Kolloquium

Konstitutionalisierung der Staatengemeinschaft

Skript 3

- Asylum Case (1950), S. 276-277
- Nicaragua Case (1986), §§ 184 – 188
- Ellis, Jaye: Shades of Grey: Soft Law and the Validity of Public International Law, Leiden Journal of International Law (2012), 25, pp. 313–334
- Glennon, Michael J.: The Un Security Council in a Unipolar World, Virginia Journal of International Law, Vol. 44:1, 2003), S. 91 - 112

This provision has been interpreted by that Government in the sense that the usages, conventions and laws of Colombia relating to the qualification of the offence can be invoked against Peru. This interpretation, which would mean that the extent of the obligation of one of the signatory States would depend upon any modifications which might occur in the law of another, cannot be accepted. The provision must be regarded as a limitation of the extent to which asylum shall be respected. What the provision says in effect is that the State of refuge shall not exercise asylum to a larger extent than is warranted by its own usages, conventions or laws and that the asylum granted must be respected by the territorial State only where such asylum would be permitted according to the usages, conventions or laws of the State of refuge. Nothing therefore can be deduced from this provision in so far as qualification is concerned.

The Colombian Government has further referred to the Montevideo Convention on Political Asylum of 1933. It was in fact this Convention which was invoked in the note of January 14th, 1949, from the Colombian Ambassador to the Peruvian Minister for Foreign Affairs. It is argued that, by Article 2 of that Convention, the Havana Convention of 1928 is interpreted in the sense that the qualification of a political offence appertains to the State granting asylum. Articles 6 and 7 of the Montevideo Convention provide that it shall be ratified and will enter into force as and when the ratifications are deposited. The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State. The fact that it was considered necessary to incorporate in that Convention an article accepting the right of unilateral qualification, seems to indicate that this solution was regarded as a new rule not recognized by the Havana Convention. Moreover, the preamble of the Montevideo Convention states in its Spanish, French and Portuguese texts that it modifies the Havana Convention. It cannot therefore be considered as representing merely an interpretation of that Convention.

The Colombian Government has finally invoked "American international law in general". In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to

international custom "as evidence of a general practice accepted as law".

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939. The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has also relied on in this connexion. It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far

to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States ; as the Court recently observed,

> "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, pp. 29-30, para. 27.)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*,

international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them ; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" – the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44) – that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

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187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and

admissibility the United States asserts that "Article 2 (4) of the Charter *is* customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that

> "the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (*ILC Yearbook*, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that "indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law". And the United States concludes :

> "In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force *are* 'modern customary law' (International Law Commission, *loc. cit.*) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other 'customary and general international law' on which Nicaragua can rest its claims."

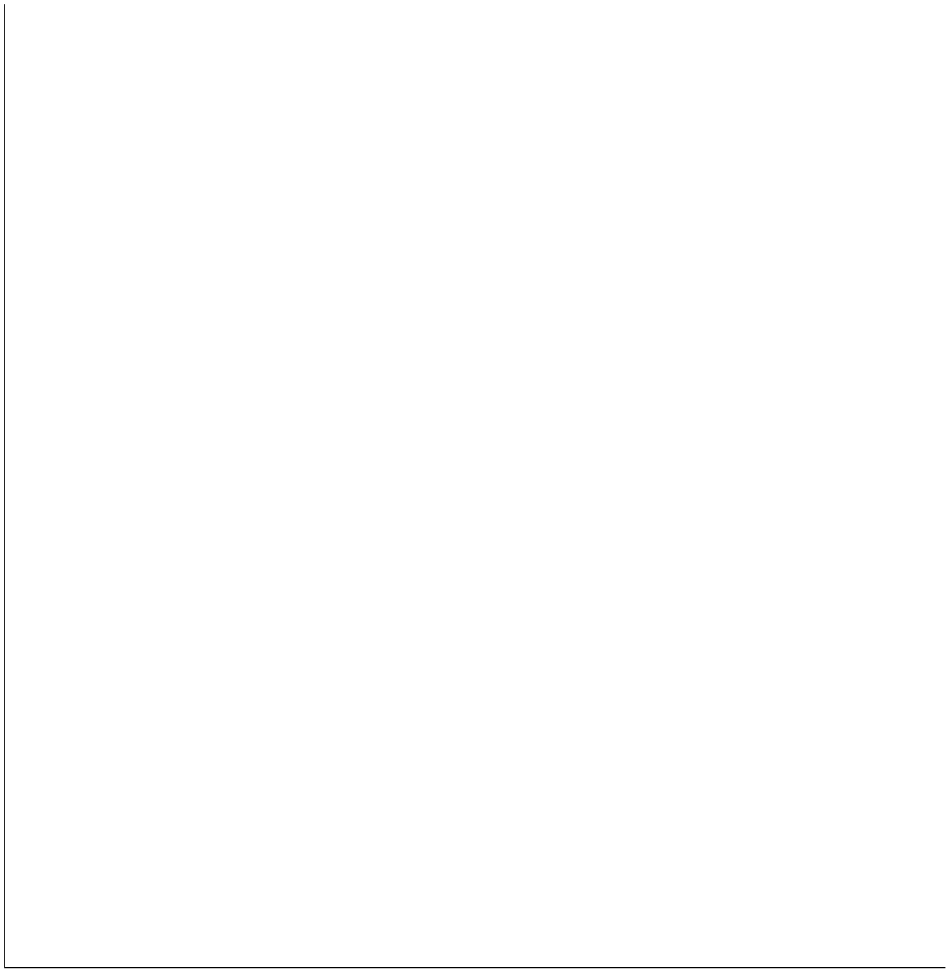
> "It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law – Article 2 (4) of the United Nations Charter."

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that

> "in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule".

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced

from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.



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Shades of Grey: Soft Law and the Validity of Public International Law

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Abstract
Soft law is often seen as a way to overcome certain problems of legitimacy in international law, notably the weaknesses of a voluntaristic conception of international law's validity. Other perceived benefits of soft law include flexibility, speed of adoption and modification, and even effectiveness. Yet, soft law is seen by others as a threat to law, because it effaces the border between law and politics. This paper explores different approaches to the boundary between law and not-law that seek both to maintain this boundary and to reconceptualize it in a way that better anchors the validity of international legal rules.

Key words
autopoietic theory; internal morality of law; publicness of law; soft law; validity of international law

1. Introduction

There seem to be two clear truths about positivism in international law: it is widely regarded, in both its voluntarist[1] and formalist[2] manifestations, as being deeply

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1 Voluntarism, as employed here, refers to approaches that distinguish law from not-law with reference to the presence or absence of state consent to be bound. It is closely associated with Lassa Oppenheim and Heinrich Triepel. For a discussion of Oppenheim's conception of international law's validity, see B. Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', (2002) 13 EJIL 401. For a discussion of Triepel's positivism and of the emergence of a positivist account of international law more generally, see S. Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism', (2001) 12 EJIL 269.

2 Formalism, as the term is employed here, refers to approaches that distinguish law from not-law with reference to the means with which putative rules come into existence. A legal rule is such if it is adopted by the appropriate authority and according to the prescribed procedure, as defined by secondary rules contained within the legal system. It is most closely associated with Hans Kelsen: see M. Koskenniemi, 'Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law', (2007) 4 *No Foundations* 7; Hall, *supra* note 1; J. Kammerhofer, 'Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law', (2009) 22 LJIL 225. This approach appears almost identical to voluntarism, since the (formal) rules of recognition of international law can be interpreted as requiring state consent in one form or another. A central difference between formalists and voluntarists is that the latter read the rules of recognition as requiring state consent. The source 'general principles of international law', though acceptable on a formalist reading,

flawed; and it continues to hold sway. Positivism fails, in the eyes of many critics, to provide a means for linking validity, or legality, with legitimacy, ethics, or justice. Yet, both these versions of positivism have their defenders, among whose number are found a great many scholars who are in fact concerned with finding links between legality and legitimacy, with virtue and law's inner morality, and with democratic principles. A common thread running through this scholarship is a concern with maintaining the distinctive nature of law – with avoiding its conflation with morality, politics, or other normative or social institutions. Both versions of positivism (voluntarism and formalism) find defenders in scholars who see the maintenance of the binary distinction between law and not-law as being normatively grounded.

This scholarship will be explored through the lens of international scholarship on soft law. Soft law poses serious challenges to the binary distinction between law and not-law and, in the eyes of many, to international law itself. This is particularly true of a certain strand of scholarship on soft law that would grant a role in law creation to non-state actors. Some scholars, notably Benedict Kingsbury and Gunther Teubner, seek to articulate conceptions of law that attribute jurisgenerative capacity to non-state actors while maintaining a formalist approach to the validity of international legal rules and therefore maintaining the binary distinction between law and not-law.

