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Imperial International Law

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Abstract

International law is often thought to depend for its effectiveness on a balance of power, and dominant actors and hegemons are presumed to turn away from law and toward politics to conduct their foreign relations. This corresponds to an often idealized contrast between international law and international politics, one being the site of reason and justice, the other that of brute power. On the other hand, critical legal scholars have long argued for a realist perspective on international law, exposing the instrumentality of the law as a tool of powerful actors. Here, the difference between international law and politics often wanes.

This paper seeks to go beyond these positions by analyzing the multiple ways in which dominant states interact with international law. Drawing on international relations theory, it develops a model of this interaction, which is then illustrated and refined with examples from historical cases of hegemony and current US dominance. The typical pattern, so the argument goes, is one of instrumentalization of and withdrawal from international law, coupled with a substitution of domestic legal tools for international law in many areas. The latter element, substitution, is quite characteristic of this interaction, and it is most pronounced in empires, which is why the pattern is termed "imperial international law".

The analysis of the relationship between the three elements of the interaction should enable us to gain a better understanding of the uses of international law for the pursuit of power and of the obstacles it poses to this pursuit. One may conclude from this analysis that, in a world characterized by power disparities, international law eventually assumes an always fragile, precarious position between the demands of the powerful and the contemporary ideals of justice.

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I. Introduction*

Hegemony and international law are often regarded as hardly compatible, or even as mutually exclusive. Hegemons appear as particularly reluctant to use the forms and abide by the rules of international law; they seem to consider it as overly burdensome and constraining and turn to politics instead.[1] On the other hand, the international legal system also seems to view the exercise of predominant power with suspicion. Based on sovereign equality, it is disinclined to grant formal recognition to structures of superiority and leaves them to the political realm.[2] Yet since it is always in need of power to enforce its norms, international law seems helpless in this situation – unable to constrain a powerful state on its own, it is assumed to depend for its effectiveness on a balance of power: "When there is neither community of interests nor balance of power, there is no international law."[3] As a result, international law often emerges as the sphere of equality, in which reason and justice play a role, whereas power asymmetries are relegated to the sphere of politics where the law of the jungle seems to reign.

This dichotomy finds its classical expression in the respective roles of law and politics during the rule of the Concert of Europe in the first half of the 19th century. In its relationship with other, weaker states, the Concert often operated outside the law, primarily through political means; and international lawyers, in turn, were only too willing to exclude this dominance from their field.[4] A similar picture of mutual exclusion is often used to describe the current turbulent relationship between international law and today's sole superpower, the United States: the US, reluctant to join treaties and ready to disregard

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[1] See Carl Schmitt, "USA. und die völkerrechtlichen Formen des modernen Imperialismus", *Königsberger Auslandsstudien* 8 (1933), 117-142.

[2] See Hermann Mosler, *Die Großmachtstellung im Völkerrecht*, 1949, who makes this observation with regret.

[3] Hans J. Morgenthau, "Positivism, Functionalism, and International Law", *American Journal of International Law* 34 (1940), 260-284, at 174. See also id., *Politics Among Nations*, 1948, 229; Lassa Oppenheim, *International Law*, vol. 1, 1905, 73; Franz von Liszt, *Das Völkerrecht*, 1898, 15-38.

[4] See, e.g., Oppenheim, supra note 3, 162-164. For a different approach, see, e.g., Thomas J. Lawrence, *Essays on Some Disputed Questions in Modern International Law*.

inconvenient legal rules, appears as a "lawless" hegemon[5], and this impression is only reinforced when we read statements of now prominent members of the US administration denying international law its legal character and denouncing it as a means of conspiring against the US.[6] On the other hand, international law seems to flourish without the hegemon, with major achievements in recent years despite the indifference or even opposition of the US. Again, law and power seem to operate in different spheres.

The resulting picture of international law is idealized and obviously inaccurate. Realist scholars of international relations as well as Marxist and critical legal scholars have long pointed to the ways in which international law itself is instrumental to, and shaped by, power[7]; some have even written the history of international law as one of the different epochs of great power dominance.[8] This critique is important and often revealing, but it falls too easily into the trap of merely reducing international law to power, of regarding international law as just another tool of the powerful to exert dominance. International law appears as either the counterpart to power or its handmaiden.

In this paper, I seek to go beyond these two positions and try to analyze in greater detail the complex ways in which powerful states interact with international law. Any deeper look at this interaction reveals that international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia.[9] I thus seek to discern, through closer inquiry, the regularities and patterns behind this relationship – patterns that I expect to result not so much from grand strategies of states as from the systemic and structural conditions pertaining in situations of power asymmetry. With this approach, I hope to elucidate the underlying factors that play a role in the varying degrees of instrumentality and resistance of international law to powerful actors, and to gain a better understanding of the conditions for international law's effectiveness in an international system inextricably bound up with asymmetries of power.

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[5] In this direction also Detlev F. Vagts, "Hegemonic International Law", *American Journal of International Law* 95 (2001), 843-848.

[6] John R. Bolton, "Is There Really 'Law' in International Affairs?", *Transnational Law and Contemporary Problems* 10 (2000), 1-48.

[7] See only John Mearsheimer, "The False Promise of International Institutions", *International Security* 19 (1994), 5-49, at 13; Martti Koskenniemi, *From Apology to Utopia*, 1989; Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal* 40 (1999), 1-80; for Marxist approaches, see Susan Marks, "Empire's Law", *Indiana Journal of Global Legal Studies* 10 (2003), 449-466.

[8] Wilhelm G. Grewe, *Epochen des Völkerrechts*, 2nd ed., 1988.

[9] To use the words of Koskenniemi, supra note 7.

I focus in this inquiry on hegemons and empires, because I expect the clearest results from the study of extremes, of the greatest power asymmetries that exist in international affairs. The paper is structured as follows: I first develop a theoretical framework for the role of international law in situations of hegemony, drawing in particular on international relations theory (II). The hypotheses drawn from this framework are then, in the bulk of the paper, illustrated and refined through empirical examples. These reflect the three principal forms of the relationship of hegemony and international law: instrumentalizing and shaping international law (III), withdrawing from and limiting it (IV), and substituting domestic for international legal mechanisms (V). I argue that hegemons, alongside using international law for their purposes, put pressure on elements of it that constrain them too much and seek, for example, to introduce hierarchies and to flexibilize the law-making process. Insofar as these efforts fail, however, dominant states tend to withdraw from international law, try to limit its reach and constraining effect, especially by loosening the rules on the use of force, and abstain from multilateral instruments. Instrumentalization and withdrawal thus often combine to produce new structures of international law or to emphasize existing ones that are particularly amenable to the exercise of power; yet they will also highlight the obstacles international law puts to that exercise. However, the characteristic, and often overlooked, element of this three-tiered structure is the third one: substitution. I argue that the resistance of international law does not drive dominant states merely into the political sphere, as is commonly assumed in the dichotomy international law/politics. Instead, they use their domestic law as a tool of international governance, since it allows much more readily than international law for structures of hierarchy and still retains the benefits of legal regulation: it is an instrument of government, otherwise absent in international affairs. This turn to domestic law is typical of formal empires, which rule their periphery entirely through internal law, and because of this structural analogy I call this three-tiered model "imperial international law".

The empirical examples in this paper are not intended to provide a rigorous test of my theoretical assumptions; instead, they serve to illustrate them, to give them some factual plausibility, and to allow their refinement. Testing them would be methodologically difficult because of the small number (and varied character) of hegemonic situations in international affairs; but it would also have strained my capacity of historical analysis. The examples should thus be seen as a starting point of further inquiry, of attempts to support or draw into doubt my assumptions. This holds especially true for the examples of former hegemonies; I have in this paper, for reasons of both interest and knowledge, placed

greater weight on the analysis of the current US predominance (a predominance that, in my view, is exercised primarily in conjunction with other North Atlantic states).[10]

II. Elements of a Theory of Imperial International Law

Theorists of international law, as mentioned before, often assume that international law requires a balance of power to operate with a sufficient degree of effectiveness. They argue that the reciprocity of international legal rules and their equal application to all makes some factual equality necessary: states with superior power would have no incentive to abide by international law; they would rather use political means than accept this egalitarian structure. This has a strong realist basis, and it is unsurprising that Carl Schmitt has argued that "no great power and even less an imperial power will bind itself to a set of strict norms and concepts that someone else could use against it".[11] Yet it ignores that the formal equality of international law often allows for the creation of norms that lie in the interest of superior powers; the structure of reciprocity often does not hinder the exercise of dominance. The long debate over "unequal treaties" has pointed to a very obvious case, but in many more the power relations are hidden and only become visible in a broader historical perspective.

1. The Costs and Benefits of Multilateral Institutions for Dominant States

In spite of this, not only international lawyers but also international relations scholars today usually analyze the value and functions of multilateral institutions (broadly understood as including formal and informal norms, regimes, and organizations, and thus also international law[12]) on the basis of a certain degree of power symmetry among the participants. For them, the function of such institutions lies primarily in the solution of collaboration and coordination problems – in the provision of information and the prevention of defection in the first, and the facilitation of stable and reliable agreements in the second

[10] It would thus perhaps be more appropriate to speak of "North Atlantic hegemony", but I have, for reasons of simplicity, mostly named the relevant state actors, i.e. the US, Europe, and other states separately.

[11] Schmitt, supra note 1, 127.

[12] See John G. Ruggie, "Multilateralism: the anatomy of an institution", *International Organization* 46 (1992), 561-598, at 568-574.

case.[13] This focus has helped overcome the deficits of realist approaches and of hegemonic stability theory, which had regarded international institutions primarily as tools of powerful states, with no independent role or constraining effects on a hegemon.[14] But with their emphasis on international affairs "after hegemony", recent institutionalist approaches have often neglected the role and effects of international institutions in situations of dominance.[15]

Within the general institutionalist framework, we can hardly grasp the role of institutions in such situations, since hegemonic powers have other ways to solve problems of collaboration and coordination than institutions. In situations otherwise characteristic of collaboration games, they can provide the good in question themselves and to bring other states in line. And with respect to coordination problems, the stance of a dominant power will often provide a focal point that others will go along with, obfuscating the need for further negotiations, organizations, or international legal norms.[16] The importance of international institutions for dominant states is thus likely to lie elsewhere. On the basis of a rationalist approach, Lisa Martin has identified three primary functions of multilateralism in situations of dominance:[17]

Regulation: reduction of transaction costs. Embodying a preferred outcome in a multilateral norm lowers the costs of regulation; otherwise, negotiations with every other state over every single instance would become necessary. However, this becomes dispensable if the hegemon is in a position to set the rules unilaterally; in this case, multilateral negotiations are not only more costly and time-consuming, but they might also force otherwise unnecessary compromises.

Pacification: reduction of enforcement costs. Negotiating international rules in multilateral fora gives weaker states greater influence on outcomes than bilateral negotiations or merely political relations would; in turn, though, this provides them with an incentive to follow the resulting agreements, leads to "quasi-voluntary" compliance, and thus lowers

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[13] See, e.g., Robert O. Keohane, *After Hegemony*, 1984.

[14] See the discussion in Keohane, supra note 13, especially ch. 3.

[15] Lisa L. Martin, "Interests, power, and multilateralism", *International Organization* 46 (1992), 765-792, at 769; Kenneth W. Abbott & Duncan Snidal, "Why States Act through Formal International Organizations", *Journal of Conflict Resolution* 42 (1998), 3-32, at 6; Ngaire Woods, "The United States and the International Financial Institutions: Power and Influence Within the World Bank and the IMF", in *US Hegemony and International Organizations* (Rosemary Foot, S. Neil MacFarlane & Michael Mastanduno, eds.), 2003, 92-114, at 95.

[16] See Martin, supra note 15, 40-49; see also Ruggie, supra note 12, 592.

[17] See Martin, supra note 15, 55-61.

the costs of enforcement. The relative stability of the Western alliance after World War II might be thus explained; the lack of balancing against US predominance after the end of the Cold War perhaps, too.[18]

Stabilization: protection against changes. Since in a multilateral setting, a dominant state accepts a less powerful position than it would wield in less formal and bilateral relationships, the resulting norms and institutions are less vulnerable to later shifts in power; they will be relatively stable even if the hegemon declines, and will thus for some time preserve an order that reflects the hegemon's preferences. This has arguably been one of the motives behind the US drive for multilateral institutions after World War II, but also behind similar developments after other major wars.[19]

2. The Role of Authority and Legitimacy in Stabilizing Dominance

The rationalist approach, however, does not fully capture some of the distinctive values – and difficulties – of international law, or international institutions, for dominant actors. It assumes that states' behavior by and large follows an instrumentalist rationality that calculates costs and benefits of particular choices on the basis of identities and preferences that are fixed, i.e. exogenous to the international system.[20] On this background, though, systems of rule in international affairs can be explained only as based on coercion or self-interest: weak states follow powerful states either because they are forced to do so by threats (of military intervention or economic sanctions), or because they hope to derive overall benefits from following. The former strategy will usually prove highly volatile, as coercion often provokes resistance. The latter one, however, can be of a relatively stable kind if weaker states regard it as in their interest to follow a powerful state *in general* and thus don't calculate costs and benefits in every situation anew. This will only occur under specific systemic circumstances; usually, though, the dominant state will have to devote significant resources to create incentives for following, and in particular to solving problems of free-riding.[21]

Therefore, stable systems of rule, both on the domestic and the international plane, will be based not so much on self-interest as on authority; in such systems, rule will not be

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[18] On the latter, see Joseph S. Nye, *The Paradox of American Power*, 2002.

[19] See G. John Ikenberry, *After Victory*, 2000.

[20] On the methodological basis, see, e.g., Keohane, supra note 13, ch. 1.

[21] See Martin's analysis of "suasion games", in Martin, supra note 15, 49-52.

regarded primarily as beneficial but as legitimate.[22] Authority and legitimacy are closely connected: through legitimacy, dominance turns into authority and provokes obedience not out of calculation, but out of the subjects' conviction that obedience is right. Legitimacy is, then, not merely the object of a given interest of a state, but also, and perhaps primarily, a form of the construction of that very interest – through the changing conceptions of legitimacy and illegitimacy in the international community, the preferences and even the very identity of a state are shaped; certain situations and power relations are normalized, others are exposed as requiring justification. Over the last twenty years, many students of international relations have sought to analyze such phenomena, and they have mounted a powerful "constructivist" challenge to the predominant rationalist approaches.[23]

For a hegemon, this role of norms and legitimacy in international affairs has three central consequences, all of which have particular bearing on the value of multilateral institutions and international law:

Construction of the identity and interests of the hegemon. Norms and perceptions of legitimacy will shape the interests and identity of the dominant actors themselves; their policies will not appear as merely instrumental, but will be shaped and constrained by the standards of normality ingrained in international society. For example, it would be inconceivable for a great power today to establish direct colonial rule over weaker entities; and it is very likely that its policy-makers will not come to this conclusion out of a calculation of costs and benefits, but simply because this option is inconceivable.[24] In many instances, compliance with international law will also be due to an internalization of the norms rather than a choice to obey or disobey.[25] A cost-benefit calculus will come into play only on the basis of the identity and interests thus shaped.

Legitimacy as a resource for pacification. Legitimacy does, however, play a role in this cost-benefit calculus as well. If legitimate rule – authority – produces obedience out of duty, it significantly reduces the costs of enforcement and contributes to the pacification of

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[22] Ian Hurd, "Legitimacy and Authority in International Politics", *International Organization* 53 (1999), 379-408; Alexander Wendt & Daniel Friedheim, "Hierarchy under anarchy: informal empire and the East German state", *International Organization* 49 (1995), 689-721.

[23] See Friedrich V. Kratochwil, *Rules, Norms, and Decisions*, 1989; John G. Ruggie, *Constructing the World Polity*, 1998; Alexander Wendt, *Social Theory of International Politics*, 2000.

[24] See Hurd, supra note 22, 397.

[25] See Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law", *Michigan Journal of International Law* 19 (1998), 345-372.

dominance.[26] Thus, the organization of an empire as informal – with independent rather than integrated client states – can in itself enhance the legitimacy of imperial rule significantly and thereby reduce the difficulties in running it.[27] Multilateral institutions can play a central role here, though not so much because they shift influence to weaker states and thus provide them with incentives to obey (as in the purely rationalist account), but because, and insofar as, their design reflects shared standards of legitimacy. *Existing* institutions will be of particular importance in this respect, if they are already recognized as reflecting such standards; however, a circumvention of such institutions creates significant costs, as it will often be regarded as at least *prima facie* illegitimate.

