warming to be beneficial, because they perceived improved plant growth and warmer weather as positive and much needed effects in a world of growing population.⁷⁵³ The debate on the causes of the Ice Age, as well as the question whether the earth was warming up or cooling down, continued in the first half of the 20th century. The variability of climate being attributed to spots on the sun,⁷⁵⁴ to changes in geography, i.e., the movement of continents,⁷⁵⁵ to human activities, to the complexity of the interaction between the various parts of the natural environment,⁷⁵⁶ and so on. Some of the works were based on scientific evidence while others were purely speculative, but the debates were nowhere near to

⁷⁴⁹ John Tyndall, "Note on the Transition of Heat Through Gaseous Bodies" *Proc. Roy. Inst. Gr. Br.*10:37, 1859.

⁷⁵⁰ G. Christianson, *Greenhouse – The 200-year Story of Global Warming* – pp.111-3

⁷⁵¹ *Ibid.* – pp. 114

⁷⁵² Svante Arrhenius "On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground", *The London, Edinburgh and Dublin Philosophical Magazine and Journal of Science*, 5th Series, April 1896

⁷⁵³ J. Fleming, *Historical Perspectives on Climate Change* – pp. 82

⁷⁵⁴ S. Weart, *The Discovery of Global Warming* - pp.15-8

⁷⁵⁵ J. Fleming, *Historical Perspectives on Climate Change* – pp.108

⁷⁵⁶ *Ibid.*; John Houghton, "The Case for the Greenhouse Effect" in P. Thompson (ed.) *Global Warming – The Debate*, (John Wiley and Sons: Chichester, UK: 1991) – pp.11

reaching one conclusion or another. The first publication arguing that fossil fuel burning has caused an increase in the temperature of the Earth's atmosphere was George Callendar's article "The Artificial Production of Carbon Dioxide and Its Influence on Temperature", published in 1938.⁷⁵⁷ The author had examined the data from 200 weather stations around the world between 1880 and 1934 and argued that temperatures were on the rise already.⁷⁵⁸

Although many scientists from different scientific fields were producing reports, articles, hypotheses, and the debate on climate change was kept going, there was no political response to these scientific developments, nor were these issues made part of the social movements' agenda. There are a number of reasons for this. Science was not taken too seriously by politicians in the early years of the 20th century because it was not perceived as systematic and objective. Science and politics were detached social spheres in the sense that science was not perceived as part of politics and the issue of climate change was only beginning to be constructed as problematic by the scientists who studied it. Moreover, even within scientific circles the issue of climate change took time to evolve - climatologists and meteorologists were slow to change their concept of climate: up until the early 20th century the predominant perception was that climate was stable and, although it might be susceptible to the influence of human activity, climate was influenced mostly by other components of the natural environment.⁷⁵⁹

The growing understanding of climate as a fragile system that can easily be influenced by industrial development came along not only due to the evolution of science

⁷⁵⁷ G. C. Callendar, "The Artificial Production of Carbon Dioxide and Its Influence on Temperature", *Quarterly Journal of the Royal Meteorological Society*, Vol. 64, 1938, 223-40.

⁷⁵⁸ G. Christianson, *Greenhouse – The 200-year Story of Global Warming* – pp.141

⁷⁵⁹ J. Fleming, *Historical Perspectives on Climate Change* – pp. 49 citing Samuel Forry (1844) "Researches in Elucidation of the Distribution of Heat over the Globe, and especially of the Climatic Features Peculiar to the Region of the United States", *American Journal of Science*, vol. 47

but with changing political perspectives and after a series of natural disasters. The political events that unfolded during WWII and after it – the use of the atomic bomb, the unfolding Cold War and the politics of the arms race that followed - made politicians realise the potential benefits of scientific research, which were then directly related to issues of national security.⁷⁶⁰ After the end of the conflict, science became part of the new industrial complex, which resulted in an increase of both public and private funding and that in turn attracted even more scientists.⁷⁶¹ In the politically-charged atmosphere of the Cold War, science was constructed as objective, neutral and practical, based on hard facts and precise calculations.

The climate change issue was raised to the attention of politicians partly by scientists and partly by public concerns. The use of nuclear weapons at the end of WWII demonstrated the effectiveness of this new weapon, but also its potential to cause harm. Nuclear testing and proliferation was raising public concerns regarding human health, damage to the atmosphere and long-term effects.⁷⁶² Atmospheric pollution was also considered in the context of the blooming industrial development during the 1950s when London became known for its ‘killer smog’.⁷⁶³ The press reflected public concerns in articles discussing apocalyptic scenarios of rising sea levels, loss of habitat, and changing agriculture zones that hindered economic development.⁷⁶⁴ These events, together with temperatures peaking (for the century so far) in the 1950s, changed an important part of the

⁷⁶⁰ D. Demeritt, “The Construction of Global Warming and the Politics of Science”, *Annals of the Association of American Geographers*, Vol. 91, no. 2, 2001 – pp. 315 Citing the work of D. Kleinman, *Politics on the endless frontier: Postwar Research Policy in the United States*, (Duke University Press: Durham, NC; 1995) and C. Kwa, “Modelling technologies of control”, *Science as Culture*, vol. 4, 1994, 363-91, - Demeritt reminds us that much of the post-war science in the United States and elsewhere was justified for the needs of the military.

⁷⁶¹ A. Jamison (2001) *The Making of Green Knowledge* – pp. 65-6

⁷⁶² S. Weart, *The Discovery of Global Warming* – pp. 41-2; J. Fleming, *Historical Perspectives on Climate Change* – pp. 118

⁷⁶³ S. Weart, *The Discovery of Global Warming* – pp. – pp. 40

⁷⁶⁴ J. Fleming, *Historical Perspectives on Climate Change* – pp.119

public perception about the natural environment – namely, that human activity could have a substantial impact on the environment in general and on climate in particular.⁷⁶⁵

In 1957 Roger Revelle and Hans Suess stirred the scientific circles by showing that the widespread belief that oceans will absorb the excess CO₂ from the atmosphere is incorrect, or at least not to the degree proposed by previous studies.⁷⁶⁶ In 1957-8, during the International Geophysical Year, under the initiative of the World Meteorological Organisation (WMO), systemic measurements of the carbon dioxide concentrations began.⁷⁶⁷ Public curiosity was raised, which sparked the need for further research and explanations. Scientists and international organisations were prepared to engage. What was missing was the attention of policy-makers to the problem of atmospheric pollution and its ensuing consequences to turn this into a vibrant political discussion.

Social movements became more active in the 1960s when ecological groups overlapped with groups protesting nuclear proliferation and the arms race of the Cold War.⁷⁶⁸ The public concern with air pollution was further strengthened by the often cited book *Silent Spring*, by Rachel Carson (1962), which discussed the effects that agricultural pesticides (DDT) had on wildlife and particularly on birds. Separate developments were taking place in the scientific realm. The Conservation Foundation produced a report in 1963

⁷⁶⁵ In 1956, Gilbert Plass, an infrared physicist, proposed that “if at the end of this century, measurements show that carbon dioxide content of the atmosphere has risen appreciably, and at the same time temperature has continued to rise throughout the world, it will be firmly established that carbon dioxide is an important factor in causing climate change” – M. Nye, D. Lindberg, R. Numbers, *The Cambridge History of Science – the Modern Physical and Mathematical Sciences*, Vol. 5, (Cambridge University Press: Cambridge: 2003) – pp. 647-8

⁷⁶⁶ R. Revelle, and H. Suess “Carbon Dioxide Exchange Between Atmosphere and Ocean and the Question of an Increase of Atmospheric CO₂ during the Past Decades”, *Tellus*, Vol. 9, No. 18, 1957.

⁷⁶⁷ Georg Borsting and Gunnar Fermann, “Climate Change Turning Political: Conference Diplomacy and Institution-Building to Rio and Beyond” in Fermann, G. (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, (Scandinavian University Press: Oslo: 1997) – pp. 54

⁷⁶⁸ C. Thomas, *The Environment in International Relations*, (Royal Institute of International Affairs: London: 1992) – pp. 23; A. Jamison, *The Making of Green Knowledge – Environmental Politics and Cultural Transformation*, (Cambridge University Press: Cambridge: 2001) – pp. 71-2

indicating in figures the relationship between CO₂ emissions and climate change.⁷⁶⁹ In a 1965 report of the US President's Science Advisory Committee, respected scientists put the greenhouse-induced warming on the domestic US policy agenda, opening an opportunity for the issue to be brought to the attention of policy-makers.⁷⁷⁰ In the same year, a scientific conference in Boulder, Colorado, became a forum for scientists of different fields to discuss the problem of global warming.⁷⁷¹ The conference was initially convened to discuss the causes of the Ice Age. An important scientific construction that evolved in the 1960s concerning the complexity and interconnectedness between the various elements of the natural environment became the foundation of growing scientific uncertainties. An accidental discovery of wide variation in results after introducing small changes in the numerical model of simulating weather patterns had a huge impact in changing the perceptions of scientists. Edward Lorenz of the MIT concluded that “orbital patterns, wind patterns, melting ice sheets, ocean circulation – everything seemed to be interacting with everything else... [and that] the planet's environment was a hugely complicated structure”.⁷⁷²

The 1970s were a tumultuous time in the development of environmental concerns. In the context of the Cold War, issues not directly linked to national security rarely reached the international agenda. The United Nations Conference on Human Environment (UNCHE), which took place in Stockholm 1972, however, managed to elevate environmental concerns to the level of global politics. Environmental issues thus became

⁷⁶⁹ Ian Rowlands, *The Politics of Global Atmospheric Change*, (Manchester University Press: Manchester: 1995) – pp. 67, citing The Conservation Foundation Report *Implications of Rising Carbon Dioxide Content of the Atmosphere*, New York: 1963 – according to the report “a doubling of CO₂ content of the atmosphere would produce a temperature rise of 3.8 degrees Celsius”

⁷⁷⁰ S. Weart, *The Discovery of Global Warming*, – pp. 44; Ian Rowlands, *The Politics of Global Atmospheric Change* – pp. 67

⁷⁷¹ S. Weart, *The Discovery of Global Warming* – pp. 39-40.

⁷⁷² *Ibid.* – pp. 63-4

imbedded in international politics because the UNCHE conference drew attention to and problematised various aspects of the human environment.⁷⁷³ Another development in world politics, which cemented environmental issues on the global agenda, was the oil crisis of 1973. The abrupt rise in oil prices opened the political space to the proponents and producers of renewable energy,⁷⁷⁴ while also raising energy issues to the top of national political agendas.⁷⁷⁵ Even though energy issues came into the political spotlight, scientists continued to struggle to convey their findings to policy-makers successfully.⁷⁷⁶ This problem was partly due to the lack of consensus in scientific circles over whether global warming or global cooling was in store for our planet.⁷⁷⁷

The climate change science was rapidly improving, with the increasing capacity of technology. One of the main methods to calculate the extent of climate change was through General Circulation Models (GCMs), which were based on extensive calculations of the interaction between various elements of the natural environment. The improving computing power and sophistication of these models led scientists to conclude that “there is no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible”.⁷⁷⁸ Although the voice of science was becoming more determined, the inherent complexity of the natural environment made it very difficult to reach scientific consensus, because the global temperatures were indicating a consistent decline between 1945 and the

⁷⁷³ Georg Borsting and Gunnar Fermann, “Climate Change Turning Political: Conference Diplomacy and Institution-Building to Rio and Beyond” from G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, (Scandinavian University Press: Oslo: 1997) – pp. 53

⁷⁷⁴ S. Weart, *The Discovery of Global Warming* – pp. 96

⁷⁷⁵ A. Jamison, *The Making of Green Knowledge* – pp. 87

⁷⁷⁶ S. Weart, *The Discovery of Global Warming* - pp. 98

⁷⁷⁷ D. Demeritt, “The Construction of Global Warming and the Politics of Science”, *Annals of the Association of American Geographers*, Vol. 91, no. 2, 2001 - pp. 315

⁷⁷⁸ Daniel Bodansky, “Prologue to the Climate Change Convention” in Mintzer, I. and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention*, (Cambridge University Press and Stockholm Environmental Institute: Cambridge: 1994) – pp. 46-7 citing National Research Council, *Carbon Dioxide and Climate: A Scientific Assessment*, Washington DC, NRC, 1979 – pp. viii

1970s.⁷⁷⁹ Scientists were not discouraged by the conflicting data that they were getting from studying the natural environment; their reports concluded that more scientific research was needed to resolve controversies surrounding climate change. Science, according to Andrew Jamison, was becoming more professionalized and there was a process of institutionalisation of knowledge production that took place during the 1970s, thus excluding those who could not afford to participate or were not educated to the required level.⁷⁸⁰

Science alone was not sufficient to raise the issue of climate change to the international level. There was growing social pressure on politicians to find solutions to both pending and future problems related to the Earth's climate. Droughts that affected India, Russia, and the American Mid West and the famine that hit Africa during the 1970s assisted in drawing the attention of the general public to environmental issues.⁷⁸¹ Environmentalist social movements were beginning to pop up in different parts of the world – most notably, 1969 saw the inception of Friends of the Earth⁷⁸² and Greenpeace was founded two years later in 1971.⁷⁸³ The activists of these organisations were taking direct action in protest both against government activities and against the ignorance of the wider public on issues such as biodiversity, deforestation, nuclear energy, protection of the oceans.⁷⁸⁴ These campaigns, along with the coverage of the droughts, attracted much needed media attention,⁷⁸⁵ which in turn assisted in mobilising the wider public in support

⁷⁷⁹ Ibid. – pp. 47; Ian Rowlands, *The Politics of Global Atmospheric Change*, (Manchester University Press: Manchester: 1995). – pp. 69

⁷⁸⁰ Andrew Jamison, *The Making of Green Knowledge – Environmental Politics and Cultural Transformation*, (Cambridge University Press: Cambridge: 2001) – pp. 87-8

⁷⁸¹ S. Weart, *The Discovery of Global Warming*, – pp. 91

⁷⁸² <http://www.foe.org/about/history.html>

⁷⁸³ <http://www.greenpeace.org/international/about/history>

⁷⁸⁴ <http://www.greenpeace.org/international/> and <http://www.foe.co.uk/campaigns/>

⁷⁸⁵ James Connelly and Graham Smith, *Politics and the Environment – From Theory to Practice*, (Routledge: London: 2003, 2nd edn) – pp. 97;

of environmental policies.

Public, political and scientific attention to the issue of global warming grew exponentially in the late 1970s and the 1980s. An increasing number of international scientific conferences took place to reflect the changing research agenda.⁷⁸⁶ Politicisation, professionalisation and specialisation characterised the field of environmental studies of the 1980s.⁷⁸⁷ Non-governmental organisations and environmental social movements became more active. Environmental departments were created within larger companies to defend their interests,⁷⁸⁸ while policy-makers were asking for more conclusive scientific knowledge. The 1980s were a decade of ever growing environmentalism, which paved the way for the political achievements of the 1990s.

Green parties entered the politics of the UK, Germany, and New Zealand,⁷⁸⁹ juxtaposing themselves to the main stream 'grey' parties, which were considered to be part of the problem of environmental degradation as opposed to part of the solution. Throughout the 1980s and the 1990s, these political movements became stronger and more noticeable, especially in the countries of the European Union.⁷⁹⁰ A new type of actor entered the sphere of domestic politics - the not-for-profit think tanks, which were prepared to provide less

⁷⁸⁶ S. Weart, *The Discovery of Global Warming* – pp. 100. The World Meteorological Organisation called together the first World Climate Conference in 1979 - Georg Borsting and Gunnar Fermann, "Climate Change Turning Political: Conference Diplomacy and Institution-Building to Rio and Beyond" from G. Fermann, *International Politics of Climate Change – Key Issues and Critical Actors*, (Scandinavian University Press: Oslo: 1997) – pp.55. An investigation to study explicitly the causes and consequences of carbon dioxide accumulation was launched by the US National Academy of Sciences (NAS) in 1975 – Ian Rowlands, *The Politics of Global Atmospheric Change*, – pp. 69

⁷⁸⁷ A. Jamison, *The Making of Green Knowledge – Environmental Politics and Cultural Transformation*, (Cambridge University Press: Cambridge: 2001) – pp.90-3.

⁷⁸⁸ Ibid. – pp. 91

⁷⁸⁹ J. Connelly and G. Smith, *Politics and the Environment – From Theory to Practice*, (Routledge: London: 2003, 2nd edn) – pp. 86

⁷⁹⁰ Ibid. – pp. 87

biased advice to policy-makers compared to mainstream scientific communities.⁷⁹¹ During the Reagan Administration, scientific communities compromised their objectivity by providing tentative conclusions to their research on climate change, which unsurprisingly coincided with the opinion of the President's administration. They indicated that warming would probably not be severe and that humankind can get through temperature changes like it has done in previous generations. As a result, President Reagan laid plans to cut back on research funding for these issues.⁷⁹² This political context and the way in which scientific reports reflected on it, indicated diminishing neutrality and objectivity within scientific circles.

National scientific unions were not the only ones blamed for acting on political biases. Environmentalists from various social movements were clashing with the in-house scientists of the fossil fuel industries as well, undermining the concept of scientific objectivity even further.⁷⁹³ Domestic think-tanks were useful, but insufficient to clear the name of science. Concerted international effort was needed not only to instigate international political action, but also to construct the science that could be the foundation of this political action, one that did not favour the interests of some actors at the expense of others. The World Climate Conference held in Geneva in 1979, which drew together both government officials and scientists, called for an international structure to be set up to conduct scientific research for the first time.⁷⁹⁴ The scientific conference in Villach, Austria that was organised by the United Nations Environment Programme (UNEP), the World Meteorological Organisation (WMO) and the International Council of Scientific Unions

⁷⁹¹ A. Jamison, *The Making of Green Knowledge – Environmental Politics and Cultural Transformation*, (Cambridge University Press: Cambridge: 2001) – pp. 91; see also: <http://www.wri.org> – World Resource Institute, Washington D.C., US; <http://www.cseindia.org> – Centre for Science and Environment, India.

⁷⁹² S. Weart, *The Discovery of Global Warming* – pp. 142-6

⁷⁹³ *Ibid.* – pp. 144

⁷⁹⁴ *Ibid.* – pp. 150

(ICSU) in 1985 became a milestone in building international scientific consensus because it ‘shifted emphasis away from solely the need for more research, towards including assertions of the need for political action’.⁷⁹⁵ The Toronto Conference of 1988 was the first one to establish a specific target for the cutting of carbon dioxide emissions, which was agreed upon by the numerous scientists and policy-makers who took part in it.⁷⁹⁶ The United Nations established the Intergovernmental Panel on Climate Change (IPCC) in 1988 to foster scientific consensus.⁷⁹⁷

All these developments hinted at some of the problems that climate negotiations would come across and would have to resolve in the future, as the negotiations were not only political, but also scientific, economic and social. Political consensus appeared difficult from the start. For a start, the scientific community had not reached closure on the debate of global warming, prompting continual arguments among scientists from different backgrounds and political inaction based on these disagreements. Although the IPCC was established to foster consensus, the scientists outside of it questioned the scientific value of the conclusions reached by this organisation. North-South disputes over economic development, responsibility, humanitarian ethics and resources began to appear on the international agenda in the 1970s and became one of the major dividing lines in world politics after the end of the Cold War. The size of the fossil fuel industry alone and the alliances and resources of the oil-producing countries enabled both the industry and states to stand in the way of political agreements. All of this meant that the future of the climate change negotiations was not one of easily negotiated treaties and general consensus.