My central concern in this paper is to explore the challenges that soft law poses to public international law by focusing on the question of the boundary between law and not-law. I examine various ways in which this boundary is treated in the literature: as something real and important that is nevertheless porous; as real and important but in need of relocation and reconceptualization; or as something that could be done away with altogether. Following this introduction (section 1), the paper addresses the most common approaches to describing and defining soft law, and presents a preliminary definition, adopting a formalist conception of international law's validity (section 2). I then turn to the potential threats posed by soft law to international law's validity (section 3) before examining approaches that seek to link legality with legitimacy without proposing a dramatically revised rule of recognition, focusing on work by Jutta Brunnée, Stephen Toope, and Jan Klabbers that draws on Fuller's internal morality of law (section 4). I then turn to approaches that pose a greater challenge to the rule of recognition and that would open up significantly more space for the participation of non-state actors in processes of international-law formation and implementation: Benedict Kingsbury's concept of international law as inter-public law (section 5) and Gunther Teubner's global law without the state (section 6). I then present some brief comments on the utility of the term 'soft law' to international law and legal scholarship (section 7), before concluding (section 8).

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encounters problems from the point of view of voluntarism, as it is difficult to see how these principles can be grounded in state consent. Similarly, the voluntarist approach to customary law requires reference to legal fictions such as implicit acceptance, or acceptance by newly independent states of the existing body of international rules as a condition of statehood.

2. Soft law: the nature of the category

The many and varied phenomena described as soft law in international legal literature can be roughly divided into three categories: binding legal norms that are vague and open-ended and therefore (arguably) neither justiciable nor enforceable; non-binding norms, such as political or moral obligations, adopted by states; and norms promulgated by non-state actors.[3] Authors do not necessarily restrict their definitions of soft law to one or another of these categories. The boundaries of the category may be drawn so as to include all three types of norm;[4] only norms, whether legally binding or not, promulgated by states;[5] non-binding norms promulgated by states;[6] non-legally binding norms, regardless of authorship;[7] or vague and general norms contained in international legal instruments,[8] to mention the most prominent examples. The various definitions are generated by a series of criteria, sometimes used alone and sometimes in combination with others. The criteria are 'normativity' (or justiciability), enforceability, precision, and formal legal status.

2.1. Normativity and enforceability

The term 'normativity'[9] is used by certain authors to refer to the right- or obligation-creating character of legal norms. For some authors, normativity refers both to the

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3 See also Christine Chinkin's categorization: instruments that 'have been articulated in non-binding form according to traditional modes of law-making'; that 'contain vague and imprecise terms'; that 'emanate from bodies lacking international law-making authority'; that 'are directed at non-state actors whose practice cannot constitute customary international law'; that 'lack any corresponding theory of responsibility'; or that 'are based solely upon voluntary adherence, or rely upon non-juridical means of enforcement': C. Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International System* (2000), 21, at 30.

4 A. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', (1999) 48 ICLQ 901, at 250–1.

5 C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', (1989) ICLQ 850; R. Baxter, 'International Law in "Her Infinite Variety"', (1980) 29 ICLQ 549; T. Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"', (1984–85) 30 *McGill Law Journal* 37; R. Dupuy, 'Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law"', in R. Akkerman (ed.), *Declarations of Principles: A Quest for Universal Peace* (1977), 252; D. Thürer, 'Soft Law – eine neue Form von Völkerrecht?', (1985) 104 *Zeitschrift für schweizerisches Recht* 429.

6 H. Hillgenberg, 'A Fresh Look at Soft Law', (1999) 10 EJIL 499, at 500; I. Seidl-Hohenveldern, *International Economic Law* (1999), 39; J. Carlson, 'International Law and World Hunger: Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem', (1985) 70 *Iowa Law Review* 1187, at 1200; C. Inglese, 'Soft Law?', (1993) 20 Pol. YIL 75; J. Klabbers, 'The Redundancy of Soft Law', (1996) 65 *Nordic Journal of International Law* 167. Klabbers would exclude commitments of a political or moral character, including only 'instruments which are to be considered as giving rise to legal effects, but do not (or not yet, perhaps) amount to real law', at 168.

7 G. Abi-Saab, 'Cours général de droit international public', (1987) 207 RCADI 9; I. Duplessis, 'Le vertige de la *soft law*: Réactions doctrinales en droit international', (2007) *Revue québecoise de droit international* 246; J. Kirton and M. Trebilcock, 'Introduction: Hard Choices and Soft Law in Sustainable Global Governance', in J. Kirton and M. Trebilcock (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004), 3. Mary Footer does not refer to norms promulgated by non-state actors but does include, in her definition of soft law, norms promulgated by international organizations: M. Footer, 'The (Re) Turn to "Soft Law" in Reconciling the Antinomies in WTO Law', (2010) 11 Melb. JIL 241, at 246–7.

8 J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', (2008) 19 EJIL 1075; Carlson, *supra* note 6, at 1203; Seidl-Hohenveldern, *supra* note 6; W. Heusel, *'Weiches' Völkerrecht: eine vergleichende Untersuchung typischer Erscheinungsformen* (1991).

9 I use the term reluctantly here, as my own approach to normativity is much broader. I would argue, for example, that definitions of aggression or torture, or secondary rules regarding rule creation, are normative even if they do not create rights or obligations. Nevertheless, the term will be used here for the sake of convenience.

creation of a legal right or obligation and to the availability of a sanction in the case of violation,[10] while others appear to treat enforceability as a separate criterion.[11] Both groups of authors take essentially functional approaches to law: law is law because it accomplishes certain things. There are two problems with a functional approach. First, legal rules perform various functions. Nicholas Onuf identifies three: directive, assertive, and commissive.[12] Only the first is captured by a definition of legal rules as obligations backed by sanctions. Other essential functions of law, such as constituting authorities, granting powers, or conferring competencies, are not adequately captured by this definition. The assertive function is found in definitions: the portion of the ocean within 12 nautical miles of the baseline is the territorial sea. This function is also filled by judgements: the assault by the troops of state A on those of state B was an act of self-defence. The commissive function is evidenced in secondary rules that govern the creation of legal obligations: state A accepts to be legally bound by a convention.

A second problem with functionalism is that many other kinds of norm carry out the same functions as legal rules.[13] Functional approaches are therefore both over- and underinclusive.[14] This point can be illustrated with reference to Anthony D'Amato's argument that legal rules are enforceable rules backed by sanction. 'The essence of any soft-law rule,' he argues, 'is that it is unenforceable.'[15] He goes on:

> A soft-law system will allow an infraction to be cost-effective: that is, a violator of a norm of soft law may suffer a reputational loss, but reputational damage may be well worth the benefits that are derived from non-compliance with the norm. By contrast, a hard-law system must, without exception, endeavour to make every violation cost-ineffective.[16]

Soft law, then, is 'a naked norm, whereas hard law is a norm clothed in a penalty'.[17] On these terms, provisions such as the definition of a treaty found in the Vienna Convention on the Law of Treaties could be described as soft law. At the same time, the myriad consequences that might befall an actor that disregards rules, commands, or threats of a non-legal nature are ignored: the only cost that counts is that imposed by a legal penalty. If cost-effectiveness of violations is the criterion for distinguishing hard from soft obligations, the lines around international law would probably have

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10 Abi-Saab, *supra* note 7; P. Dupuy, 'Soft Law and the International Law of the Environment', (1990) 12 Mich. JIL 420.

11 A. D'Amato, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont', (2009) 20 EJIL 897; K. Abbott et al., 'The Concept of Legalization', (2000) 54 IO 401.

12 N. Onuf, 'Do Rules Say What They Do? From Ordinary Language to International Law', (1985) 26 Harv. JIL 385, at 399–402.

13 For legal pluralists, this does not pose a problem, but the authors considered here are not legal pluralists.

14 Gunther Teubner is highly critical of a functional approach to law, arguing that one cannot identify law's singular function and that a different approach to distinguishing it from other normative and social systems should be taken: G. Teubner, '"Global Bukowina": Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law without a State* (1997), 3, at 13–14.

15 D'Amato, *supra* note 11, at 899, despite D'Amato's assertion that he goes on to treat soft law as norms that are not legally binding, at least in international law; see also Baxter, *supra* note 5; K. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', (2000) 54 IO 421.

16 D'Amato, *supra* note 11, at 902.

17 Ibid., at 902.

to be redrawn altogether; indeed, law would become indistinguishable from the exercise of power.[18]

The criteria of obligation creation and enforceability seem to refer to a third approach to positivism – one more closely related to social sciences than to legal science, which places emphasis on the effectiveness of law – on its measurable impact on behaviour and outcomes. It might be assumed that among the most effective legal rules are those that clearly communicate an obligation, but, even if this is a sound assumption, which is open to question, the *validity* of a legal rule is and must be a separate issue from its effectiveness.[19] Clearly, law's effectiveness and the pathways through which law has an impact on the world are issues of great concern to jurists as well as to scholars in cognate disciplines. But criteria based on effectiveness are less helpful – though certainly far from irrelevant – for identifying the bases of law's validity.[20]

2.2. Precision

Many authors categorize norms as 'soft' due to their lack of precision.[21] This can overlap with the criterion regarding the creation of an obligation – it is argued by many that vague provisions may set out objectives but cannot create obligations – but is nevertheless distinct. For example, a provision calling on parties to endeavour to reduce greenhouse gas emissions or to improve literacy rates among girls and women creates an obligation, though one whose fulfilment is difficult to measure. Such obligations, like the obligation in Quebec civil law 'to abide by the rules of conduct which lie upon [one], according to the circumstances, usage or law, so as not to cause injury to another',[22] are certainly vague, and any attempt to specify the location of the threshold between legal and illegal behaviour, as defined by this provision, would fail. Fortunately, judges are not required to locate this threshold; they are rather required to determine whether it has been passed or not.