Stabilization through the production of legitimacy. Legitimacy and authority are not only relevant in order to pacify contemporary rule, but also to stabilize it into the future. If dominance – and the norms and institutions that come with it – come to be regarded as legitimate, it is much more likely to survive a decline in the dominant actor's power, for some time at least. Drawing on existing procedures to create legitimacy for new institutions will often be central to this endeavor; and many victorious powers have made use of it in order to preserve an order beneficial for them.[28] If this creates a new legitimacy, these institutions will be much more stable than if their preservation continues to depend on calculations of interest by other states; in Gramscian terms, we could call the ideology thereby brought to dominance itself "hegemonic".

These last two functions have significant repercussions on the design of the institutions. In order to enjoy and produce legitimacy, they must not appear as mere tools of a dominant power, but must be, at least to some degree, shielded from its influence.[29] This requires a certain independence of the institutions, which will in turn tend to produce constraints on their participants, and also on the hegemon itself. The latter thus faces a trade-off between gaining legitimacy through institutions and being unconstrained in unilateral action.

The study of the role and function of legitimacy is complicated by the different historical, geographical and social forms it takes. Since it is socially constructed, it necessarily varies with the sites of production and thus from society to society. Leaving aside variations over time for the moment, the analysis of imperial actors is confronted with essen-

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[26] As Thomas Franck puts it, legitimate norms exert a "compliance pull"; Thomas M. Franck, *The Power of Legitimacy among Nations*, 1990, 24.

[27] See Wendt & Friedheim, supra note 22, 700-705.

[28] Ikenberry, supra note 19.

[29] Abbott & Snidal, supra note 15, 16.

tially three sets of relations in which legitimacy may take different contents and play different roles. One is, and I have focused on it so far, the relations with international society and especially with other important powers; the second, the relations with the periphery, i.e. the states controlled; and the third, the relations with its domestic society. Of course, even within these relations, huge differences exist: for example, elites usually have different ideas of legitimacy than other parts of society. Yet keeping in mind the three general layers of legitimacy will be helpful as a structuring device, for it reminds us of the different constituencies of imperial actors and also makes plain the inadequacy of a monolithic, invariable notion of legitimacy.

3. Variations in the Role of Multilateralism

The different benefits of multilateral institutions for dominant powers don't necessarily translate into policy choices, and we observe much variation in the importance of multilateralism over time. The factors influencing this variation are obviously manifold, and I cannot attempt to give a comprehensive picture of them here, but wish to draw attention to four especially critical elements.

Many of the benefits of multilateralism accrue only in a mid- or long-term perspective, and obtaining them may thus require foregoing significant short-term advantages.[30] Whether or not a hegemonic power makes use of multilateral institutions will thus often depend, in part, on its *farsightedness*. Here again, different factors are certainly relevant, including the domestic political system and the incentives for the political actors involved.[31] Yet systemic factors also seem to play a role. In bipolar international systems, for example, the hegemonic powers tend to be more concerned about the stability of their sphere of influence than in multipolar or unipolar systems, because defection usually results in an immediate gain for the other hegemon. Thus, in such settings, we can expect relatively greater efforts at legitimizing dominance, oftentimes through the use of multilateral institutions.[32]

A second major factor in the importance of multilateral institutions is the *status quo orientiation vs. revisionism* of the great power in question. Hegemons that do not seek or do not expect to extend their dominance further will usually have a strong interest in stabilization: they will attempt to preserve the existing system for the future. This tendency will

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[30] Martin, supra note 15, 55-61.

[31] On the factors leading to US multilateralism after World War II, see Ruggie, supra note 12, 584-593.

[32] See Martin, supra note 15, 58-61.

be particularly accentuated if such hegemons expect to decline rather than rise, as may have been the case with the US after World War II when its dominance seemed "ephemeral"; building a stable system that projected the superior position of the US into the future was therefore of central importance.[33] A revisionist stance, in contrast, reduces the interest in stabilization. If further change is sought, preserving the system in its current state makes little sense. This will be especially so if a revisionist attitude is based on a revolutionary ideology, which might result from a domestic revolution – as was the case after the French and the Russian revolutions[34] – or from the realization that the own rise in power allows to form the international system according to one's own, pre-existing ideology. The European expansion with its Christian and later "civilizing" mission is a case in point, as is possibly the current US attempt to spread freedom, democracy and free markets throughout the world.

The example of revisionism also points to a third factor explaining variation in the role of multilateral institutions: the availability of *alternative forms of legitimacy*. Multilateralism can create a specific kind of legitimacy, which is procedural and based on the recognition of a certain pluralism: everyone's view of the world counts, to some extent at least, in the creation of the rules of the system. It comes relatively close to Max Weber's legalistic-bureaucratic type of legitimacy, which, however, is bound to lose in relevance once a more "charismatic" basis becomes available. Such a shift will often come about with the rise of substantive universalist ideologies: they have little room for pluralism or proceduralism, unless forced to accept them by the distribution of power. In situations of a superiority of material power, this acceptance will be lacking, and there will be little interest in creating legitimacy through structures that are, like multilateralism, founded on diversity. In general, hegemons with such substantive ideologies are likely to pay little attention to existing forms of ensuring legitimacy; their aim is to replace them in the future with their own, substantive form of legitimacy. This will, of course, require a normalization of this order and eventually a return to a legalistic-bureaucratic type of legitimacy to stabilize it. Yet during the transition and the process of normalization, there will often be little room for multilateral forms.

These latter processes take us to a fourth factor of general relevance for variations in multilateralism: *changes in the legitimatory environment*. What counts as legitimate or illegitimate depends on the historical circumstances. Thus, in antiquity it seems to have been

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[33] See Steve Weber, "Shaping the Postwar Balance of Power: Multilateralism in NATO", *International Organization* 46 (1992), 633-680.

[34] See David Armstrong, *Revolution and World Order*, 1993, Chapters 3, 4 and 6.

much more commonly accepted to embody differences in power in the design of institutions than it is today; "unequal" treaties were regarded as normal.[35] And while today it would appear quite illegitimate to create a formal empire, this was hardly so in the era of Roman dominance, or even in the period of European expansion. Likewise, while in the 18th century there seems hardly to have been an expectation for states to engage in multilateralism, today acting through multilateral institutions has almost become the rule, and unilateralism often requires particular justification or else increases the costs of action.

4. The Promise and Problems of International Law

International law is a multilateral institution, and the general observations above thus apply to it as well, though not to the same extent to all parts of international law. Especially bilateral treaties, though embedded in the general international legal order through rules of interpretation, state responsibility etc., also bear important characteristics of bilateralism; and even multilateral treaties do not necessarily reflect what John Ruggie calls true multilateralism: a regime distinguished by "indivisibility" and "diffuse reciprocity".[36]

Yet despite these variations, international law has a number of common characteristics that significantly affect its particular value for dominant states. I wish to mention here only two of them: its age and stability, and its relatively egalitarian nature.

International law's age – reaching back to at least the 15th century, thus much farther than most multilateral institutions – has a distinct advantage from the perspective of a hegemon, since its legitimacy has been established for a long time and its core is, despite occasional challenges, relatively secure. Using international law makes it thus possible to draw upon an existing resource of legitimacy, thereby reducing the need to create legitimacy on a new basis. On the other hand, and often more visibly, the age of international law presents a sizeable burden. It is not a structure that could be invented according to a new vision, but it projects history – and thus a time in which the current dominant power was weaker – into the present. International law stores past struggles and, to use an argument familiar from constitutional law, it allows previous generations to rule over present ones, at least to some extent. Change in international law is slow and cumbersome, especially as regards the constitutive rules of the system, and the possibilities for a dominant power to remake international law in its own image are therefore limited, at least in

[35] See David J. Bederman, *International Law in Antiquity*, 2001, Chapter 5.

[36] See Ruggie, supra note 12, 571.

the short term. This is exacerbated today by the "legalization of world politics"[37], by the almost comprehensive coverage of all areas of international affairs by legal regulation. International law-making cannot start from scratch, and this often creates a degree of resistance to a hegemon.

On the other hand, though, these very characteristics – age and stability – make international law a prime instrument for the stabilization of dominance. Shifts in power affect the international legal order only slowly; a current hegemon can thus project its own vision of the world into the future by means of law. The strong legitimacy of international law raises the prospects of such an endeavor; over time, changes in international law will lead to a new normality, which in turn is difficult to change. Even for a hegemon on the rise, with a typical lack of interest in stabilization, such a normalization can be extremely useful: it allows for gradual change in the basic rules of the international system and might thus pave the way for shaping it in the future in ways that might have seemed inconceivable in the past. To take just one example, only the introduction of human rights into international law after World War II, and the ensuing normalization of this state of affairs, made it possible in the 1990s to argue for humanitarian intervention – collective and unilateral – the way Western countries did.

An even greater challenge for a hegemonic actor stems from the relatively egalitarian character of international law.[38] The sovereign equality of states is a building block of the modern international legal system, and it is reflected above all in the rules on international law-making. The formally equal position of states in this process makes it difficult for powerful actors to achieve their goals – in customary law, for example, they have often failed to turn their preferences into international legal rules, and they even had to accept rules that went against their interests.[39] Yet customary law is still a relatively easy tool for dominant states, as its vagueness, its underenforced character and its focus on state practice give them a significant advantage in the application stage. This is different for treaty rules, and especially for rules in multilateral treaties with institutional mechanisms for supervision and enforcement, which have become increasingly common during the

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[37] See *Legalization and World Politics* (Judith L. Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, eds.), 2001.

[38] For a closer analysis, see Nico Krisch, "More equal than the rest? Hierarchy, equality and US predominance in international law", in *United States Hegemony and the Foundations of International Law* (Michael Byers & Georg Nolte, eds.), 2003, 135-175.

[39] See Michael Byers, *Custom, Power and the Power of Rules*, 1999; Stephen Toope, "Powerful but unpersuasive? The role of the USA in the evolution of customary international law", in *United States Hegemony and the Foundations of International Law*, supra note 38, 287-316.

second half of the 20th century. Here the consequences of a relatively egalitarian law-making process make themselves felt with particular strength: evasion becomes more visible and costly, and the application of power at the stage of implementation is significantly curtailed (though not eliminated, since the interpretation of the law and its rules are still open to various influences). The typical mode of international law-making today is thus much more ambiguous for powerful actors than the more malleable forms of previous centuries.

Yet both customary international law and multilateral treaties share a characteristic that might be an even greater irritant for powerful states than the principle of sovereign equality as such: the equal application of international legal rules to all states, or to all parties to a treaty. Because law-makers and subjects of law are identical in the international legal system, the option of making law for others – of directly *ruling* them through law – is formally foreclosed. Of course, rules of a formally universal character can still be used for purposes of governing others, since the structural equality of the subjects before the law does not imply their substantive equality; the creation of a highly unequal UN Security Council on the basis of a treaty is only the most visible example. But international law poses limits to the legalization of inequality, and from the perspective of a hegemonic power, this must appear as a constraint since it hardly reflects the power relationships prevailing outside the law.

5. Hegemony and International Law: Some Guiding Hypotheses

International law thus confronts dominant states with a dilemma. It offers them an excellent tool for international regulation and for the pacification and stabilization of their dominance, especially because of the high degree of legitimacy action in legal forms and through legal procedures enjoys. Yet reaping these benefits requires giving up a significant degree of control: existing rules need to be honored; new rules can only be created in a relatively egalitarian setting; and they place constraints on the hegemon as well.

It is therefore likely that dominant states' policies towards international law will oscillate between two poles: instrumentalization of and withdrawal from international law. As far as they are free to choose, we can expect that in some areas benefits will outweigh costs, for example because other states have similar interests and little compromise is necessary, or because the interest in regulating others is superior to the desire to be unconstrained. In the case of the US, for example, both factors weighed in for increased legalization in the WTO, supported by hopes for positive domestic effects from international constraints. Yet the extent of instrumentalization will obviously vary depending on factors such as those outlined in section 3 above. On the other hand, dominant states are likely to withdraw from international law to a significant degree, especially if they have a

strong short-term orientation. This does not necessarily entail violations of the existing law, but it will certainly include shifts away from legal mechanisms in areas central to the dominant state's interests, and in particular attempts at reducing the legal constraints on the tools of dominance, as those on the use of force. I will analyze these tendencies in greater detail in parts III and IV below.

Yet the dichotomy instrumentalization/withdrawal is certainly overdrawn. International law is a highly complex, historically variable and by far not uniform structure, and not all parts of it present the same obstacles to the exercise of dominance. Thus the constraining effect of customary law is, because of the imprecision of customary norms, usually less severe than that of treaties, especially if the latter establish mechanisms of supervision and enforcement.[40] Even less constraining are informal norms, such as standards and soft law[41]; least constraining, though, are norms that are made only for others, as is possible in some institutional settings such as the World Bank. In the same vein, not all processes of international law-making are similarly egalitarian. Again, treaties, especially those with global participation, are established under conditions of the greatest and most formalized equality, whereas customary law-making will usually allow for stronger influence by important actors[42], as will standard-setting or treaty-making on a bilateral or regional rather than global basis.[43] Even less egalitarian are processes of the elaboration of treaties and the setting of standards by restricted "clubs", or law-making through such exclusive bodies as the Security Council.

While thus the costs of international law for a dominant state vary according to the specific form of the law, the same holds true for the benefits. Regulatory goals will be most effectively furthered by binding and precise treaty norms, even though standards can often fulfill a similar function.[44] Pacification and stabilization will likewise be achieved best by forms of law widely accepted as legitimate, especially those involving

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[40] See the conceptualization of different degrees of legalization in Kenneth W. Abbott et al, "The Concept of Legalization", in *Legalization and World Politics*, supra note 37, 17-35; and of dispute resolution in Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational", *ibid.*, 73-104.

[41] See Kenneth W. Abbott & Duncan Snidal, "Hard and Soft Law in International Governance", in *Legalization and World Politics*, supra note 37, 37-72, at 52-56.

[42] But see Toope, supra note 39, for a different perspective.

[43] See Miles Kahler, "Multilateralism with small and large Numbers", *International Organization* 46 (1992), 681-708; Richard H. Steinberg, "Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development", *American Journal of International Law* 91 (1997), 231-267.

[44] See Abbott & Snidal, supra note 41, 46-47.

some form of consent (like treaties) or at least acquiescence (customary law). However, it is not clear that the benefits are just the inverse of the costs for a given form of law: soft law, for example, has often been found to be as effective in inducing compliance as hard law[45], but involves lower costs; and it might also be argued that law-making through a body such as the Security Council enjoys relatively high legitimacy despite its openly inegalitarian operation. These forms of international law, combining high benefits with limited costs, are thus likely to be preferred by a dominant state. Moreover, the less-farsighted and interested in stabilization a hegemon is, the more it will tend to prefer forms with low costs (and correspondingly, low benefits) – the reduced gains in legal regulation will usually appear to be offset by the possibility of regulation through coercion or incentives.[46] We can thus usually expect dominant states to shift away from treaties to other, less constraining forms of international law. All of this, however, only holds for those areas in which the use of a particular form is not already part of the state's identity: at a certain point it may, for example, be "normal" to take part in international treaty-making, and if a hegemon is thus socialized, the choices outlined above will not appear as real choices. Hegemonic policies towards international law will thus be far from uniform over time, but they will share common characteristics and significantly differ from those of weaker states at a given moment. I will examine examples of them in the parts III and IV below.

However, the resulting picture of instrumentalization and withdrawal, even if complemented by considerations of the more nuanced structure of international law, is still unduly narrow. It suggests that the withdrawal from international law is primarily a turn from law to politics; that the problems associated with international law drive hegemons into an abdication of the law as such. Although this corresponds to a widespread assumption, as mentioned in the introduction, it would appear quite implausible, given the theoretical arguments I have advanced so far. The mere turn to politics would be detrimental in all the respects in which international law provides benefits: regulation, pacification, stabilization. Especially as regards regulation, a dominant actor is thus more likely to use another tool: domestic law. The use of domestic law for international govern-

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[45] See Edith Brown Weiss, "Conclusion: Understanding Compliance with Soft Law", in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Dinah Shelton, ed.), 2000, 535-553.