⁷⁹⁵ G. Borsting and G. Fermann, “Climate Change Turning Political: Conference Diplomacy and Institution-Building to Rio and Beyond” in G. Fermann, (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, (Scandinavian University Press: Oslo: 1997) – pp. 55

⁷⁹⁶ Ian Rowlands, *The Politics of Global Atmospheric Change* – pp. 74

⁷⁹⁷ <http://www.ipcc.ch>

To begin untangling the negotiating processes and examining the actors involved and the sources of their influence, I will apply the model of norm creation proposed in chapter one to the historical developments of the international norm for the protection of the atmosphere from increasing GHG concentrations. *Figure 4.1* below reflects the chronological sequence of the unfolding political events.

Figure 4.1

TIMELINE OF THE CREATION OF INTERNATIONAL AND REGIONAL INSTRUMENTS TO
CONTROL CLIMATE CHANGE

1827	Baron Jean Baptiste Fourier showed that the earth's atmosphere traps heat in a similar fashion to a greenhouse.
1859	John Tyndall discovered that some of the gases in the atmosphere are transparent and let heat escape in space, while others are opaque, trapping heat and keeping the Earth warm.
1896	Svante Arrhenius proposed a link between human activity such as fossil fuel burning and the increase in earth's surface temperature.
1938	British scientist G.S.Callendar suggests that human emissions are sufficient to alter climate significantly
1957	<i>Study of Man's Impact on Climate</i> , International Council of Scientific Unions (ICSU) concluding that the build-up of carbon dioxide is potentially a major threat
1957-8	International Geographical Year – the first major international plan to develop a better understanding of the atmosphere, co-organised by the WMO and the International Council of Scientific Unions (ICSU)
1965	“Causes of Climate Change” Scientific Conference in Boulder, Colorado, USA
Jul 1971	First major international meeting of scientists “Study of Man’s Impact on Climate” – Wijk, Sweden – begin to establish the state of scientific understanding regarding the impact of human activity on regional and global climate
1971	First International Conference on Environmental Futures, Finland
1972	UN Conference on the Human Environment, Stockholm
Dec 1972	UNEP was established by the UN General Assembly Resolution 2997 of 15 Dec
1977	The Beijer International Institute, Stockholm, was established under the auspices of the Royal Swedish Academy of Sciences to foster interdisciplinary work on environment, economics and development
Feb 1979	First World Climate Conference, Geneva

1979	World Climate Program (WCP) was launched by the WMO, UNEP, UNESCO, and ICSU
1980	First WMO/UNEP/ICSU Meeting of Experts on the Assessment of the Role of CO ₂ on Climate Variations and their impact, Villach, Austria. WMO and ICSU Agreement on the World Climate Research Programme.
1985	Scientific Report UNEP, WMO, International Council of Scientific Union (ICSU)
Oct 1985	Second International Conference - <i>Assessment of the Role of Carbon Dioxide and Other Greenhouse Gases in Climate Variations and Associated Impacts</i> – held in Villach, Austria. Organised at the initiative of UNEP, WMO and ICSU
May 1987	Brundtland Report
1987	<i>Developing Policies for Responding to Climate Change</i> – workshops held in Villach (Austria - Oct) and Bellagio (Italy- Nov)
June 1988	<i>The Changing Atmosphere: Implications for Global Security</i> , Toronto, Canada
Nov 1988	World Congress on Climate and Development, Hamburg, Germany
Nov 1988	The Intergovernmental Panel on Climate Change (IPCC) is established by UNEP, WMO, and ICSU
Dec 1988	UNGA Resolution 43/53 <i>Protection of Global Climate for Present and Future Generations of Mankind</i>
Feb 1989	Conference on Global Warming and Climate Change: Perspectives from Developing Countries, New Delhi, India
Feb 1989	International Meeting of Legal and Policy Experts on the Protection of the Atmosphere, Ottawa, Canada
May 1989	UNEP Governmental Council Decision 15/36 to prepare for negotiations of a Framework Convention on Climate
Jul 1989	G-7 meeting was held in Paris and was dubbed the ‘green summit’
Sep 1989	Tokyo Conference on Global Environment and Human Response Towards Sustainable Development, Tokyo
Nov 1989	Small States Conference on Sea-Level Rise, Maldives
Nov 1989	Ministerial Conference on Atmospheric Pollution and Climatic Change, Noordwijk, the Netherlands (representatives from 72 countries) – producing the Noordwijk Declaration on Climate Change.
May 1990	Bergen Conference – preparatory meeting for the UN Conference on Economic Development
Jan 1990	Global Forum on Environment and Development, Moscow
Nov 1990	Second World Climate Conference, Geneva
Feb 1991	Intergovernmental Negotiating Committee (ING) holds the first session towards the creation of a framework convention on climate change
Jun 1991	Beijing Declaration on Renewable Energy for Sustainable Development– resulting from the meeting of 40 developing countries
Jul 1991	International Meeting of Scientific and Technical Experts on climate change and oceans,

	Malta
Oct 1991	World Bank, UNDP and UNEP jointly establish the <i>Global Environmental Facility (GEF)</i> to provide funding for research into the protection of the environment in developing countries.
Jun 1992	United Nations Framework Convention on Climate Change (FCCC) signed at the United Nations Conference on Environment and Development – Rio de Janeiro
Apr 1995	Conference of the Parties (CoP-1), Berlin – Berlin Mandate
Jul 1996	Conference of the Parties (CoP-2), Geneva – Geneva Ministerial Declaration
Dec 1997	Conference of the Parties (CoP-3), Kyoto – Kyoto Protocol
Nov 1998	CoP-4, Buenos Aires
Nov 1999	CoP-5, Bonn
Nov 2000	CoP-6, The Hague
Nov 2001	CoP-7, Marrakech
Nov 2002	CoP-8, New Delhi
Dec 2003	CoP-9, Milan
Nov 2004	Russia ratifies the Kyoto Protocol
Dec 2004	CoP-10, Buenos Aires
Feb 2005	Kyoto Protocol enters into force

Theoretical Model and Empirical Findings

Formulating the idea

Although 19th century scientists began examining issues relating to the earth's atmosphere and the way in which it functions, the problem of climate change was not formulated until the middle of the 20th century. The early researchers believed that rising temperatures were a good thing, as the latter would improve food production and would open more areas for agriculture. It was not until the mid-1950s that scientists started working on the hypothesis that the increase of CO₂, which resulted from industrialisation, could have extreme consequences for our environment, threatening the livelihood and habitat of many.⁷⁹⁸ These theories evolved slowly and were a product not only of growing scientific knowledge but of the combined effects of changing weather conditions, increasing social awareness, and even changing military doctrines.

Scientists dedicated their efforts to working out the causal relationships of the climate change issue in view of the new hypothesis that climate change may have negative effects. They began by examining the causal relationships between human activity and the increased concentrations of greenhouse gases in the atmosphere. The term greenhouse effect is often misused as a substitute for global warming. However, there is nothing problematic about the greenhouse effect as it keeps the surface of the Earth warm and inhabitable. It is the enhanced greenhouse effect that has drawn the attention of scientists. It has almost been accepted as conventional wisdom that burning fossil fuels along with certain agricultural activities (including clearing land) are the causes of increased concentrations of greenhouse gases (GHGs) in the atmosphere.⁷⁹⁹ Consensus within scientific circles on the sources and sinks of GHGs, as well as on the effects of increasing

⁷⁹⁸ See *supra* note 45; S. Weart, *The Discovery of Global Warming*, - pp. 40-3

⁷⁹⁹ See *supra* note 17

GHG concentrations has still not been achieved.

The issue of global warming came on to the public agenda in the 1950s. The Northern Hemisphere was experiencing unusually high temperatures⁸⁰⁰ and popular press was asking whether the world was getting warmer.⁸⁰¹ The International Geophysical Year was under way in 1957 and it marked the beginning of consistent studies of the carbon cycle.⁸⁰² The first laboratory for the study of changing CO₂ concentrations in the atmosphere was established by the US government in an extinct volcano in Hawaii.⁸⁰³ Mauna Loa was chosen because of its distance from cities and industrial facilities, which could otherwise distort the measurements made there. The advancement of science in the sphere of climatology and meteorology reflected the growing confidence of policy-makers in the ability of scientists to tackle complex issues. Governments in Western societies actively sought and encouraged the construction of new knowledge, which assigned natural sciences a new social position.⁸⁰⁴ Governing elites began to realise the potential of scientific knowledge for improving policy-choices - predictions, calculations and increased clarity were at the heart of any scientific enquiry, while causality and predictions can help make better policies.

A landmark study was produced in 1957 and later presented by the International

⁸⁰⁰ James R. Fleming, *Historical Perspectives on Climate Change*, (Oxford University Press: New York: 1998) – pp.118

⁸⁰¹ James R. Fleming, *Historical Perspectives on Climate Change* citing *Saturday Evening Post* of 1950 – pp. 119

⁸⁰² J. Lanchbery and D. Victor, “The Role of Science in the Global Climate Negotiations” in Helge Bergesen, G. Parmann, and O. Themmesen (eds.) *Green Globe Yearbook of International Co-operation on Environment and Development 1995*, (Oxford University Press: Oxford: 1995) – pp. 30; P. Bunyard, *The Breakdown of Climate – Human Choices or Global Disaster?*, (Floris Books: Edinburgh: 1999)– pp. 51

⁸⁰³ P. Bunyard, *The Breakdown of Climate* – pp.51; Daniel Bodansky, “Prologue to the Climate Convention” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention*, (Cambridge University Press and Stockholm Environmental Institute: Cambridge: 1994) – pp. 46; Ian Rowlands, *The Politics of Global Atmospheric Change*, – pp. 67

⁸⁰⁴ J. Lanchbery and D. Victor, “The Role of Science in the Global Climate Negotiations” in Helge Bergesen, G. Parmann, and O. Themmesen (eds.) *Green Globe Yearbook of International Co-operation on Environment and Development 1995*,– pp. 31

Council of Scientific Unions (ICSU) to the Stockholm Conference in 1972. *The Study of Man's Impact on Climate*, authored by Roger Revelle and Hans Suess of the Massachusetts Institute of Technology (MIT), suggested a causal link between growing concentrations of CO₂ in the atmosphere and extreme weather conditions.⁸⁰⁵ Although this study proposed and defended important causal relationships that outline potential harm to our natural habitat, scientists concluded that further research was needed to clarify the causal links between atmospheric changes and unusual weather patterns. The underlying assumptions that climate was largely stable (or at least that any changes were gradual and took place over centuries) and that humans could not have a sizeable impact on a planetary scale, however, remained prevalent,⁸⁰⁶ which slowed the process of constructing climate change as a serious problem.

The ideas about the possible effects of the enhanced greenhouse effect began to consolidate in the 1960s, not least because some observation data on CO₂ concentrations was already available from the laboratories. Scientific models were constructed to calculate the change of GHG concentrations and any possible effects on world's climate. Issues such as nuclear pollution, acid rain, industrial smog, loss of biodiversity⁸⁰⁷ found a niche in the public agenda and prompted the rise of public environmentalism⁸⁰⁸ at a time when social movements and NGOs were gaining increasing influence on domestic politics, especially in

⁸⁰⁵ David Runnalls, "The International Politics of Climate Change" in J. Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation*, (Tata McGraw-Hill Publishing Co Ltd: New Delhi: 1997) – pp. 20; Roger Revelle and H. Suess, "Carbon Dioxide Exchange Between Atmosphere and Ocean and the Question of an Increase of Atmospheric CO₂ during the Past Decades", *Tellus*, Vol. 9, No. 18, 1957.

⁸⁰⁶ J. Lanchbery and D. Victor, "The Role of Science in the Global Climate Negotiations" in Helge Bergesen, G. Parmann, and O. Themmesen (eds.) *Green Globe Yearbook of International Co-operation on Environment and Development 1995* – pp. 30-1.

⁸⁰⁷ Some authors claim that it was Rachel Carson's *Silent Spring* discussing the effect of the agricultural chemical DDT on birds, published in 1962 that marked the beginning of social environmentalism – L. Elliot, *The Global Politics of the Environment*, (Palgrave Macmillan: Basingstoke: 2004) – pp. 9; A. Jamison, *The Making of Green Knowledge – Environmental Politics and Cultural Transformation*, (Cambridge University Press: Cambridge: 2001) – pp. 68

⁸⁰⁸ L. Elliot, *The Global Politics of the Environment* – pp. 8-9

the US. In 1964 Roger Revelle authored a White House study of the relationship between climate change and the use of fossil fuels,⁸⁰⁹ which signalled that concerns about and doomsday predictions of the effects of climate change entered US politics on the back of newly created scientific knowledge. Another scientific novelty was the growing consensus that “everything was interacting with everything else... [and that] the planet’s environment was a hugely complicated structure”.⁸¹⁰ This paradigm resulted from improved General Circulation Models (GCM). These models are computer simulations of the changes that take place in the atmosphere of the Earth. They require extensive calculating capabilities, which explains why their development was boosted in the 1970s (due to improving computing capabilities). The studies of climatology could begin concerning themselves with more global issues. These models allowed scientists to begin working on their hypothesis for the effect of human activities on the environment and the possible effects of global climate change.⁸¹¹ By displaying errors and mismatches in predictions in GCMs which used different components of the natural environment, these models indicated that there were many more elements that needed to be incorporated in the calculations in order to improve the understanding of the way in which the natural environment functions.⁸¹² These developments called for more complex studies and observations, because scientists had to begin to understand how the different parts of the earth’s natural environment – air, water, ice, winds, etc. – interacted.

The understanding of the changing concentrations of greenhouse gases in the atmosphere was improving in the 1970s, but this decade was also marked by a slight loss of public interest in the issue of global warming. Reports were produced showing that average

⁸⁰⁹ Ian Rowlands, *The Politics of Global Atmospheric Change* – pp. 67

⁸¹⁰ S. Weart, *The Discovery of Global Warming* – pp. 64.

⁸¹¹ “Historical overview of AGCMs”, available from <http://www.aip.org/history/sloan/gcm/histoverview.html>

⁸¹² *See supra note 48*

global temperatures have actually dropped in the period 1945-1970,⁸¹³ which in turn increased fears that a new Ice Age might be about to set in.⁸¹⁴ Scientific interest in the issues of global warming or indeed global cooling did not slow down, although the same cannot be said about the public and political interest in the issue.

In 1971 the first international scientific conference on the long-term effects of climate change took place in Wijk, Sweden, with the aim of assessing the state of scientific understanding of the human impact on global climate.⁸¹⁵ It is important to outline at this point that scientific interest was being driven primarily by the logic of truth-seeking at that point, as there didn't seem to be enough political interest or economic interest, based on material gains that could have driven scientific research instead. This could not be said with the same degree of confidence for the years following the oil crisis (1973), which were marked by the increased attention of oil producers and their counterparts - the producers of 'green energy' - for the issue of climate change. Global warming became part of the agenda of economic actors as well.

The 1970s were also a decade of stark climate anomalies, which attracted scientific interest.⁸¹⁶ There were droughts in India, the USSR, the American Mid-West and Canada, droughts in Africa resulted in widespread famine, floods hit Romania, Argentina, Bangladesh, Iceland, the US, and so on.⁸¹⁷ These focused the attention of the media back on

⁸¹³ Ian Rowlands, *The Politics of Global Atmospheric Change* – pp. 68

⁸¹⁴ D. Demeritt, "The Construction of Global Warming and the Politics of Science", *Annals of the Association of American Geographers*, Vol. 91, no. 2 – pp. 315; J. Morris, (ed.) *Climate Change – Challenging Conventional Wisdom*, IEA Studies of the Environment No. 10, (Harlington Fine Arts Ltd, London: 1997) – pp. 18

⁸¹⁵ Ian Rowlands, *The Politics of Global Atmospheric Change* - pp. 70

⁸¹⁶ *Ibid.* - pp.89

⁸¹⁷ S. Weart, *The Discovery of Global Warming* – pp. 91; M. Holdgate, M. Kassas, G. White, (eds.) *The World Environment 1972-1982 – A Report by the United Nations Environment Programme*, (Tycooly International Publishing Limited: Dublin: 1982) – See Table 2.8, pp. 55

the issue and resulted in the publication of apocalyptic scenarios of the future.⁸¹⁸ A report by the United Nations Environmental Programme claims that the rise in articles in the public media was supplemented by “an information explosion among scientific journals”, which reflected both the increased calculating capacity of GCMs and the deepening understanding of the workings of the environmental system.⁸¹⁹

Scientific opinion was tentatively consolidating around an agreement on the existence of a causal relationship between human industrial activities and growing concentrations of greenhouse gases in the Earth’s atmosphere, and, further, that the growing amounts of GHGs may lead to global warming, which in turn might have undesirable consequences on human habitats and world’s climate. The 1970s was the decade in which consensus was reached to problematise the enhanced greenhouse effect and to conduct further studies into the components of the proposed causal links – i.e. to research the relationship between human economic activity and increased GHGs in the atmosphere, as well as the probable effects of this increase on the overall climate of our planet, and the future consequences of this climate change. Scientific uncertainties remained high, but the issue was officially on research agendas across the world, as became apparent at the first World Climate Conference in 1979. The Conference was organised by the World Meteorological Organisation and held in Geneva, where it concluded that:

it could be said with some confidence that the burning of fossil fuels, deforestation and changes of land use have increased the amount of carbon dioxide in the atmosphere... it appears that an increased amount of carbon dioxide in the atmosphere can contribute to a

⁸¹⁸ Opinions in the media were conflicting from articles such as the one published in the *The Times* – 26 Aug 1970 “Pollution ‘catastrophe’ denied” or the publication of “World’s temperature likely to rise” on 22 Jun 1976 and “Ominous Changes in World’s Weather”, *Fortune* Feb 1974, “Another Ice Age?” *Time*, 26 Jun 1974; to more moderate assessments and scientific reports – *The Times*, 7 Feb 1974, “Pollution: Assessing CO₂ Levels”; *The Times*, 13 May 1976, “Meteorology: Effect of Pollution”, “The World Climate is Getting Worse”, *Business Week*, 2 Aug 1976, “The Carbon Dioxide Question”, *Scientific American*, Jan 1978.