The precision of an obligation depends not only on the legal text itself, but also on the thickness of shared understandings that support the rule. The obligation regarding negligence drawn from the Quebec Civil Code, cited above, is expressed in vague and open-ended language, and its application in particular cases is often extremely difficult but, in Quebec society, there is a dense network of shared understandings regarding applicable rules of conduct on which citizens, lawyers, and judges can draw in evaluating behaviour. In international law, in which shared understandings are much thinner and more fragile, vague and open-ended legal provisions may be

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18 Koskenniemi, *supra* note 2, at 18; J. d'Aspremont, 'The Politics of Deformalization in International Law', (2011) 3 *Göttingen Journal of International Law* 503, at 539.

19 D'Aspremont, *supra* note 8, at 1085 ff.; d'Aspremont's approach, focusing on the distinction between a legal *fact* and a legal *act*, is not adopted here, but it does permit him to make this point neatly: the *negotium*, or the expression of the authors' intentions (in other words, the content of the rule), may be 'soft' in the sense of creating no clear obligations, or no obligations whatsoever, but the rule's validity as a rule of law depends not on that, but rather on the *instrumentum*, or the container for the rule's content: d'Aspremont, *supra* note 18, at 1081.

20 But see R. Ago, 'Positive Law and International Law', (1957) 51 AJIL 691.

21 Baxter, *supra* note 5; d'Aspremont, *supra* note 8. This is one of three definitions of soft law explored by Boyle, *supra* note 4, at 906 ff.

22 Quebec Civil Code, Art. 1457.

more problematic. Particularly troubling is the use of vague language as a deliberate strategy to create the illusion of agreement and resolution.[23] Prosper Weil refers to deliberately vague rules as '"precarious" norms' and states that the proliferation of such norms 'does not help strengthen the international normative system'.[24] But he also notes – correctly, in my view – that '[a] rule of treaty or customary law may be vague, "soft;" but . . . it does not thereby cease to be a legal norm'.[25]

2.3. Formal status

A third criterion for identifying soft law, which is adopted here, focuses on the manner in which a rule comes into being. If the rule meets the criteria contained in the rule of recognition of positive rules of law, it is a legal rule; if not, then it is not. Of course, there are different accounts of what the rule of recognition is. A 'useful starting point'[26] is the list of sources in Article 38(1) of the Statute of the International Court of Justice, but it is probably no more than a starting point.[27] Increasingly controversial, however, is the proposition that the rule of recognition is based on state consent – a position that Jean d'Aspremont argues has been central to international-law scholarship since the nineteenth century and has come to be challenged only in recent decades.[28] Even among scholars committed to formalism in international law, a rule of recognition phrased in terms of a state's consent to be bound encounters resistance. For example, d'Aspremont and Klabbers, while recognizing the centrality of intent to be bound to the boundary between law and not-law, remind us that it is the rule of recognition and not the simple expression of consent that confers legally binding status on a rule.[29] This question will occupy a significant portion of the discussion below. For present purposes, the point to be made is that, following a formal approach, 'soft' law is not-law, though that need not be the end of the story. There may be reasons to identify a subset of non-legal rules, norms, or standards and place them under the rubric 'soft law'. Proponents of this approach seek to identify criteria to distinguish soft international law from the mass of norms, rules, and standards that may exist at any given time: the term 'soft law' is taken to refer to a body of norms that are relevant to international law in some way, such as because of their close resemblance to law, the extent to which they are taken up in legal discourse, the extent of consensus around them, their influence on the

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23 See Baxter, *supra* note 5, at 561.

24 P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 AJIL 413, at 414–15.

25 Ibid., at 414; see also Inglese, *supra* note 6, at 81–2.

26 J. Klabbers, 'Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law', (2008) 5 *No Foundations* 84, at 84.

27 Ibid., at 84; J. d'Aspremont, *Formalism and the Sources of International Law* (2011), at 149.

28 D'Aspremont, *supra* note 27, at 65–8.

29 The authors' approaches are nevertheless different. Klabbers, relying on Hart's analysis of internal and external elements of law, proposes a presumption of legality: 'normative utterances should be presumed to give rise to law, unless and until the opposite can somehow be proven.' The normative utterance alone is not sufficient; one must also consider 'how norms are received by their possible addressees': J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), at 115, 119; Klabbers, *supra* note 26, at 90; d'Aspremont argues that intent, to lead to the formation of law, must be expressed in a particular form, 'by a systematic use of *written linguistic indicators*': d'Aspremont, *supra* note 27, at 185 (emphasis in original).

behaviour of international actors and outcomes in international society, and other such factors.[30]

As a step in the direction of a definition of soft law, then, soft law is not law, but is somehow of relevance to law. The reasons for adopting this approach have already been identified in the above discussion regarding the range of criteria used in the literature to define and describe soft law, and can be summarized as follows. Definitions of law based on function – approaches that focus, for example, on the command-like structure of a rule and the availability of sanction in case of violation – are over- and underinclusive and do not help us to understand how rules of international law differ from other normative statements, commands, or threats. For these reasons, approaches that focus on the normativity or justiciability of rules to distinguish between soft and hard law must be set aside. As for approaches that focus on the precision of a rule, they must be rejected, for similar reasons. Lack of precision may indeed cause a rule to be non-justiciable, particularly when the vague and general language in which the rule is expressed is not undergirded by shared understandings in the legal community. But the meaning to be ascribed to a legal rule often develops gradually and indeed can change significantly as jurists and laypersons seek to interpret and apply it.[31] Therefore, while lack of precision may in many cases affect the quality of a rule, its effectiveness, its influence, its compliance pull, etc., one should not too quickly reach a conclusion that deprives the rule of its rule-ness.

3. Soft law: threats and challenges

The potential dangers posed by soft law depend on one's approach to defining it. Vague provisions in legally binding instruments may be regarded as a waste of valuable time and effort, or as creating the illusion of agreement among parties and resolution of a problem.[32] When such vague provisions come before third-party dispute-settlement bodies, the wide discretion that they confer on those bodies may be cause for concern.[33]

The main concern regarding definitions of soft law as non-binding agreements concluded by states – political declarations, unilateral statements by political authorities, non-binding resolutions, recommendations, and decisions adopted by inter-governmental bodies – appears to be a muddying of the waters. Potentially applicable norms proliferate, some of which may be mutually incompatible.[34] The

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30 Dupuy, *supra* note 10; Chinkin, *supra* note 3, at 30–1; Carlson, *supra* note 6, at 1202 ff.; J. Gold, 'Strengthening the Soft International Law of Exchange Arrangements', (1983) 77 AJIL 443, at 443; Abi-Saab, *supra* note 7, at 209 ff.; Footer, *supra* note 7.

31 For a Kantian interpretation of the distinction between the articulation and application of a rule, see Koskenniemi, *supra* note 2, at 9–10.

32 Carlson, *supra* note 6, at 1204 ff.

33 It could be argued that this concern is misplaced, as the parties to the dispute will have agreed to grant jurisdiction to the adjudicatory body. Yet the parties may make unwarranted predictions about the manner in which the adjudicators will interpret and apply vague provisions, and may be in for some unpleasant surprises. Furthermore, the interpretation will, despite the fact that there is, formally, no doctrine of precedent in international law, have impacts on other parties to the convention subject to interpretation.

34 D'Amato, *supra* note 11; Chinkin, *supra* note 5.

clarity provided by a binary approach to the definition of law is lost; actors can no longer be sure which rules apply, or with what force, or with what consequences in the case of violation.[35] Key functions of legal systems – the provision of order, predictability, and stability – are compromised.

A further concern lies with democratic process: soft-law instruments may seem preferable because they are easier to adopt, particularly if the rigours of debate and approval through formal law-making processes can be dispensed with.[36] It is frequently observed that states negotiate non-binding declarations, and even press releases, with almost as much care as they do binding instruments.[37] Often, however, the appeal of soft law may lie in the relative ease with which it can be created because democratic processes and other formal procedures required for the creation of legally binding rules can be circumvented.[38]

The version of soft law that presents the most serious challenge to international law's rule of recognition is that which encompasses norms promulgated by non-state actors.[39] However, many of the authors who include such norms in their definitions of soft law do not wish to efface the boundary between law and not-law or even to relocate it: they place soft law outside the boundary of international law. For many such authors, norms produced by non-state actors are of interest because of their *lex ferenda* character – their influence on the development of international law. They may ask what conditions seem to favour this transformation,[40] or whether the creation of a strong consensus around a norm before it crosses the boundary has an impact on its effectiveness or on perceptions of its legitimacy once it is transformed into law.[41] Alternatively, they may be interested in the influence that discourse, debate, and consensus formation in civil society or in more specialized fora have over processes of law creation, interpretation, and application.[42] For these authors, soft-law norms are legal facts that, as d'Aspremont notes:

> can still produce legal effects . . . [such as] partak[ing] in the *internationalisation of the subject matter*, provid[ing] guidelines for the interpretation of other legal acts, or pav[ing] the way for further subsequent practice that may one day be taken into account for the emergence of a norm of customary international law.[43]

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35 Koskenniemi, *supra* note 2; M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9; J. Klabbers, 'The Undesirability of Soft Law', (1998) 67 *Nordic Journal of International Law* 381; Chinkin, *supra* note 5.