[46] Miles Kahler, "Conclusion: The Causes and Consequences of Legalization", in *Legalization and World Politics*, supra note 37, 277-299, at 281-282; Abbott & Snidal, supra note 39, 63-66. See also the findings of McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts", *International Organization* 54 (2000), 137-180.

ance brings with it many of the advantages of international law (especially precise rules that may reduce transaction costs over time), but avoids its costs (the constraints on the hegemon itself and the inclusive law-making procedures). It also allows for the use of openly hierarchical tools, since domestic law is, unlike international law, a tool of government. This obviously leads to a lack of legitimacy and thus losses in the pacificatory and stabilizatory functions, which might, however, be offset to some degree by other factors, such as incentives or alternative forms of legitimacy. And it is likely that legal forms, whether domestic or not, often enjoy greater legitimacy worldwide than purely political ones: they are more transparent, and especially courts often enjoy independence from the political branches and thus appear as more impartial. We can thus expect that international law is in part replaced not just by politics, but by domestic law, and I will analyze examples of this in part V of this paper.

As a result the international legal policies of hegemonic actors are likely to be characterized by a combination of three elements: *instrumentalization* of, *withdrawal* from, and *substitution* for international law. This hypothesis shall structure the further analysis in this article, but the next sections are not supposed to test them in any rigorous way; they are only intended to provide illustration and a fuller picture of the international legal strategies of imperial powers. These strategies do not always, or necessarily, lead to changes in the rules; we will find many instances in which imperial goals were frustrated, and they are a major cause for the substitution of other tools for international law. However, the strategies will help us understand the pressures for change that dominant states exert on international law, and in turn also the conditions under which international law can and must operate in international society.

III. Instrumentalization: Using and Shaping International Law

Predominant states make use of international law in many forms. The most common of them also departs the least from the classical type of international law: it uses international law in its usual forms – custom, treaty – to shape the international order according to the hegemonic vision, or to maintain it insofar as it already corresponds to that vision. This tends to strengthen international law significantly, as the hegemon puts its weight behind it and thus provides the legal order with an otherwise lacking enforcement mechanism. But predominant states also put pressure on the structure of international law: as mentioned in the last section, they will favor forms that constrain them less and benefit them more. Two such strategies shall be discussed in this section: the deformalization of international law, and the turn to forms of it that are more hierarchical in nature. The historical examples for them, as well as for the general activism in international law, shall

serve to grasp some commonalities of, and differences between, hegemonic strategies over time, and should allow refining the theoretical assumptions, even though they can only provide illustrations, not tests for them.

1. Hegemonic Activism in International Law-Making and Enforcement

Most hegemonic powers have been active forces behind the development of international law and behind its enforcement. In the 16th century, Spain was heavily involved in developing international legal rules, two examples of which I will discuss below. Britain in the 19th century had a reputation as a defender of the sanctity of treaties and was proactive in erecting a system of arbitration.[47] Likewise, US initiative has been crucial to many of the major achievements in international law after World War II, such as the United Nations, the international financial institutions and international human rights law. The same holds true for the post-Cold War world: the extension of the Non-Proliferation Treaty, the Chemical Weapons Convention, the Landmines Convention, the Statute of the International Criminal Court, and the establishment of the WTO are quite unlikely to have succeeded in the same way without the strong support of the US, at least in the initial phases.[48]

This activism is not surprising, given the value international law holds for the exercise of dominance, as discussed in some detail in the last section. Yet this activism is quite selective and is strong on issues where dominant states can expect high gains from legalization. A number of general tendencies seem to emerge in this respect, three of which I shall briefly outline here: a proclivity for the law of international trade, special attention to territorial questions, and a turn to bilateral rather than multilateral instruments.

Freeing International Trade

The activism in the area of international trade is particularly well reflected in US practice. While the US has been relatively reluctant to ratify treaties in the fields of human rights, the environment, and arms control (and has been more reluctant to ratify treaties in general than most other states)[49], it has been proactive in such areas as trade and invest-

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[47] See below, III 3.

[48] See Nico Krisch, "Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy", in *Unilateralism and U.S. Foreign Policy* (David Malone and Yuen Foong Khong, eds.), 2003, 41-70.

[49] See below, IV 3.

ment. Since its rejection of the Havana Charter, the US has increasingly worked towards stronger free trade rules, and it has especially urged the reform of the GATT, with its expansion through GATS and TRIPS as well as its institutionalization in the WTO.[50] More recently, the United States has urged the creation of a Free Trade Area of the Americas, which is to follow the wide-ranging regional market liberalization under NAFTA, and it has concluded a number of bilateral free-trade agreements. A similarly positive stance towards legal instruments prevails with respect to other economic issues. Following European states, in 1981 the United States began to conclude Bilateral Investment Treaties (BITs). While approximately a dozen of these were concluded in the 1980s, their number rose sharply in the 1990s, when thirty-three were concluded.[51] The United States has also urged the conclusion of the Multilateral Agreement on Investment in the framework of the OECD, albeit without success, and is now pressing for inclusion of the issue into the WTO agenda.[52] Likewise, it has continued to enter into tax treaties with other countries, concluding or renegotiating 22 such treaties since January 1993.[53]

Trade appears as an area in which dominant actors have often left their reluctance to enter into international agreements behind. Under Spanish dominance, arguments for a right to trade freely around the world had strong currency, and it was in part upon them that Vitoria based his defense of the right to use force against indigenous peoples in the Americas.[54] During the following centuries, as mercantilism gained ground, global free trade moved to the background. But the colonial empires were built upon the internal freedom of trade, and Europeans accordingly concluded many agreements facilitating trade with native rulers under their influence, especially in the East. The British Empire understood itself as an "empire of free trade", and the British East India Company concluded hundreds of such agreements which initially contained primarily commercial

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[50] See Kimberley Ann Elliott & Gary Clyde Hufbauer, "Ambivalent Multilateralism and the Emerging Backlash: The IMF and the WTO", in *Multilateralism and U.S. Foreign Policy* (Stewart Patrick & Shepard Forman, eds.), 2002, 377-413; Per Magnus Wijkman, "US Trade Policy: Alternative Tacks or Parallel Tracks?", in *Unilateralism and U.S. Foreign Policy*, supra note 48, 251-284.

[51] See *Treaties and International Agreements: The role of the United States Senate* (Congressional Research Service, Library of Congress, ed.), 2001, 266-9.

[52] See Stephen J. Canner, 'The Multilateral Agreement on Investment', *Cornell International Law Journal* 31 (1998), 657-81, at 677-9.

[53] See *Treaties and Other International Agreements*, supra note 51, p. 270.

[54] See Richard Tuck, *The Rights of War and Peace*, 1999, Chapter 2.

clauses, allowing for unrestricted trade from their bases on the coast.[55] Trade was likewise facilitated through the numerous "capitulations" that European countries concluded with rulers around the world, most famously with the Ottoman Empire.[56] A particularly impressive example of this proclivity for freeing trade through international law were the "open door" treaties that Western powers concluded with China, the treaties of Nanking of 1842 and Tientsin of 1858. They were driven by a desire for facilitating trade with isolationist China, but they didn't follow the typical colonial pattern – because none of the Western powers was able to win over China on its own, they had to act in unison.[57] The result were treaties that formally only provided for the free entry of goods and extraterritorial rights in certain ports, but in fact made it possible for the economically far superior West to extend its dominance into China.

In the area of trade, the formal equality of international law rarely appears to pose problems for dominant powers: the smaller the hurdles for trade flows, the easier it is for a superior economy to gain advantages; this even more so if it can shape the rules of the game by excluding certain areas in which it is vulnerable, as for example today in the agricultural sector. To understand this one doesn't have to subscribe to the thesis that imperialism was primarily a result of the need to expand markets, which has been defended by many, and in particular by Marxists.[58] Whatever the driving forces behind a specific empire, its dominance is usually not challenged but reinforced by formally equal rules providing for freer trade with weaker partners.

Modifying Territorial Rules

Another area in which dominant powers typically engage very actively with international law is that of rules on the acquisition of territory. This appears easily explicable: title to territory allows internalizing rule, to exercise power there more freely, and to exclude other states from using it. Moreover, withdrawal from international law – the mere limitation of constraints imposed by it – is hardly an option in this area. The distribution of territory is not just limited by law; it is positively constructed by it: without law, there would be no such concept as territorial title. However, one could imagine an alternative order based not on territorial exclusivities, but on freedom of use; this alternative was

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[55] See Charles H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, 1967, Chapters 5-9.

[56] See below, V 2.

[57] See Martti Koskenniemi, *The Gentle Civilizer of Nations*, 2001, 112.

[58] See only J.A. Hobson, *Imperialism: A Study*, 3rd ed., 1938; Vladimir I. Lenin, *Imperialism: The Highest Stage of Capitalism*, 1916.

posed much more clearly on the high seas. In most cases, though, a dominant power will benefit from the stabilizing and legitimizing effects of the legal attribution of title.

The most impressive case for engagement with that area of the law is certainly Spain and the dispute over the acquisition of territory outside Europe. Having been very successful in the discovery and conquest of non-European territories, Spain sought to consolidate these possessions and was in particular interested in a legal title to them. It had recourse to two arguments in this respect. The first – and relatively weak – relied on an authorization by the Pope, but the second was more modern and centered on discovery as a basis for acquiring territory, coupled with a general denial of indigenous populations' rights to their lands.[59] As is easy to see, the establishment of an international legal rule to this effect would have bestowed far-reaching advantages on Spain, not only over non-European peoples, but also over weaker states whose colonial endeavors had begun later. It was therefore strictly opposed by the British, French and later the Dutch, who argued that only effective occupation could confer title over territory; this would have made it possible for them to benefit from their rise in power. This latter claim eventually prevailed, but it is important to note the central role international law played in Spain's attempt to preserve its dominance.

This is also evident in its policy on the law of the sea.[60] Being the dominant sea power, Spain argued for the *mare clausum*, for the possibility of title to the seas. Combined with its insistence on discovery as the main mechanism to confer title, this would have allowed Spain to exercise sovereign rights over much of the high seas, to exclude other states from them as it wanted, and to consolidate its position by these means. Here again, Spain eventually failed, but its main thesis was later defended by the then-dominant sea power, Britain, and was replaced by the principle of *mare liberum* only in the 18th century. However, here too we should note the importance of international law as a tool for locking in a certain order, for preserving it against other, rising powers. Territorial and maritime titles are, because of their exclusive character, especially apt for this purpose.

Great power activism in this area continued throughout the 19th century, when European powers took care to ensure that only they enjoyed international legal personality, and thus the possibility of title to territory; non-Europeans were mostly excluded and their lands the object of facile acquisition. I will come back to that point later.[61] Moreover, Britain was eager to maintain its dominance in Africa over other European powers, and it thus

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[59] See Grewe, supra note 8, 294; Tuck, supra note 54, Chapter 2.

[60] See Grewe, supra note 8, 300-322.

[61] See below, IV 1; Koskenniemi, supra note 57, 121-127.

attempted to keep the conditions of acquiring territory as undefined as possible, so as to make the exercise of power in their application easier. These efforts succeeded at the Berlin Conference of 1884-1885, and they played out again, for example, in the Fashoda crisis. Here the British successfully used troops to assert their claim, based on a sphere of influence, against the French one, which was grounded in effective occupation, a principle probably more defensible at the time but already sufficiently weakened to be replaced, for all practical purposes, soon thereafter.[62]

In the 20th century, decolonization has significantly reduced the importance of the acquisition of territory. Rule over distant territories has become more informal, and it uses partial inroads into the sovereignty of weaker states instead of the complete internalization that is typical of the direct exercise of territorial sovereignty of annexed territories. Some of these contemporary forms, such as extraterritorial jurisdiction and economic conditionality, will be discussed in greater detail in part V.

Utilizing Bilateral Treaties

Our theoretical discussion in part II had led me to assume that dominant states would prefer acting through law-making procedures that are less egalitarian than those of multilateral conferences, and would in particular prefer bilateral to multilateral treaties. For the US, this indeed appears to be the case. As has been pointed out above, the United States favors legal regulation in trade and investment, and it is also active in concluding treaties on tax cooperation and legal assistance.[63] However, in these areas, except for trade, bilateral treaties predominate, and only few universal treaties exist, and on investment matters, the US has started to press for WTO negotiations only after it recognized the limitations of bilateral treaties and negotiations within the OECD failed.

The US also privileges bilateral treaties on the domestic level. They are almost the only instruments to be granted self-executing character and thus to be enforceable in U.S. courts; since the end of the Second World War, this status has been conferred mainly on treaties of Friendship, Commerce, and Navigation (FCN). Bilateral Investment Treaties (BIT) approach this model, in providing for the enforcement in domestic courts of international arbitral awards sought by private parties.[64] Both these categories (like Chapter 11 of NAFTA, whose enforcement mechanism resembles that of the BITs) are primarily concerned with investment, an area in which the strict enforcement of treaty rules would most

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[62] Koskenniemi, supra note 57, 121-127, 152-155.

[63] See Krisch, supra note 48, 49-50.

[64] José E. Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory", *European Journal of International Law* 12 (2001), 183-246, at 195-8.

seem to benefit U.S. investors abroad, since the United States already adheres to similar domestic rules. These specific benefits, coupled with the minimal risk of enforcement against itself, seem to have led the United States to grant these bilateral treaties their privileged status. But the turn to bilateral treaties is not limited to these fields. It has been most obvious recently in the US efforts to conclude bilateral agreements with as many states as possible to limit the risk of US citizens being brought before the International Criminal Court.[65] Here, what the United States couldn't achieve through multilateral negotiations will now be the result of a web of bilateral treaties.

This preference for bilateralism is easily explicable. Bilateral negotiations are far more likely to be influenced by the superior power of one party than are multilateral negotiations, in which other states can unite against a dominant one.[66] And they are a far better vehicle to create exceptional rules for powerful states. In multilateral treaties particular exceptions for certain states are always suspicious and in need of justification because they damage the coherence of the instrument and create open inequality. Bilateral treaties don't pose such problems: because of their more direct reciprocity, they usually create an inequality of rights and obligations vis-à-vis other states, and this is generally accepted. Thus the creation of a particular regime for one state will usually be effected more easily through bilateral treaties. This is also reflected in a historical precedent that I shall discuss in greater detail below[67]: Britain's attempt to establish a right to search and seizure for slave trade on the high seas in the early 19th century. From 1817 to 1822, several international conferences were dedicated to this issue, but none of them produced palpable results. Britain then gave up its efforts to create a general solution and instead pursued its project through bilateral treaties, and with far greater success.[68] Bilateral treaties are a much easier tool for dominant states than multilateral ones.

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[65] See Jean Galbraith, "The Bush Administration's Response to the International Criminal Court" *Berkeley Journal of International Law* 21 (2003), 683-702.

[66] See also Abbott & Snidal, supra note 41, 449, note 68. On the specific reasons for the conclusion of Bilateral Investment Treaties, see Andrew T. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", *Virginia Journal of International Law* 38 (1998), 639-88.

[67] See below, IV 2.

[68] Grewe, supra note 8, 657-659.

2. Flexibilizing Legal Change: The Deformalization of International Law-Making

Change in international law today is relatively slow, and it requires widespread participation of states, either through the conclusion of treaties or the formation of custom. For a dominant state, such a process would appear as overly burdensome, compared to other ways of achieving its goals, and it will likely push for law-making procedures which are more flexible and allow it to better control outcomes. One typical way of achieving this is the deformalization of international law-making, the replacement of formal criteria for determining the law by more substantive ones which usually reflect the universalist principles underlying a hegemon's foreign policy. Such a turn to substantive criteria leads to far-reaching change with a high degree of control: since the criteria are usually very vague, their concrete application will involve much discretion and thus allows for a significantly greater exercise of power than more formalist ones.

The most impressive case of this kind is probably the Napoleonic empire in the aftermath of the French revolution, in which expansionism matched the overthrow of the traditional formal foundations of international law.[69] The French revolution set out to reframe these foundations according to the ideas that had guided it domestically. Their very universality militated for the transfer to the international sphere, and thus liberty, popular sovereignty, and the idea of the nation were to become central for international law as well. This had the most far-reaching effects in the area of the use of force, with an attempt to strengthen the principle of non-intervention significantly. The envisaged system was, however, bifurcated: non-intervention was to protect only those states that were ordered according to the revolutionary principles, while others could be invaded in order to establish just governments. France thus claimed the illegality of monarchic attempts to rid it of its revolutionary achievements, but it also asserted a right to come to the aid of other peoples fighting for their liberty and for popular sovereignty – a right that came to serve as the basis for the conquests of the next two decades. The turn to substantive principles as the basis of international law made it possible to rewrite its rules in a way particularly beneficial for the nation that dominated much of continental Europe until 1814.