⁸¹⁹ M. Holdgate, M. Kassas, G. White, (eds.) *The World Environment 1972-1982 – A Report by the United Nations Environment Programme* – pp. 14

gradual warming of the lower atmosphere, especially at high latitudes.⁸²⁰

The initial idea regarding global climate change was formulated almost exclusively by communities of scientists, whose work was brought to the fore by the media and active social movements at the time. Politically, the need to construct an international norm regarding environmental sustainability, responsibility and equity was formulated much later. However, the 1972 UN Conference on the Human Environment, held in Stockholm (which will be discussed in more detail in the following stages) marked an important political cornerstone. It outlined the causal link between human activities and the state of our environment, and clearly stated the principle of states' responsibility for environmental damage even when the latter is beyond state borders.⁸²¹

Network Configuration

The network of support for the reversal of climate change is loosely knit. This network encompasses an incredibly large number of actors⁸²² with a broad spectrum of vested interests – political, normative, economic or scientific. An interesting characteristic for the normative network of support to reverse climate change has been the disconnectedness between its normative and scientific partnerships. Unlike the networks in the case of outlawing torture or those in the intellectual property debate discussed in previous chapters, the actors in this case-study seemed to have been working on more than one aspect of the new norm. Technical knowledge was constructed not only by scientific

⁸²⁰ C. Dasgupta, “The Climate Change Negotiations” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention*, - pp. 129-130 citing WMO, *World Climate Conference Declaration and Supporting Documents*, (WMO: Geneva: 1979).

⁸²¹ L. Elliot, *The Global Politics of the Environment* – pp. 11

⁸²² Although the exact number of environmental NGOs around the world is unknown, at least 4,000 NGOs are included in the database of one environmental organisation – G. Porter and J. Brown, *Global Environmental Politics*, (Westview Press: Oxford: 1996) – pp. 50.

communities, but by businesses, NGOs and IOs, which made it extremely difficult to rely on scientific objectivity and/or neutrality. And although science is inherently political, in this particular case, scientific knowledge became so politicised that it began reflecting the interests of its creators, which in turn undermined its credibility to a degree.

Studies of the evolution of the climate change issue have tended to classify the actors participating in the norm entrepreneur networks into international organisations, NGOs, epistemic communities and corporations.⁸²³ This classification is likely to become repetitive, as the activities and tactics of these otherwise different types of actors overlap. The issue of climate change is politically and economically charged; it is contentious and has the potential to have far-reaching consequences whether or not political action is taken.⁸²⁴ NGOs, scientists, IOs, and business communities were equally concerned about the outcomes of international political negotiations. Since the problem at the heart of this normative campaign was primarily scientific, most actors chose a knowledge-creating strategy to persuade policy-makers of the merits of their cause. Some of these actors – such as the representatives of the fossil fuel industry - sought to destabilize scientific consensus and thus contribute to scientific uncertainties, while others – like green NGOs and scientific think-tanks – were focusing on decreasing uncertainties and gaining useful knowledge to back up policies that can reverse the enhanced greenhouse effect.

This case study differs from the previous two in two major respects. Firstly, there

⁸²³ G. Porter and J. Brown, *Global Environmental Politics*, (Westview Press: Oxford: 1996) – pp. 41-65; S. Oberthuer and H. Ott, *The Kyoto Protocol – International Climate Policy for the 21st Century*, (Springer: Berlin: 1999) – pp. 29-32; C. Gough and S. Shackley, “The Respectable Politics of Climate Change: The Epistemic communities and NGOs”, *International Affairs*, vol. 77, no. 2, 2001 – pp. 331-6; L. Elliott, *The Global Politics of the Environment* – pp. 113-125; J. E. Smith, “The Role of Special Purpose and Non-Governmental Organisations in the Environmental Crisis”, *International Organisation*, vol. 26, no.2, 1972, *Special Issue* – International Institutions and the Environmental Crisis, 302-326; D. A. Davies, “The Role of the WMO in Environmental Issues”, *International Organisation*, vol. 26, no.2, 1972, 327-336; R. Gardner, “The Role of the UN in Environmental Problems”, *International Organisation*, Vol. 26, no.2, 1972, 237-254

⁸²⁴ If no action is taken to curtail GHG emissions, the consequences are likely to come in the form of natural disasters or other physical changes to the natural environment; if immediate action to the above effect is taken, the consequences that will ensue are likely to be economic, political, and social.

were two distinct networks in the process of the development of the norm for controlling climate change. One of the networks was made up of actors who believed that climate change is a problem that needed to be tackled and the second one propagated against this notion. It is necessary to emphasise once again that none of these networks is as closely linked as their counterparts in the two previous studies. Secondly, the process of network configuration continued even during the stage of dialogue with the conservative actors, i.e., the state-level negotiations. The membership of the networks of support evolved continuously, making this case-study particularly complex and dynamic.

The network in favour of the need for political action to control climate change was configured during a number of conferences and scientific meetings. Some of these conferences were organised under the auspices of the UN – like the UN Conference on the Human Environment and the First Meeting of Experts in Villach (Austria) - while others were convened by communities of scientists – such as the First International Meeting of Scientists in Wijk, Sweden and the First International Conference on Environmental Futures in Finland. The initial stages of the configuration of this network took place during the 1970s and were confined mainly to scientific circles in the US and Western Europe. Scientists were working on GCMs, which were improving over time with the evolution of information technology. These scientific communities were functioning within meteorological organisations and prestigious universities – the Weather Bureau of the US, Princeton University, UCLA, and the UK Meteorological Office.⁸²⁵ Other scientific communities were working on assessing the human influence on the environment. The Scientific Committee on Problems of the Environment was established in 1969 to provide expertise and scientific advice to nation-states, other scientific communities, and the UN

⁸²⁵ http://www.aip.org/history/sloan/gcm/1955_65.html

General Assembly.⁸²⁶ This network of scientists worked closely with other intergovernmental and nongovernmental organisations. The Massachusetts Institute of Technology (MIT) also conducted influential studies and they became fundamental to the UN Conference on Human Environment in 1972 – namely, the Study of Critical Environmental Problems (SCEP) and the Study of Man’s Impact on Climate (SMIC).⁸²⁷ Furthermore, these studies provided the basis for the establishment of the US Environmental Protection Agency.⁸²⁸ The agency was to lead the nation’s environmental science, research, education and assessment efforts.⁸²⁹ Another national scientific community, which later became a prominent international actor, is the Beijer Institute of Ecological Economics, established in 1977 under the auspices of the Royal Swedish Academy of Sciences to study issues of energy and development.⁸³⁰ These scientific communities were initially doing work at the national level, addressing domestic issues and influencing national governments. It took time for them to develop international connections and to aim to influence policies at the international level.

A number of environmental NGOs were created in the late 1960s and early 1970s – Friends of the Earth was established in 1969,⁸³¹ Greenpeace was launched in 1971,⁸³² Earth First! was created in 1979.⁸³³ These NGOs used direct action and spectacular campaigns to get their ideas through to policy-makers and engage public opinion. However, their efforts were dispersed on different environmental issues, and since these were not coordinated, the

⁸²⁶ <http://www.icsu-scope.org/>

⁸²⁷ Massachusetts Institute of Technology, *Man’s Impact of the Global Environment – Report of the Study of Critical Environmental Problems*, (MIT Press: Cambridge, Massachusetts: 1970); Massachusetts Institute of Technology, *Inadvertent Climate Modification – Report of the Study of Man’s Impact on Climate*, (MIT Press: Cambridge, Massachusetts: 1971)

⁸²⁸ M. Gemmill and J. Lehr, “Ecology’s Ancestry” in J. Lehr (ed.) *Rational Readings on Environmental Concerns*, (John Wiley and Sons: 1992) – pp. 14

⁸²⁹ <http://www.epa.gov/epahome/aboutepa.htm>

⁸³⁰ <http://www.beijer.kva.se>

⁸³¹ <http://www.foe.org> – Friends of the Earth

⁸³² <http://www.greenpeace.org> – Greenpeace

⁸³³ <http://www.earthfirst.org> – Earth First!

NGOs were lacking the critical voice and mass that was needed to be persuasive and effective in influencing politics.

During the 1980s there was a significant growth in the number of activists and scientific communities campaigning in favour of the curbing of greenhouse emissions. The network of activists, although loosely knit, was dynamic and managed to push the climate change issue higher on the international agenda. Some green NGOs, especially in the developing countries, were consolidating at the regional level – the African NGO Coalition was created in Nairobi, 1982;⁸³⁴ the Asia-Pacific Peoples' Environment Network was founded in Malaysia, 1983;⁸³⁵ the Asian Society for Environmental Protection (ASEP) was founded in Germany in 1984 to provide a training and resource point for professionals and organisations in the region.⁸³⁶ The Climate Action Network was established in 1989 to provide a forum, at which NGOs could discuss strategies for action, exchange information on climate change and construct policies to be offered to nation-states.⁸³⁷ The organisation provided a much-needed forum for the consolidation of critical mass and voice for NGOs, because otherwise the actors' differing objectives and priorities were sending them off in different directions, thus dispersing their ability to influence policy-makers. In 1989 a number of international lawyers who were concerned with the issue of climate change created the Foundation for International Environmental Law and Development (FIELD) in London, which is a not-for-profit organisation providing advice to governments, inter-governmental organisations and NGOs.⁸³⁸ The Stockholm Environmental Institute was

⁸³⁴ L. Elliott, *The Global Politics of the Environment* – pp. 121;

<http://www.interenvironment.org/wd3intl/ingo-a-b.htm> - World Directory of Environmental Organisations: Section 3.4: International Nongovernmental Organisations

⁸³⁵ <http://www.interenvironment.org/wd3intl/ingo-a-b.htm> - World Directory of Environmental Organisations: Section 3.4: International Nongovernmental Organisations

⁸³⁶ <http://stweb.ait.ac.th/~tony/asep/index.php>

⁸³⁷ <http://www.climatenetwork.org/pages/AboutCANInt.html#briefhistory>

⁸³⁸ http://www.field.org.uk/about_overview.php

established in the same year at the initiative of the Swedish government with the aim of developing an international environmental research organisation.⁸³⁹ Although these groups communicated, they were not actively involved with each other. Their work was mainly concentrated on influencing governments, or on assisting them with expertise and scientific knowledge during international negotiations. The actors in this coalition were acting out a logic of truth-seeking in a context of appropriateness. They were seeking answers to complicated questions, without having an agenda of economic or political interests to follow. In other words, the science created by this network is more likely to be objective than the science constructed by the second normative network, which is discussed below.

The second major normative network argued that global warming was not a problem. Instead, they claimed, these were only natural fluctuations of climate. It was made up primarily of the industries (and later nation-states) that produced or relied heavily on fossil fuels. The non-governmental organisations associated with the above actors are often called ‘grey NGOs’ and were coordinated by the International Chamber of Commerce.⁸⁴⁰ These organisations – both companies and NGOs – outlined the impact that any change of policy with respect to global warming will have on the international economy, which is still largely dependent on the burning of fossil fuels for energy. They based their arguments on the lack of scientific certainty about the causality between human activity and increased concentrations of GHGs in the atmosphere, about the effects of global warming on the environment and finally about what action would be appropriate to avoid catastrophic consequences. According to economists, the price of these uncertainties is too high, because, while little is known about the way in which nature will react, quite a lot is known

⁸³⁹ <http://www.sei.se> – Stockholm Environment Institute

⁸⁴⁰ S.Oberthuer and H.Ott, *The Kyoto Protocol– International Climate Policy for the 21st Century*, –pp. 31

about the price of adjustment and/or abatement costs and their effect on the economy.⁸⁴¹ Companies were using their financial might and political clout to influence domestic politics by creating the Global Climate Coalition (GCC).⁸⁴² The GCC hired professionals to lobby the governments of the Organisation of Petroleum Exporting Countries (OPEC) and the United States.⁸⁴³ This network used the usual tactics of persuasion – lobbying, knowledge construction, data and research collection. The coalition was made up of different actors that were led in their actions by a logic of consequences and used the logic of rhetorical action to direct where possible policies in a way that they considered beneficial to their own interests. The scientists employed by the GCC, united by their relations to the fossil fuel industry produced sceptical reports about the findings of mainstream scientists. For purposes of clarity, I will designate these ‘politicised’ scientists to differentiate them from the scientists who were engaged with research without an economic agenda.

The interests of the two normative coalitions collided irreconcilably and the agencies of the United Nations provided a forum for debates, while keeping its work focused on the most practical solution to the problem of climate change. The agencies of the United Nations became heavily involved with the issue of climate change and greenhouse emissions. The World Meteorological Organisation was one of the most active participants in the formulation of the norm to protect the atmosphere. WMO undertook, coordinated and summarised research into climate change,⁸⁴⁴ and helped to create

⁸⁴¹ R. Schmalensee, “Symposium on Global Climate Change”, *Journal of Economic Perspectives*, vol.7, no.3, 1993, 3-10

⁸⁴² <http://www.globalclimate.org/index.htm> - the Global Climate Coalition was established in 1989 to look after the interests of industries concerned with the global climate change issue

⁸⁴³ B. Arts and J. Cozijnsen, “Between ‘curbing the trends’ and ‘business-as-usual’: NGOs in international climate change policy” in E. Ierland, J. Gupta, M. Kok (eds.) *Issues in International Climate Policy – Theory and Policy*, – pp. 248-9

⁸⁴⁴ Ian Rowlands, *The Politics of Global Atmospheric Change*, - pp. 71

international standards for measuring and recording various aspects of the world's climate.⁸⁴⁵ The First World Climate Conference was held under the auspices of the WMO in February 1979. The organisation became a focal point for early climatic research and was particularly useful in indicating the interconnectedness of our natural environment, due to its involvement in projects related to the atmosphere, the oceans, and other water resources.⁸⁴⁶ The WMO has been very active in giving policy advice to fellow UN agencies, as well as to nation-states. It provided an international framework for cooperation on the complex issues of climate change. The WMO was rather useful in the international negotiations because it combined expertise with its status of an IGO agency, thus increasing its political clout and trustworthiness. Moreover, the organisation *per se* has no vested interests in the issue apart from the furthering of knowledge about the atmosphere and climate, and the protection of people from extreme weather conditions.

The United Nations Environmental Programme (UNEP) was created as a result of the recommendations of the UNCHE Conference in 1972. The United Nations General Assembly “convinced of the need for prompt and effective implementation by Governments and the international community of measures designed to safeguard and enhance the environment for the benefit of present and future generations” established the United Nations Environmental Programme.⁸⁴⁷ UNEP became an important hub for scientific communities and expert organisations, as it dealt with a large array of environmental issues. Together with the World Climate Organisation, the UNEP helped set up the International Panel on Climate Change in 1988.⁸⁴⁸ The IPCC was established to

⁸⁴⁵ D. A. Davies, “The Role of the WMO in Environmental Issues”, *International Organisation*, vol. 26, no.2, 1972, *Special Issue* – International Institutions and the Environmental Crisis – pp. 329

⁸⁴⁶ <http://www.wmo.ch/index-en.html>

⁸⁴⁷ UNGA, 2112th plenary meeting, 15th Dec 1972, Resolution 2997

⁸⁴⁸ <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43&ArticleID=206&l=en>

assist the achievement of scientific consensus on the climate change issue by combining various aspects of existing knowledge – economic, political, environmental, and social.⁸⁴⁹

Although many actors became involved in the climate change campaign and the actors already involved were interested in projecting their influence to the realm of international politics, this network of normative support remained highly decentralised. Moreover, this large, diverse and relatively disconnected group of social movements was often torn by conflicts and disagreements between Northern and Southern NGOs, between mainstream and politicised scientists, over different priorities, conflicting objectives and strategies, resulting in its powerlessness. According to Mark Valentine from the US Citizen's Network, NGOs “barely scratched the surface of official documents [at the UN Conference on Environment and Development in 1992]”, while Larry Williams of the Sierra Club admitted that “[NGOs] had almost no impact” at these negotiations.⁸⁵⁰ Scientific communities were more successful in influencing the agenda and the direction of the negotiations, but analysts have concluded that the heart of the problem of climate change is deeply political in nature and so would be the solutions to it.⁸⁵¹

Issue Formation

The issue of climate change was not problematised until the middle of the 20th century. Although scientific hypotheses about an enhanced greenhouse effect existed, scientists believed that global warming was a positive and welcome change, which would improve the ability of humanity to produce food and would increase the chances for development of those in more deprived regions of the world. As apocalyptic scenarios

⁸⁴⁹ Ibid.

⁸⁵⁰ L. Elliott, *The Global Politics of the Environment* – pp. 123

⁸⁵¹ S. Weart, *The Discovery of Global Warming* – pp. 174; L. Susskind, *Environmental Diplomacy – Negotiating More Effective Global Agreements*, (Oxford University Press: New York: 1994) – 63-66.

began filtering through the public media in the 1960s and the 1970s, scientific research had already been undertaken to try to establish whether the nature of the changes in our environment is positive or not, what the causes of these changes are and what effects can be foreseen. The results of these studies were inconclusive every time. Scientists were tentative in their hypotheses and emphasised the need for further research into the causal links of the global warming problem. The campaign for the creation of a norm to control climate change was different from the two cases considered in the previous chapters, in that it was not a focused committed campaign to achieve a particular goal, but rather a collection of normative campaigns related by the common theme of the effects of climate change. This characteristic is reflected in the issue formulation process, which is decentralised and where the separate campaigning normative networks construct different parts of the future norm.

Constructing an issue to be put forward to policy-makers who, in turn, are expected to create an international norm to govern it is, ultimately a political process. The problematic issue needs to be constructed in a way that will attract and sustain the interest of policy-makers and that justifies political attention, and this can be very difficult at times. The process of issue formation requires information and data gathering, research and analysis, sensitivity to the overall normative context of the times and the sympathy of public opinion. The final decision on whether a norm will be created or not lies ultimately with policy-makers, which means that national interests and national priorities will play a role.

The issue of climate change is highly complex, affecting many aspects of human activity, development and international justice. Different aspects of climate change were formulated by different actors who took interest at different moments in time. The problem was not really compounded into one single issue until the 1990s. The Toronto Conference

of 1988 brought the issue of global warming onto the international agenda, the 1989 G-7 meeting in Paris also addressed environmental issues, and the UN set up the Intergovernmental Negotiating Committee to negotiate the framework convention on climate change in 1990, thus embedding the issue in the international political agenda.⁸⁵² At the first meeting of the INC held in December 1990, the Executive Director of UNEP said that “the mounting evidence of global warming and climate change gave urgency to the present negotiations”.⁸⁵³ The first report of the International Panel on Climate Change (IPCC), published in 1990, emphasised the existence of broad scientific consensus that the “possibility of global warming had to be taken seriously”.⁸⁵⁴ Moreover, the overall political climate following the end of the Cold War was favourable for international cooperation, economic integration and multilateral institutionalisation of world politics.⁸⁵⁵ The UN Conference on Environment and Development scheduled for 1992 attracted the attention of the activists of civil society as a forum where they could present their issues to policy-makers, which further assisted in consolidating the problem of climate change in its entire complexity.