36 Footer, *supra* note 7, at 248; D. Shelton, 'Soft Law', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), 68.

37 G. Palmer, 'New Ways to Make International Environmental Law', (1992) 86 AJIL 259, at 270.

38 J. Klabbers, 'Informal Agreements in International Law: Towards a Theoretical Framework', (1994) 5 *Finnish Yearbook of International Law* 267, at 361–2; Klabbers, Peters, and Ulfstein, *supra* note 29, at 89.

39 Chinkin, *supra* note 3, at 29.

40 Boyle, *supra* note 4; M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', (1998) 52 IO 887. Finnemore and Sikkink do not focus on legal norms; nevertheless, their discussion of the life cycle of international norms, at 895 ff., is highly illuminating for discussions of the emergence of international legal norms.

41 This is one of the insights of the interactional-law approach, drawing on Lon Fuller's conception of the internal morality of law, taken by J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010).

42 Ibid., at 98 ff.

43 D'Aspremont, *supra* note 27, at 129 (footnotes omitted, emphasis in original).

Soft law is often seen as a means to address certain acknowledged weaknesses of the international legal system: the limited effect of many legal norms on state behaviour and the relative paucity of sanctions for violations, the democratic deficit,[44] the slowness and reluctance with which international legal institutions respond to grave problems in international society,[45] and the woeful inadequacy of many of those responses.[46] Many critics of soft law acknowledge these weaknesses but are nevertheless concerned to preserve a binary definition of law, not because of a deep-seated commitment to it, but because they conclude that it is in fact a *more* effective means of pursuing principles such as democracy, rule of law, and collective self-determination than any readily available alternatives. For example, Weil refers to the 'two essential functions' of international law: 'to reduce anarchy through the elaboration of norms of conduct enabling orderly relations to be established among sovereign and equal states . . . [and] to serve the common aims of members of the international community'.[47] He then argues that the fulfilment of this function requires international law to retain a number of essential features: voluntarism, neutrality, and positivism.[48] These, importantly, are not presented as ends in themselves, but rather as features essential to international law's ability to carry out its twin functions of coexistence and common aims. He freely acknowledges that 'neither the basis nor the ultimate justification of international law is to be found in the normative system as such' but argues that 'it is still necessary for that system to be perceived as a self-contained, self-sufficient world'.[49]

Klabbers's conclusion that soft law is 'undesirable' rests in large part on the latitude that soft law gives to actors who already enjoy extensive power and influence in international society – power and influence that formal processes of law creation serve, in some measure, to constrain. Soft law, Klabbers argues, is not autonomous of morality and politics and risks being 'a fig leaf for power'.[50] In a similar vein, Anna Di Robilant summarizes a line of critique of soft law as follows: '"Pluralistic participation" in soft governance processes is limited to visible and powerful social actors, reinforcing and asserting existing power structures and cleavages rather than encouraging openness. Soft rhetoric, they [critics of soft law] contend, masks hard practices'.[51] She is speaking of the European context, but this critique becomes all the more powerful when we move to the international level and consider undemocratic states: any attempt to represent at the international level the voices of the citizens of authoritarian states would have to rely heavily on what participants imagine those citizens would say if they could speak up.

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44 This could refer to the perceived need to include non-state actors in law-making processes (Duplessis, *supra* note 7, at 250–1) or to the unequal influence of different groups of states on law-making processes (Seidl-Hohenveldern, *supra* note 6, at 40).

45 Kirton and Trebilcock, 'Introduction', *supra* note 7; Chinkin, *supra* note 3, at 22.

46 See, e.g., Palmer, *supra* note 37, at 269.

47 Weil, *supra* note 24, at 418–19.

48 Ibid., at 420–1.

49 Ibid., at 421.

50 Klabbers, *supra* note 35, at 391.

51 A. Di Robilant, 'Genealogies of Soft Law', (2006) 54 *American Journal of Comparative Law* 499, at 508.

One of the threats posed by soft law is to the boundary between law and politics. Many soft-law norms are in fact political or ethical values presented in the language of law. Klabbers, drawing on the writings of Hannah Arendt, highlights problems with this approach, notably with its tendency to conflate politics and law to the detriment of both. Arendt, Klabbers notes, insists on the public nature of politics, which is seen not as the mere aggregation of interests, but rather as debate and deliberation in a public sphere in which people gather to make collective judgements.[52] As Klabbers puts it, Arendt seeks to '[develop] a style of thinking about politics where individuals jointly, in all their plurality, take care of the world, and assume responsibility for it together'.[53]

Arendt's concept of natality[54] is key, first as it relates to plurality: the collective judgements made in the public sphere are not the result of a gradual homogenization of interests or values through processes of discourse, but rather of an agonistic confrontation among people, each of whom is utterly unique.[55] Each human action unleashes chains of events on the world that are utterly unpredictable and quickly escape the control of their authors.[56] The only institutions available to place some bounds on the uncontrollability and unpredictability of human interaction are promises and forgiveness.[57] Arendt's focus on promises manifests itself in an interest in contract, and more generally in positive law.[58] Her approach to law focuses closely on the contract as a means of creating '"islands of predictability," or "guideposts of reliability"'.[59] Klabbers states:

> If it is the case that force, domination, and rule are not authentically political, then any attempt to bring legislation and politics (in the Arendtian sense) together would have to stress the consensual nature of law, all law, including legislation.[60]

Of course, international political processes that lead to law formation bear little resemblance to Arendt's deliberation in the public sphere. Domestic legislative processes, even in robust democracies, fall short as well. But, in domestic democratic systems, there are at least attempts to ensure the existence and operation of 'sluices' between informal processes of will and opinion formation on the one hand, and formal legislative processes on the other.[61] It is probably fair to say that international society does possess something like a public sphere (or rather *spheres*), but it is much harder to argue that these spheres have strong links with formal processes of law-making. This is precisely one of the objectives of certain proponents of soft law – to render processes of law formation more genuinely public. The question is whether, and how, this could be done.

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52 H. Arendt, *The Human Condition* (1958), at 198.
53 J. Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt', (2007) 20 LJIL 1, at 8.
54 Arendt, *supra* note 52, at 9, 177–8.
55 Ibid., at 41.
56 Ibid., at 190 ff., 232 ff.
57 Ibid., at 237.
58 Klabbers, *supra* note 53, at 9–11.
59 Ibid., at 9; Klabbers refers to Arendt, *supra* note 52, at 244.
60 Klabbers, *supra* note 53, at 38.
61 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by W. Rehg) (1998), 38.

4. Diminishing the danger

At the heart of much literature on soft law is a desire to move beyond a description of international law's validity that depends directly (as in voluntarism) or indirectly (as in formalism) on state consent. In the words of Benedict Kingsbury:

> The idea that international law should speak to the whole of society is evident in the continuous efforts to nudge the field beyond states-will theories of sources, beyond bilaterality and opposability, toward community norms, beyond a focus on managing disputes and adversarial proceedings, toward a deeper structure of normative enunciation and claims arising from neighbourhood and impact rather than contract and technical legal interests. It appears in the idea of *jus cogens* – peremptory norms applicable to all, which no group of states can contract out of – and in other modern natural law ideas. It appears in the frequent resort to 'general international law' rather than simply the specific agreement made by the parties in a dispute.[62]

The weaknesses of voluntarism have been well understood for decades, and many authors express surprise at the durability of this approach to international law's validity.[63] But the reason is not far to seek, as Kingsbury notes:

> Much of the effort of international lawyers in the century since Oppenheim wrote has gone into broadening the functioning legal conception of international society from the narrowly statist one of Oppenheim's 'Family of Nations'. But it is difficult to argue that a robust theory of international law has as yet accompanied these newer accounts of more and more inclusive and complex international society with disaggregated states, an infinite diversity of non-state actors, private or hybrid rule-making, and an ever expanding range of topics covered by competing systems or fragments of norms. The extensive cognitive and material reconstruction required to actualize emancipatory projects such as that of Philip Allott is indicative of the scale of the challenge. However unappealing Oppenheim's approach has seemed, its coherence and manageability are normative attractions that make its continuing political influence intelligible.[64]

More particularly, Kingsbury notes that a renewed interest in voluntarist approaches is spurred by a desire to connect international law-making processes to democratic principles.[65] Nevertheless, Kingsbury, along with a number of other authors, has sought to rethink international law's rules of recognition. The challenge, as Klabbers and Koskenniemi make eminently clear,[66] is to do so in a manner that does not threaten to undermine law by conflating it with cognate social systems such as politics, ethics, or economics. Lon L. Fuller's conception of the internal morality of law provides an excellent starting point for discussions of legality and legitimacy in the heterogeneous setting of international society. Fuller proposed a set of criteria that allow us to grasp the particularity of law while at the same time linking legality and legitimacy.[67]

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62 B. Kingsbury, 'International Law as Inter-Public Law', in H. Richardson and M. Williams (eds.), *Nomos XLIX: Moral Universalism and Pluralism* (2009), 181.