Similar tendencies reappear in British policy throughout the 19th century, but they were far less pronounced. As I have mentioned, British foreign policy defended the sanctity of treaties and the expansion of arbitral mechanisms more than other nations at the

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[69] See Armstrong, supra note 34, Chapters 3 and 6; Mlada Bukovansky, *Legitimacy and Power Politics*, 2002, Chapter 5; Grewe, supra note 8, 485-498.

time. However, it was also Britain and British scholars that were at the forefront of the shift from the international law of Christian states to that of "civilized" nations. The introduction of civilization as a key term of international law allowed for far greater flexibility in many respects. On the one hand, it allowed for a quite selective policy on inclusion and exclusion; the lines between "civilized", "half-civilized" and "barbaric" communities were not precise and could be redrawn according to political expediency. The latter was shown by the US and British success in recognizing the Latin American states in the 1820s, and also in the admission of the Ottoman Empire to the "system of civilized states" in 1856. The notion of civilization was also instrumental in effecting changes in substantive international law, and especially in the area of the use of force. A right to humanitarian intervention became widely recognized[70]: it was used extensively by Britain and corresponded to the self-understanding of Europe as a community of "civilized nations", distinct from the rest of the world. Even more closely connected to it was the prohibition of the slave trade that British policy fought so hard to establish and enforce.[71] The Vienna Declaration on the Abolition of the Slave Trade of 1815 named the slave trade as being "considered by just and enlightened men … as repugnant to the principles of humanity and universal morality", which "the public voice, in all civilized countries" called aloud to suppress.[72] The slave trade thus appeared increasingly as a question of interest to all of humanity, and on this basis Britain could claim that it was analogous to piracy and could be suppressed by the same mechanisms, namely the right to visit and search on the high seas. This argument eventually failed, even before British courts[73], and Britain had to pursue the issue through treaties. Yet the destabilization of the foundations of international law that the introduction of "civilization" as a key element had brought with it, was what made this far-reaching argument possible, and it allowed Britain to make legal *bona fide* claims in support of its foreign policy.

The flexibilization of law-making processes is also a central component of late 20th century international law under the dominance of the US and its Western allies. Formal sources have diminished in importance, while "interests of the international community" or humanitarian exigencies have increasingly gained status as elements of the development of new international legal norms.[74] The most striking example of this approach in-

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[70] See in greater detail below, IV 2.

[71] See in greater detail below, IV 2.

[72] Wilhelm G. Grewe, *The Epochs of International Law* (Michael Byers, trans.), 2000, 554.

[73] See Grewe, supra note 8, 662-663.

[74] See in general Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht*, 2001.

volves the Kosovo intervention of 1999. The US justified the use of force by NATO mainly by reference to the "humanitarian catastrophe" in Kosovo, and thereby asserted a right deriving from noble values rather than any process of law creation. Moreover, NATO states claimed to act in the interest and on behalf of the "international community" – a community with a shape so unclear and interests so ill-defined that little restraint is posed on action in its name.[75] These arguments can hardly be fitted into traditional theories of legal sources[76], and it can indeed be said that the Kosovo case marked a "turn to ethics" in international law – a turn that may, however, characterize an order in which "what counts as law, or humanitarianism, or morality, is decided with conclusive authority by the sensibilities of the Western prince".[77]

Kosovo was not a singular case: the United States has made similar arguments to justify continued military action against Iraq after the end of the Gulf War. In 1991-2, it invoked the necessity of protecting the civilian population to justify the establishment, with the United Kingdom and France, of no-fly zones in northern and southern Iraq. And for its air strikes against Iraq in the end of 1998, the United States referred to the need for prevention of further aggression. In both these cases, the United States depicted its actions as furthering community objectives, by citing UN Security Council resolutions which, though not authorizing military action, had determined that Iraqi behavior posed a threat to international peace and security.[78] In a similar vein, the President George W. Bush claimed that the U.S. military response to the terrorist attacks of September 2001 was supported by the "collective will of the world"[79], and that the wars on terrorism and on Iraq were fought for "civilization" against its enemies.[80]

The recourse to such arguments reminiscent of natural law is, of course, not new. It did not entirely disappear even in the most positivist times, and in the US, has taken a prominent place, for example, in the approach of the New Haven School. This was already reflected in US policy during the Cold War: in 1968-69, the head of the US delega-

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[75] See Nico Krisch "Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council", *Max Planck Yearbook of United Nations Law* 3 (1999), 59-103.

[76] See Michael Byers & Simon Chesterman, "Changing the rules about rules? Unilateral humanitarian intervention and the future of international law", in *Humanitarian Intervention* (J.L. Holzgrefe & Robert O. Keohane, eds.), 2003, 177-203.

[77] Martti Koskenniemi, "'The Lady doth protest too much': Kosovo, and the turn to ethics in international law", *Modern Law Review* 65 (2002), 159-175, at 171.

[78] See Krisch, supra note 75.

[79] See the text of his speech, *The New York Times*, October 8, 2001.

[80] See the text of his speech, *The New York Times*, September 24, 2003.

tion to the Vienna Conference on the Law of Treaties, Myres McDougal, proposed that a purposive approach be adopted as the preferred method of interpretation in international law. This approach would have emphasized an examination of the common will of the parties: a common will that would have evolved over time and would have been very receptive to the introduction of value judgments by the interpreter.[81] At the time, this proposal was rejected, but since the end of the ideological divide with the Soviet Union, similar arguments have become easier to use, and they have resurfaced not only with respect to the use of force, but also in other instances – for example, in the extension of individual criminal responsibility in internal conflicts by the International Criminal Tribunal for the Former Yugoslavia, which had been strongly supported by the US[82]; or in the restriction of the immunity of former heads of states on grounds of human rights that other Western states have defended.[83] Similar arguments have played a role in the renewed application of the Alien Tort Claims Act to violations of international law committed abroad: in its *Filartiga v. Peña-Irala* opinion, a federal appeals court held that such an extension was justified because "the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind"[84]. In 1998, a federal district court used the same language to justify the restriction of sovereign immunity for states deemed by the US State Department to be sponsors of terrorism, pursuant to a recent legislative amendment to the same effect.[85]

The US, supported (and sometimes surpassed) by American scholars, has also pushed for other changes in the law-making process that would make that process more amenable to the influence of power; this is most clearly reflected in an emphasis on physical acts rather than words, or resolutions, in the development of customary international law.[86]

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[81] See Byers & Chesterman, supra note 76, 184-185.

[82] See ICTY, *Tadic (Jurisdiction)*, Judgment of Oct. 2, 1995, *International Legal Materials* 35 (1996), 32, at 68, para. 119 ("What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."). For the US position, see the statement of the US representative in the Security Council, UN Doc. S/PV.3217, May 25, 1993, p. 14-15.

[83] See, in particular, the first decision of the UK House of Lords, *International Legal Materials* 37 (1998), pp. 1302, 1333. For further information and the defense of a similar position, see Bianchi, "Immunity versus Human Rights".

[84] *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). See also Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Peña-Irala*", *Harvard International Law Journal* 22 (1981), 53-113, at 60-2.

[85] *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 23 (D.D.C. 1998). See also the U.S. Anti-Terrorism and Effective Death Penalty Act of 1996, Public Law 104-132, Section 221, April 24, 1996, partly reproduced in *International Legal Materials* 36 (1997), 759-60.

[86] See Byers & Chesterman, supra note 76, 187-189.

Just such an effect would also result from the introduction of a category of "exceptional illegality": again with respect to Kosovo, some Western states, including the US, and a number of scholars argued that the use of force should have no precedential value and should remain an exceptional case.[87] This would, however, allow for the ultimate flexibilization of the legal order: when or when not an exception would be admissible would be largely up to the powerful to decide, which might lead to a situation where the powerful can make use of a right and the weak cannot.

Flexibilization does, however, not always imply a push for change. The resulting methodological indeterminacy allows a dominant state to oppose – on traditional grounds – inconvenient changes, even though these changes would further the values otherwise used to justify transformation. For example, the US has strongly opposed the particular regime of reservations that the UN Human Rights Committee has favoured for the Covenant on Civil and Political Rights as particularly effective for the protection of human rights.[88] Likewise, the US resists the extension of the jurisdiction of the International Criminal Court to its citizens, even though this extension already finds a strong basis in customary law and appears, in general, to further human rights goals by reducing impunity.[89] And the US has fervently argued against the exercise of extraterritorial jurisdiction by Belgium over persons accused of war crimes and crimes against humanity.[90] The deformalization of international law-making allows for change, but also allows a dominant state to control the instances of change on a highly selective basis.

3. Creating Law for Others: the Turn to Hierarchical Structures

Despite the positive use great powers have always made of international law, and despite their successes in flexibilizing and shaping it, the standard structure of international legal rules has always posed obstacles to great power politics. The central obstacle, as discussed in part II above, is the relatively egalitarian character of international law: the right of all states to participate in law-making, and their equal subjection to universal norms.[91] We

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[87] See Byers & Chesterman, supra note 76, 199.

[88] See Rosemary Foot, "Credibility at Stake: Domestic Supremacy in U.S. Human Rights Policy", in *Unilateralism and U.S. Foreign Policy*, supra note 48, 95-115; Catherine Redgwell, "US reservations to human rights treaties: all for one and none for all?", in *United States Hegemony and the Foundations of International Law*, supra note 38, 392-415.

[89] See Georg Nolte, "The United States and the International Criminal Court", in *Unilateralism and U.S. Foreign Policy*, supra note 48, 71-93.

[90] See Richard Bernstein, "Belgium Rethinks Its Prosecutorial Zeal", *New York Times*, 01.04.2003, A8.

[91] See above, II 4.

can therefore expect an uneasiness of great powers with this form of law, and attempts by them to modify it: to create international legal structures that deviate from the horizontal model and embody hierarchies. Such attempts can indeed be traced back to antiquity: Athens based its empire in the 5th century BC on alliances and treaties that gave it a dominant position, and Rome had its "maiestas" recognized in the treaties it concluded with defeated powers.[92] But international law at the time (if we can call it that) was in any event much less egalitarian, and more recent examples of legal hierarchies are of much greater import for assessing the role and function of modern international law.

Modern Empires and the Subjection of Non-European Peoples

In modern empires, we can observe some attempts at using hierarchical "international institutions" similar to those used by Athens. Spain relied, in part, on papal authority to justify its conquests outside Europe, especially at a time when the Pope himself was Spanish.[93] And Britain made use, for example, of an authorization by the Congress of Vienna to enforce the decisions of the Congress against piracy in the Mediterranean.[94] The whole system of the Holy Alliance and the Concert of Europe that dominated Europe during the decades after 1815 was, of course, hierarchical in nature: it allowed the great powers of the time to regulate collectively the affairs of the continent, without much participation by smaller states, even if they were directly affected by the decisions.

The most openly hierarchical instruments used by modern empires were, however, treaties with non-European rulers. This is particularly evident in the example of the British Empire with its emphasis on indirect rule, which long maintained its client states as independent entities; the history of the British Empire in India is a striking example. The British East India Company established itself in India, alongside similar companies of other European powers, especially France, and mostly on the basis of admission by the local rulers, many of whom were part of the Moghul Empire. The relationship with these princes was often regulated by treaties, initially of a commercial nature, later – following the rise in power of the Company – with stronger political elements.[95] Eventually, after the dissolution of the East India Company and the succession by the British Crown, the Crown had treaty relationships with 584 Indian states.[96] The treaties recognized the for-

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[92] See Bederman, supra note 35, Chapter 5.

[93] See supra note 59.

[94] Grewe, supra note 8, 649.

[95] See Alexandrowicz, supra note 55, 172.

[96] Jenny F. Poleman, "The Indian Princes' Treaty Rights", *Far Eastern Survey* 11 (1942), 196-201, at 197.

mal independence of these states and many also maintained a formal symmetry of relations, even though the asymmetry in power became increasingly obvious. Others, however, required a far-reaching submission of the Indian rulers to the East India Company. For example, in a treaty of 1803, a number of them promised to pay tributes and to "always hold [themselves] in submission and loyal obedience to the Honorable East India Company".[97] The flexibility of the treaty as an instrument thus allowed adapting it to changing power relations and needs, and it could embody technical provisions as well as the creation of protectorates or far-reaching submission to a European government.[98] The practice of other states and not only in India but also in Africa was relatively similar in that respect.[99] In the scramble for Africa in the 19th century, practically all acquisition of territory by European powers was accompanied by a treaty with native rulers.[100] There has been much debate on whether these treaties were indeed part of international law, especially given the limitation of sovereignty that occurred in the 19th century.[101] However, the formal categorization matters little for our purposes. The mere fact that European powers resorted to these treaties reflects their usefulness for the governance of empires – maintaining the local rulers in client states was a way of reducing administrative costs and enhancing the legitimacy of dominance; and the use of treaties for this purpose brought clarity on the precise relationship and often a much-sought recognition and stabilization for the local prince himself.[102] In the context of colonial competition, they also – and often primarily – served to secure the rights of one European state as against another. Thus there was no doubt that treaties were useful instruments for the building of empire; what was in doubt was only whether categorizing them as international law would imply too much of a recognition of the treaty partner as equal – as equally sovereign, equally civilized.[103] Yet this only reflects the efforts of imperial actors to break out of the classical, horizontal and somewhat egalitarian structures of international law, and to move toward a more hierarchical system. The more dubious the international law character of the relationship with non-European peoples was, the easier it was to erect hierarchical structures to govern it.

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[97] Poleman, supra note 96, 199.

[98] See Alexandrowicz, supra note 55, ch. IX.

[99] See Charles H. Alexandrowicz, *The European-African Confrontation*, 1973, ch. V.

[100] Koskenniemi, supra note 57, 140.

[101] See Koskenniemi, supra note 57, 127-132, 136-143; Alexandrowicz, supra note 99, 94-105. See also below, IV 1.

[102] See Michael W. Doyle, *Empires*, 1986, 343.

[103] Koskenniemi, supra note 57.

The United States: Hierarchy by Other Means

In the 20th century, international law has undergone transformations that make open hierarchies as they existed in former times difficult to conceive. Decolonization in particular has made it all but impossible to formally subject states in a way similar to that used by Britain only a century before. Equality is today far more important in international law than in any earlier period. At the same time, international affairs have been increasingly ordered by law – they have been "legalized" – and there is today far less space for politics and the exercise of power outside the law than there was previously. For a great power, the option to turn away from international law into the sphere of politics is relatively limited today; the possibility to separate a sphere of equality (law) from a sphere of inequality (politics) has practically disappeared. As a result, the pressure to take account of factual inequalities within the law has risen: powerful states will hardly content themselves with "equality before the law" – but because of the stronger place of equality in international law, they also face great difficulties in transforming their factual superiority into law.[104] Consequently, contemporary attempts by the US to establish stronger hierarchies in international law are very numerous, but they are for the most part less open than those I have discussed so far. They take three general forms: legal exceptionalism, hierarchical lawmaking, and exclusive informalism.

Legal exceptionalism. As I have mentioned, the US has been a very active force behind many recent developments in international law, and many important treaties would probably not have been concluded without it. Yet it also has a record of great reluctance to ratify treaties. I will discuss it below in greater detail[105], but well-known examples abound, from the Comprehensive Test Ban Treaty to the Kyoto Protocol. These tendencies seem to be quite contradictory, but they are reconcilable if we recognize that the activism has not been matched by a corresponding readiness to accept new obligations flowing from its results – the US has assumed a dominant role in negotiations on many new international legal instruments without eventually ratifying them. Examples include the Statute of the ICC, the Kyoto Protocol, and the Ban on Landmines; in all these cases, the United States helped create law for others but not for itself. A similar recent example is that of the Biosafety Protocol to the Convention on Biological Diversity (CBD). As the United States had not become a party to the CBD, it was formally not entitled to participate in the negotiations on the Protocol. Endowed only with observer status in the negotiations, it was nevertheless part of the important "Miami Group" and able to exert strong

[104] For a more detailed argument, see Krisch, supra note 38, 149-156.

[105] See below, IV 3.

influence on the resulting agreement, as reflected, for example, in provisions on the scope of the agreement, on the role of the precautionary principle, and on the protocol's relationship with other treaties.[106] In all these cases, the US appears as a law-maker, but not as a subject of the law – it assumes an exceptionalist position and is above, not under the law.