There are a number of different aspects to climate change. One relates to the natural environment and biodiversity. A second aspect concerns issues of human wellbeing, equity, justice, development and sustainability (these two aspects are largely normative and dealt with by social movements, NGOs, advocacy groups, and some scientific communities). A third aspect is economic and deals with the impact of climate change on the economy and

⁸⁵² Wendy Franz, *The Development of an International Agenda for Climate Change: Connecting Science to Policy*, ENRP Discussion Paper E-97-07, Kennedy School of Government, Harvard University, August 1997 – pp. 11

⁸⁵³ Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its first session, Washington D.C., 4-11Feb 1991, UNGA Doc No A/AC.237/6 – pp. 37

⁸⁵⁴ P. Bhandari, “Historical Perspective on Negotiations” in *Climate Change Post-Kyoto Perspectives from the South*, (Tata Energy Research Group: New Delhi: 1998) – pp. 51

⁸⁵⁵ F. Yamin and J. Depledge, *The International Climate Change Regime – A Guide to Rules, Institutions and Procedures*, (Cambridge University Press: Cambridge: 2004) – pp. 23-4

different industries. The fourth aspect is the scientific, relating to the causes and effects of climate change (the latter two aspects are primarily technical and have been studied by epistemic communities and economists). This is a simplified picture of the scope of the climate change issue, but it is comprehensive enough to provide a good understanding of the dynamics and relationships of the various aspects and social groups that took part in the formulation of this problem.

The problem of climate change was formulated from the vantage point of the four thematic layers discussed above. Climate change emerged as a technical issue during the International Geophysical Year (1957-58),⁸⁵⁶ when laboratories were established to begin measuring CO₂ concentrations in the atmosphere. Studies of the human impact on the environment were commissioned and scientific activity was underway to develop knowledge that would improve the understanding of the complex issue of climate change. The 1960s were the decade when the underlying construction that climate is inherently stable and that any fluctuations are natural and short-lived was altered.⁸⁵⁷ Changes in the basic understanding about the nature of climate continued to take place during the 1970s as well. Following a series of natural disasters and unusual weather conditions, scientists concluded that the climate system is based on a fragile equilibrium that can easily be upset, with catastrophic consequences.⁸⁵⁸ Moreover, a report published in the United States, entitled *Limits to Growth*, suggested that continued economic growth would have

⁸⁵⁶ The International Geophysical Year was organised by the International Council of Scientific Unions (ICSU) and stretched between 1 Jan 1957 and 31 Dec 1958 – J.E. Smith, “The Role of Special Purpose and Non-Governmental Organisations in the Environmental Crisis”, *International Organisation*, vol. 26, no.2, 1997, *Special Issue* – International Institutions and the Environmental Crisis – pp. 308

⁸⁵⁷ W. J. Maunder, *The Human Impact of Climate Uncertainty – Weather Information, Economic Planning and Business Management*, (Routledge: London: 1989) – pp. 15

⁸⁵⁸ M. Holdgate, M. Kassas, G. White (eds.) *The World Environment 1972-1982 – A Report by the United Nations Environment Programme*, (Tycooly International Publishing Limited: Dublin: 1982) – pp. 54-7

devastating environmental consequences.⁸⁵⁹ This perception of a zero-sum game between economic growth and stable environment was prevalent for a decade and a half and has left a serious mark on the social perceptions and expectations about the link between human economic activity and global warming.

The research in the 1960s and 1970s was primarily conducted at the domestic level with the greatest role being played by US scientific communities.⁸⁶⁰ Developments that were brought about by these domestic communities were slow and had trouble reaching policy-makers. Although the oil crisis from 1973-4 empowered to some degree the advocates of green energy, the fossil fuel industrial lobby was much more powerful within the United States, which hindered the ability of the mainstream scientific communities to influence the US government.⁸⁶¹ National scientific communities were unable to formulate the problem of the enhanced greenhouse effect on their own and had to seek critical mass and voice in uniting with other such communities across national borders.

The United Nations Conference on Human Environment (UNCHE), held in Sweden in 1972 was an important landmark for the construction of the problem of global warming. This conference, although poorly attended by government representatives,⁸⁶² was a crucial focal point for the normative concerns relating to the impact of human activity on the environment and for NGO participation in UN conferences.⁸⁶³ As discussed previously, a number of local and regional NGOs were already engaged with issues of biodiversity and

⁸⁵⁹ Ian Rowlands, *The Politics of Global Atmospheric Change* – pp. 127 citing Donella Meadows, D.Meadows, J. Randers and W. Behrens, *The Limits to Growth*, (Universe Books: New York: 1972)

⁸⁶⁰ P. Bhandari, “Historical Perspective on Negotiations” in Centre for Global Environmental Research (eds.) *Climate Change: Post-Kyoto Perspectives from the South*, (Tata Energy Research Institute: New Delhi: 1998). Available from: <http://www.teriin.org> – pp. 50; The US National Academy of Sciences established a Committee on Climatic Variation in 1974, under pressure from which a Congressional Committee began hearings in 1976 – S. Weart, *The Discovery of Global Warming* – pp. 96-7.

⁸⁶¹ S. Weart, *The Discovery of Global Warming* – pp. 96-7.

⁸⁶² Only two heads of government attended – L. Elliott, *The Global Politics of the Environment* – pp. 11

⁸⁶³ The UNCHE set a precedent of NGO participation in Conferences by allowing accredited NGOs to lobby delegates and present formal statements to the conference - L. Elliott, *The Global Politics of the Environment* – pp. 11

the impact of human activity on the natural environment. The UNCHE is famous for principle 21, according to which

States have...the sovereign *right* to exploit their own resources pursuant to their own environmental policies, and the *responsibility* to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁸⁶⁴

The creation of a number of international NGOs dealing with environmental issues, such as WWF and Greenpeace, in the early 1970s further assisted in establishing environmental issues as international problems that go beyond state borders and require concerted international effort to alleviate any undesirable consequences.

The normative concern relating to climate change was not confined to the problems of the biosphere and wildlife. Following the end of the era of decolonisation and the economic shocks of the Oil Crisis, in 1974 newly-independent countries brought the issue of economic development to the agenda of the United Nations General Assembly by calling for the creation of a New International Economic Order.⁸⁶⁵ Economic development and international distributive justice became dominant issues on the normative international agenda. Within this politico-normative context, research showing that the worst impact of possible global warming will be experienced by the poorest regions of the world⁸⁶⁶ brought about demands for unconditional international cooperation, equitable distribution of responsibility and improved principles of international justice. These demands were voiced by a number of NGOs and environmental institutes, such as the International Institute for Environment and Development in London and Buenos Aires; the International Institute for Sustainable Development of Canada; the Stockholm Environment Institute of Sweden,

⁸⁶⁴ Declaration of the United Nations Conference on the Human Development, 21st Plenary Meeting, 16th Jun 1972. Available from <http://www.unep.org> – emphasis added

⁸⁶⁵ J. Young and J. Kent, *International Relations Since 1945 – A Global History*, (Oxford University Press: Oxford, UK: 2004) – pp. 433

⁸⁶⁶ J. Walter and A. Simms, *The End of Development?*, R. Roach, *Dried Up, Drowned Out – Voices from the developing world on a changing climate*, (Tearfund Publications: Teddington, UK: 2005)

etc.⁸⁶⁷ The predominant number of NGOs are based in industrialised countries and this has given rise to controversies between Northern and Southern NGOs, and to criticism that Northern NGOs lack sensitivity to the real needs of the developing South.

The culmination in the formulation of this aspect of the future norm for controlling climate change came with the report of the independent World Commission on Environment and Development (WCED), chaired by the Prime Minister of Norway Gro Harlem Brundtland *Our Common Future*, published in 1987.⁸⁶⁸ This report, also known as the Brundtland report, spelled out the norm of sustainable development – our duty to use resources in such a way as to not compromise the needs of future generations for development.⁸⁶⁹ The report also called for those more affluent to make sensible use of natural resources⁸⁷⁰ and this hinted at the principle of equitable distribution of responsibility. At the state level, the contentious issue of distribution of responsibility later turned into a negotiation impasse between North and South.

Another change of perceptions that was brought about by the Brundtland report relates to the conventional wisdom constructed by economists of the 1970s. As previously mentioned, there was a wide-spread belief that environmental protection and human economic development is a zero sum game. The Brundtland report overturned this belief by claiming that protecting the environment does not have to compromise economic development and would not necessarily result in economic stagnation.⁸⁷¹ The old view, however, was so deeply rooted in social constructions that these two opposing beliefs gave rise to competing policy recommendations on climate policy, which I will discuss at a later

⁸⁶⁷ G. Porter and J. Brown, *Global Environmental Politics*, (Westview Press: Oxford: 1996) – pp. 52-3

⁸⁶⁸ J. Connelly and Graham Smith, *Politics and the Environment – From Theory to Practice*, (Routledge: London: 2003, 2nd edn) – pp. 237

⁸⁶⁹ Report of the World Commission on Environment and Development, *Our Common Future*, Forty-Second Session of the UN General Assembly, 4 August 1987, Doc. No. A/42/427 – para 30

⁸⁷⁰ *Ibid.* – para 29

⁸⁷¹ Ian Rowlands, *The Politics of Global Atmospheric Change* – pp. 128

point.

The most important debate, leading to the formulation of the problem of climate change and global warming, was scientific. One aspect of the science of climate change is its fundamental uncertainty, which continues to play a role in policy-making and institution-building even today. Arrhenius proposed a causal link between human activity and increasing greenhouse gas concentrations in 1896. It was not until the 1960s that scientists problematised this causal relationship. Scientists joined efforts across national borders at a number of international scientific conferences in the early 1970s held in Sweden and Finland (*Figure 3.1*) and, although some scientific publications proposed apocalyptic scenarios,⁸⁷² the overall agreement among scientists was that more research was needed. There was no certainty on the question of how the increased GHG concentrations would change the Earth's climate, when, with what intensity and what would be the impact of that change in different regions of the world.

In 1980 one of a series of workshops of climate experts took place in Villach, Austria, under the auspices of the World Meteorological Organisation, the United Nations Environment Programme and the International Council of Scientific Unions.⁸⁷³ This conference of experts reached consensus on some basic scientific understandings and put together a list of recommended actions that were passed on to governments.⁸⁷⁴ The conclusions of this workshop warned that “the accumulation of greenhouse gases posed a great risk to the earth's natural equilibrium”.⁸⁷⁵ The second workshop of this series took place in Villach in 1985 and this time scientists began formulating demands for

⁸⁷² See S. Weart, *The Discovery of Global Warming* – pp. 92-3

⁸⁷³ Ian Rowlands, *The Politics of Global Atmospheric Change* – pp. 79-80

⁸⁷⁴ Statement by the UNEP/WMO/ICSU (1985), *The Greenhouse Effect, Climate Change, and Ecosystems*, International Conference on the Assessment of the Role of Carbon Dioxide and of other greenhouse gases in climate variation and associated impacts. Villach, Austria, 9-15 Oct 1985. Available from: <http://www.icsu-scope.org/downloadpubs/scope29/statement.html>

⁸⁷⁵ *Ibid.* – pp.80

international political action.⁸⁷⁶ This conference was authoritative in its conclusions, because it gathered top scientists from 29 industrialised and developing countries who reached some level of consensus on the scientific findings and put together an action plan that policy-makers could take into account.⁸⁷⁷ Discussions among scientists and policy-makers continued in the same format with further workshops being organised in Villach (Oct 1987) and Bellagio (Nov 1987). Scientists examined various possible scenarios of climate change and the responses of the natural system to those.⁸⁷⁸ They also discussed possible strategies to deal with the changes, which were divided in two groups – adaptation strategies and limitation strategies.⁸⁷⁹ The former included the calculation of anticipated large expenditures that would need to be dedicated to adapting to the effects of climate change – adapting infrastructure, coastal defences, fresh water supplies, irrigation systems, etc. - while limitation strategies would incur the limiting of GHG emissions, which would also involve high costs.⁸⁸⁰

Inspired by the work of the scientific conferences of the 1980s, policy-makers and mainstream scientists took part in the Toronto Conference of 1988, entitled “The Changing Atmosphere: Implications for Global Security”. However, this consensus seemed premature, policy prescriptions were issued⁸⁸¹ but no mechanisms were created to ensure

⁸⁷⁶ L. Elliot, *The Global Politics of the Environment* – pp. 81

⁸⁷⁷ G. Borsting and G. Fermann, “Climate Change Turning Political: Conference Diplomacy and Institution-Building to Rio and Beyond” in G. Fermann, (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, (Scandinavian University Press: Oslo: 1997) – pp. 55

⁸⁷⁸ *Developing Policies for Responding to Climate Change*, A Summary of the discussions and recommendations of the workshop held in Villach (28 Sept-2 Oct 1987) and Bellagio (9-13 Nov 1987) under the auspices of the Beijer Institute, Sweden. Doc. No. WMO/TD-No.225 (Apr 1988). World Climate Programme – Impact Studies – pp. 6-7

⁸⁷⁹ *Ibid.* – pp. 19-25

⁸⁸⁰ *Ibid.*

⁸⁸¹ The Toronto Conference issued a “call for action” to (i) reduce CO₂ emissions by 20% of the 1988 levels by the year 2000; (ii) improve energy efficiency by as much as 10% by the year 2005; (iii) initiate the necessary technological changes to reach these goals; (iv) prepare principles and components of a framework treaty for the protection of the atmosphere in time for the 1992 UNCED - G. Borsting and G. Fermann, “Climate Change Turning Political: Conference Diplomacy and Institution-Building to Rio and Beyond” – pp.

that the ambitious targets would be met, nor were institutions created to monitor compliance and provide policy advice and ultimately. None of the recommendations was applied. The Toronto Target was based on much enthusiasm and little in-depth understanding of the complexity of the issue. The consensus was unstable and unproductive because it was not founded upon a solid closure to the scientific debates that made up this issue. Many unresolved controversies remained among the actors involved.

The unusually hot summer that hit the United States in 1988 helped the climate change issue climb further up on the international agenda among speculations that scientists were wrong in predicting when climate change would take place and that the latter is upon humankind already. In June, James Hansen of NASA's Goddard Institute for Space Studies declared before the US Senate Energy and Natural Resources Committee that he was 99% certain that the current temperatures experienced that summer were evidence of global warming.⁸⁸² This statement raised public attention in America,⁸⁸³ but for all the wrong reasons, because public pressure for the expansion of knowledge was bringing in expectations about the underlying causal links between various elements of the natural climatic system. These expectations were becoming the foundations of scientific research and might have pushed natural sciences in the wrong direction altogether.⁸⁸⁴

56-7 citing Toronto Conference Statement (1988) *American Journal of International Law and Policy*, vol.5, no.15

⁸⁸² I. Rowlands, *The Politics of Global Atmospheric Change* – pp. 73 citing Statement of Dr James Hansen, Director, NASA Goddard Institute for Space Studies, *Greenhouse Effect and Global Climate Change – Hearing Before the Committee on Energy and Natural Resources, United States Senate, One Hundredth Congress, First Session on the Greenhouse Effect and Global Climate Change, Part 2*.

⁸⁸³ A poll ran by the CNN two nights later, asking viewers whether the drought of 1988 was caused by human activity showed that 72% of the viewers responded yes. Not one scientist has ever said that the drought is caused by human greenhouse alteration – Professor Patrick Michael, “Global Warming: Beyond the Popular Consensus” in P. Thompson (ed.) *Global Warming – The Debate*. (John Wiley and Sons: Chichester, UK: 1991) – pp. 13

⁸⁸⁴ One author rightly pointed out that “research on the CO₂ problem is itself a response to the *perception* that CO₂ induced climate changes could adversely affect people and society in the future... [and in view of this] Is it likely that knowledge can probably be made to grow faster than the problem?” – Robert Chen, “Interdisciplinary Research and Integration: The case of CO₂ and climate” in P.Chen, E. Boulding and S.

The issue of scientific uncertainty penetrates all scientific reports and books on the subject and is the basis, some argue, for political inaction. Scientific uncertainty, which was further fuelled by ‘politicised’ scientists, was also the underlying principle on which much of the arguments of ‘grey’ NGOs and the fossil fuel industry were built. Apart from human-produced emissions of carbon dioxide, nature has its own sources of CO₂ as well as natural mechanisms that absorb these gases (CO₂ sinks), which balance off the sources. Since modern science does not have a clear idea about all sinks and sources, about their capacity to emit or reduce CO₂ concentrations in the atmosphere, it is difficult to predict the level of future GHG concentrations.⁸⁸⁵ Moreover, there are natural negative feedback mechanisms, which influence the magnitude, timing and patterns of climate change. Sulphur particles, clouds, volcanic dust and water vapour can offset the effects of global warming,⁸⁸⁶ changes in the temperatures of the oceans and the thickness of the polar ice sheets will have an impact on the scale and regional distribution of the effects of climate change, including sea-level rise.⁸⁸⁷ Another major difficulty in scientific analysis, giving rise to scientific uncertainty, is the global nature of this problem, as the natural environment is a very large system, which is slow to display both positive and negative changes in its equilibrium.⁸⁸⁸

Schneider (eds.) *Social Science Research and Climate Change*, (D. Reidel Publishing Company: Dordrecht, the Netherlands: 1983) – pp. 242

⁸⁸⁵ W. Nitze, *The Greenhouse Effect: Formulating a Convention*, (The Royal Institute of International Affairs: London: 1990) – pp. 12-3; *Developing Policies for Responding to Climate Change*, A Summary of the discussions and recommendations of the workshop held in Villach (28 Sept-2 Oct 1987) and Bellagio (9-13 Nov 1987) – pp. 6-7; J. Houghton (1991) “The Case for the Greenhouse Effect” in P. Thompson (ed.) *Global Warming – The Debate* – pp. 11

⁸⁸⁶ P. Frasn, “Does CO₂ respond to global temperature changes rather than cause them?-Counter evidence from greenhouse assumptions from ice core data and volcanoes” in Roger Bate, F. Boettcher, J. Emsley (eds.) *The Global Warming Debate*, The Report of the European Science and Environment Forum, (Bourne Press Limited: Bournemouth: 1996) – pp. 74-5; Tom Segalstad, “The Distribution of CO₂ between Atmosphere, Hydrosphere, and Lithosphere; Minimal Influence from Anthropogenic CO₂ on the Global Greenhouse Effect” in Roger Bate, F. Boettcher, J. Emsley (eds.) *The Global Warming Debate* – pp. 41-8; Sherwood Idso, “Real-World Constraints on Global Warming” in Jones, L. (1997) (ed.) *Global Warming – The Science and the Politics* – pp. 92-7; W. Nitze, *The Greenhouse Effect: Formulating a Convention* – pp. 13.

⁸⁸⁷ W. Nitze, *The Greenhouse Effect: Formulating a Convention*, -pp. 13

⁸⁸⁸ E. Skolnikoff, “The Policy Gridlock on Global Warming”, *Foreign Policy*, vol. 79, 1990 – pp. 82-3

Scientists still debate the degree to which increasing GHG concentrations are necessarily coupled to rising temperatures.⁸⁸⁹

These uncertainties influenced the desire of industries to participate in the process of alleviating climate change by opposing any meaningful actions that could cut into their profits. Corporate actors recruited their own teams of economists and natural scientists to construct knowledge that would reflect the downsides of environmental policies based on uncertainties. Another approach used by the ‘grey’ NGOs was to couple the issue of climate change with that of energy policy. This move was quite effective and slowed down the process of policy-making because energy policy is tightly related to issues of national security: when it comes to compromising national security, international consensus tends to break down.⁸⁹⁰ Economic analysis of adaptation costs, the cost of the research into new and cleaner but unreliable energy sources, the cost of slowed down economic development not only in industrialised countries, but in poorer countries too, all managed to sway the opinion of policy-makers in their consideration of the possible options.⁸⁹¹ Corporate actors like the Global Climate Coalition were better equipped to lobby governments at the national level because of their experience and connections with government agencies, and were thus more effective in getting their message through.