63 Hall, *supra* note 1.

64 Kingsbury, *supra* note 1, at 416.

65 Ibid., at 436.

66 See, e.g., Klabbers, *supra* note 6; Klabbers, *supra* note 35; Klabbers, Peters, and Ulfstein, *supra* note 29.

67 Klabbers, Peters, and Ulfstein, *supra* note 29.

Fuller's approach is apt for international law, with its decentralized, horizontal structure and its dependence on its subjects' adherence to its rules. The notion that law's legitimacy depends on its capacity to achieve acceptance among the members of the society to which it is addressed is central to Fuller's notion of a legal system that supports the self-determination of its addressees. In the first place, Fuller rejects the idea that law's effectiveness can be based on the notion of public order, on the use or threat of force, or on a formal hierarchy of authority.[68] Fuller argues that legal systems cannot be regarded as structures of authority to which their addressees are subject,[69] but rather consist of 'the enterprise of subjecting human conduct to the governance of rules'[70] – an enterprise in which legislators, the administrators of law (administrative authorities and judges), and addressees participate.[71] Gerald Postema refers to this as Fuller's vertical interaction thesis:[72]

> First, law regulates or guides actions of citizens by addressing reasons or norms to them. Rather than altering the social or natural environment of action, or manipulating (nonrational) psychological determinants of action, law seeks to influence behavior by influencing deliberation. It addresses norms to agents and expects them to guide their actions by those norms. Moreover, it expects those norms to figure in deliberation not as contextual features setting the environment or parameters of choice, but as *reasons for* deliberate choice. Thus, rules are intended to be 'internal' in two respects: (a) they figure in the deliberation of agents, and (b) they figure as reasons for, and not merely parameters of, deliberation and choice.
>
> Second, law seeks to influence deliberation in a wholesale fashion, not through detailed step-by-step instructions, but through general norms that agents must interpret and apply to their specific practical situations.[73]

The effectiveness of rules is thus not based on their ability to inform their addressees precisely what forms of behaviour are required of them, or the ability of a judge to apply the rules without having to engage in interpretive processes.[74] Once the rule has been articulated, its addressees and those charged with its application must begin the process of determining what it means in individual cases. In international law, this task tends to fall to the addressees themselves, as third-party adjudication is not often resorted to.

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68 L. Fuller, *The Morality of Law* (1964), 107.

69 Ibid., at 63, 145.

70 Ibid., at 106.

71 Ibid., at 91.

72 G. Postema, 'Implicit Law', in W. Witteveen and W. van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (1999), 255, at 255, 260.

73 Ibid., at 262 (emphasis in original).

74 Hart has given extensive consideration to the problem of interpretation of legal rules. He argues that legal rules have an 'open texture', the consequence of which is that, at some point, rules will prove indeterminate: H. L. A. Hart, *The Concept of Law* (1997), 124. This indeterminacy, in Hart's conception, appears around the edges of the scope of a rule's application – rules possess a 'core of settled meaning' surrounded by a 'penumbra' of uncertainty: H. Hart, *Essays in Jurisprudence and Philosophy* (1983), 63. The approach taken here differs in that the rule's 'core of settled meaning' is not regarded as an inherent quality of the rule itself, but rather as the result of a shared understanding regarding the meaning of the rule and the scope of its application. At one point in time, it may seem beyond dispute that a rule will receive a particular interpretation: for example, it once appeared self-evident that state sovereignty implied a right of the sovereign to define and pursue domestic policy goals without interference from other states. This interpretation of sovereignty remains highly persuasive and pervasive, but has lost its self-evidence. The content of the 'core of settled meaning' will change and evolve with changes in the shared understandings surrounding the rule.

For Fuller, the uniqueness of law is due not to formal criteria, but to its internal morality. In the words of Jutta Brunnée and Stephen J. Toope, '[w]hat distinguishes law from other types of social ordering is not form, but adherence to specific criteria of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action'.[75] This procedural approach, note Brunnée and Toope, allows a link to be established between legality and legitimacy, without assuming a thick set of shared values or an international community.[76]

One potential contribution of this interactional approach to international law is to shed light on the role of non-state actors in the project of law. Because a legal rule can only function as such if it generates a sense of legal obligation, rules concluded under pressure of time, power, or economic clout may qualify on a positivist account as rules of law, but may fail to generate fidelity. Rules rooted in understandings shared by many international actors, on the other hand, may be capable of doing so.[77] Indeed, Brunnée and Toope acknowledge that certain non-binding rules may have a greater capacity to generate fidelity than certain binding rules.[78] A rule may become capable over time of generating a sense of legal obligation, or may lose that capacity: for example, states formally bound by the rule may not respect it, or may ignore it in formulating legal arguments about their own or others' behaviour. The extent to which a norm generates a sense of legal obligation can be influenced by non-state actors as they critique (or, less frequently, praise) state behaviour or make representations in legal and political arenas.[79]

Brunnée's and Toope's insistence on the importance of links between legitimacy and legality, the role of non-state actors in the project of international law, and their welcoming attitude towards the influence of non-binding norms on legal arguments do not lead them to deny the existence or importance of a boundary between law and not-law.[80] Similarly, Klabbers, while embracing Fuller's internal-morality arguments, concludes that formal criteria are still needed to distinguish law from other forms of normativity.[81] He acknowledges that 'state consent cannot explain the binding force of the legal system' but adds that 'it can – or rather could – explain most individual rules of international law in most individual settings'.[82] To attenuate the weaknesses of this approach, Klabbers argues for '"presumptive law": normative utterances should be presumed to give rise to law, unless and until the opposite can somehow be proved'.[83]

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75 Brunnée and Toope, *supra* note 41, at 6.
76 Ibid., at 29, 42 ff.; Klabbers, Peters, and Ulfstein, *supra* note 29, at 100.
77 Brunnée and Toope, *supra* note 41, at 65 ff.
78 Ibid., at 51.
79 Brunnée and Toope open their book with a discussion of protests against the Iraq war, and refer to comments made by one protester, an 11-year-old boy in Los Angeles, questioning the evidence upon which the decision to go to war had ostensibly been based: ibid., at 1–2.
80 Ibid., at 46.
81 Klabbers, Peters, and Ulfstein, *supra* note 29; Klabbers, *supra* note 26.
82 Klabbers, Peters, and Ulfstein, *supra* note 29, at 113.
83 Ibid., at 115.

These approaches certainly take their distance from (certain versions of) positivism, and may create space for various kinds of soft law or, more precisely, for appeals to soft-law norms for some purposes, but, at the same time, they acknowledge the ongoing need for a formal rule of recognition based on state consent. The two approaches considered below – international law as inter-public law and global law without the state – rely on a distinction between law and not-law but propose to redraw that boundary.

5. Public international law as inter-public law

Benedict Kingsbury proposes a modified rule of recognition for international law – one that incorporates 'publicness' as a criterion for formally binding legal rules. He describes 'publicness' as 'the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such'.[84] He further argues that '"[p]ublicness" is a necessary element in the concept of law under modern democratic conditions',[85] presenting a modified version of Hart's rule of recognition that 'include[s] a stipulation that only rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law'.[86] Kingsbury fleshes out his notion of publicness with reference to a series of general principles, presented as an indicative list: the principle of legality, according to which authorities 'are constrained to act in accordance with the rules of the system'; the principle of rationality, or the requirement that reasons be given for decisions; the principle of proportionality between means and ends; rule of law, understood in a procedural sense; and human rights.[87] He argues that:

> in choosing to claim to be law, or in pursuing law-like practices dependent on law-like reasoning and attractions, or in being evaluated as a law-like normative order by other actors determining what weight to give to the norms and decisions of a particular global governance entity, a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law.[88]

This approach does more than alter the basis on which international law is recognized as law; it also makes it possible for non-state entities to possess jurisgenerative capacity.