Another way to achieve a similar result is the above-mentioned reliance on reservations, which in the case of the US sometimes amounts to essentially voiding the obligations assumed under a given instrument. Sometimes, though, neither abstention from a treaty, nor the practice of reservations, suffice for the US to elude new obligations. Thus, for example, the jurisdiction of the ICC will extend to U.S. citizens even if the United States is not a party to the Statute – a result that the United States worked hard, but failed, to prevent during the negotiations.[107] In this case, though, the US has secured an exceptionalist position through the Security Council as well as a web of bilateral agreements prohibiting the extradition of certain US citizens to the Court.[108]

Yet it has not always been necessary for the United States to exempt itself from obligations it expects others to obey. In some cases, it has also succeeded in incorporating a special set of rights and obligations into a treaty itself; the Non-Proliferation Treaty is certainly the most prominent example. However, similar attempts in recent years, especially those aimed at a special exemption in the Landmine Convention and at a stronger role for the Security Council in the ICC Statute, have met with powerful resistance and have eventually failed. The multilateral process, through which most new legal regimes are today created, is inimical to the manifest transformation of factual dominance into law.

Hierarchical Law-Making. Due to the difficulties posed by the standard forms of international law-making, and in particular by multilateral negotiations, the US has increasingly sought to legislate through institutions that afford it a privileged position, and in particular through the UN Security Council. The US has increasingly made use of the Council in the last decade, which has provoked serious charges that the Council serves as a tool of US foreign policy rather than as a truly international organ.[109] In the course of this development, the Security Council has significantly broadened its powers: not only has it, as initially conceived, taken forceful measures to stop inter-state war, it has also extended

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[106] See See Robert Falkner, 'Regulating biotech trade: the Cartagena Protocol on Biosafety', *International Affairs* 76 (2000), 299-313.

[107] See Nolte, supra note 89.

[108] See supra note 65.

[109] See David D. Caron, "The Legitimacy of the Collective Authority of the Security Council', *American Journal of International Law* 97 (1993), 552-588, at 562-5.

the reach of its mandatory measures to internal conflicts and humanitarian emergencies. Moreover, it has established itself as a law-enforcement organ in matters of peace and security[110], and even engaged in far-reaching exercises in law-making. It has, in particular, broadened the scope of economic sanctions so as to include the long-term regulation of matters relating to security, as most recently with the far-reaching quasi-legislative measures on the financing of terrorism, the criminalization of terrorist acts and the tightening of border controls.[111] Moreover, the Council has enacted binding measures for the settlement of disputes, for example through the demarcation of the border between Iraq and Kuwait. And it has created several important institutions, such as the UN Compensation Commission for Iraq, the criminal tribunals for the Former Yugoslavia and Rwanda, and the territorial administrations in Kosovo and East Timor.[112] The criminal tribunals are a particularly good example of the United States' privileged use of the Security Council as opposed to conventional forms of international law-making: the US pressed for the establishment of these *ad hoc* tribunals by the Council, but rejected proposals to found the ICTY on a conventional basis or through the General Assembly and, eventually, to establish the International Criminal Court by way of treaty. However, the US has not only strengthened the Security Council. On the contrary, it has circumvented the Council whenever negotiations in the UN threatened to pose obstacles to the policy options preferred by the US.[113] Thus the collective security system of the UN has been strengthened *and* weakened by the US – it has in effect been instrumentalized, which the US is because of its veto power in an outstanding position to do.

Hierarchical law-making is not confined to the Security Council. The US enjoys, because of its contributions, privileged voting rights also in the Bretton Woods institutions, and these institutions, too, have enjoyed special regard by the US, far more than, for example, UNCTAD. During the 1990s, they have increasingly served to develop numerous conditions for countries in need of loans. The World Bank has begun to focus on "good governance", and through this means has more than ever influenced the internal structure

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[110] Cf. Vera Gowland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", *International and Comparative Law Quarterly* 43 (1994), 55-98, at 61-90.

[111] Security Council Resolution 1373 (2001) of Sept. 28, 2001.

[112] See Jochen A. Frowein & Nico Krisch, "Introduction to Chapter VII", in *The Charter of the United Nations: A Commentary* (Bruno Simma et al., eds.), 2nd ed., 2002, 701-716, at 707-710.

[113] See David M. Malone, "US-UN Relations in the UN Security Council in the Post-Cold War Era", in *US Hegemony and International Organizations*, supra note 38, 73-91; on the particular example of the fight against terrorism, see Nico Krisch, "The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council", in *Terrorism as a Challenge for National and International Law* (C. Walter et al., eds.), forthcoming, 2004.

of developing countries. States seeking funding by the World Bank must now in general prove progress in the establishment of liberal-democratic institutions.[114] Likewise, the IMF has started to pay greater attention to the internal structure of receiving countries and has required far-reaching structural transformations of their domestic institutions, most notably after the Asian financial crisis.[115] Western (and particular US) dominance in these institutions makes it possible to use them as a convenient substitute for unilateral aid; the (limited) loss in autonomy in the formulation of policy is usually outweighed by the comparatively greater legitimacy and effectiveness of action provided by the multilateral framework as well as by the financial burden-sharing usually involved in it. Through these institutions, Western states exercise informal but far-reaching law-making authority which sometimes resembles that which existed under the Mandate system of the League of Nations.[116]

Exclusive Informalism. The case of the Bretton Woods institutions could also be categorized as yet another form of a turn to hierarchy: the use of exclusive fora for the creation of informal rules. In most of the examples in this group, specific influence has not been conferred by a legal instrument, but is the result of the exclusion from decision-making of the states targeted by the decisions. The OECD is the most prominent case in point.[117] It unites the 30 economically most advanced countries, but does not restrict its activities to this group of states. Instead, it establishes standards that, though not legally binding, are to be observed by third states if they desire access to OECD markets or other privileges. For example, during the 1990s the OECD negotiated a Multilateral Agreement on Investment (MAI) without the participation of developing states, although the main purpose of the instrument presumably was to harmonize rules for foreign investment in precisely those countries.[118] Although this effort failed, in part due to protests against the exclusionary

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[114] See Michelle Miller-Adams, *The World Bank: New Agendas in a Changing World*, 1999, 100-33.

[115] See, e.g., Eva Riesenhuber, *The International Monetary Fund under Constraint*, 2001, 36-59; Elliott & Hufbauer, supra note 50, 382-386.

[116] See Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World", *New York University Journal of International Law and Politics* 32 (2000), 243-290, at 246. See also David P. Fidler, "A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization", *Texas International Law Journal* 35 (2000), 387-413, at 398-408.

[117] See James E. Salzman, "Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development", *Michigan Journal of International Law* 21 (2001), 769-848.

[118] See the revealing explanation of the choice of the OECD instead of the WTO as a forum of negotiations by Canner, supra note 52, 665-6. See also Edward Kwakwa, "Regulating the

character of the decision-making procedure, many other, politically less charged efforts succeeded. For example, the OECD has set up the Financial Action Task Force on Money Laundering (FATF), which has developed an impressive body of rules through its forty recommendations of 1990, as revised in 1996.[119] Though formulated only by OECD members, the FATF recommendations purport to apply worldwide and, accordingly, the FATF monitors their observance by third states. In 2001, for example, seventeen non-OECD countries or territories were listed as "non-cooperative", and the FATF recommended countermeasures against three of them.[120] Due to the impact of the recommendations, third states have even set up specific mechanisms to implement the FATF measures. For example, Caribbean states have created the Caribbean Financial Action Task Force, the primary purpose of which is to "endorse and implement the FATF Forty Recommendations"; an Asia/Pacific Group on Money Laundering as well as an Eastern and Southern Africa Anti-Money Laundering Group have been established for the same purpose.[121] The OECD has thus, albeit in a legally non-binding way, instituted a highly sophisticated and institutionalised framework for coping with money laundering – a framework designed for third states.[122] But the phenomenon of informal regulation of third states' affairs is not restricted to the OECD: in other fora as well, informal networks have been established to deal with global problems. Some of them, for example the Basle Committee on Banking Supervision, are deliberately restricted to the world's most powerful states. Others are less exclusive but, as one of their most ardent defenders admits, their informality and flexibility nevertheless "privileges the expertise and superior resources of US government institutions in many ways".[123] In the absence of legally binding force, standards set in such an informal way are not subject to the restrictions sovereign equality places on the develop-

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International Economy: What Role for the State?", in *The Role of Law in International Politics* (Michael Byers, ed.), 2000, 227-246, at 234-6.

[119] See http://www1.oecd.org/fatf/40Recs_en.htm (visited on February 26, 2004).

[120] See http://www1.oecd.org/fatf/pdf/NCCT2001_en.pdf (visited on February 26, 2004). The use of the term "countermeasure" by the FATF even implies the violation of legal obligations by the non-member states.

[121] On these groups, see http://www1.oecd.org/fatf/Members_en.htm (visited on February 26, 2004).

[122] See Beth Simmons, "International Efforts against Money Laundering", in *Commitment and Compliance*, supra note 45, 244-263, at 255-60.

[123] Anne-Marie Slaughter, "Governing the Global Economy through Government Networks", in *The Role of Law in International Politics*, supra note 118, 177-205, at 205.

ment of international law.[124] Still, many of them have proved to be just as effective as binding rules[125], and they are accordingly far superior as a tool of hierarchy.

IV. Withdrawal: Limiting the Constraining Effects of International Law

International law's resistance to the pursuit of their policies makes hegemons not only choose specific forms of international law and press for changes in the international legal structure; they also drive hegemons outside of international law as such. In order to avoid the egalitarian processes and constraining effects of international law, they opt for alternative means through which they can better bring their dominance to bear. Oftentimes, this implies efforts at repelling the reach of international law in order to gain greater freedom of action. Withdrawal thus has two general components: a defensive one, consisting in the rejection of immediate legal obligations, and an expansive one, broadening the space for own action by the use of alternative forms. Both are closely intertwined, and they have historically been most clearly expressed in four forms: attempts to limit the reach of international law; challenges to the regulation of the use of force; a reluctance to enter into multilateral treaties; and a disinclination to submit to adjudicative or enforcement mechanisms.

1. Limiting the Reach of International Law

The most typical imperial policy to limit the reach of international law, and to thereby exclude some relationships out of its scope, is the formalization of the empire. The Roman Empire provides the classical example: Rome had long dealt with many of the dependent states, especially those in Greece and the East, on the basis of formal independence and often in the form of treaties. When this structure became too burdensome and greater control became necessary – especially to counter rebellions – Rome abandoned the international approach and integrated the former allies as provinces into its formal empire, which allowed for open and direct hierarchical rule from the metropolis.[126] International law was replaced by domestic law, and the status of the provinces became the domain of

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[124] See also the remark of Slaughter, supra note 123, 199 ("[G]overnment networks can be seen as a way of avoiding the universality of international organizations and the cumbersome formality of their procedures that is typically designed to ensure some measure of equality of participation.").

[125] See supra note 45.

[126] See Doyle, supra note 102, ch. 4; Robert M. Kallet-Marx, *Hegemony to Empire*, ch. 7.

constitutional law.[127] The development of the modern European empires was very similar. Especially in the East, European powers initially dealt with independent entities and concluded agreements with them, though the status of these agreements in international law was doubtful for several reasons. Britain and its trading companies alone concluded hundreds of agreements with Indian rulers.[128] In the 19th century, though, dissatisfied with the limitations this approach brought about – either because the political structures broke down, because influence could not be exercised smoothly enough, or because European competitors needed to be excluded – these entities were formally integrated into the empires as colonies.[129]

I will return to this formalization of empires, and especially to the turn to domestic law it brought about[130], but this approach was by far not the only one to limit the reach of international law in the relations of great powers with weaker states. Spain, for example, at the height of its sea dominance in the 16th century, was able to achieve an agreement with the weaker European states that their treaties establishing peace in Europe were without effect in their competition for non-European territories. "No peace beyond the line" was the principle thus created, allowing for the unfettered exercise of power beyond that line and giving Spain ample opportunities to bring its sea power to bear, to control the oceans and to conquer territory.[131]

The most important example of the general tendency to limit the reach of international law was, however, the direct exclusion of certain entities from the international legal order – the creation of "outlaws".[132] Such attempts were made in the 16th and 17th centuries with respect to non-European peoples, but they had their greatest effect in the 19th century, when positivism replaced the natural law system that, because of its focus on individuals, had mostly been held to be valid on a universal scale. The turn to positivism and voluntarism brought with it an emphasis on legal personality, and thus allowed for distinctions in the recognition practice. This made it possible to elevate the distinction between civilized and non-civilized states to a formal criterion for membership in the international legal community. Most non-European countries were treated as non-sovereign or semi-sovereign, as was for example Japan. As a result, the relations of inequality that prevailed

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[127] See Andrew Lintott, *Imperium Romanum*, 1993, 28-32, for some of the legal forms involved.

[128] See supra note 96.

[129] See Doyle, supra note 102, part II.

[130] See below, V 1.

[131] See Grewe, supra note 8, 181-193.

[132] See Anghie, supra note 7.

between Europeans and the rest of the world were no longer subject to international law, and whatever rules were established among the European powers had little effect outside Europe. International law became the law among (relatively) equals, and the most unequal relationships were governed by politics and power, in part also by the domestic law of the empires.

In the 20th century, the international legal order became, through decolonization, more inclusive than it had ever been before, but we currently witness again tendencies to limit its reach. The most far-reaching of these is the introduction of democracy as a criterion for the legitimacy of governments into international law.[133] In some contexts, especially in some regional organizations, this has already led to an exclusion of non-democratically elected leaders from international conferences, and the recognition practice of Western states has also increasingly emphasized the importance of democratic credentials. But while the practice of the US is still unsteady, American international lawyers have taken the issue much further and have argued for a far-reaching limitation of the protection that sovereignty affords non-democratic states, partly extending to rights of intervention in such countries.[134] Others have defended a general distinction between liberal and non-liberal states in international law[135], or, with a much stronger normative component, for an international legal order centered on liberal states, with some non-liberal, "well-ordered" states deserving toleration, and outlaw regimes with only few remaining rights.[136]

To a limited extent, such distinctions have been formalized in US foreign policy. Since the mid-1980s, the US has developed a category of outlaw states under varying titles – reaching from "terrorist states" and "state sponsors of terrorism" over "rogue states" and "states of concern" to the more recent "axis of evil".[137] Initially, these notions mainly served political purposes and as criteria for economic sanctions, but since 1996 states designated as "state sponsors of terrorism" have also lost their immunity before US courts and have thus legally become second-class states: they no longer enjoy the full protection of sovereign states but can be subjected to the exercise of US jurisdiction.[138] With the 2002

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[133] See Gerry Simpson, "Two Liberalisms", *European Journal of International Law* 12 (2001), 537-571.

[134] See only W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law* 84 (1990), 866-876.

[135] Anne-Marie Slaughter, "International Law in a World of Liberal States", *European Journal of International Law* 6 (1995), 503-538.

[136] John Rawls, *The Law of Peoples*, 1999.

[137] See Petra Minnerop, "Legal Status of State Sponsors of Terrorism in US Law", in *Terrorism as a Challenge for National and International Law*, supra note 113.

[138] See supra note 85.

National Security Strategy of the US, rogue states – now the "axis of evil" – have been further stripped of protection. Perceived as the main threat to the national security of the United States, they have become the potential objects of pre-emptive self-defense, and given the vague definition of the limits of this concept, are essentially denied the protection of the prohibition on the use of force in international law.[139] Similarly, terrorists and "unlawful combatants" are stripped of many of the rights they enjoy under international human rights and humanitarian law.[140] In a manner less open and sweeping than the formalization of empire or the outright denial of sovereignty, the US has thus undertaken attempts to create different categories of states and individuals and to limit the reach of international law to some of these.

2. Challenging Constraints on the Use of Force

The most visible element of imperial attitudes toward international law is usually the challenge to constraints on the use of force. Dominance is always built, at least in part, on superior military power, and general constraints on the use of force thus affect a dominant state far more than weaker states that could not compete militarily anyway. Moreover, most prohibitions in this area result from a particularly strong sense that reciprocity is needed: without limiting one's own uses of force in cases one deems just, one might fall prey to another state's exercise of its own judgment on the just cause. This need for reciprocity fades away in a hegemonic setting: the superior power usually does not face significant military challenges by its inferiors.

The tendency to broaden rights to use force has a long history. As has already been mentioned, Spain relied for its colonial conquests first on the classical title of papal authorization, but then turned to broadened rights of discovery and occupation, arguing that the indigenous populations had neither property nor legitimate state authority and that their lands, as *terra nullius*, could therefore be taken into possession by the Europeans.[141] Similarly, Spanish theorists of international law, many of whom were highly skeptical of medieval religious justifications, construed broad alternative rights to use force. Thus Francisco de Vitoria, argued for the possibility to use force in defense of a general right to travel and trade with the indigenous peoples. He also allowed for the

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[139] http://www.whitehouse.gov/nsc/nss.pdf (visited February 26, 2004), pp. 13-15.