In 1988, following the Toronto Conference, which marked the beginning of high-level political debate on climate change, UNEP, WMO and the ICSU created the

⁸⁸⁹ J. Lanchbery and D. Victor, “The Role of Science in the Global Climate Negotiations” in Helge Bergesen, G. Parmann, and O. Themmesen (eds.) *Green Globe Yearbook of International Co-operation on Environment and Development 1995*, (Oxford University Press: Oxford: 1995) – pp. 30; R. Schmalensee, “Symposium on Global Climate Change”, *Journal of Economic Perspectives*, vol.7, no.3, 1993 – pp. 5

⁸⁹⁰ J. Gupta and R. Tol, “Why Reduce Greenhouse Gas Emissions? Reasons, issue-linkages and dilemmas” in Ireland, E., J. Gupta, M. Kok (2003) (eds.) *Issues in International Climate Policy – Theory and Policy* – pp. 26

⁸⁹¹ R. Schmalensee, “Symposium on Global Climate Change”, *Journal of Economic Perspectives*, vol.7, no.3, 1993; G. Porter and J. Brown, *Global Environmental Politics*, (Westview Press: Oxford: 1996) – pp. 59-65; S. Oberthuer and H. Ott, *The Kyoto Protocol – International Climate Policy for the 21st Century*, (Springer: Berlin: 1999) – pp. 72-3

Intergovernmental Panel on Climate Change (IPCC) “to assess scientific, technical and socio- economic information relevant for the understanding of climate change, its potential impacts and options for adaptation and mitigation”.⁸⁹² The IPCC produced its first scientific report in 1990, in time for the United Nations Conference on Economic Development (Rio Summit, 1992). The conclusions that were reached in this report represented scientific consensus that “the increase in global-mean temperature over the coming century was likely to be of the order of 2°C but might be as much as 4.5°C... noting that such warming was likely to have severe adverse consequences for mankind and recommending that GHG emissions should be cut by at least 50%”.⁸⁹³ Global warming as a threat to humankind and as a result of human activity was officially confirmed in the Second Assessment Report by the IPCC, published in 1995, which stated that “the balance of evidence suggests there is a discernable human influence on global climate”.⁸⁹⁴ In other words, the IPCC downplayed the scientific uncertainties that were discussed earlier to create scientific closure on the basis of which solid political action could be taken. Thus, the scientific closure reached was institutional rather than based on true scientific consensus and the nature of this closure would haunt the political negotiations that followed.

The politicisation of science for the purposes of climate change negotiations tainted the perceived objectivity of scientists and made science much more open to criticism for siding with some political actors and not with others. The problem of institutional scientific closure undermined scientific efforts to gain a better understanding of the nature of the problem and the appropriate remedies. In the process of formulating the norm for the

⁸⁹² <http://www.ipcc.ch/>

⁸⁹³ Julian Morris, “Introduction: Climate Change – Prevention or Adaptation?” in J. Morris (ed.) *Climate Change – Challenging Conventional Wisdom*, IEA Studies of the Environment No. 10: (Harlington Fine Arts Ltd, London: 1997) – pp. 21

⁸⁹⁴ P. Bunyard, *The Breakdown of Climate – Human Choices or Global Disaster?*, (Floris Books: Edinburgh: 1999) – pp. 201

prevention of climate change, science lost some of its aura of neutrality and the perception that scientists would work for the greater good. This has added confusion and intensity to scientific debates and has undermined the foundation of any future political agreement related to the norms and instruments of improving our natural environment.

Dialogue with the Conservative Actors

The problem of climate change cannot be resolved by research alone, because the decisions that need to be made with regards to climate change policy are value-laden policy decisions.⁸⁹⁵ Some interests will have to be sacrificed for the greater good; costs will have to be borne by businesses or societies, or both; economic development might have to change pace and direction. These are issues of distribution and justice and they need to be addressed by policy-makers. The global character of the problem of increasing the concentrations of greenhouse gases in the earth's atmosphere means that the action of one, or a number of states, or indeed for that matter, any combination of states short of the whole international community promises to be short of effective as "the actions of one [state] can be negated if others fail to act".⁸⁹⁶ If climate change is even to be slowed down, that will only be achieved by concerted action by the majority of states. Although this principle has been made very clear by mainstream scientists, it has had very little effect on reaching consensus about the mechanism through which this problem needs to be addressed.

Although the positions on the climate change issue are two – in favour and against the creation of an effective norm that will curb the increasing amount of GHG emissions –

⁸⁹⁵ Robert Chen (1983) "Interdisciplinary Research and Integration: The case of CO₂ and climate" in P.Chen, E. Boulding and S. Schneider (eds.) *Social Science Research and Climate Change*– pp. 242

⁸⁹⁶ E. Skolnikoff, "The Policy Gridlock on Global Warming", *Foreign Policy*, vol. 79, 1990 – pp. 84

there are a number of groups of states with different priorities and competing demands for the provisions of the upcoming agreement. Following the UNEP Governmental Council Decision 15/36 of May 1989, preparation began for negotiations of a framework on climate change. In February 1991 the Intergovernmental Negotiating Committee (INC) held its first session, establishing two working groups – Working Group I to deal with ‘Commitments’ and Working Group II to work on ‘Mechanisms’ for implementing these commitments.⁸⁹⁷ The negotiating positions of the participants became clear from the first few sessions of the INC. The main division line ran between North and South. Industrialised and developing countries are locked into a relationship of economic interdependence, and unequal economic power and development prospects. The North has been “keen to emphasise that whilst it has contributed most of the problem historically, the future emissions of Southern countries will counter the global effectiveness of any action the North takes to offset climate change”.⁸⁹⁸ The problem of global warming is likely to put the South in an even more disadvantaged position whatever policy-course the industrialised countries choose to take. Adaptation policies would require large amounts of money to be put into defences against sea rises, into adapting agricultural technologies to new weather conditions, and dealing with an increased number of natural disasters. Limitation policies will require investments in new cleaner technologies, and in training specialists how to use them, which will make economic development even harder to achieve. A secondary dividing line among states involved in these negotiations was between the producers and consumers of fossil fuels, where the former were doing their best to slow negotiations down, while the latter

⁸⁹⁷ Rapporteur's Report of the Executive Session: "Negotiating a Global Climate Change Agreement." March 14-15, 1991. CSIA Discussion Paper 91-10, Kennedy School of Government, Harvard University, November 1991 – pp. 3

⁸⁹⁸ P. Newell (2000) *Climate for Change – Non-state Actors and the Global Politics of the Greenhouse*, Cambridge University Press; Cambridge – pp. 16

were keen to create effective principles to control climate change and were ready to explore the production of greener energy.

Outlining the conservative actors in these negotiations is an awkward task because of the nuanced negotiations relating to such a complex and dynamic problem as climate change. States disagreed on different aspects of these negotiations, which produced unusual alliances. The OPEC group, for example, was opposed to the whole process of regulating GHG emissions and the very norm of controlling climate change. At the other spectrum of the negotiations was the Alliance of Small Island States (AOSIS), which was in favour of the new norm and on its timely operationalisation, as some of these islands are in danger of disappearing should sea levels rise. The US, Canada, Australia and Japan did not oppose the creation of a new norm, but were against extensive responsibilities to control GHGs, which could harm their industries, while the EU was in favour of the new norm and new responsibilities, as long as the provisions of the norm were effective. The developing countries – ranging from LDCs to the Newly Industrialised Countries - were in favour of a new norm, but against any binding obligations that might slow down their development. I will examine the positions of these coalitions in more detail, before moving on to discuss the dynamics of the negotiating process.

The most active group of states in favour of concerted action to control climate change is the Alliance of Small Island States (AOSIS) for which the issue of reversing and/or preventing global warming is an issue of life and death.⁸⁹⁹ Many of these states will be submerged under water if sea levels rise even a few meters. Their vulnerability has made them virulent supporters of concerted international political action and they have utilised the alliance of international NGOs and legal professionals (FIELD) who provided them

⁸⁹⁹ <http://www.sidsnet.org/aosis/index.html>

with useful scientific and professional advice and cooperated closely on negotiating positions and the drafting of resolutions.⁹⁰⁰

The Organisation of Petroleum Exporting Countries (OPEC) stands for the exact opposite principles to those advocated by AOSIS. Although the OPEC countries are members of the G-77, their position is determined by their heightened dependence on oil revenues: should the latter seize or be cut significantly, these countries' economies will suffer very much. Their position in negotiations has been to question the need for strong action and to emphasise the economic cost of scientific uncertainties.⁹⁰¹ This group of states has also made use of the scientific and policy-proposals from groups of scientists and other professional organisations, who have been looking to lobby sympathetic states.⁹⁰²

Another Southern coalition is the one emerging among China, Brazil, India and other newly industrialising countries.⁹⁰³ These countries are united in their ambitions for improved economic growth. They have demanded that their responsibilities under climate change conventions be postponed in time, so that their opportunities to achieve higher levels of economic development are not sacrificed. This coalition has been defending such principles of international customary law as equitable distribution of responsibilities for

⁹⁰⁰ David Runnalls, "The International Politics of Climate Change" in J.Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp. 36; F. Yamin and J. Depledge, *The International Climate Change Regime – A Guide to Rules, Institutions and Procedures*, (Cambridge University Press: Cambridge: 2004) – pp. 37-9; http://www.field.org.uk/climate_1.php

⁹⁰¹ F. Yamin and J. Depledge, *The International Climate Change Regime* – pp. 40-1; David Runnalls, "The International Politics of Climate Change" in J.Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp. 37; P. Newell, *Climate for Change – Non-state Actors and the Global Politics of the Greenhouse*, (Cambridge University Press; Cambridge: 2000) – pp. 13

⁹⁰² The OPEC countries were regularly briefed by business lobbyists from the Global Climate Coalition and the Climate Council – S. Oberthuer and H. Ott, *The Kyoto Protocol – International Climate Policy for the 21st Century*, (Springer: Berlin: 1999) – pp. 45; B. Arts and J. Cozijnsen, "Between 'curbing the trends' and 'business-as-usual': NGOs in international climate change policies" in E. Ierland, J. Gupta, M. Kok (eds.) *Issues in International Climate Policy*, - pp. 248; G. Porter and J. Brown, *Global Environmental Politics*, - pp. 62-4

⁹⁰³ P. Newell, *Climate for Change – Non-state Actors and the Global Politics of the Greenhouse*, – pp. 17

environmental degradation, the polluter should pay and the principle that states should ensure that they cause no harm to other states.⁹⁰⁴ Their focus has been not so much on the environment but more on issues of justice, development and pragmatic solutions that are suited to both their needs and economic capabilities.⁹⁰⁵ India, China and Brazil have been particularly vocal in these negotiations and have stood their ground against the pressure from OECD countries to commit to targets that even industrialised countries avoid.⁹⁰⁶

The remaining G-77 countries are mainly LDCs and they have been primarily active at the national and regional level, partly due to limited resources and partly to the specific character of the problems that they were facing – drought, desertification and floods.⁹⁰⁷ Their main contribution to the debate has been confined to developmental issues and searching for financial assistance for any commitments required under the new international environmental roles..⁹⁰⁸

Consensus has been lacking among industrialised countries as well. The European Union took the role of a normative entrepreneur, but could not always find a single voice – with the Scandinavian countries being very enthusiastic and proactive, while Southern Europe tried to pull away from strict guidelines and specific policies.⁹⁰⁹ The United States also opposed concrete targets and timetables,⁹¹⁰ basing its arguments mainly on the lack of solid scientific consensus on the issue. The US has been a rogue state in these negotiations

⁹⁰⁴ J. Gupta and R. Tol, “Why Reduce Greenhouse Gas Emissions? Reasons, Issue-Linkages and Dilemmas” in E. Ierland, J. Gupta, M. Kok (eds.) *Issues in International Climate Policy – Theory and Policy* – pp. 23

⁹⁰⁵ David Runnalls, “The International Politics of Climate Change” in J.Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp. 35-6

⁹⁰⁶ P. Newell, *Climate for Change – Non-state Actors and the Global Politics of the Greenhouse* – pp. 17

⁹⁰⁷ F. Yamin and J. Depledge, *The International Climate Change Regime – A Guide to Rules, Institutions and Procedures*, – pp. 39-40

⁹⁰⁸ P. Newell, *Climate for Change – Non-state Actors and the Global Politics of the Greenhouse* – pp. 18

⁹⁰⁹ Ibid. – pp. 14

⁹¹⁰ David Runnalls, “The International Politics of Climate Change” in J.Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp.29

and continues to play this role today by not joining the responsibilities set by the Kyoto Protocol. The economic position of America, combined with its high dependence on burning fossil fuels,⁹¹¹ goes some way towards explaining the practical aspect of this opposition.

The positions of these coalitions clashed at meetings of the Intergovernmental Negotiating Committee on Climate Change (INC)⁹¹² in the lead up to the UN Conference on Environment and Development, held in Rio de Janeiro, 1992. The INC was charged with the task of drawing up a convention on climate change that would be signed by political leaders at the Rio Summit.⁹¹³ One might wonder why coalitions of nation-states whose interests clash and are in some cases completely irreconcilable demanded a climate change convention when consensus seemed completely out of sight. The reason for that was the realisation that if any political action is to have practical effects at slowing down or reversing climate change it would have to be based on broad international cooperation.⁹¹⁴

Negotiations on the climate change convention started in the first INC meeting in February 1991.⁹¹⁵ The task of bridging the differences among the coalitions listed above and of finding a solution among the noise of scientific theories and expert opinions was daunting to say the least. The problems of climate change, GHG emissions, the causal relationships between the latter, are highly political and politicised, going far beyond science, objectivity and neutrality. The United States were the strongest dissenting voice in

⁹¹¹ The US uses more energy per capita than any other OECD Country – W. Nitze, *The Greenhouse Effect: Formulating a Convention*, (The Royal Institute of International Affairs: London: 1990) – pp. 5

⁹¹² The INC was established by a UN General Assembly Resolution 45/212 of Dec 21, 1990 – C. Dasgupta, “The Climate Change Negotiations” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention* – pp. 130

⁹¹³ Lanchbery, J. and D. Victor, “The Role of Science in the Global Climate Negotiations” in Helge Bergesen, G. Parmann, and O. Themmesen (eds.) *Green Globe Yearbook of International Co-operation on Environment and Development 1995*– pp. 33

⁹¹⁴ W. Nitze, *The Greenhouse Effect: Formulating a Convention* – pp. 9

⁹¹⁵ C. Dasgupta, “The Climate Change Negotiations” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention* – pp.131

these negotiations and the hardest bargain maker. They entered the negotiations resolved to avoid being ‘trapped’ in any explicit commitments like deadlines and specific reduction targets,⁹¹⁶ as well as to include developing countries in the international response to climate change, even if in a limited manner.⁹¹⁷ The developing countries, on the other hand, were resolved to stick to their position that the developed countries were responsible for the CO₂ problems and refused to undertake specific commitments.⁹¹⁸ The available records from the meetings of the INC, however, are not verbatim records of the discussions that took place and rarely mention the positions of particular states.⁹¹⁹ Reliable information about state positions can be found in publications by individuals who have participated or observed these negotiations.

During the INC meetings, consensus was slow to develop and the European Union was at the forefront of the effort to foster cooperation. The Union made the first move to bridge differences with Japan and later with Canada, Australia and other OECD countries.⁹²⁰ The G-77 members were also negotiating a unified position around issues of poverty, economic development, and countering the power of the OECD coalition.⁹²¹ The US position was proving difficult to negotiate around and its interests were closest to those

⁹¹⁶ The US delegation explained this position as a desire to afford “flexibility in nations’ choices of their own measures” - C. Dasgupta, “The Climate Change Negotiations” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention* – pp.134-5

⁹¹⁷ D. Runnalls, “The International Politics of Climate Change” in J. Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp. 28-30

⁹¹⁸ Ibid. – pp. 27; C. Dasgupta, “The Climate Change Negotiations” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention* – pp.135

⁹¹⁹ See Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its first session, Washington D.C., 4-11Feb 1991, UNGA Doc No A/AC.237/6; Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its second session, Geneva, 19-28 Jun 1991, UNGA Doc No A/AC.237/9; Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its third session, Nairobi, 9-20 Sept 1991, UNGA Doc No A/AC.237/12

⁹²⁰ C. Dasgupta, “The Climate Change Negotiations” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention* – pp.136-7

⁹²¹ Yamin, F. and J. Depledge, *The International Climate Change Regime – A Guide to Rules, Institutions and Procedures* – pp. 35

of the OPEC countries. Differences had to be narrowed within this triangle of world political power. The only possible way was to water down the provisions of the future climate convention. Some observers argue that there was pressure of expectations on the national delegations at the INC meetings to come up with an agreed text of a climate convention for the Rio Summit, because 105 Heads of State were going to attend and the meeting had to be a success.⁹²²

Political Closure

After long hours of negotiations and hard bargaining prior to the Rio Summit, the resulting proposal for a climate change convention was ambiguous, set no specific targets for emission cut-backs, avoided shifting the responsibility to developing states⁹²³ and established the Conference of Parties to negotiate, review and implement further particulars of what specific actions will be taken and when.⁹²⁴ The Framework Climate Change Convention (FCCC) was signed at the Rio Conference in 1992 and entered into force in 1994. The signing of this convention constitutes political closure on the problem of climate change. It is unusual that states agreed in such a short period of time to create a framework convention with such far-reaching consequences,⁹²⁵ but it is not surprising why consensus was easily reached. The FCCC “established a non-binding goal and policy framework for the industrialised countries to pursue various voluntary measures to limit their emissions of

⁹²² D. Runnalls (1997) “The International Politics of Climate Change” in J. Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp.37

⁹²³ C. Dasgupta (1994) “The Climate Change Negotiations” in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention* – pp. 144-5

⁹²⁴ L. Elliot (2004) *The Global Politics of the Environment* – pp. 85

⁹²⁵ I. Mintzer and J. Leonard, (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention*, - pp. 131

greenhouse gases to 1990 levels by the year 2000”.⁹²⁶ Even though the Convention was based on limited consensus among the negotiating partners, resulting in hardly any practical change, it still reflected an agreement that greenhouse gas emissions, climate change and global warming were interconnected, problematic issues that needed to be addressed at the international level. One clear sign that political closure has taken place is an observation made by Lanchberry and Victor. According to these authors, “science has not been very relevant in the post-Rio negotiations. Most of the issues facing negotiators are either not scientific or are only very narrowly so”,⁹²⁷ which signifies that the debate over whether climate change is a problem is closed. The UNFCCC also recognised that the framework convention reached some kind of political closure and classified this as “a major accomplishment”.⁹²⁸ The Secretariat of the UNFCCC argued that “recognising that there is a problem... was no small thing [in 1994]”, especially in view of the fact that it is very difficult to get states to agree on and adopt a common approach to anything in world politics, especially if it is a complicated issue with unforeseen consequences.⁹²⁹

The political closure that was reached on climate change remains unstable due to the continuing scientific uncertainty over the causal relationships between human activity, GHG concentrations, and global warming. This is demonstrated by continuing negotiations and debates on these problems post-Rio, post-Kyoto and up to the present day. However, what this tentative political closure indicates is that the place of the issue of controlling climate change has been secured on the political agenda and its technical and normative

⁹²⁶ W. Morrissey, *Global climate Change: A Survey of Scientific Research and Policy Reports*, CRS Report for Congress: 2000. Available from: <http://www.ncseonline.org/NLE/CRSreports/Climate/clim-24.cfm> - pp. 3

⁹²⁷ J. Lanchberry and D. Victor, “The Role of Science in the Global Climate Negotiations” in Helge Bergesen, G. Parmann, and O. Themmesen (eds.) *Green Globe Yearbook of International Co-operation on Environment and Development 1995* – pp. 37

⁹²⁸ United Nations Framework Convention on Climate Change Secretariat (2005) *The United Nations Framework Convention on Climate Change – Essential Background*, available from: http://unfccc.int/essential_background/feeling_the_heat/items/2914.php

⁹²⁹ Ibid.

parameters agreed on a very basic level, which closed off the debate between the normative entrepreneurs and the conservative actors as to whether this issue is a problem at all. Even in the face of significant scientific uncertainty, the need for meaningful international action has been recognised and accepted. Political negotiations moved on to issues of institutional and procedural mechanisms related to climate change.