Kingsbury's dissatisfaction with a voluntarist approach arises from the difficulty of explaining why states should have jurisgenerative capacity, and why other types of actor should not.[89] He notes that 'the concept of the state as a juridical unit . . . does not adequately reflect the quality of states as public law entities, a quality that

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84 B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', (2009) 20 EJIL 23, at 31 (footnotes omitted).
85 Ibid.
86 Ibid., at 30.
87 Ibid., at 32–3.
88 Ibid., at 30.
89 Kingsbury, *supra* note 62, at 168.

distinguishes them from mere "rational actors"'. Second, 'the *jus inter gentes* model of international law does not account adequately for the burgeoning activities of regulatory entities that are neither states nor simple delegates of states'.[90] As to the first point regarding the reasons why states should be seen to have jurisgenerative capacity, Kingsbury does not seek to question this capacity, but rather to rethink its conceptual grounding:

> When states – as public law entities and committed to publicness in law – come together with each other in an international legal rule-making and decision-making normative process, the results are not identical in form or meaning to what would result from a comparable process among unitary rational non-public actors.[91]

Actors possessing jurisgenerative capacity on this understanding include states, but not as such – rather, because they are 'entities that are themselves public – operating under their own public law, and oriented toward publicness as a requirement of law'.[92] But so are certain other actors.[93]

Kingsbury's dissatisfaction with voluntarism does not lead him to the conclusion that one can or must treat 'every normative assertion in transnational governance as international law, on condition only that it is made with a claim to authority and establishes a sense of obligation'.[94] He notes that 'a convincing rule of recognition for a legal system that is not simply the inter-state system has not been formulated'[95] and lays the groundwork for a new approach to developing such a rule, locating the point of origin of 'the normative content of law . . . in the public nature of law itself'.[96]

Kingsbury's approach goes a great distance towards answering many of the concerns of critics of soft law. It takes seriously the distinction between law and not-law, purporting to identify a uniform rule of recognition that allows one to identify valid legal rules. The distinction is formal, based neither on the function of rules nor on their content. The criteria proposed to distinguish law from not-law are robust: an actor seeking to demonstrate the existence of a legal rule will be required to produce evidence of the rule's validity and will not be able to rely on wishful thinking. Finally – and this is a central contribution of this approach – the normative criteria proposed for distinguishing between law and not-law are much more robust than the references to democracy that have come to serve as a justification for voluntarism.[97]

Kingsbury does not seek to ground his rule of recognition in principles of representative democracy.[98] The qualification of public entities as such does not depend, in Kingsbury's conception, on the extent to which they actually represent the will or interests of specific publics.[99] This approach has been criticized as giving rise to

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90 Ibid.
91 Ibid., at 168–9.
92 Ibid., at 188.
93 Ibid., at 168, 188.
94 Ibid., at 170.
95 Ibid., at 171; see also M. Koskenniemi, 'The Future of Statehood', (1992) 32 Harv. JIL 397.
96 Kingsbury, *supra* note 62, at 173.
97 Kingsbury, *supra* note 1, at 436.
98 Kingsbury, *supra* note 62, at 196.
99 Kingsbury, *supra* note 84, at 56.

a 'fundamental legitimacy crisis' that Kingsbury seeks to resolve by 'locat[ing] its legitimacy [of law] outside democratic control'.[100] This is true, on the whole, but, as a practical matter, the legitimization of international law through democratic control is very difficult to conceive of.[101] If Klabbers and Koskenniemi are right about the threats posed by soft law to law and politics, then attempts to ground international law on genuinely democratic foundations might pose more of a threat to than an opportunity for international law and respect for democratic principles. Kingsbury's assessment of the medium-term prospects for cosmopolitan democracy at the global level leads him to search for other, firmer ground for law's legitimacy.

Kingsbury's approach has been criticized for relying more heavily on natural law, and less on positivism, than he claims. Alexander Somek makes a couple of different points in this respect. First, he notes that global administrative law (GAL) has brought within its compass a range of processes that go beyond the exercise by rule-making and rule-applying bodies of authority delegated by a legal authority, which, he argues, are of doubtful relevance to administrative law 'if they do not give rise to the adoption of legally binding administrative acts'.[102] Somek calls on scholars of GAL to 'explain which of the phenomena it studies are to be described as law'.[103] For his part, Kingsbury has done so, in two different ways. First, he explains why the kinds of procedure, rule, standard, etc. to which he and colleagues refer should be understood as forming part of a body of GAL, referring to David Dyzenhaus's distinction among constitutive, substantive, and procedural administrative law.[104] Second, he acknowledges that he is not limiting himself to a discussion of law, if law is to be understood as based on state consent; he states that the term 'global' was preferred to 'international':

> to avoid implying that this is part of the recognized *lex lata* or indeed *lex ferenda*, and instead to include informal institutional arrangements . . . and other normative practices and sources that are not encompassed within standard conceptions of 'international law'.[105]

He seeks a new rule of recognition, and the categories of norms to which he refers do or could meet the criteria of this new rule.[106]

Another aspect of Somek's criticism is that the principles in light of which administrative acts are to be judged seem to be derived using natural-law, not positive-law, methodologies. 'The underlying idea,' writes Somek:

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100 M. Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', (2010) 20 EJIL 997, at 1003.

101 One promising approach is that of Karl-Heinz Ladeur: his approach is based not on direct democracy, but on global society conceived of as a network of networks in which individuals either do or could participate: K. Ladeur, *Globalisation and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?* (2003).

102 A. Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', (2010) 20 EJIL 985, at 986–7.

103 Ibid., at 988.

104 Kingsbury, *supra* note 84, at 34, referring to D. Dyzenhaus, 'The Concept of (Global) Administrative Law', (2009) *Acta Juridica*.

105 Kingsbury, *supra* note 84, at 25–6.

106 Ibid., particularly at 29 ff.; see also Kingsbury, *supra* note 62.

> appears to be that no people with 'mature reason' (Kant) would adopt laws incompatible with freedom (hence, rationality and proportionality along with the rule of law) or equality (hence, the principle of legality). The regulative principles that flesh out the meaning of what are necessary components of the *volonté générale* are presented as principles underlying any law, and hence, any public law.[107]

These principles may be compatible with natural-law thinking; in other words, they may be susceptible to justification in natural-law terms. But Kingsbury's methodology is empirical, perhaps influenced by certain comparative approaches: he looks to 'diverse substantive regimes of global regulatory practice' for insights into principles that may be emerging; his own contribution is not to derive them from first principles, as in natural law, but to proceed in an inductive fashion,[108] observing the practice of diverse public authorities, and to categorize and evaluate those practices in light of his version of a Hartian rule of recognition that incorporates publicness as a criterion.[109] Furthermore, there is no indication that Kingsbury is presenting these principles as the final word on GAL: he makes it clear that this is an emerging field.[110] The principles ought to be understood as works in progress and not as a constitution, to my mind.

Yet another approach to the drawing of a boundary around law seeks to implicate individuals and social groups directly in international law-making processes, rejecting the centrality of the state in those processes but at the same time maintaining – or, more accurately, working towards – a clear distinction between law and other social systems such as autopoiesis. This approach, based on autopoietic theory as developed by the sociologist Niklas Luhmann and the jurist Gunther Teubner, identifies an emerging body of 'global law without the state' and argues that this could be the future for law under conditions of globalization.

6. Global law without the state

Some scholars of autopoietic theory, notably Gunther Teubner and Karl-Heinz Ladeur, seek through global law without the state to carve out an even greater role for non-state actors in the generation of legal norms. Autopoietic theory takes a formal approach to the definition of law: the legal system is distinguished from other social systems through its use of the code legal/illegal lawful/unlawful[111] to distinguish itself from and communicate with its environment. But the formalism of autopoiesis is obviously different from that of positive international law, in which state consent is generally regarded as being a formal criterion, and a fundamental

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107 Somek, *supra* note 102, at 990.

108 Kingsbury, *supra* note 84, at 24.

109 Ibid., at 41.

110 Ibid., at 23.

111 King and Thornhill note the difficulties of translating *Recht/Unrecht*, which encompasses both legal/illegal and lawful/unlawful, into English, where both pairs of concepts are needed. *Recht/Unrecht* permits the legal system to determine whether an actor is in the right (the question the legal system tends to ask in a private-law context) or in the wrong (a question better suited for criminal law). But it also permits the legal system to distinguish itself from its environment: certain aspects of a factual situation will be relevant for law and others will not; certain aspects will be relevant for law generally but not for a given legal dispute: M. King and C. Thornhill, *Niklas Luhmann's Theory of Politics and Law* (2006), 55.

one at that. For theorists of global law without the state, state consent is not a requirement for the validity of legal rules. This emerging global law is law, argues Teubner, in the sense that it constitutes a social system distinct from morality, politics, economics, and other social systems,[112] but not in the sense of emanating from national legal processes or the sovereign will.[113] Rather, it 'emerges from various globalization processes in multiple sectors of civil society independently of the laws of the nation-states'.[114] Teubner rejects functional or structural criteria for defining law generally, and global law more in particular, in favour of the nature of the binary code used by the legal system to distinguish itself from its environment and to identify that which is relevant for the legal system.

It is difficult to grasp – and, for this author, even more difficult to describe – the nature of law's binary code. This is largely because it rests on a tautology: law is law because the legal system says it is law. Let us look at this from the point of view of participants in a legal argument. We can readily accept that lawyers representing plaintiffs and defendants, presenting arguments to a judge, are engaging in legal argumentation. It is probably not difficult to accept that two businesspeople involved in negotiations and making reference to legal rules as they understand them are also engaging in legal argumentation. But, one might object, if they are referring to rules that do not in fact exist (i.e., that have not been formally adopted in conformity with the legal system's rule of recognition), then they are not *really* engaged in *legal* argumentation. Perhaps, although autopoietic scholars would probably conclude that, in fact, they are – that this negotiation does indeed constitute an operation of the legal system.