[140] See George H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants", *American Journal of International Law* 96 (2002), 891-898; Jordan J. Paust, "War and Enemy Status after 9/11: Attacks on the Laws of War", *Yale Journal of International Law* 28 (2003), 325-335

[141] Grewe, supra note 8, 172.

subjective justice of a war on both sides – a thesis that was widely accepted among 16th century scholars and significantly limited restraints on warfare.[142] Another example of the tendency to expand the right to use force results from the Spanish claim to rule the high seas: from the argument for a *mare clausum* in contrast to the British, French and later Dutch position of a *mare liberum*.[143] This would have led to a practically unlimited right for Spain to use force on its own seas; but, as mentioned before, it is evidence not only of a withdrawal from international law, but also of its deliberate use for the consolidation and defense of dominance.

British predominance in the 19th century provides us with probably the most impressive historical examples of attempts to limit constraints on the use of force. This period witnessed the emergence of the concept of humanitarian intervention, grounded on the universalist, liberal basis of an "international law of civilized nations", defended mainly by British authors, and increasingly absorbing other causes for intervention.[144] It was also the time of the pacific blockade, a particularly intrusive form of reprisal that included the complete blockade of the ports of a country for the ships flying its flag. Like most extended intervention rights, it was used primarily by the great powers, and especially by Britain.[145] Yet it was on the seas that Britain was most dominant and pushed most for extended rights of forcible action; it effectively sought changes in the law of the sea that would have allowed it to use its fleet to police the high seas.[146] This started with a proposal for "a system of maritime police against the contraband slavetrade", as the British foreign minister Castlereagh put it in 1818: a system that centered on a right of visit and search analogous to the existing rights against piracy.[147] This system eventually took shape in treaties with a great number of countries, but in order to give it effect, Britain also needed to make sure that ships were not flying a wrong flag, i.e. the flag of a state not party to the system. This required a general right to inquire into the correctness of the flag, the so-called "enquête du pavillon", which Britain increasingly claimed. It also proceeded to a form of self-help and undertook visits and searches not provided for in the treaties if the other parties were unable to police their own ships sufficiently, as was the case with Portugal. However, Britain's aggressive policy provoked a significant backlash,

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[142] Tuck, supra note 54, ch. 2; Grewe, supra note 8, 243.

[143] Grewe, supra note 8, 300-304.

[144] Grewe, supra note 8 , 575-583.

[145] Grewe, supra note 8 , 617-622.

[146] See Grewe, supra note 8, 647-676.

[147] Quoted in Grewe, supra note 8, 657.

made France refuse ratification of its treaty with Britain and led to a confrontation with the US, which in 1858 ended with the House of Commons declaring that "by international law we had no right of search, no right of visitation whatever, in time of peace".[148] Despite this failure to establish a general right of this kind, Britain succeeded in achieving very wide-spread conventional recognition of it, resulting in the Brussels Anti-Slavery Act of 1890. In effect, Britain was, because of its superiority, practically the only country to make use of it on a larger scale.[149]

Limitations of warfare were resisted by Britain also in respect to the *ius in bello*: it was the strongest opponent to the development of extensive rights of neutrals.[150] And it defended a wide concept of war against the narrower notion held by continental powers; for Britain, a state of war existed not only between states but also between individuals, with the effect that trade relations were cut off as well.[151] This position again reflected its superior position on the seas: as Lord Kenyon put it at the time, it was particularly suited to maritime states "where their principal object is to destroy the marine and commerce of the enemy."[152] In the area of its greatest dominance, Britain advocated the furthest possible extension of rights to use force.

In the case of the US and its allies, attempts to reduce international legal constraints on its uses of force are even more pronounced than those of Britain in the 19th century. This is not surprising, given that its military superiority exceeds by far that of any other great power in the last millennium: its military expenses account for almost half of all military expenses worldwide; those of NATO countries represent an even higher proportion. Moreover, the international legal environment has changed drastically. While Spain and Britain – and ancient empires even more – faced few limitations on waging war, the twentieth century has witnessed an unprecedented regulation of this area. With a general prohibition on the use of force and tightly circumscribed exceptions for self-defense and collective security, international law now leaves the US relatively little room for exercising its military superiority.

The US has been ambivalent about legal constraints on the use of force since it emerged as a major military power: it defended the Monroe doctrine and its right to unilaterally define self-defense against attempts at limitation, and it has during the Cold War

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[148] Quoted in Grewe, supra note 8, 668.

[149] See Grewe, supra note 8, 661f.

[150] See Grewe, supra note 8, 635.

[151] Grewe, supra note 8, 628-629.

[152] Quoted in Grewe, supra note 8, 629.

been one of the few states to press for broad exceptions to the prohibition on the use of force, such as a right to protect nationals abroad and to use self-defense against impending attacks and in response to terrorism.[153] But it has radically expanded its challenges to traditional limits on the use of force since its rise as the sole remaining superpower. In the five years from 1998 to 2003 alone, the US has claimed four major revisions in this area: it has relied on an alleged unilateral right to enforce decisions of the UN Security Council against Iraq and the former Yugoslavia[154]; has justified its war in Afghanistan with a right to exercise self-defense against terrorist attacks[155]; has made bold claims for a right to pre-emptive self-defense[156]; and has alluded to the possibility of intervention on humanitarian grounds (though not directly claimed a right to it) in the cases of Kosovo and of Iraq in 2003.[157] Moreover, the US has sought to significantly restrict the application of international humanitarian law to its "war on terrorism", both with respect to combat in Afghanistan and Iraq and to the detention of persons on its base in Guantánamo, Cuba.[158] And it has recently begun to press for extended possibilities to police shipments of weapons on the high seas; even though not stated explicitly, its "Proliferation Security Initiative" seems to aim at another extension of rights to use force.[159] Not all of these attempts have been successful, but they add up to a serious challenge to the existing regime on the use of force. And the rights claimed by the US would open up far greater opportunities for the US than for any other state since it can make use of them in ways that other states, for both political and military reasons, could not. Unsurprisingly, in the US case as in the earlier examples, expanding possibilities to use force is a central element of great power policy – in this area, attempts at pushing back international law, at withdrawal from international legal constraints, are especially marked.

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[153] See Christine Gray, *International Law and the Use of Force*, 2000, 22-3, 84-119; Marcelo Kohen, "The Use of Force by the United States after the End of the Cold War and Its Impact on International Law", in *United States Hegemony and the Foundations of International Law*, supra note 38, 197-231.

[154] See Krisch, supra note 75.

[155] See Michael Byers, "Terrorism, the Use of Force and International Law after 11 September", *International and Comparative Law Quarterly* 51 (2002), 401-414.

[156] See only Michael Bothe, "Terrorism and the Legality of Preemptive Force", *European Journal of International Law* 14 (2003), 227-240.

[157] See Byers & Chesterman, supra note 76.

[158] See supra note 140.

[159] See Michael Byers, "Gunboat Diplomacy", *The World Today* 59 (October 2003), 14-15.

3. Evading Multilateral Treaties

A particular reluctance on the part of the United States to accede to multilateral treaties has often been observed in recent years, and examples abound, ranging from the Comprehensive Test Ban Treaty to the Statute of the International Criminal Court and the Kyoto Protocol on Climate Change. We shall see below that this account is largely confirmed by closer analysis. This result is, again, unsurprising, because multilateral negotiations put all participants on an equal footing and a hegemon is only a *primus inter pares*; the one vote it wields hardly reflects its factual dominance.

However, it is quite difficult to discern a historical trend in this respect, if only because multilateral treaties have entered international law late and have become a standard element of international law-making only in the 20th century. Yet reluctance to multilateral treaties becomes quite visible in the British case, and to the largest extent in the area of its most pronounced superiority, the high seas. The 19th century witnessed significant efforts on the part of many states to establish a regime for naval warfare, but Britain obstructed most of them. The Paris Declaration on the law of the sea of 1856 was adopted only after protracted negotiations to overcome British resistance, and the London Declaration on the Laws of Naval War of 1909 was prevented from entering into force by the refusal of the House of Lords to ratify it.[160] It was obvious that a regulation of this area was hardly useful without the participation of the dominant power, but Britain preferred to remain untied. Similarly, it resisted the Hague neutrality conventions of 1907 and failed to ratify them eventually; as has already been pointed out, extensive neutrality rules were perceived as obstacles by a power that was more often a belligerent than a neutral party in the wars of the time. Still, British opposition was not always successful: the law of naval warfare and of neutrality developed considerably in the 19th century, and eventually often in a direction contrary to what Britain would have preferred. Ultimately, British reluctance to engage in multilateral treaty-making could not block these developments, but it often derailed and delayed them. As already mentioned, Britain's specific problems with multilateral approaches also surfaced when it sought to establish a system of maritime police against the slave trade. After several failed attempts at a multilateral solution, Britain eventually pursued the issue, quite successfully, through bilateral treaties.[161] Multilateral negotiations were too egalitarian and inclusive for the hegemon to achieve its goals.

The United States has shown a reluctance to enter into international treaties since its foundation, and thus long before it became powerful: the fear of "entangling alliances"

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[160] Grewe, supra note 8, 635, 647.

[161] Grewe, supra note 8, 657-659.

and the two-thirds majority required for ratification by the Senate created serious obstacles to treaty-making.[162] However, the US reluctance to enter into multilateral treaties has been especially marked since the United States' rise to power in the twentieth century. After the Second World War, the US has become party to only 60% of the treaties deposited with the UN Secretary-General that have been ratified by more than half of all states. In contrast, other states are, on average, party to 79% of these treaties, and the other members of the G-8 to 93% of them.[163] In the 1990s, this divergence appeared even more accentuated, with the US refusing to ratify many treaties which are regarded as cornerstones of the development of international law, in particular the Comprehensive Test Ban Treaty, the Kyoto Protocol, the ICC Statute, the Landmines Treaty, the Convention on Biological Diversity and the amended Convention on the Law of the Sea. However, it is difficult to discern at this point whether the end of the Cold War indeed marked a hardening of US reluctance, especially since long delays in the domestic ratification process have always been common in the United States. Moreover, during the same period the US has also subscribed to important international agreements, most notably with respect to free trade, such as the WTO Agreements and NAFTA, as has already been discussed. The degree of US reluctance thus varies significantly from issue area to issue area, and much of it may be explained by specific domestic policies in these fields.[164] However, the overall figures reflect, on average, a particularly skeptical attitude of the US towards multilateral treaties when compared with other states, and especially with other industrialized countries.

This attitude is only confirmed by the practice of reservations. The United States has made use of this mechanism with respect to most important new conventions, and where reservations are excluded – as in the ICC Statute and the Landmine Treaty – it has often preferred not to become a party. So essential have reservations become to U.S. foreign policy that the Senate has even urged the President to reject in treaty negotiations any provision excluding them.[165] Indeed, US reservations are often so extensive that they change treaty obligations significantly; other, especially Western European states have consequently questioned their admissibility. Even the UN Human Rights Committee, responsible for overseeing the implementation of the Covenant on Civil and Political Rights, stated that it "regrets the extent of the [US] reservations, declarations and understandings", and expressed its view that some of them were "incompatible with the object

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[162] See Krisch, supra note 48, 43-45.

[163] See, in more detail, Krisch, supra note 48, 45-47. Data updated: as of January 2004.

[164] See Krisch, supra note 48, 47-51.

[165] See *Treaties and Other International Agreements*, supra note 51, 274-6.

and purpose of the Covenant." The Committee believed that the reservations, declarations, and understandings, "taken together ... intended to ensure that the United States has accepted what is already law of the United States."[166] A similar tendency to eliminate obligations that would require a change in behaviour surfaced in attempts by the US to achieve exemptions in the text of multilateral agreements themselves. In the case of the Landmine Convention, the US not only sought to remove the prohibition on reservations, but it also pressed for the specific exemption of its mines in Korea from the scope of the treaty.[167] This attempt eventually failed, which reflects a growing dissatisfaction among many states with the US resistance to multilateral agreements and its withdrawal from international law in general. Yet the US has found other ways to exempt itself from particular provisions: in the case of the ICC Statute, it has used the Security Council and a web of bilateral treaties to ensure that its own soldiers will not be prosecuted and handed over to the Court.[168] Overall, this US attitude only confirms the general assumption that powerful states will evade institutions based on equality and seek to make decisions outside their framework.

4. Resisting Enforcement and Adjudication

If great powers typically seek to limit the extent to which they are bound by international law, we can expect an even more pronounced withdrawal from mechanisms for the enforcement and adjudication of international norms. Underenforced norms usually allow powerful states much greater latitude in application than weaker ones, as they can bring their influence to bear on the interpretation stage. This possibility shrinks with the degree to which independent bodies control norm interpretation. And even if the composition of such bodies might reflect power asymmetries, as may be said of the ICJ and other international adjudicatory bodies with traditionally strong Western representation, these bodies will usually not merely follow the precise lines of governmental views.

British attitudes towards such bodies in the 19th century – which were primarily arbitration tribunals – seem at first to run counter to this hypothesis. Arbitration, which flourished during the late Middle Ages, all but disappeared with the emergence of the

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[166] See UN Doc. CCPR/C/79/Add.50 (1995); see also Foot, supra note 88; Redgwell, supra note 88.

[167] See Peter Malanczuk, "The International Criminal Court and Landmines: What are the Consequences of Leaving the US Behind?", *European Journal of International Law* 11 (2000), 77-90, at 84-5.

[168] See Marc Weller, "Undoing the global constitution: UN Security Council action on the International Criminal Court", *International Affairs* 78 (2002)< 693-712.

doctrine of sovereignty; it enjoyed a renaissance after the Napoleonic Wars, with an increasing formalization and judicialization of the proceedings and the eventual establishment of the Permanent Court of Arbitration in the early 20th century.[169] Britain played a central role in this revival, beginning with the arbitration agreement with the US in the Jay Treaty of 1795 and continuing through a number of other disputes settled in this way with the United States. The US was, of course, a rising power with considerable weight, especially late in the 19th century, and this would seem to explain the British openness to arbitration in this relationship. However, the openness was not confined to this setting: Britain was the country that overall was most often party to arbitral settlements during the course of the century. This corresponds with the observation that the British keenly insisted on the sanctity of treaties: they sought to preserve a world order that was largely favorable to them, and used international law for this purpose.[170] However, one should not lose sight of the fact that international law, as has been emphasized before, was restricted to a relatively small part of the world and thus did not cover the major power asymmetries anyway. On the other hand, strong arbitration also did not involve a general acceptance of adjudication by the dominant power. Britain could often use its influence to ward off efforts at arbitration by others; smaller states, however, were often forced to submit to arbitration whatever their chances of success. The Swiss government gave expression to this concern in an exceptionally candid way in 1919.[171]

For the US, in contrast, the evidence of a particular reluctance to permit international supervision and adjudication is quite unambiguous. It has accepted such a mechanism in the WTO, and it has shown compliance with the findings of the relevant dispute settlement bodies, albeit with a resistance similar to that of the European Union. But while it has accepted an enforcement mechanism for NAFTA antidumping and investment disputes, it has not agreed to strong enforcement in other areas covered by this agreement.[172] Moreover, the United States has sought to protect its citizens from potential action by the ICC, through attempts to limit the court's jurisdiction,[173] and it has made reservations and enacted hurdles in domestic law with respect to the supervisory mechanism of the Chemi-

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[169] See Grewe, supra note 8, 606-615.

[170] Grewe, supra note 8, 605.

[171] See Grewe, supra note 8, 614, fn. 28.

[172] See Kenneth W. Abbott, "NAFTA and the Legalization of World Politics: A Case Study", in *Legalization and World Politics*, supra note 37, 135-163.

[173] Nolte, supra note 89; Malanczuk, supra note 167, 80.

cal Weapons Convention.[174] Similarly, it concluded in summer 2001 that the draft verification protocol to the Convention on Biological Weapons was flawed, arguing that the envisaged monitoring mechanism was too weak towards other states and too strong towards U.S. industry. U.S. officials even argued that monitoring would be better if performed by Western intelligence services.[175]

In a similar vein, the United States has chosen not to allow individual petitions to the Human Rights Committee, as provided for by the Optional Protocol to the Covenant on Civil and Political Rights, which has now been accepted by 104 states. Likewise, it has not ratified the Optional Protocol to the Convention on the Elimination of All Discrimination against Women, adopted in 1999, which provides for a procedure of individual petitions. Again with respect to human rights instruments, the United States has made reservations to clauses establishing the jurisdiction of the International Court of Justice for the settlement of disputes.[176] And it has defied the International Court of Justice by disregarding provisional measures in the *Breard* and *LaGrand* cases involving instances of capital punishment following on from violations of the Vienna Convention on Consular Relations.[177] This followed a period of particular disenchantment with the ICJ since the *Nicaragua* case, which also led to the termination of the US acceptance of compulsory ICJ jurisdiction under the optional clause. In all these instances, US behavior corresponds to the general observation that powerful states are particularly reluctant to delegate power to international actors.[178] It is an example of a pronounced withdrawal from international law, including not only a limitation on the substantive obligations, but also an insistence on its own freedom to interpret and apply the obligations incurred.