Legalisation and Operationalisation

The political closure on the problem of controlling climate change was very rudimentary and did not involve any substantial agreement on how to protect the atmosphere and reverse global warming. This was partly due to the continuing scientific debates on causality and partly to the difficulties that faced the negotiating parties in their attempts to find consensus. The dialogue among states continued with the same fervour as prior to the FCCC and the positions of these actors did not change much. A deeper level of agreement and commitment was needed to produce an effective legal instrument that would be accepted by the majority of states.

The process of *legalisation* and *operationalisation* were taking place simultaneously. States attempted to reconcile their conflicting views as they were creating legal principles with specific enforceable guidelines. The Framework Convention on Climate Change, which was signed at the Rio Summit (1992) and came into force in 1994, was the main legal document began the processes of legalisation and operationalisation. Following the FCCC, the climate change debate moved on to practical questions of how this norm for the prevention of global climate change would be implemented and

operationalised.⁹³⁰ The FCCC established five institutions the Conference of the Parties (COP), the Secretariat, two subsidiary bodies to deal with questions of implementation and advice on science and technology, and a financial mechanism.⁹³¹ The Global Environmental Facility was established in 1991 to help developing countries fund environmental projects,⁹³² its functions were later utilised on an interim basis under the FCCC as a financial mechanisms.⁹³³ COP became the supreme decision-making body of the Climate Change Convention, responsible for the review and implementation of the convention provisions.⁹³⁴ Negotiations among states on commitments and mechanisms under the FCCC continued in the INC. The developing countries tended to unite in their demands for “common but differentiated responsibilities”.⁹³⁵ The countries most concerned with the problem of global warming – the AOSIS coalition – submitted a proposal for a protocol on climate change in 1995, which was met well by most states, apart from Saudi Arabia and Kuwait.⁹³⁶ At the end of the 11th meeting of INC and prior to the first conference of parties, some states and NGOs were not pleased with the progress made in these negotiations, but appreciated the successes in beginning the process of operationalising this thorny issue.⁹³⁷ The first meeting of the Conference of the Parties took

⁹³⁰ Yamin, F. and J. Depledge, *The International Climate Change Regime – A Guide to Rules, Institutions and Procedures* – pp. 431

⁹³¹ *Ibid.* – pp. 398

⁹³² <http://www.gefweb.org/>

⁹³³ G. Borsting and G. Fermann, “Climate Change Turning Political: Conference-Diplomacy and Institution Building to Rio and Beyond” in G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors* – pp. 75; S. Oberthuer and H. Ott (1999) *The Kyoto Protocol – International Climate Policy for the 21st Century* – pp. 39

⁹³⁴ G. Borsting and G. Fermann (1997) “Climate Change Turning Political: Conference-Diplomacy and Institution Building to Rio and Beyond” in G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors* – pp. 69

⁹³⁵ Earth Negotiations Bulletin – A Reporting Service for Environment and Development Negotiations, Vol. 12 – United Nations Framework Convention on Climate Change, 11th Session of the INC for the FCCC, No.4 – Feb 9, 1995, Available from: <http://www.iisd.ca/vol12/1204002e.html>

⁹³⁶ Earth Negotiations Bulletin – A Reporting Service for Environment and Development Negotiations, Vol. 12 – United Nations Framework Convention on Climate Change, 11th Session of the INC for the FCCC, No.3 – Feb 8, 1995, Available from: <http://www.iisd.ca/vol12/1204002e.html>

⁹³⁷ Earth Negotiations Bulletin – A Reporting Service for Environment and Development Negotiations, Vol.

place in Berlin in 1995.⁹³⁸

According to Yamin and Depledge, the mere establishment of international institutions by states “signals acceptance that the pursuit of a shared goal is better achieved through a permanent mechanism to facilitate cooperation”,⁹³⁹ further emphasising that some sort of a political closure has been reached. Each of the COP yearly meetings resulted in the preparation of a mandate. The Berlin Mandate was mainly organisational and administrative in character, emphasising the need for the creation of stronger legal documents that would outline adequate commitments to alleviate the human effects on the Earth’s atmosphere.⁹⁴⁰ The Berlin COP meeting established the Ad-Hoc Group on the Berlin Mandate (AGBM), which was given the task putting together an authoritative document, spelling out legal obligations to the parties of the convention.⁹⁴¹

COP-2 took place in 1996 in Geneva and brought together 1500 delegates and observers.⁹⁴² Three important developments took place at this meeting, which further established the direction for the efforts to implement and operationalised this new norm. Firstly, the Geneva declaration endorsed the IPCC reports as an authoritative and exhaustive scientific appraisal on the issue of climate change and confirmed the

12 – United Nations Framework Convention on Climate Change, 11th Session of the INC for the FCCC, No.11 – Feb 17, 1995, Available from: <http://www.iisd.ca/vol12/1204002e.html> - “Challenges for Berlin”

⁹³⁸ L. Elliot (2004) *The Global Politics of the Environment* – pp. 85, 86; D. Runnalls (1997) “The International Politics of Climate Change” in J. Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp.39

⁹³⁹ Yamin, F. and J. Depledge (2004) *The International Climate Change Regime – A Guide to Rules, Institutions and Procedures* – pp. 399

⁹⁴⁰ G. Borsting and G. Fermann (1997) “Climate Change Turning Political: Conference-Diplomacy and Institution Building to Rio and Beyond” in G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors* – pp. 74, 78; S. Oberthuer and H. Ott (1999) *The Kyoto Protocol – International Climate Policy for the 21st Century* – pp. 46-7

⁹⁴¹ G. Borsting and G. Fermann (1997) “Climate Change Turning Political: Conference-Diplomacy and Institution Building to Rio and Beyond” in G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*, - pp. 74-5; J. Depledge, *The Organisation of Global Negotiations: Constructing the Climate Change Regime*, (Earthscan: London: 2005)- pp. 23

⁹⁴² G. Borsting and G. Fermann (1997) “Climate Change Turning Political: Conference-Diplomacy and Institution Building to Rio and Beyond” in G. Fermann (ed.) *International Politics of Climate Change – Key Issues and Critical Actors*– pp.79

conclusions of these reports that continued GHG emissions will “lead to dangerous interference with the climate system”.⁹⁴³ Secondly, the declaration encouraged the AGBM to intensify the negotiations to create a legally-binding instrument for the adoption of steps towards limiting GHG emissions in the atmosphere.⁹⁴⁴ The third important development was the change in the US position on climate change and the instruments that should be adopted: the US government agreed on the need for “realistic, verifiable and binding medium-term emission target”.⁹⁴⁵

The third COP meeting held in Kyoto, Japan in 1997 produced the Kyoto Protocol, which was based on the work of the AGBM and was created after long and complex negotiations among actors with conflicting interests.⁹⁴⁶ The Protocol was negotiated in an overnight session on the last day of the COP conference in Kyoto⁹⁴⁷ and although most analysts perceived it as a major achievement signifying the creation of practical mechanisms for the protection of the Earth’s atmosphere, some declared it as insufficient in light of what was needed to avoid future climate change.⁹⁴⁸

The Kyoto Protocol to the Framework Convention on Climate Change remained unimplemented until 2004 when Russia agreed to sign it and thus achieve the number of signatures needed to make the protocol binding.⁹⁴⁹ The COP meetings after Kyoto continued with debates on the problems and solutions to climate change. Even though these meetings take place every year, they have not managed to change the attitudes of states, nor

⁹⁴³ Ibid. – pp. 79 *citing* Document: FCCC/CP/1996/15/Add.1

⁹⁴⁴ Ibid. – pp. 79 *citing* Document: FCCC/CP/1996/15

⁹⁴⁵ S. Oberthuer and H. Ott, *The Kyoto Protocol – International Climate Policy for the 21st Century* – pp. 52 *citing* Timothy Wirth, Under Secretary of State for Global Affairs, reprinted in: *Global Issues – Confronting Climate Change* (Electronic Journal of the US Information Agency) Apr 1997, vol. 2, no.2; L. Elliott, *The Global Politics of the Environment* – pp. 87-8

⁹⁴⁶ S. Oberthuer and H. Ott, *The Kyoto Protocol – International Climate Policy for the 21st Century* – pp. 54-8

⁹⁴⁷ For detailed description and analysis of events see S. Oberthuer and H. Ott, *The Kyoto Protocol – International Climate Policy for the 21st Century* – pp. 77-91

⁹⁴⁸ L. Elliott, *The Global Politics of the Environment* – pp.89

⁹⁴⁹ “Putin Clears Way for Kyoto Treaty”, *BBC News*, 5th November 2004

have they produced any effective mechanisms to implement the norm to control climate change.

After hurricane Katrina hit the United States in 2005, fresh fears of the impact of global warming rekindled the debate. With the coming into force of the Kyoto Protocol, states in Europe are concerned whether they can meet their obligations under the watchful eye of NGOs and scientific communities, which continue to rely on bleak scenarios to sustain the public interest on the issue. The United States, however, continues to refuse to follow the guidelines set by Kyoto, which it rejected from the very beginning. The freshest example of this attitude of the United States was displayed as the US delegation walked out of the 11th meeting of the Conference of the Parties held in Montreal (28Nov-9 Dec 2005).⁹⁵⁰ Some journalists have argued, however, that President Bush and his administration are isolated at home for their climate change policies and that local action is taken by more than 140 city mayors to curb GHG emissions.⁹⁵¹ Saudi Arabia and Kuwait continue their sustained opposition to the Kyoto targets as well. However, the combined opposition of these states has proved insufficient to prevent the process of operationalising the Protocol. COP-11 produced one of the most important instruments in the history of controlling climate change and that is the ‘rule book’ to operationalise the Kyoto Protocol.⁹⁵²

Conclusions

This chapter has studied in some detail the development of a norm to control climate change by reducing the emission of GHGs in the atmosphere, since they are

⁹⁵⁰ “UN poised for new climate talks”, *BBC News*, 9th December 2005; Mary Milliken and Timothy Gardner, “US isolated at world climate talks”, *Reuters UK*, 9th Dec 2005

⁹⁵¹ “Bush ‘isolated in US’ on climate”, *BBC News*, 9th December 2005;

⁹⁵² UN FCCC – Secretariat (2005) “Montreal Climate Conference adopts ‘rule book’ of the Kyoto Protocol” – Press Release, Montreal, 30th Nov 2005

believed to be capable of upsetting the heat balance of the Earth, leading to change of climatic conditions, some with disastrous consequences. The process of creation and negotiation of this norm has been unusual, prolonged and extremely complex, reflecting on the character of the issue of climate change.

The information available on this issue is vast. Analysts have studied many aspects of the problem, the science, the social concerns, the economic issues, and the politics of climate change. The literature on climate change reflects on a complex, diverse and loosely knit social network of support for the new norm, which shares concerns about the impact of human activity on the atmosphere and the resulting impact on natural weather conditions. The issue of climate change as discussed throughout this chapter is ridden with uncertainties, continual negotiations of meaning, implications and political discussion of consequences. Even today scientists cannot explain with sufficient clarity the exact causal links between human activity and GHG concentrations, between the change in GHG concentrations and natural climate, and cannot predict how exactly climate will change and with what effect. There is a further uncertainty over whether more research will resolve the above questions and whether humans are at all in a position to understand the intricate balancing mechanisms of nature, which make the physical environment relatively stable over time, let alone to try and influence these complex mechanisms.

There are two important conclusions to be drawn from this detailed historical reconstruction of the events leading up to the creation of a norm to control climate change. Firstly, the complexity of the issue of atmospheric pollution and climate change, of its causes and effects, has resulted in very difficult political negotiations at the international level. Nation-states have had different degrees of involvement with this issue and varying degrees of responsibility for this problem. These complexities, combined with often irreconcilable national interests, have led to states being unable to agree on a meaningful

and effective solution to the problem. Since controversies over whether climate is indeed changing have not been settled with overwhelming scientific evidence, and because national interests make states carefully choose their policy, it has been difficult to identify who the conservative states are. Some states are conservative on some issues and cooperative on others and vice versa. The climate change negotiations are very densely layered and affect different spheres of economic, political and social life, which makes them complex for the analysis of the social sciences. Some of the agreements that have been reached are not based on genuine consensus, but on bargaining and trade-offs, which will ultimately affect the implementation of these agreements.

Scientific uncertainties have provided further basis for difficulties in reaching political closure. Scientific consensus has been undermined by ‘politicised’ scientists who have been looking after the interests of the fossil fuel industries. The findings of these scientists, however, cannot be dismissed, because of the lack of overwhelming proof that one or the other network of scientists is right. Tentative and partial scientific closure has provided poor foundations for political closure and causal relationships are continually re-examined, questioning the basis of closure.

The former US President Bill Clinton, however, made a powerful assertion at the COP meeting in Montreal in December 2005, stating that “there is no longer any serious doubt that climate change is real, accelerating and caused by human activity” and that is sufficient evidence to demand state action on this problem, even in view of the continued scientific uncertainties, regarding some aspects of this issue.⁹⁵³ Scientific uncertainties have been the reason for hesitant policy-making, which is not sufficient to limit greenhouse gas emissions and is in no position to reverse global warming if such a process is indeed under

⁹⁵³ “UN poised for new climate talks”, *BBC News*, 9th December 2005

way. Clashing interests among states and other non-state actors have managed to limit agreements to a minimal common denominator, which has been celebrated by some but declared thoroughly inefficient by others. It is unclear whether policy-makers will be able to reach more meaningful agreements and implement effective mechanisms to tackle the issue of climate change. It is also unclear when climate change is likely to manifest itself and whether humanity can handle the consequences of it or not. The international resolve has not been strong enough to foster meaningful political action and the lack of a feeling of impending urgency has been fostering a more lax attitude of states towards this truly global problem. The latest COP meeting in Montreal reached what has been celebrated as an outstanding political achievement, to extend Kyoto Protocol beyond its initial deadline of 2012. The United States agreed to hold informal talks, which was a further breakthrough after consistent opposition on their side to participate in any such negotiations.⁹⁵⁴ However, even these steps may prove insufficient in the global and far-reaching context of this problem. Many NGOs continue to call for a more determined approach to the issue of climate change, claiming that the current political agreements reflect too little action, which is coming too late and is insufficient in terms of the resources committed to it.

⁹⁵⁴ “Last minute Climate Deals Reached”, *BBC News*, 10 December 2005

CHAPTER 6

CONCLUSIONS

International behavioural norms are created through complex social processes and are a product of the interplay between scientific knowledge, political and social power, and normative beliefs. Norms are not exogenously given, they are constructed as a result of a multitude of negotiations, taking place at different levels of analysis, in which actors with conflicting interests and/or demands battle out their differences. Behavioural norms are not always 'good', i.e., catering for the greater good or the greater number of people; neither are they always a product of genuine consensus based on unbiased scientific knowledge. International behavioural norms are constructed to respond to specific problems, which are either contemporary or are perceived to have far-reaching consequences in the foreseeable future. The attention of governments is usually drawn to the need of creating behavioural norms by a wide variety of non-state actors, or by pressing national interests.

Norms emerge out of different circumstances, which inevitably affect the newly developing norm and in turn account for the variance in norm strength, norm compliance, and other aspects of the norm's character. What this research has sought to demonstrate is that norms have similar patterns of development. A very important part of this pattern of norm construction is the moment of political closure that each normative idea has to go through before nation-states agree on the need for a new prescription for appropriate behaviour. The character of the political closure, which establishes the need for the creation of a new norm together with the basic parameters of this norm, is likely to influence the level of implementation and norm-compliance by states and non-state actors. The concept of closure, borrowed from the sociologists of scientific knowledge, is particularly useful in

understanding the dynamics of norm development and is an interesting social moment, which demands further research.

If norms are socially constructed and emerge in a relatively defined logical sequence, then a number of questions arise. What is the right mix of scientific knowledge, political power and normative beliefs that leads to successful norm creation? What circumstances favour the development of new norms? What factors induce change in social perceptions? How is consensus built among actors of different calibre, different social roles and diverse aims and not necessarily harmonious interests? Who are the actors best positioned to attract the attention and support of policy-makers for the creation of new norms? The goal of this research has been to seek answers to these questions, as these would shed further light on our understanding of global governance and the everyday conduct of international politics, as well as the role and the type of power that various actors wield in the international system.

These conclusions are organised around two questions central to this research. The first one being - how we theorise normative change; and the second one – how norm development and normative change actually take place in the context of world politics. This research has taken an innovative approach to theorising norm development by bridging two literatures that have not been communicating meaningfully so far – the sociology of scientific knowledge and the social constructivists in international relations. These two theoretical approaches have much in common, as both examine social processes in which perceptions, shared knowledge and ideas play important roles. Building on both the theoretical and empirical findings of these approaches, I propose a synthetic model of norm development, which is built on previous models that have not been as exhaustive and as comprehensive in their attempt to understand the causal relationships between the separate stages in the process of norm creation. I have further sought to reconstruct the events

leading up to the creation of three contemporary international norms in three separate fields of world policy-making. The historical reconstruction in this research has relied on primary documents, first-hand accounts of participants and negotiators, analysts both of state and non-state behaviour, media reporters, and conference documents, producing a comprehensive historical account of events that combines the viewpoints of state and non-state actors alike. By reconstructing the sequence of events, I continuously analysed how these compare to the proposed model, which produced interesting empirical and theoretical conclusions.

Theorising Normative Change

Combining the findings of conventional constructivists of international relations and the sociologists of scientific knowledge has proven rather useful, as both have produced detailed studies of how changes in social constructions take place and of what processes lead up to these changes. Both approaches have drawn attention to power relationships that influence the process of creating social norms and scientific facts and to the tools that actors use - persuasion, argumentation, coercion, knowledge creation – in their work towards shaping social perceptions.