To take this line of argument one step further, what if actors were not arguing about the application of legal rules they believe to exist, but rather about the rules whose operation allow legal rules to be created? In other words, actors may make claims about the nature and content of the rule of recognition. Can they actually create a rule of recognition in this manner? Yes, according to autopoietic theory, though the mere assertion by a small group of actors that a rule of recognition exists is not sufficient.

Global law's validity rests, argues Teubner, on a 'paradox of self-reference':[115] the rule is valid because its authors declare it to be valid. This is a tautology, of course, but Teubner argues that it does little harm because it is concealed through a combination of 'time, hierarchy and externalisation'.[116] Time is relatively straightforward: the circumstances under which a rule emerged are, with time, forgotten; the rule takes on a self-evident character. As to hierarchy, Teubner describes the phenomenon of the 'self-regulatory contract which goes far beyond one particular commercial transaction and establishes a whole private legal order with a claim to global validity'.[117] The presence within this 'legal order' of 'an internal hierarchy of contract rules',

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112 Teubner, *supra* note 14, at 12.
113 Ibid., at 4.
114 Ibid.
115 Ibid., at 15.
116 Ibid., at 16.
117 Ibid.

including primary and secondary rules, further obscures the paradox.[118] Third, the process of externalization involves referring processes of validation, interpretation, and application to other institutions that appear to be external to the contract but that in fact are created by it. The most prominent example is commercial arbitration, 'which has to judge the validity of the contracts, although its own validity is based on the very contract the validity of which it is supposed to be judging!'.[119]

Teubner is acutely aware of problems relating to the 'democratic deficit' of global law. Discussing this problem in light of *lex mercatoria*, he notes that this body of non-state-based law:

> is extremely vulnerable to interest and power pressures from economic processes. Since there is no institutional insulation of its quasi-legislation and its quasi-jurisdiction, the relative autonomy and independence which historically national legal orders have been able to achieve will probably remain something unknown. For the foreseeable future *lex mercatoria* will be a corrupt law – in the technical sense of the Latin word *corrumpere*. At the same time, *lack of institutional autonomy* makes this law vulnerable to political pressures for its political 'legitimation'.[120]

Could the corruption of *lex mercatoria* be cured by granting this body of law greater autonomy from powerful economic actors? This emphasis on the autonomy of law is instructive, not least because it recalls arguments made by Klabbers and Koskenniemi about the independence of law from politics and vice versa.

Teubner does not believe that global law without the state is inevitably corrupt. Rather than seeking to protect state-based law from 'private' governance, he asks, what would happen if these private governmental activities were seen as jurisgenerative? This might prompt us, he suggests, to 'ask more urgently than before the question: What is this "private legal regime's" democratic legitimation?'. It would be 'naïve', he argues, to think of the democratic legitimation of such regimes in the narrow terms of parliamentary democracy: 'Rather, we are provoked to look for new forms of democratic legitimation of private government that would bring economic, technical and professional action under public scrutiny and control.' He describes this as the:

> liberating move that the paradox of global law without the state has actually provoked: an expansion of constitutionalism into private law production which would take into account that 'private' governments are 'public' governments. And the potentially fruitful analogy to traditional political democracy might lie in the rudimentary consensual elements in contract, organization and other extra-legal norm producing mechanisms. Is a democratization of these rudimentary consensual elements feasible?[121]

Teubner is as alive as are Kingsbury, Klabbers, and Koskenniemi to the weaknesses of the current sources of international law's validity. But he is also fully aware of the power that these private forms of governance often wield. His proposed approach is reminiscent of Arendt's observation that the only thing to counter power is more

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118 Ibid.

119 Ibid., at 16–19.

120 Ibid., at 19 (emphasis added).

121 G. Teubner, 'Breaking Frames: Economic Globalization and the Emergence of *Lex Mercatoria*', (2002) 5 *European Journal of Social Theory* 199, at 159.

power – that trying to hem power in with rules and constraints is not nearly as effective as creating more sites of power.[122] Arendt's rather idiosyncratic description of power – that it 'springs up between men when they act together and vanishes the moment they disperse' – is evocative in this context. But Teubner's proposition involves a leap of faith: if we invite *lex mercatoria* into the house, will it throw a huge corporate bash and wreck the place?

If one hesitates to take on board the full implications of global law without the state – international and domestic law sidelined, if not altogether replaced, by norms emerging through networks of private and public actors – this approach is nevertheless of great value. First and foremost, it presents a different perspective on the function and importance of the boundary between law and not-law, even if it proposes to draw it in a dramatically new way. Second, it presents a theoretical and methodological framework for analysing an extremely important phenomenon: the growth of norms and indeed entire regimes created and implemented by non-state actors. The legitimacy and effectiveness of these norms and regimes are secured – to the extent that they are secured – without resort to the authority of the state, but in ways that nevertheless resemble state-based law. Global law without the state, and autopoietic theory more generally, helps us to understand the logic that can make private authority effective, even when the actors seeking to exercise that authority do not themselves wield immense economic or political clout.

Organizations such as the Forest Stewardship Council (FSC), a non-governmental organization that has created and administers a programme for the certification of forestry industries and related distributors and retailers based on sustainable practices, provide excellent objects for autopoietic analysis. The FSC has no formal authority to certify forestry industries, and therefore must rely on a combination of economic incentive structures and appeals to political and ethical principles to transform its certification into a commodity that firms are anxious to get and keep.[123] The FSC could potentially qualify as a public actor on Kingsbury's definition: it seeks to provide a public good, namely sustainable harvesting of forest products,[124] and it has taken care to structure its decision-making process along democratic lines: transparency is striven for, and the three 'chambers' representing stakeholder groups are clearly intended to ensure representativeness as well as responsiveness to a constituency wider than the organization's members.[125] In other words, the FSC has taken pains to structure itself as a public actor, rather than a pressure group

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122 Arendt, *supra* note 52.

123 B. Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority', (2002) 15 *Governance* 503; B. Cashore, G. Auld, and D. Newsom, 'Forest Certification (Eco-Labeling) Programs and Their Policy-Making Authority: Explaining Divergence among North American and European Case Studies', (2003) 5 *Forest Policy and Economics* 225; B. Cashore, G. Auld, and D. Newsom, *Governing through Markets: Forest Certification and the Emergence of Non-State Authority* (2004).

124 The FSC's mission is 'to promote environmentally appropriate, socially beneficial and economically viable management of the world's forests'; Forest Stewardship Council, 'About – Who We Are – Vision', available at www.fsc.org/vision_mission.html.

125 Forest Stewardship Council, 'About – Who We Are – Governance', available at www.fsc.org/membership_chambers.html. The three chambers are Environmental, Social, and Economic; each is further divided into North and South.

seeking to promote the interests of its members. However, global law without the state brings an additional dimension to the analysis, prompting questions about the extent to which the authority which the FSC wields or seeks to wield has been 'constitutionalized' – a complex concept that draws attention, in particular, to the extent to which the political and legal facets of its activity are separate from one another.[126]

7. Soft law: a useful concept?

Two separate questions should perhaps be put: first, is soft law a useful concept for international legal scholars? Second, is it useful for international jurists more generally? My answer to the first question would be a qualified 'no', and to the second a qualified 'yes'. For international legal scholars, the term simply means too many different things to different people. Even if one were able to settle on a definition, most such definitions encompass such a wide range of phenomena that the usefulness of the category for legal and scholarly analysis is severely limited. My 'no' is qualified because I strongly believe that the phenomena generally referred to by the term 'soft law' *are* extremely important to both scholarship and practice. Certainly, the term 'soft law' can be of some service in describing a fairly eclectic body of principles, rules, documents, statements, and various forms of communication that both scholars and practitioners ignore at their peril. But, from an analytical point of view, it makes more sense to use the categories *legal act* and *legal fact*, as suggested by d'Aspremont.[127]

Aside from the problem of the eclecticism of the category of phenomena that could count as 'soft law', the term is unfortunate in that it evokes a blurring of the boundary between law and not-law, which leads almost inevitably to a blurring of boundaries between law and politics, law and economics, law and science, etc. This is a particular problem for projects such as Kingsbury's and Teubner's. Neither uses the term to describe the law that would issue from a newly constituted rule of recognition, and for good reason: neither suggests that law that has not emerged by way of state consent is any less 'law-like' for that. But both acknowledge the need to make distinctions between law and politics. Indeed, Teubner insists on it: law that is insufficiently distinguished from politics is corrupt, or readily subject to corruption.

8. Concluding remarks

A recurring theme in much, though by no means all, of the literature touching on or relevant to soft law is the need for *formal* criteria for identifying law and explaining its legitimacy. At the same time, formal criteria need not be incompatible with the maintenance of robust links between legality and legitimacy. The boundary around

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126 G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in C. Joerges, I. Sand, and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (2004), 3, at 21, 25–6. The need for the autonomy of law is clearly underlined in the discussion of *lex mercatoria* in Teubner, *supra* note 14.