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[174] Amy E. Smithson, "The Chemical Weapons Convention", in *Multilateralism and U.S. Foreign Policy*, supra note 50, 247-65.

[175] See M.R. Gordon, "Germ Warfare Talks Open in London; U.S. is the Pariah", *The New York Times*, July 24, 2001; N. Busse, "Und wieder sind die Amerikaner die bösen Buben: Streit über das Verbot biologischer Waffen", *Frankfurter Allgemeine Zeitung*, July 23, 2001.

[176] See Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker", *American Journal of International Law* 89 (1995), 314-50, at 344-5.

[177] See M.K. Addo, "Vienna Convention on Consular Relations (Paraguay v. United States of America) ("Breard") and LaGrand (Germany v. United States of America), applications for provisional measures", *International and Comparative Law Quarterly* 48 (1999), pp. 673-81

[178] See Abbott & Snidal, supra note 41, 63-65; see also Kahler, supra note 46, 281-282. See also above, II 4, 5.

V. Substitution: The Domestication of International Rule

The picture that has emerged so far seems very well-structured. On the one hand, dominant actors engage with international law, use it for their purposes and reshape it so as to better reflect their factual superiority. Yet insofar as international law doesn't bow to their demands – as it defends equality against hierarchy and stability against flexible change – powerful states withdraw: they try to limit the reach and impact of international legal rules on them and turn to the sphere of politics in order to achieve their goals. However, the simplicity of this picture, and in particular the dichotomy between international law and politics that it suggests, is misleading. Withdrawal from international law doesn't necessarily result in a rejection of law in favor of politics; instead it frequently leads to a substitution of *domestic* law for *international* law. Domestic law, though lacking the legitimacy of international law, can fulfill its regulatory functions, and the hierarchies that are often so difficult to establish in a formally international structure, are already present in the domestic legal order with its legislative, executive, and judicial institutions. Formal government, conspicuously absent from the international plane, is a regular mode of exercising power domestically.

This turn to domestic law, to government, is the characteristic third element of the order I seek to describe here – an order that I call "imperial" precisely because the use of domestic law is typical of the structures classically known as empires. Such empires as the Roman or British ones were to a significant extent formal empires – they had integrated formerly independent entities as provinces or colonies into their internal order, and governed them through domestic law. Though typical for formal empires, the use of domestic law as a tool of government is, however, often also present in informal empires and hegemony, but it takes a number of less obvious forms, some of which I will analyze in the following: conditionality of market access and sanctions; informal standard-setting; extraterritorial jurisdiction; and a turn to private actors.

1. Domestic Legislation and International Rule

Although formal empires are certainly the most classical form of empires, they have historically emerged only under certain specific conditions, and often after long periods of informal rule. Athens never turned to formal empire, and for several centuries, Rome governed large parts of its empire, especially in the East, informally; the immediate integration of conquered territories was largely confined to the North and West. Britain, though establishing formal imperial structures in America through its colonies there, long treated the Eastern parts of the empire, in particular the states of India, as independent; I have already discussed some of the forms these relationships took. The factors influencing

the choice of domestic instead of international governance vary from case to case, and they range from the international environment to the viability of local government structures and the kind of economic interests behind imperial expansion, and to the need to quell resistance to the dominance of the metropolis. However, while one can usually observe a development towards formalization, it has rarely been the default mode of running an empire, because the costs associated with it are usually relatively high, in terms of both administrative expenses and a loss in legitimacy.[179]

Contrary to what the dichotomy of law/equality and politics/inequality suggests, the formalization of empire, and the related withdrawal of the imperial structure from international law, has never led to an abdication of law as a tool of governance. Instead, the former client states were subjected to the rule of domestic law, through which hierarchical relationships were far easier to establish than through international law. Rome enacted particular statutes on its provinces, *leges provinciae*, that structured parts of their relationship with the center; and treatises on Roman constitutional law devote particular sections on this issue. Likewise in Britain, the structures of rule of the colonies became the province of constitutional lawyers, and they also asserted their competence on matters pertaining to the formally independent protectorates – just as their German colleagues did.[180] Formalization, though, never meant full integration or subjection to all domestic law. The periphery remained distinct from the center, it was governed by particular institutions (the judicial committee of the British Privy Council is but one example), and its inhabitants didn't enjoy the same rights as those of the metropolis, especially with respect to political liberties and the freedom of movement. The domestic law governing the periphery was usually one of particular inequality.

Decolonization in the 20th century has terminated most formal empires, and the establishment of a formal empire today would be regarded as clearly illegitimate. Yet we can still (or again) observe the extensive use of domestic law for governing the periphery, and particularly by the US. This does not imply an equation of this practice with formal empire, but both certainly share structural similarities. US domestic law today sets norms specifically targeted at other states, and it provides means for their enforcement that are often highly effective. The two principal instruments in this regard are certification mechanisms and unilateral sanctions.

Certification mechanisms have become a common tool for the US to define rules for other states and monitor their observance, and they now exist for areas as diverse as abor-

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[179] See Doyle, supra note 102, 341-344.

[180] Koskenniemi, supra note 57.

tion, arms control, environmental protection, human rights, narcotics and terrorism.[181] Usually the US Congress defines some substantive standard and charges the President with providing reports on whether the standard has been met. Accordingly, the administration produces extensive and detailed annual reports, which often lead (automatically or not) to the adoption of sanctions. In many of the areas mentioned, for example human rights, the standards set for the most part follow the lines of international law.[182] In others, in particular narcotics, the norms initially established significantly exceeded by far the international rules existing at the time, and many states, especially in Latin America, have felt compelled to adapt their laws accordingly. Later on, some of these rules have been adopted in the framework of multilateral organizations.[183] The history of the TRIPS agreement in the WTO framework is a particularly impressive example of this kind, given that it was based initially on an "aggressive unilateralism" of the US in the enforcement of intellectual property rules.[184] A more recent and very striking case of a combination of existing and newly created standards is the Africa Growth and Opportunity Act of 2000, in which aid to developing countries is linked to a number of conditions, including the establishment of a market economy, political pluralism and the adoption of measures against corruption. These conditions add up to a comprehensive set of prescriptions for all countries that depend on development aid, and the US president is required to sit in judgment every year on whether they have obeyed the rules.[185] In any case, the extensive use of the certification mechanism provides a tool for the US to create law for other states and to monitor its observance, while the US itself remains unbound and unmonitored. It thereby provides a convenient substitute for treaties and their monitoring bodies, as can best be observed in the area of human rights where the US has been termed a "trendsetter in unilateralism"[186]. The US is particularly reluctant to subscribe to new international

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[181] See Mark A. Chinen, "Presidential Certifications in U.S. Foreign Policy Legislation", *New York University Journal of International Law and Politics* 31 (1999), 217-306.

[182] Sarah H. Cleveland, "Norm Internalization and U.S. Economic Sanctions", *Yale Journal of International Law* 26 (2001), 1-102, at 70-3.

[183] See Monica Serrano, "The Certification Process in Latin America", in *Unilateralism and U.S. Foreign Policy*, supra note 48.

[184] See Elliott & Hufbauer, supra note 50.

[185] See Kwakwa, supra note 118, 236; J.M. Migai Akech, "The African Growth and Opportunity Act: Implications for Kenya's Trade and Development", *New York University Journal of International Law and Politics* 33 (2001), 651-702, at 663-70.

[186] Katarina Tomaševski, *Responding to Human Rights Violations*, 2000, 75 et seq.

human rights obligations and accept international supervision[187], but is proactive when it comes to domestic tools for the enforcement of human rights abroad. The annual country report on human rights now covers 195 countries and territories, carefully lists human rights violations around the world and serves as the basis for financial aid, trade privileges and the imposition of sanctions.[188] Most states in the world can hardly afford to ignore it.

The certification practice of the US gains further strength through its combination with unilateral sanctions. Such sanctions have been an integral part of US foreign policy for several decades, and always provoked significant criticism, most notably, of course, when applied with extraterritorial effect.[189] In many cases, these sanctions seek to enforce international rules. For example, Section 301 of the Trade Act provides for mandatory countermeasures against violations of international trade agreements by other states.[190] And sanctions against Libya were justified in part as enforcing Security Council sanctions against that country.[191] However, in some cases the rules enforced had a doubtful standing in international law, as for example the supposed prohibition on trafficking in property formerly expropriated by Cuba.[192] Sanctions designed to protect the environment have often relied on a US assessment of their necessity rather than an international norm.[193] And in the recent case of sanctions against states that refused to sign bilateral treaties preventing the extradition of Americans to the ICC, the US was almost alone in its claim that this only served to counter the inadmissible exercise of extraterritorial jurisdiction by the

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[187] See Foot, supra note 88; Andrew Moravcsik, "Why is U.S. Human Rights Policy So Unilateralist?", in *Multilateralism and U.S. Foreign Policy*, supra note 50.

[188] For the 2000 report, see http://www.state.gov/g/drl/rls/hrrpt/2000/ (visited on February 26, 2004).

[189] On the sanctions practice, see in general Michael P. Malloy, *United States Economic Sanctions: Theory and Practice*, 2001. On some of the more prominent examples of extraterritorial sanctions, see Vaughan Lowe, "US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts", *International and Comparative Law Quarterly* 46 (1997), 378-90.

[190] See Lynne A. Puckett & William L. Reynolds, 'Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?', *American Journal of International Law* 90 (1996), 675-89, at 677.

[191] See Section 3 (b) of the D'Amato Act of 1996, *International Legal Materials* 35 (1996), at 1275. For the weak basis of this justification, see Brigitte Stern, 'Vers la mondialisation juridique? Les lois Helms-Burton et D'Amato-Kennedy', *Revue Générale de Droit International Public* 100 (1996), 979-1003, at 996.

[192] See Stern, supra note 191, 995; Lowe, supra note 189, 383-4.

[193] For an account of these sanctions, see Elizabeth R. DeSombre, "Environmental Sanctions in U.S. Foreign Policy", in *The Environment, International Relations, and U.S. Foreign Policy* (P.G. Harris, ed.), 2001.

Court. Unilateral sanctions are thus a tool for the enforcement of law as defined or interpreted by the US; international law does not necessarily play a role.[194]

2. Domestic Courts as International Courts: the Use of Extraterritorial Jurisdiction

Dominant actors often make use not only of the legislative mechanisms of domestic law, but also of their judicial institutions for purposes of international rule. Again, this is obvious in formal empires where questions of jurisdictional boundaries don't exist. But it is also widespread in informal empires, which tend to challenge the limits posed by international law on the exercise of jurisdiction over subordinates. The use of courts for governance has distinct advantages and disadvantages, especially at a time when courts enjoy relative independence from the political bodies of government. This independence lets them appear as less partial, and lets their exercise of jurisdiction look less as an instrument of government than as an exercise in the adjudication of an "apolitical" law. The political bodies, in turn, bear less responsibility for the activities of the judiciary, but they also lose, to some extent, the possibility to influence it and thus to conduct foreign policy according to their views. Legalization (or judicialization), here again, involves a trade-off, though along very different lines than in international law.

The use of courts and the exercise of extraterritorial jurisdiction has been an important element of imperial rule since antiquity. In the Athenian empire of the 5th century BC, courts of Athens served, for example, as courts of appeals on the amount of tributes the allies were to pay and as criminal courts with respect to the most important crimes committed in allied states.[195] Rome reserved metropolitan jurisdiction over its own citizens, regardless of whether the case in dispute had taken place in the metropolis or in the provinces.[196] This is taken further in modern empires, and in particular with the emergence of "capitulations" and the establishment of consular jurisdiction. The most influential of such capitulations was granted France by Sultan Suleiman of the Ottoman Empire in 1535, and it removed French citizens from Ottoman jurisdiction when they did business there; instead, jurisdiction was to be exercised by the French consul, and French law

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[194] In areas governed by the GATT, however, restrictions might now require at least some prior efforts to achieve international agreement; see, e.g., Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 2nd ed., 1999, 428-432, on environmental trade measures.

[195] Russell Meiggs, *The Athenian Empire*, 1972, ch. 12.

[196] See Lintott, supra note 127, 1993, ch. 9.

applied.[197] In the 16th century, this concerned a relationship of relatively equals – in Europe, France was inferior to Spain, and the Ottoman Empire was very powerful in the East. Yet in the centuries to follow, capitulations became a central instrument for dominant European powers to open markets in the non-European world, and to protect their citizens from the vagaries of the jurisdiction of "barbaric" countries. They did not only apply to criminal prosecutions of own citizens, but extended also to private litigation of citizens against natives, thus subjecting the latter to the jurisdiction of the metropolis.[198] Over time, the system thus created was increasingly regarded as discriminatory, however, and in the 19th and early 20th century, provoked significant discussion among international lawyers as well.[199] Decolonization let it disappear, but until then, it had been an important tool in the governance of the informal empires of Europe; in modified form, we can find traces of it in the removal of foreign investors from final domestic jurisdiction of host countries that is provided for in the arbitration clauses of contemporary investment treaties.[200]

Beyond the system of capitulations, the British Empire also established a centralized judicial institution, the Judicial Committee of the Privy Council, before which appeals from all over the empire could be brought. This reflects the formal nature of large parts of the empire, and it brings out the distinctness of the institutional order for the colonies from that of the metropolis. But the Judicial Committee also performed important functions in the governance of the formally independent parts of the empire in that it heard appeals against the consular jurisdiction exercised under the capitulations system. Still today, long after the independence of most former colonies, the Judicial Committee of the Privy Council functions as the highest appeals court for a number of commonwealth countries.

In the last two decades, US courts have increasingly assumed a similar function of global appeals courts, though in a less structured fashion; they have become important fora for suits of an international nature. Since the reinterpretation of the Alien Tort Claims Act in 1980, certain groups of private persons can bring claims against others for certain violations of international law, and the Torture Victim Protection Act of 1991 has further augmented this tool. Various successful suits have been brought under these provisions, in part against such important international figures as the daughter of former Philippine

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[197] See James B. Angell, "The Turkish Capitulations", *American Historical Review* 6 (1901), 254-259.

[198] See Fidler, supra note 116. The law applied by European powers had, however, to take account of local customs; see Alexandrowicz, supra note 55.

[199] See Koskenniemi, supra note 57.

[200] For a comparison with other contemporary policies, see Fidler, supra note 116.

president Ferdinand Marcos, and the Bosnian Serb general Radovan Karadzič.[201] Until recently, however, the rules on foreign sovereign immunity barred many claims against states and thus made it impossible to use American courts to deal with the principal actors in (and thus also the main violators of) international law. This has changed significantly since the mid-1990s with the restriction of immunity for "states sponsors of terrorism".[202]

This use of domestic courts allows the US to enforce international law against others, but to prevent enforcement against itself – a result that would be hardly possible to achieve through international bodies. The Alien Tort Claims Act applies in a virtually unrestricted manner to foreigners, but neither the US nor its employees can be sued under it.[203] Moreover, international treaties are usually declared to be "non-self-executing", with the result that they cannot be invoked before US domestic courts unless enacted through implementing legislation. And customary law, though generally conceived to be part of American law[204], is increasingly denied this status in scholarly writing.[205] US courts are thus a tool of a highly asymmetrical application of international law: by the US, but not against it.

Yet one should not lose sight of the ambiguities of the US position in this respect. The US administration has recently challenged the courts' extraterritorial application of the Alien Tort Claims Act. It has argued that this would allow cases to be brought indirectly against US action abroad and against allies of the US, could thus hamper the fight against terrorism and interfere with the pursuit of US foreign policy in general; instead foreign policy should be left to the political bodies.[206] This brings to light the costs of using law and judicial institutions for global rule, and the current administration seems intent on avoiding theses costs by all means. Meanwhile, its European allies have made more

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[201] See Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts*, 1996; Marc Rosen, "The Alien Tort Claims Act and the Foreign Sovereign Immunities Act", *Cardozo Journal of International and Comparative Law* 6 (1998), 461-517.

[202] See above, IV 1.