Constructivists have studied the influence that norms have on state behaviour; they have also asked why states comply with international norms, how international norms affect state behaviour, and have tried to explain how specific norms have evolved and have been internalised. Another aspect of state behaviour that constructivists have analysed has to do with the way in which norms shape state action and influence state decision-making. A further constructivist contribution to IR theorising is the study of how various actors bring about change in the social environment and what processes of advocacy, persuasion or coercion take place before a norm is created.

The sociologists of scientific knowledge, on the other hand, have argued that

science and scientific knowledge are both socially constructed, in a way that reflects hierarchical power networks and vested interests. SSK theorists have studied in great detail the social processes leading up to the closure of scientific debates and have drawn attention to this complex social phenomenon.

I have sought to analyse both the theoretical proposals and the various case-studies presented by constructivists and synthesise a more comprehensive and flexible theoretical model of norm development, based on repetitive social processes apparent from already existing studies. The synthetic theoretical model proposed in Chapter 1 offers to create a bridge between studies of norm-compliance and studies of norm creation by showing in some detail how the process of norm development influences the future behavioural norm and possibly the levels of compliance with this norm in the future. The current research analyses repetitive practices, the influence of social, political, and economic context, the power and methods of argument and persuasion that influence norm construction and make-up this complex, multi-layered, social process.

The theoretical model of norm development, proposed at the outset of this research, was based on the hypothesis that international norms are constituted by technical knowledge and normative beliefs. This hypothesis has held true across all case-studies and is an important contribution to the understanding of how norms evolve. When a campaign for the creation of a new norm is initiated, actors need to show that there is a good enough reason for the creation of a norm and that is usually done through demonstrating that there is a need to fix a problem or correct some form of an injustice. The campaign then proceeds to demonstrate in what is considered 'clear and reliable terms' (preferably by means of scientific knowledge) what the causes of the problem are and how the effects need to be remedied. Scientific knowledge is used to explain causal relationships, while normative beliefs justify the need for states to create a new behavioural norm. This view of norms as

constituted by technical knowledge and normative ideas is a departure from mainstream constructivist thought, which has tended to divide norms according to their character – as discussed in Chapter 2, where the work of Keck and Sikkink and Audie Klotz was examined.⁹⁵⁵

This research is centred around the synthetic theoretical model of norm development, which is based on a combination of existing constructivist theoretical and empirical studies and the research of the sociologists of scientific knowledge. The model consists of seven main stages of evolution which have a causal character, meaning that the completion of one stage, leads to the next. After conducting the research on the three case-studies presented above, it has become apparent that the evolution of some norms may go through some of the same stages more than once, until an agreement is reached between the pro-active and conservative actors.

The first stage of norm development is the formulation of the initial idea to regulate behaviour in a particular sphere. Ideas for norms are usually formulated in the context of a crisis or an impending calamity. Norms emerge for reasons that are time- and context-specific. One cannot understand entirely the growth of an initial idea if it is detached from the immediate political, economic, and cultural environment. As argued previously, norms are not created as part of an overarching process of ‘civilising’ world society; instead, they are constructed to respond to a particular concern or crisis.

The formulation of the initial idea is closely followed by stages two and three of the synthetic model – network configuration and issue formulation. These two processes

⁹⁵⁵ See M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Relations*. (Cornell University Press, Ithaca: 1998) – pp. 30; Sikkink briefly introduces this idea in an earlier article – K. Sikkink, “Human Rights, Principled Issue-Networks, and Sovereignty in Latin America”, *International Organisation*. Vol. 47, no. 3, 1993 – pp. 412; and A. Klotz, “Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences” *European Journal of International Relations*. Vol. 8, no. 1, 2002 – pp. 52

usually take place simultaneously but have been artificially separated in the model to reflect in more detail the dynamics of interaction between the actors involved. Constructivists have studied some aspects of these two processes and have hinted on their importance for understanding norm construction.⁹⁵⁶ However, these studies have been largely incomplete, not very detailed and based on the differentiation of actors into states, epistemic communities, advocacy networks and NGOs. The current research has unpacked and studied these processes in more detail in order to understand the bargaining and argumentation that takes place. By closely examining the behaviour of various types of actors, one can also begin to understand how normative networks are being formed, the types of power that non-state actors use, and the ways in which these actors interact.

A hypothesis stated in the opening chapter of this research that different actors – states, scientific communities, NGOs, etc. - come together to form normative networks and to take advantage of each other's strengths and bargaining skills, has been confirmed by all three case-studies, which will be discussed in more detail below. Actors have grouped together according to their aims. The variance in membership to a norm-entrepreneurial network has been related to higher chances of an impact on state policy-making, since the differing backgrounds and capabilities of the actors involved allowed them to address both issues of normative beliefs and scientific knowledge. Normative entrepreneurs need technical and scientific expertise to substantiate their claims of injustices that need to be addressed by policy-makers. Scientific experts need normative entrepreneurs to help formulate a problem by covering it in a normative cloak. It is the combination of these two

⁹⁵⁶ M. Finnemore and K. Sikkink, "International Norm Dynamics and Political Change", *International Organisation*, Autumn 1998, vol. 52, no. 4 – pp. 901; P. Haas, "Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control", *International Organisation*, Vol. 43, No. 3, 1989 – pp. 384; W. Drake and K. Nicolaidis, "Ideas, Interests and Institutionalisation: 'Trade in Services' and the Uruguay Round", *International Organisation*, Vol. 46, No. 1, 1992 – pp. 39; E. Adler, "The Emergence of Cooperation: National Epistemic Communities and the international Evolution of the Idea of Nuclear Arms Control", *International Organisation*, Vol. 46, No. 1, 1992 – pp. 104

sides to a proposed norm that has made for successful and productive normative campaigns, as will be discussed below.

In the process of issue formulation actors participating in the normative network define the technical and normative scope of the proposed new norm. The scope of the norm is usually expressed in a working definition of the new norm. Actors need to define relationships of cause and effect that lead to problematic consequences or behaviour. Agreement may sometimes take a long time to achieve. Such agreement is signified by reaching normative and scientific closures. It is at various conferences and forums, in working groups, and at workshops that normative and scientific closures are reached. If closures are not reached the development of the norm is not necessarily discontinued, but the reaching of political closure is made all the more difficult, as opponents to the emerging norm will always try to exploit scientific or normative uncertainties to their advantage – as demonstrated in the case of the protection of the atmosphere. The concept of closure is borrowed from the sociologists of knowledge here and will be discussed in more detail below in relation to political closure. The empirical evidence in this research has shown that the process of creating norms is based on a continuum of closures through which the debates are moving forward, overcoming controversies that with time help norms evolve and reach the point where they are uncontested and their existence seems natural.

Once the norm entrepreneurs formulate the problem that needs a policy solution, they begin seeking ways of putting this problem or normative proposal onto the political agenda. There usually are states that are supportive of the development of a new norm, and are even actively involved in normative campaigning, as well as states that are either not interested at all or actively oppose proposals for a new norm. The task that normative networks face is to persuade or coerce the actors who to a larger or lesser degree are in favour of keeping the *status quo*, which I have called ‘conservative actors’. Once again, this

stage of norm development has been acknowledged by some constructivists,⁹⁵⁷ but has not been studied in enough detail, and the politics of the dialogue with the conservative actors is just too dense to miss out in the overall analysis of the nature and effect of norms. How states and non-state actors reach an agreement to create a new norm has been demonstrated to affect the new norm – in terms of its strength, the level of compliance, and the way in which the norm influences state behaviour in the future.

The dialogue with the conservative actors on the need to create a new norm concludes with reaching the moment of *political closure*. This moment marks the end of the controversy over whether a certain normative principle needs to be constructed and endowed with the power to regulate behaviour, i.e. the moment when a new norm becomes a part of the normative context within which actors interact. If closure is not reached, a loop may open in the model where actors go back to the preparation stages to amend either the norm proposed, or their normative campaign. The studies of the sociology of knowledge have contributed greatly to our understanding of the moment of closure, which is referred to as the ‘tipping point’ of norm development by constructivists in IR.⁹⁵⁸ However, the empirical case-studies in this research have revealed important shortcomings in our understanding of closure. One such deficiency is in the available tools of measuring closure and in the lack of a mechanism of establishing when closure has been reached. Pinpointing the moment of closure is a difficult task in the midst of multilateral political negotiations, which often include a number of equally thorny political issues. The causes of closure

⁹⁵⁷ In their article “International Norm Dynamics and Political Change” Finnemore and Sikkink, hint to a process of persuasion, but do not examine how the latter proceeds in much detail, while the constructivists studying the behaviour of epistemic communities seem to suggest that the changes in opinion of states takes place, due to the so-called process of ‘policy diffusion’, i.e. from policy change from within – see E. Adler and P. Haas, “Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program”. *International Organisation*. Vol. 46, No. 1, 1992 -pp.375-8

⁹⁵⁸ M. Finnemore and K. Sikkink, “International Norm Dynamics and Political Change”. *International Organisation*, Autumn 1998, vol. 52, no. 4, 1998 – pp. 901

cannot be isolated with certainty, because in international negotiations it is often the case that some states are coerced into accepting a norm, or lured with trade offs in spheres they consider of higher importance to their national interests; closure sometimes happens unexpectedly under the pressure of deadlines to complete negotiations. Understanding the processes that lead up to closure more clearly will help us understand why some controversies are resolved, others reopened, and yet others ignored altogether. There is a need for further inquiry into the mechanisms of reaching political closure and into the ways in which closure can be measured and defined, as this is one of the crucial moments in the processes of both norm development and knowledge creation.

The next two stages of the synthetic model – legalisation and operationalisation – do not necessarily take place in relation to every norm. The process of legalisation entails the creation of treaties, conventions, covenants, and other written rules of international law, referred to as ‘international conventions’ in Article 38 (1) of the Statute of the International Court of Justice, which establishes the sources of international law.⁹⁵⁹ According to some legal scholars, treaties are increasingly beginning to replace customary international law, meaning that generally speaking more norms reach the legalisation stage.⁹⁶⁰ Constructing the legal language of the obligations that states agree to undertake is a process of difficult negotiations, which is increasingly involving not just states but non-state actors as well, both directly and indirectly. Consensus on the limits and legal language of the new norm may take a long time to achieve. Negotiations often reach deadlock, as none of the parties that present drafts of the new norm are willing to give way to other drafts. It has become apparent from the empirical studies in this research that negotiations are often concluded

⁹⁵⁹ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised edn, (Routledge, London: 1997) – pp. 36

⁹⁶⁰ *Ibid.* – pp. 37

due to pressing negotiation deadlines, with states signing up to final drafts that come short of their initial demands and comprise elements from the various proposed drafts. This is an interesting finding that needs to be researched further, as it might have far reaching implications for our understanding of how international negotiations are concluded.

Even though some norms evolve so far as to be legalised, states might need extra help to make the legalised norms functional, for example, by creating institutions that oversee norm-compliance, or by constructing optional protocols that offer mechanisms to verify norm-compliance, etc. The operationalisation of norms is another stage of norm development where the work of non-state actors is again focusing on attracting public attention and pressuring states into upholding their normative obligations. A specific feature of the public campaigns at this point is that they already have a legal basis and it is much more likely to shame states into norm compliance. The stage of operationalisation provides the link between norm development and norm internalisation. The issue of how states adopt norms and why they choose to follow them is closely related to the way in which norms have been negotiated and constructed. We cannot understand why states comply with norms until we understand why these norms have materialised in the first place.

This synthetic theoretical model, based on the theoretical and empirical research of social constructivists in IR and the sociologists of scientific knowledge, was compared to three empirical studies. In this research I have historically reconstructed the events leading up to the creation of three separate behavioural norms, which have been constructed in the relatively recent past. This detailed historical reconstruction has been quite insightful with regards to the validity of the theoretical model. Alongside the theoretical findings, I have also tried to examine the process of norm development in its dynamic form by comparing records of the same process kept by the different actors part-taking in it. This research has

resulted in detailed empirical and theoretical examinations of the development of three norms from different spheres of the field of international relations- the norm outlawing the use of torture, cruel, inhuman and degrading treatment or punishment, the norm protecting intellectual property in the pharmaceutical industry and the norm for the protection of the atmosphere from increasing levels of greenhouse gases. All examples studied here have been marked by the strong influence of normative beliefs, which has not necessarily resulted in the creation of 'good' norms. Technical knowledge has been instrumental in pushing forward the normative campaigns, but it has also provided the main source of contention in the case of the protection of the earth's atmosphere.

Normative Change in World Politics

Initial ideas in world politics, as argued by the theoretical model in this research, are constructed as a result either of a crisis or of a feeling of an impending disaster. The evidence from all three case-studies has confirmed this hypothesis. The development of international norms is neither predetermined, nor natural and often at the beginning of a normative campaign, norm entrepreneurs may not be able to predict the scale of the impact of their campaign. In the case of the creation of a norm to outlaw torture, the campaign that Amnesty International began was aiming at drawing the attention of policy-makers to an age-old practice, which as Amnesty demonstrated in a series of reports was taking enormous proportions and was in breach of basic human rights. The way, in which the campaign for the protection of intellectual property rights began, was also incidental in the sense that although the multilateral corporations involved wanted to have worldwide protection, they took a gamble by accusing developing state governments of allowing the

theft of intellectual property to take place.⁹⁶¹ The reason why this campaign was a gamble was because developing states were important markets for the corporations and the whole matter could have turned against vital corporate interests leading to large scale losses of revenues. The campaign to control emissions of greenhouse gases experienced a prolonged period of consolidation, as the interest in the protection of the atmosphere fluctuated with the incidents of freak weather conditions. One of the catalysts keeping this idea going was the continual fear that humans might soon come to pass the point of no return upon which damage to the world climate might be permanent.

All three empirical cases suggest that when the normative idea had gained enough momentum, the actors supporting it begin to configure networks of support. Contrary to more traditional constructivist beliefs, the process of network configuration draws actors from different spheres of social life – global civil society organisations, advocacy networks, communities of scientists, professional networks, industries, even some states that are sympathetic and supportive of the proposed norm. Evidence of this is available from conference records that documented the configuration of the normative network against torture,⁹⁶² from reports and existing literature⁹⁶² on the development of the norm protecting intellectual property rights,⁹⁶³ reports and conference papers delivered by scientists, green energy producers and some interested states in the case of the norm for the protection of the

⁹⁶¹ P. Drahos and J. Braithwaite, *Information Feudalism – Who Owns the Knowledge Economy?* (Earthscan Publications Ltd, London: 2002) – pp. 61

⁹⁶² See for example: Amnesty International, *Conference for the Abolition of Torture – Final Report*. Paris, 10-11 Dec 1973. (Amnesty International Publications, London); Amnesty International, *Report on an Amnesty International Medical Seminar “Violations of Human Rights: Torture and the Medical Profession”*, Athens, 10-11 March 1978, AI Index: CAT 02/03/78; Report of the “International Seminar on Torture and Human Rights” – Palais de l’Europe, Strasbourg, 3-5 Oct 1977, published by Amnesty International, London.

⁹⁶³ See for example: Oxfam, *World Trade Rules and Poor People’s Access to Essential Drugs*, 1999, available from http://www.oxfam.org.uk/what_we_do/issues/health/worldtrade_drugs.htm; Oxfam, *Patent Injustice: How World Trade Rules Threaten the Health of Poor People*, Oxfam GB: 2001. Report of the Workshop on “Differential Pricing and Financing of Essential Drugs” – World Health Organisation and World Trade Organisation Secretariats, Norwegian Foreign Affairs Ministry, Global Health Council, 8-11 Apr 2001.

atmosphere.⁹⁶⁴ It is important to note that actors group together according to their vested interests and in the search of not only critical mass, but also expertise and effective access to policy-makers. Actors who are interested in the technical language and scientific logic of a norm seek others who can add a normative spin to that knowledge, providing evidence in favour of another hypothesis of this research – namely, that all norms contain a technical and a normative component, prescribing what is appropriate in the normative context of society and what is effective, given the laws of science.⁹⁶⁵ The case of the norm outlawing the use of torture illustrates this point where a network of support for the new norm comprised the International Commission of Jurists alongside Amnesty International, the British Medical Association, the World Council of Churches, the Danish Medical Group, and so on. Two important empirical conclusions emerged from this case study – firstly, that networks of support can be in a perpetual state of flux as actors were coming to the forefront of the campaign when their expertise was needed and taking a back seat when questions outside their competence were discussed. Secondly, the different parts of this campaign were interlocked, in the sense that findings from the medical and legal field were logically connected and provided a solid ground for the technical argument related to the norm.

Technical and normative campaigners are not always on the same side of the debate over the need for the creation of a new norm, as was the case with the development of a

⁹⁶⁴ *Developing Policies for Responding to Climate Change* (1988), A Summary of the discussions and recommendations of the workshop held in Villach (28 Sept-2 Oct 1987) and Bellagio (9-13 Nov 1987) under the auspices of the Beijer Institute, Sweden. Doc. No. WMO/TD-No.225 (Apr 1988). World Climate Programme – Impact Studies; http://www.aip.org/history/sloan/gcm/1955_65.html; <http://www.climatenetwork.org/pages/AboutCANInt.html#briefhistory>; http://www.field.org.uk/about_overview.php

⁹⁶⁵ T. Farrell, “Transnational Norms and Military Development: Constructing Ireland’s Professional Army”, *European Journal of International Relations*. Vol. 7, No. 1, 2001 – pp. 71

one-size-fits-all type of norm for the protection of intellectual property. The industry network leading the process of norm development created close ties with the governments of economically developed states by setting up expert committees and industry-wide associations, which supplied expertise to governments on issues of concern. The network avoided the attention of the wider public and concentrated on lobbying governments. The normative entrepreneurs of the campaign against this norm had to deal with the well-developed arguments of the economists supporting a blanket norm. Actors attempted to engage in debates to reconcile their differences and find plausible solutions, but no consensus was reached. If no consensus can be reached, then a norm would either not emerge at all, or it will emerge but only addressing the concerns of one side, which in turn might lead to that norm being continually challenged by the group whose concerns were not addressed. In this particular case, while attempting to operationalise the norm reflecting industry sentiments and actively hurting individuals in poorer countries, the continuum of norm creation opened a loop – there was a second instance of network configuration for the network opposing the blanket norm and demanding a norm more sensitive towards the needs of the underprivileged.

The case study of the campaign for the protection of the atmosphere from greenhouse gases presents a different scenario of network configuration where two opposing normative networks developed simultaneously. Both of these were loosely connected and the normative and scientific partnerships did not work very productively together. The contributions of developing scientific knowledge were pulled together by the World Meteorological Organisation, which coordinated and summarised research to produce some common standards for measuring and recording various aspects of world climate fluctuations.

The process of formulating the problematic issue has been taking place

simultaneously with the process of the configuration of the network of support in all three cases reconstructed in this research. The aim of this process is, by reaching scientific and normative closures, to come to a definition of the nature and scope of the problem and propose solutions. Part of the proposed solution is the creation of a new norm, which will ameliorate the problematic consequences of certain behaviour. The normative network needs to determine the substance and limits of a norm and position it within the appropriate context, so as to demonstrate to policy-makers the benefits that it can bring.

The three case-studies of this research provided further insight into the dynamics of the stage of norm development. The campaigners against the use of torture were determined not to repeat the mistakes of previous campaigns and to formulate the norm against the use of torture in a way that would not provide any room for justification of the use of this practice. Normative closure and determination to create the norm was at the heart of the normative campaign, the stage of issue formulation was dedicated to the technical definition of torture, cruel, inhuman and degrading treatment or punishment. The discoveries of the full extent of the consequences made by medical professionals working with torture survivors gave great impetus to the normative campaign, which ran parallel to campaigns for the creation of codes of ethics for medical personnel. In the legal field various national courts confirmed the existence of a customary principle of law against the use of torture. Legal professionals worked towards a tighter definition of torture with a more universal reach. The scientific closure was marked by the unified position of non-state actors rallying for a new norm on torture.

The case study of the norm of intellectual property protection outlined the importance of an appropriate choice of institutional forum, which best to address the needs of the norm entrepreneurs. Formulating the issue of the protection of intellectual property rights as a problem of unfair trade practices secured the attention of the US government and

the governments of other industrialised countries. The proposed forum for intellectual property-related trade grievances was the GATT (and later WTO), an organisation with more enforcement mechanisms than the World Intellectual Property Organisation. The various industrial associations emphasised the normative character of their campaign – fairness and the protection of private property (including ideas and products of the mind) – and carefully formulated the technical parameters of their normative proposal in close cooperation with the US government.

Formulating the issue at the heart of a norm for the protection of the atmosphere and for the prevention of climate change took place in a number of different forums and over a long period of time. The loose character of the normative networks proposing the creation of competing norms led to a decentralised process of issue formulation, resulting from the work of a number of different campaigns. The construction of new knowledge about the relationship between different aspects of climate and human activities was in high demand, meaning that scientists were not the only actors engaged in knowledge construction. This case-study illustrates most clearly the socially-constructed character of scientific knowledge. Some critics claimed that scientific knowledge was produced to respond to certain concerns, depriving this knowledge of objectivity and neutrality. The separate campaigns on the protection of the environment reached their own normative closures regarding biodiversity, the protection of the atmosphere, fairness, the right to development, etc. There was no overall scientific closure, however, meaning that scientific uncertainty remained a source of opposition throughout the process of norm development. The only reason why states came together to discuss climate change and try and work out a solution to the problem was the constant pressure from UN agencies – the World Meteorological Organisation and the United Nations Environment Programme.

The dialogue with conservative actors is one of the most important stages of norm

evolution. This is the stage at which enough political will needs to be generated to create a new behavioural norm. All three normative campaigns echoed a common concern – namely, that the problematic issues that they addressed ultimately boiled down to questions of political will. When normative campaigners reach the stage of dialogue with the conservative actors, they have to make their case stand out among all other issues on the world political agenda. This is a crucial social moment when policy-makers have to make a normative judgement as to whether the problem in front of them requires regulation and the creation of a new norm. The empirical findings of this research show that the dialogue with conservative actors takes different forms, from the near lack of normative opposition in the case of the norm against torture, to the abundance and varying success of opposing groups in the case of the norm protecting the earth's atmosphere.

The normative dialogue with states unwilling to change the human rights *status quo* began with Amnesty's petition with more than one million signatures. The proactive states that played the role of norm entrepreneurs used persuasion and argumentation at the UN General Assembly and in the Third Committee to push forward with the creation of a new norm. The conservative states (many non-aligned states led by Chile and Yugoslavia) downplayed the seriousness and extent of torture and claimed that their sovereignty would suffer if such a norm is created. Normative opposition was difficult due to the nature of the problem and due to the fact that no state wanted to openly support the use of torture. The overall international normative climate was conducive to the creation of a more structured and extensive prohibition on the use of torture. Agreement developed in a functionalist manner – starting from agreements to create professional standards of ethics – for policemen, doctors, medical personnel, prison officers, etc., all of which incorporated the belief that torture is inexcusable, and finished with overall agreement to create a convention against torture, inhuman, cruel and degrading treatment or punishment.

When proposals for the creation of a one-size-fits-all norm protecting intellectual property rights were tabled at the Uruguay Round of trade negotiations, India and Brazil immediately formed a coalition of developing states to oppose the creation of such norm. The discussions to put together such a norm, however, were part and parcel of a larger framework of trade talks, where the coalition of transnational corporations had the right partners on its side – the industrialised states. The normative leader among the negotiating states was the US, later supported by the European Union countries, Japan, and Canada. The US government signalled how dedicated it is to create this norm by changing domestic legislation in such a way as to allow US companies to punish foreign governments for not upholding US domestic principles of IPR protection abroad. It was mainly due to coercion, linkage bargaining, and trade offs in other spheres of trade that the industrialised countries emerged victorious from these negotiations. The leaders of the opposition campaign – India and Brazil were both coerced and enticed by US trade policies into agreeing to negotiate the TRIPs agreement.

The most complex case in terms of reconstructing the dialogue with the conservative actors was that on the prevention of climate change. There was not a single state that was totally dedicated to the creation of this norm. Some states played the role of normative leaders – such as the Nordic states of Europe – but they would only agree to the new norm if its provisions were constructed to be effective, which of course could not be guaranteed. The Southern Member States of the EU, however, were not as keen. US, Canada, Australia and Japan did not oppose a new norm, in principle, but were not eager to agree to a norm, which imposed extensive responsibilities to control greenhouse gas emissions. Some developing countries were concerned with issues of development, social justice and responsibility, while others were worried about the consequences that global warming might have on their natural environment; for some like the states from the

Association of Small Island States, this was a question of survival. The countries members of OPEC were understandably concerned for their future income from the production and use of oil and other fossil fuels. In other words, the dividing lines of opposition among states ran on so many levels, and states brought along so many of their personal demands that the resulting agreement for the protection of the environment emerged in a very weak, watered down form. The dialogue in this case was based on conflicting scientific reports and the agreement reached bore fairly little value. It was only with the help of the UN agencies that debates were sustained for long enough so states could agree to take legislative action.

In the successful process of norm development the dialogue with the conservative actors completes with reaching political closure. Political closure is an understudied stage of normative development and it carries useful information about the strength and effectiveness of the emerging norm. The issue of closure was studied in greater detail by the sociologists of scientific knowledge, who have conducted extensive research and produced an in-depth analysis of different types of closure.⁹⁶⁶ These observations are particularly relevant to the study of the development of norms, as it seems that social norms emerge in a similar process to scientific knowledge, and under the influence of similar factors. This research applied the concept of closure to the development of behavioural norms and has suggested a link between political closure and the strength of the new norm.

The empirical evidence gathered in relation to the three case-studies shows different political dynamics leading on to closures. In the case of the creation of a norm prohibiting the use of torture, inhuman, cruel, and degrading treatment or punishment, closure was reached fairly quickly at the UN General Assembly, where a UN Resolution was put

⁹⁶⁶ H. Engelhardt and A. Caplan, (eds.) *Scientific Controversies – Case studies in the resolution and closure of disputes in science and technology*. (Cambridge UP, New York: 1987)

together requesting the Third Committee, which deals with pressing concerns on human rights and social welfare to prepare a draft convention against torture. Things went fairly smoothly in the case of the creation of a norm on the protection of intellectual property rights too. Once the opposition of India and Brazil was thwarted by a series of coercive measures, economic sanctions, and trade-off bargains, the discussions at the Ministerial Meeting turned to the technical scope and the wording of a new norm. This is a sign that political closure was reached. The closure, however, was not a stable one, as it was neither a result of genuine consensus, nor of fair persuasion. Fundamental disagreements remained among the negotiating partners and that undermined the prospects of making the norm functional.

Another reason to relate closure to the future stability and effectiveness of an emerging role is the empirical evidence from the third detailed case study on the norm for the protection of atmosphere. Closure here emerged as a product of circumstances and expectations rather than as a result of widespread agreement that action was needed. The pressure to come to an agreement among state leaders who had gathered at the INC meeting prior to the Rio Summit, some authors argued,⁹⁶⁷ led to a tentative closure under which political leaders undertook responsibility to commit to cutting back on GHG emissions in the future. The reason why the Framework Climate Change Convention signalled a political closure was because in the words of some commentators on the development of the debates, science was no longer relevant in the post-Rio negotiations,⁹⁶⁸ meaning that the process of persuasion and argumentation on the need for a new norm was complete.

⁹⁶⁷ D. Runnalls (1997) "The International Politics of Climate Change" in J. Parikh, R. Culpeper, D. Runnalls, J. Painuly (eds.) *Climate Change and North-South Cooperation – Indo-Canadian Cooperation in Joint Implementation* – pp.37; C. Dasgupta (1994) "The Climate Change Negotiations" in I. Mintzer and J. Leonard (eds.) *Negotiating Climate Change – The Inside Story of the Rio Convention* – pp. 144-5

⁹⁶⁸ J. Lanchbery and D. Victor, "The Role of Science in the Global Climate Negotiations" in Helge Bergesen, G. Parmann, and O. Themmesen (eds.) *Green Globe Yearbook of International Co-operation on Environment and Development 1995* – pp. 37

These findings have broadly confirmed the hypothesis on the existence of a causal link between political closure and norm strength, but what they have also outlined is the need for further research in this field and the need to work out a more objective test to show when closure has been reached. The relationship between closure and the future of the emerging norm needs to be examined in further depth.

The processes of legalisation and operationalisation have taken the form proposed in the theoretical model only in one of the three cases. The development of the norm prohibiting the use of torture is the only example of clear-cut legalisation followed by attempts at operationalisation. In this case-study non-governmental actors were particularly active and involved in close cooperation with national governments in working out the technical sides of the new norm. The norm prohibiting the use of torture materialised in the Convention Against Torture (1984). Non-state actors, however, did not feel that the convention had enough impetus to ensure compliance and the Swiss Committee against Torture called for the creation of an optional protocol, containing provisions for prison inspections and further instruments for the implementation of the new norm. The Optional Protocol was signed in 2002 and has taken further four years to be ratified and enter into force.

Chapter 5 demonstrated that legalisation and operationalisation can take place simultaneously and yet manage to have limited success. The success and effectiveness of legalisation is partly dependant on the stability of political closure. In the case of the norm for the protection of the environment a limited political closure was based on contested scientific knowledge, which was supplemented by the lack of desire of states to take determined action to deal with this problem. States with conflicting interests continued to pull in different directions, resulting in the creation of an increasing number of institutions, which were supposed to foster consensus. Consensus, however, was evasive, as the issue of

atmosphere protection needed widespread political agreement. It was not until 1997 that such consensus emerged in a very watered down form – the Kyoto Protocol, which some argue was outdated even at the time of its completion. It took further seven years for the required number of states to ratify the protocol, which finally entered into force in 2004. This rather disappointing development has been weakened significantly by the sustained opposition of the United States, which is one of the main producers of Green House Gases. The analysis of the norm for the protection of the atmosphere presented an example of how a ‘good norm’ can be badly implemented and rendered almost powerless by political considerations.

The study of the development of the norm for the protection of intellectual property seemed as if it provided a clear example of norm development and knowledge creation by the overpowering muscle of international corporations working closely with the industrialised North. Legalisation advanced in the context of the Uruguay Round of trade negotiations under GATT, with the help of informal meetings among small working groups made up of experts from interested parties. Even though the power of the developed states was by far overwhelming, political and economic might alone proved insufficient to complete these negotiations. When negotiations reached impasse across the board at the Uruguay Round, the Director General of GATT – Arthur Dunkel – created a historic draft (the Dunkel Draft), which summarised the results of negotiations and provided an arbitrated resolution on issues undecided by the negotiators. Even though the United States and India wanted to revise the draft, only minor changes were adopted. The final agreement of the Uruguay Round was the almost unchanged Dunkel Draft, which included an agreement on TRIPs. The conclusion of the TRIPs agreement, in other words, was almost entirely circumstantial, fostered by the leadership role of the Director General. Political analysts have tried to make sense of this unexpected turn of the negotiations, arguing that it was

considerations such as the state of the world economy, the expensive nature of the negotiations, fears of protectionism, political events, and the emergence of the US as the undisputed hegemon of world politics, that influenced the hasty conclusion of the round of trade negotiations.

Following the conclusion of the TRIPs agreement, the United States took operationalisation in its own hands by both applying domestic mechanisms to ensure compliance (Section 301), and concluding Bilateral Investment Treaties (BIT), which allowed the US to request developing states' compliance with principles for the protection of intellectual property much earlier than stipulated by the TRIPs agreement. The growing concern among welfare- and health-based NGOs, and developing states suffering the consequences of US trade sanctions, were at the heart of a normative campaign to oppose full implementation of the TRIPs agreement, earlier than planned, and at the cost of public health and human lives. This case study provides an example of the creation of a loop within the model of norm development. The political closure underlying TRIPs came undone when developing states and NGOs began to campaign together for a less rigid approach to the protection of intellectual property rights in the pharmaceutical sector.

The network of normative opposition centred attention around the fact that, for centuries, governments had exempted the pharmaceutical industry from the application of intellectual property rights regulations, due to concerns for public welfare. Normative issues stemming from the application of IPRs brought together a number of NGOs – the Consumer Project on Technology, Health Action International, Medicines Sans Frontiers, Health GAP Coalition, Oxfam UK, and so on – that campaigned for accessible drugs, for more research and development into neglected diseases, and for the establishment of practices that would allow the production and trade of generic drugs in the developing world. The campaign against the pharmacological giants was sustained and hard-hitting and

attracted many experts and academics, who exposed some shortcomings of the economic arguments of corporations and presented a strong normative case in favour of more lax legislation in the pharmaceutical sphere.

This normative campaign proceeded in the same sequence as other normative campaigns in this research. The developing states had the support of a variety of NGOs and some UN agencies – the World Health Organisation and the United Nations Development Programme. An extensive number of conferences were held, which aimed at attracting the attention and support of the wider public for the revision of the initial norm to protect intellectual property rights. A high profile case by pharmaceutical corporations against the government of South Africa was dropped, as it was generating negative PR for the companies, which signalled that public opinion was successful in exercising pressure in the United States and Great Britain. African states were invited to participate in various workshops on differential pricing and financing essential drugs, which was another important move in this campaign, as African states were practically not included in the initial negotiations of the TRIPs.

It was a chance happening, however, that allowed the above dynamics to produce the required change. The anthrax attacks that followed the attacks on the World Trade Centre in New York, acted as a catalyst to the changing position of the US government on issues of IPR protection in the pharmaceutical industry. The Doha Declaration on Public Health (2001) signalled political closure in the debate on the need for special treatment of the pharmaceutical industry. The Doha Declaration was aimed at ameliorating the effects of TRIPs and also at allowing at least partially the limited production of and trade in generic drugs among underdeveloped states. This was a major victory for the normative campaign that sought the revision of the TRIPs agreement, which reflected the power and influence that NGOs can exert together with developing states in the world system. This campaign is

not entirely over, as debates on the implementation of TRIPs are likely to continue in future ministerial meetings of the WTO. This case study has provided abundant material for research and analysis with regards to the normative issues that question international politics today.

Conclusions

The theoretical model presented in this research combines the findings of the social constructivists of international relations and the sociologists of scientific knowledge. The comparison between the hypothesis of the theoretical model and the detailed empirical case-studies presented here shows that the model is flexible enough to accommodate differences in the dynamics of the emerging norms, while still reflecting the logically connected stages of norm evolution. The stages of the theoretical model are broadly defined, allowing for much fluctuation and different developments. These stages largely manage to describe and to some degree explain how international norms develop. Findings from the empirical case-studies reflecting the role of contingencies, chance, the role played by individuals in leadership positions, call for a rethinking of the overall perception of policy-making, the roles that different actors play in social, political and economic interactions and the liaisons that they form in their search for political leverage. It has become apparent that political deadlock is often resolved unexpectedly - under the influence of external events, under political or public pressure, etc. – which is another issue that requires further research. It has also become clear that key individuals in leadership positions – Director Generals of Organisations, Chairmen of meetings, and so on - can yield much power to keep negotiations going and foster agreement and closure. The individual level of analysis, of course, is difficult to accommodate in an overall theory of norm evolution, but it is worth remembering the crucial role that individuals can play. As outlined on a number of occasions throughout this research, actors form networks of

support for various ideas, regardless of their nature. It is not unusual for states to be norm entrepreneurs. Since norms are composed of scientific and normative parts, NGOs end up working with scientists, various specialists, UN agencies, and sometimes states. In other words, normative labels regarding good and bad actors are not relevant and may even hinder political analysis. Further studies into political closure, as well as into the relationship between closure and norm compliance are essential, as these would bear useful answers to the question of why states follow norms and how norms affect state behaviour.

International behavioural norms are a central element of the analysis of world politics today and understanding how they shape behaviour is rooted in understanding how they come into existence. States are the actors who validate behavioural norms, meaning that states are often part of the problem as well as part of the solution. Keeping this in mind, it has been useful to analyse the roles that other actors play in the process of norm development. The reconstruction of politics events has provided empirical evidence of processes that have often been discounted in the analysis of state behaviour in an increasingly legalised world. Understanding the nature of social processes leading to norm creation might help state and non-state actors alike to moderate or indeed foster the development of better norms, catering for the wellbeing of people around the world.

APPENDIX I

UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

Resolution 2997	Resolution establishing the United Nations Environmental Programme, December 1972
Resolution 3059	Question of torture and other cruel, inhuman or degrading treatment or punishment, November 1973
Resolution 3218	Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment adopted November 1974
Resolution 3219	<i>Protection and Human Rights in Chile</i> , November 1974
Resolution 3452	<i>Declaration on the Protection of all Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</i> , December 1975
Resolution 3453	Resolution to consider issues of torture, cruel, inhuman and degrading treatment or punishment in relation to detention and imprisonment
Resolution 34/169	Resolution, containing an Annex, which spelled out the Code of Conduct for Law Enforcement Officials
A/RES/32/62	Resolution requesting the Commission on Human Rights to prepare a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, December 1977
A/RES/39/46	Resolution adopting the Convention Against Torture, December 1984
A/RES/43/53	Resolution to further examine issues of the protection of global climate for present and future generations of mankind, adopted without vote, December 1988
A/RES/45/212	Resolution establishing the Intergovernmental Negotiating Committee on climate change
A/RES/57/199	Resolution adopting the Optional Protocol to the Convention Against Torture, December 2002

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<http://www.cioms.ch> – The Official website of the Council for International Organisations
of Medical Sciences

<http://www.climatenetwork.org> – Climate Action Network

<http://www.cptech.org> – Consumer Project on Technologies

<http://www.cseindia.org> – Centre for Science and Environment, India

<http://www.earthfirst.org> – Earth First!

<http://www.eeb.org> – The European Environmental Bureau

<http://www.field.org.uk> – Foundation for International Environmental Law and
Development (FIELD)

<http://www.foe.org> – Friends of the Earth

<http://www.g77.org> – Group of 77

<http://www.gefweb.org/> - Global Environmental Facility

<http://www.globalclimate.org> - Global Climate Coalition

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<http://www.wbcasd.ch> – World Business Council for Sustainable Development

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<http://www.wmo.ch/web/wcrp/wcrp-home.htm> - World Climate Programme

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