[203] The US enjoys sovereign immunity against such claims unless it is specifically waived, Sanchez-Espinosa v. Reagan, 770 F.2d 202 (1985), at 207. Its employees benefit from a specific exception, see Sean D. Murphy, "United States Practice in International Law", *American Journal of International Law* 93 (1999), at 894. See also Stephens & Ratner, supra note 201, 104-8.

[204] See Louis Henkin, "International Law as Law in the United States", *Michigan Law Review* 82 (1984), 1555-1569, 1561-7.

[205] See Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position", *Harvard Law Review* 110 (1997), 815-76.

[206] See the amicus curiae brief at www.hrw.org/press/2003/05/doj050803.pdf (visited on February 26, 2004).

extensive use of extraterritorial jurisdiction, especially in criminal cases.[207] The Pinochet case in Britain is the most well-known example, though Spain and Belgium are the proponents of using their criminal courts for universal purposes. Belgium has suffered setbacks before the International Court of Justice[208] and has been severely criticized by the US for potentially prosecuting American citizens[209], but all in all, the picture is one of a far-reaching extension of the use of domestic courts as international fora.

3. Indirect Regulation: The Informal Diffusion of Norms

The direct enactment of rules, backed by sanctions, carries significant costs, whether in the framework of a formal or of an informal empire. It openly forces subordinate states to do what they otherwise would not do, at least as long as it has not modified their identities and interests to a sufficient degree. Thus it needs enforcement power in its background, be it military intervention or, as is today more common, the threat of economic disadvantage. The potential use of these means produces a constant image of domination, and it reflects a precarious legitimacy, which today depends on an acceptance of the right of the economically stronger to dictate the conditions for the granting of aid – a right that is constantly challenged.

The costs associated with this precarious legitimacy can be avoided when the image of domination disappears. As we have seen in part II, international law can be an instrument to achieve this; but it has serious disadvantages for the powerful. Domestic law, though, has much potential in this respect, too, if it can be portrayed as not imposed on subordinates, but freely accepted by them. This makes the process of establishing rules for other significantly slower, and it imposes constraints on the kinds of rules to be diffused. It also depends on the *authority* of the powerful to enact rules – on a widespread acceptance that one should follow its rules even in the absence of enforcement. Such authority can, for example, result from the recognition of superior expertise or capacities for rule-making.

Yet the informal diffusion of norms often takes place in an even slower, though less open form: through processes of normalization and as the result of a hegemonic

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[207] One might, however, regard Guantanamo as another example of the exercise of universal criminal jurisdiction.

[208] ICJ, *Arrest Warrant (Democratic Republic of the Congo v. Belgium)*, Judgment of April 11, 2002, www.icj-cij.org (visited on February 26, 2004). See also the proceedings in *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *ibid*.

[209] See above, III 2.

ideology.[210] Once the content of the norms set by the metropolis are recognized as normal and right, there is no question left of a particular need for legitimizing imperial rule-making: the source of the norm is obscured, and images of dominance disappear entirely. This effect, though, is rarely consciously steered; it is instead the result of various influences on dominant discourses, and often it is often caused by an interplay of imposition and less intrusive processes. We can observe this today, for example, in the establishment of "good governance" as a standard for developing countries. From being a condition for unilateral Western aid to being embodied in agreements between developing countries and Northern states and organizations, this standard has now been internalized by many elites in developing countries – much aided by theoretical arguments for its importance for economic development, and by linkages with liberal societal actors pressing for reforms in the internal realm of these countries. Similarly, we can observe a spread of American models of the separation of powers and the rule of law, and especially of a central role of independent actors, namely courts, in constitutional law.[211] The jurisprudence of the US Supreme Court, like that of the European Court of Human Rights or the British House of Lords, often serves as a point of reference for courts in more peripheral countries.[212] Similar developments have been part of most stable hegemonies, and many have led to far-reaching changes in the self-understanding of the periphery. For example, the idea of stages of evolution of civilization, and the depiction of the periphery as being on an earlier stage in this process, has significantly aided in the acceptance of European colonial rule and the adoption of European concepts and standards by non-European peoples.[213]

More direct forms of norm diffusion are often associated with market regulation, and they have in the past involved, for example, the acceptance of metropolitan measures and weights, sometimes also money, by the periphery. Likewise today, they are most evident in the operation of markets: due to the dominant position of the US economy in world markets, US rules often exceed their formal confines and begin to function as global rules.[214] Thus, in a study of thirteen areas of economic regulation, Braithwaite and Drahos have identified the US as the most or one of the most influential state actors in each of

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[210] See Ugo Mattei, "A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance", *Indiana Journal of Global Legal Studies* 10 (2003), 383-448.

[211] See Mattei, supra note 210.

[212] See Anne-Marie Slaughter, "Judicial Globalization", *Virginia Journal of International Law* 40 (2000), 1103-1124.

[213] In this sense, see only Ania Loomba, *Colonialism – Postcolonialism*, 1998, ch. 2.

[214] See, e.g., Beth A. Simmons, "The International Politics of Harmonization: The Case of Capital Market Regulation", *International Organization* 55 (2001), 589-620; Kwakwa, supra note 118, 232-40.

these areas, and it has emerged as the by far most influential actor overall.[215] This is not only so because of the exercise of raw political pressure, but more often because of the superior expertise of US agencies, the availability of model norms in US domestic law, and the market dominance of US corporations, especially in the early phases of emerging fields. All these factors favour the modelling of internationally applicable rules on US domestic law, and modelling is, as has been noted, "the key mechanism of globalisation that lays the foundation of global norms".[216] Through this mechanism, the US is particularly influential with respect to technical standards, as, for example, in the fields of corporation and securities law or air safety through global reliance on the standards of the US Security and Exchange Commission (SEC) and the Federal Aviation Administration (FAA).[217]

4. The Privatization of Imperial Rule

While international law is only a limited tool for global dominance because of the continued constraints of sovereign equality, domestic law is limited because of jurisdictional rules. They prohibit the direct rule-making and adjudication for other states and force dominant actors into strategies of evasion. One of them is, as we have seen, the turn to conditionality instead of imposition, which, however, has significant costs – not only because of the legitimacy questions involved, but also because governance is dependent on the granting of aid. The second strategy of evading jurisdictional questions that I have discussed so far is the informal diffusion of norms, but this is fraught with difficulties, too, especially because it is often a slow process and depends on the prior establishment of authority.

A third possibility is that of privatization. Private actors, unlike states, are not bound by jurisdictional limits, and they are free to act on the global plane, especially if rules of free trade prevent states from denying them access. Private actors are also free from other constraints of international law, since international legal rules most commonly address states. They are subject to the domestic law of the states they are operating in, but these, too, may pose few constraints. Between the 16th and the early 20th century, due to the system of capitulations that prevailed then, European private actors in many non-

[215] John Braithwaite & Peter Drahos, *Global Business Regulation*, 2000, 475-7.

[216] Braithwaite & Drahos, supra note 215, 491; see also 578-601.

[217] Braithwaite & Drahos, supra note 215, 157-8, 457-60; for further examples taken from the regulation of capital markets, see Simmons, supra note 214, 601-15.

European states were subject only to their home laws.[218] And today, the ability of states to regulate foreign private actors is limited in fact by the forces of the global market, and in law by the limits of trade and investment agreements and by the intricacies of multiple incorporations with the resulting opportunities for tax and regulation evasion.

The use of trade companies for European expansion since its early days is certainly the most obvious use of private actors for the building of empires so far; the most well-known of them are certainly the British and Dutch East and West India companies. Their initial emergence might have reflected the dominance of private entrepreneurship, but soon they took on a hybrid character, as they were chartered, and sometimes militarily protected, by their countries of origin. Yet the use of these companies had distinct advantages: not only did the risk of the enterprise often lie with them, but they could also act more freely towards the natives they encountered. Their dubious international legal standing also drew into doubt the character of the agreements they concluded with native rulers, and this helped avoid the problems of equality the full application of international law might have brought about.[219] On the other hand, the use of such private actors made it easier to decouple the relationships between great powers in Europe from those in the colonial sphere; war outside Europe thus did not have to lead to war within.[220]

Private actors today are less openly associated with their home states than the trading companies, but they are crucial for the overwhelming dominance of the US and Europe in the current international system. This is of course partly due to the sheer economic strength of American and European companies in world markets. Beyond that, though, private actors today perform central functions in the governance and rule-making for the global economy, with important repercussions on politics, and the bulk of the work here is done by actors from the US, in conjunction with a few Europeans and Japanese.[221] These actors are largely regulated by their home states, and they inevitably spread concepts, values and norms from their original contexts to the rest of the world.

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[218] See above, V 2.

[219] See above, IV 1.

[220] Grewe, supra note 8, 352-353.

[221] See *The Emergence of Private Authority in Global Governance* (Rodney Bruce Hall & Thomas Biersteker, eds.), 2003.

An impressive case in this respect is the regulation of the Internet.[222] Originating in the US, the Internet has developed mainly under US law and thus reflects American regulatory efforts – or, rather, their absence. Moreover, the organization of the Internet takes place through organizations operating under US law. In the early days of the medium, domain names were assigned by a single person, and later on by private organizations under contract with US government agencies. In 1998, a dispute arose over the future governance of the Internet, with the European Union urging the adoption of an international framework. The US decided instead to pursue a domestic solution, and ICANN, the Internet Corporation for Assigned Names and Numbers, was created as a private organization under Californian law. Accordingly, Internet organization continues to operate in the shadow of US jurisdiction, which may have far-reaching implications for the possibility of direct regulation, for matters of competition and for issues of fundamental rights. Moreover, although ICANN has made significant steps towards global accountability, the US government continues to exert special influence on it, especially since it can revoke its authorization – and sometimes threatens to do so.

Another case of privatized imperial rule are bond-rating agencies.[223] Assessing the security of debt repayments, they have immense influence on the action not only of private persons or companies, but also of governments. Since most states today depend on the possibility to incur large debts, their rating and the ensuing adjustment of the cost of borrowing money are crucial for their ability to act, and as a result they have to fulfill the criteria set by the rating agencies. Through this means, these agencies set parameters for government policies, especially in the economic sector, and thus perform themselves functions of rule over the countries concerned. The two dominant agencies, however – Standard & Poor's and Moody's – are both based in the US; the attempts of European agencies to compete with them have so far failed, as have their efforts to be accredited by US agencies. In this area, US companies perform functions of governance that could hardly be performed by the state; rule is privatized.

Many other examples of private governance in international affairs could be cited that have similar effects; from international standard-setting through ISO to the manifold certification institutions set up to govern the activities of transnational corporations, in par-

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[222] See Franz C. Mayer, "Europe and the Internet: The Old World and the New Medium", *European Journal of International Law* 11 (2000), 149-69. See also Edward Kwakwa, "The international community, international law and the United States: three in one, two Against one, or one and the same?", in *United States Hegemony and the Foundations of International Law*, supra note 38, 25-56.

[223] See only Saskia Sassen, *Losing Control?*, 1996, 15-16.

ticular with respect to labor and environmental codes.[224] Many of the latter are established not by corporate actors alone, but in conjunction with social and environmental NGOs. This has been hailed as increasing the accountability of corporations, but it also lends a legitimacy to these codes that potentially reinforces Western dominance. Global NGOs themselves are often based in Western countries and dependent on contributions from these regions, and they thus defend and disseminate primarily Western ideas, as progressive as they might seem. Their role has thus been compared to that of the missionaries during the period of colonization – while being a humanitarian counterweight to the action of governments and companies, they only deepened the influence of European values and norms.[225] In a similar way today, disputes between transnational corporations and global NGOs risk to replay the struggles so far internal to Western societies – now on a global level, without the territorial boundaries that existed previously.

VI. Conclusion

Neither merely a tool of nor the counterpart to power, international law assumes an uneasy position in situations of hegemony. It is devoid of the support of and enforcement through a balance of power, but that does not deprive it of its role; it just changes its function. In this paper, I have identified three central functions that multilateral institutions – and international law among them – can perform in situations of dominance: regulation (the setting of rules), pacification (the reduction of resistance and enhancement of compliance), and stabilization (the preservation of the current order for the future). In all of these, the legitimacy of multilateral institutions and their ensuing capacity to constitute authority play a central role, which, however, will be exploited fully only by farsighted hegemons with a status quo orientation. In this framework, international law holds special promises: being old, stable and egalitarian, international law confers strong legitimacy on those acting within its framework and it allows, in particular, stabilizing an order significantly. Yet due to these characteristics, it also places considerable constraints on the exercise of dominance. Its pre-existing rules limit the freedom of action, its stability prevents a quick reshaping according to the hegemon's vision, and its egalitarian character

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[224] See John G. Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection", *IILJ Working Paper* 2003/2, www.nyuiilj.org/governance/workingpapger_2003_02.pdf (visited on February 26, 2004).

[225] Michael Hardt & Antonio Negri, *Empire*, 2000, 35-37.

gives other states an important role in law-making and makes it difficult for the hegemon to create rules that apply only to others, not to itself.

This typically leads to a pronounced ambivalence of dominant states towards international law, and to a combination of different strategies towards it: they instrumentalize and reshape it; withdraw from it and limit its constraining effects; and substitute alternative forms, especially domestic law, for it. The instrumentalization of international law in its standard form occurs in many areas in which a hegemon is able to determine the content of the rules, or where their application to itself is less problematic, as is the case with rules on free trade, territorial acquisition, or with bilateral treaties. Where the constraining effects are more palpable, dominant states tend to reshape international law: they try to flexibilize the law-making process, often through a turn from formalism to moral argument; exploit opportunities for introducing hierarchical elements into international law; and attempt to exempt themselves from the rules while maintaining influence on the law-making process for others. This, however, is not always successful – the structure of international law often resists quick changes as well as the introduction of open hierarchies. In response, hegemons usually seek to push back the limits that international law places on their action: they try to exclude certain relations from international law, as has been most famously the case with the "non-civilized" world in the 19th century; they soften the law on the use of force to be better able to bring their military superiority to bear; and they avoid entering into new agreements, let alone subscribing to mechanisms of adjudication and enforcement of international law against them. Yet this withdrawal does not solve the problem of international governance: while it allows for the exercise of political power outside the law, it does not provide means for regulation and rule-making. For the latter, legal mechanisms remain necessary, but dominant states often turn to domestic law for this purpose. Domestic law, unlike international law, provides hierarchical tools and allows retaining complete control over the content of the rules; it allows for government instead of coordination. The most obvious example is certainly the formalization of empire, but domestic law is used in many other forms as a means of international government: through the conditionality of aid, the extraterritorial use of domestic courts, the informal diffusion of domestic norms, or the privatization of international governance.

All these strategies together reflect different stages of a trade-off: the more a dominant state turns away from the standard form of international law, the more it can assert control over the outcome but foregoes gains in pacification and stabilization, and especially in legitimacy. Since this usually leads to significantly higher enforcement costs – either through coercion or incentives for compliance –, only states with extreme superiority will be able to afford the more radical withdrawal from and replacement of international law, and we will typically find this most clearly expressed in the behavior of imperial actors.

Accordingly, the most far-reaching turn away from international law is the establishment of formal empire – the complete substitution of a domestic for an international organization of rule. The picture of instrumentalization, reshaping, withdrawal, and substitution is thus likely to emerge in its most comprehensive form in the different shapes of empires, and I have therefore termed it "imperial international law".

This does not mean, however, that my argument is limited to situations of empire. Imperial international law is at one end of a continuum, the other end of which is marked by an international law of coordination based on a balance of power. Many intermediate forms exist between both, but wherever differences in power underlie international legal structures, we are likely to find some of the elements that I have described. In all such situations, we will encounter the ambivalent position of international law as both a tool of the exercise of dominance and an element of resistance to it. Both functions are interdependent: without the resistance – its stable and egalitarian character – international law could not provide the benefits of pacification, stabilization, and legitimation for powerful states. But without providing these benefits to the powerful, international law would lose much of its effectiveness in most circumstances: international relations are marked by inequality, and if international law were simply an order of equals, its role would be weak indeed. Power relations are inevitably inscribed into international law, as they are into all forms of law, sometimes more, sometimes less visibly.

International law thus finds itself necessarily in a precarious position. It is always under pressure from powerful states and needs to bow to their demands in order not to be entirely sidelined. Yet it can provide its particular value to the powerful only if it does not completely bow to them: once it appears merely as their tool, it will be unable to provide them with the legitimacy they seek. International law thus always needs to appear as reflecting both the demands of the powerful and the ideals of justice the international society holds at a given moment.[226] Oscillating between both, it will occupy an unstable, yet ultimately secure, place.

[226] This is not to imply that ideals of justice are independent from power relations, on the contrary. Sometimes material power translates into ideology in such a way as to minimize the difference.