127 D'Aspremont, *supra* note 27, at 129.

international law is not hermetic. Processes of legal argumentation inevitably move back and forth across it. But the interaction of law with other social systems ought not to lead to the collapse of law into those systems.

Perhaps the greatest challenge to current conceptions of the sources of international law's validity is the assumption by non-state actors of the mantle of legal or law-like authority. Norms and standards promulgated by non-state actors are clearly not-law on most positivist conceptions. Yet, their close resemblance to law – a resemblance that is often desired and deliberately pursued by soft law's authors, state and non-state – compels legal scholars to think carefully about what distinguishes such efforts from positive international law. The answer is not far to seek – state consent for voluntarists and respect for international law's rule of recognition (whatever form it may take) for formalists. But these answers prompt further questions about the adequacy of state consent as a *sine qua non* for the creation of international law and, most pointedly, about the normative arguments underpinning state consent. As we have seen, the arguments in favour of a positivist framework are often phrased in negative terms – the alternatives provide inadequate guarantees of certainty, order, stability, and clear differentiations between power and law. Yet, these arguments are no less compelling for all that.

Throughout this paper, I have made much of the importance of the boundary surrounding law and the necessity of maintaining a distinction between law and other social systems. This position is strongly influenced by autopoietic theory and is born as much of a concern for the integrity of cognate social systems, notably politics, as it is for the integrity of law. Political processes, when they work reasonably well, permit the telling of stories from various points of view, the consultation of experts, the weighing of different types of objective, reference to languages of efficiency as well as justice, and careful attention to possible consequences. Attempts to package this wide-ranging discourse into the language of legal rights and obligations involve the imposition of significant constraints on the stories that can be told and how they can be related. This is not meant as a criticism of law, which is capable of doing certain things that political processes cannot accomplish, or can accomplish only with difficulty: reaching decisions with some expediency and finality, arriving at solutions without purporting to make determinations about the right and the good, providing actors with means to interact with one another and project their wills into the future, to name a few. The debate about soft law is, on one level, a debate about the relative functions and merits of law and politics and about the interaction of the two. Interaction there must be, but the boundary between the two is of importance, nowhere more so than in international society.

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The UN Security Council in a Unipolar World

MICHAEL J. GLENNON*

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INTRODUCTION

"The tents have been struck," said South African Prime Minister Jan Christian Smuts upon the founding of the League of Nations, "and the great caravan of humanity is once more on the march."[1] "What we seek," President Woodrow Wilson declared, "is the reign of law...sustained by the organized opinion of mankind."[2] A generation later, the march toward the international rule of law continued with the founding of the United Nations, which Secretary of State Cordell Hull hailed as the key to "the fulfillment of humanity's highest aspirations."[3]

In 2003, the great caravan came to a halt.

Events were set in motion on September 12, 2002, when President Bush, to the surprise of some critics, went to the General Assembly and

* Professor of International Law, the Fletcher School of Law & Diplomacy. The author expresses his thanks to Seth Tillman for comments on a prior draft and to Stephanie Schmidt for research assistance. A shorter version of this article appeared in the May/June, 2003 issue of *Foreign Affairs*. Copyright © 2003 Council on Foreign Relations, Inc. Reprinted with permission.

1. Lieutenant-General Jan Christian Smuts, *The League of Nations: A Practical Suggestion*, *reprinted in* 2 THE DRAFTING OF THE COVENANT 23, 60 (David Hunter Miller ed., 1928).

2. 1 WOODROW WILSON, The Four-Point Speech, Address Delivered at Mount Vernon (July 4, 1918) *in* WAR AND PEACE: PRESIDENTIAL MESSAGES, ADDRESSES, AND PUBLIC PAPERS (1917-1924) 231, 234 (Ray Stannard Baker & William E. Dodd eds., 1927).

3. THOMAS M. FRANCK, NATION AGAINST NATION 8 (1985) (quoting *Hull Asks Nations to Affirm Charter*, N.Y. TIMES, June 27, 1945, at 10).

challenged the UN to take action against Iraq for repeated violation of resolutions requiring it to disarm. "We will work with the UN Security Council for the necessary resolutions," he said[4]—but he left little doubt that the United States would act alone if those resolutions were not forthcoming. This was affirmed by the U.S. Congress on October 11, 2002, which approved the use of force against Iraq without any requirement of prior Security Council authorization. A senior administration official thereupon remarked that "we don't need the Security Council," and that "if the Security Council wants to stay relevant, then it has to give us similar authority."[5]

The United States formally proposed a resolution on October 25, 2002, which would have implicitly permitted use of force against Iraq without further Security Council authorization. But three days later, President George W. Bush reiterated before the General Assembly that the U.S. hand would not be stayed by Security Council inaction. "If the United Nations doesn't have the will or the courage to disarm Saddam Hussein and if Saddam Hussein will not disarm...," he said, "the United States will lead a coalition and disarm Saddam Hussein."[6] After intensive behind the scenes haggling, the Council responded on November 7, 2002, by adopting Resolution 1441, which found Iraq in "material breach" of prior resolutions, set up a new inspections regime, and warned once again of "serious consequences" if Iraq again failed to disarm.[7] The Resolution did not explicitly authorize the use of force; the United States pledged to return to the Council to "consult" and debate the issue before those consequences obtained.[8] But it was a huge personal victory for Secretary of State Colin Powell, who had staked much on going the Security Council route and personally waded into the New York diplomatic thicket to salvage the effort.

Nonetheless, doubts emerged concerning the effectiveness of the inspections regime and the extent of Iraqi cooperation, and on January

4. Address to the United Nations General Assembly in New York City, 38 WEEKLY COMP. PRES. DOC. 1529 (Sept. 12, 2002).

5. Elisabeth Bumiller & Carl Hulse, *Threats And Responses: The Overview; Bush Will Use Congress Vote To Press U.N.*, N.Y. TIMES, Oct. 12, 2002, at A1.

6. Remarks in Denver, Colorado, 38 WEEKLY COMP. PRES. DOC. 1880 (Oct. 28, 2002).

7. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., at 1, 13, U.N. Doc. S/RES/1441 (2002), *at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf [hereinafter S.C. Res. 1441].

8. *CNN Live Event/Special: Bush on Iraq Accepting U.N. Resolution* (CNN television broadcast, Nov. 13, 2002) (transcript # 111304CN.V54). President George W. Bush stated, "I have told the United Nations we'll be glad to consult with them, but the resolution does not prevent us from doing what needs to be done, which is to hold Saddam Hussein into account." *Id.*

21, 2003, Powell himself declared that "[i]nspections will not work."[9] By this point, British Prime Minister Tony Blair had joined in the threat to sidestep the Council. "Where there is an unreasonable veto put down," he declared on January 15, 2003, "we will not rule out action."[10] Powell returned to the UN on February 5, 2003, and laid out the case that Iraq was still hiding weapons of mass destruction, while France and Germany continued to press for more inspections. As tensions mounted and divisions deepened, eighteen European countries signed letters in support of the American position. Germany, France, and Belgium, meanwhile, blocked U.S. and British efforts in NATO to plan for Turkey's defense in the anticipated war.

On February 14, after eleven weeks of inspections, the inspectors reported back to the Security Council. They had discovered no evidence of weapons of mass destruction, they said, but many items remained unaccounted for.[11] They added that the inspection period would be short if Iraq were cooperative, noting that "it is not the task of the inspectors" to locate Iraq's weapons of mass destruction.[12] Ten days later, on February 24, 2003, the United States, Britain, and Spain introduced a resolution that would have had the Council declare simply, under Chapter 7, that "Iraq has failed to take the final opportunity afforded to it in resolution 1441."[13] France, Germany, and Russia simultaneously proposed a program-by-program timetable for Iraq's disarmament via inspections.[14] But on February 28, White House spokesman Ari Fleischer upped the ante, saying that the Administration's goal was no longer simply disarmament but now included "regime change."[15] There followed a period of intense lobbying, culminating in France and Russia's March 5 announcement that they would block a resolution authorizing use of force. China, the next day, said that its position on Iraq was consistent with theirs.

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9. Glenn Kessler, *Moderate Powell Turns Hawkish on War with Iraq*, WASH. POST, Jan. 24, 2003, at A01; Todd S. Purdum, *Threats and Responses: Washington; Rebuffing 2 Allies, U.S. Pushes Demand That Iraq Disarm*, N.Y. TIMES, Jan. 24, 2003, at A1.

10. Richard W. Stevenson & David E. Sanger, *Threats and Responses: White House; U.S. Resisting Calls For a 2nd U.N. Vote On a War With Iraq*, N.Y. TIMES, Jan. 16, 2003, at A1.

11. Threats and Responses; Reports to the Security Council by the Chief U.N. Weapons Inspectors, N.Y. TIMES, Feb. 15, 2003, at A10.

12. *Id.*

13. James Harding & Mark Turner, *US Faces Uphill Task in Winning Swift UN Mandate Second Resolution*, FIN. TIMES (LONDON), Feb. 25, 2003, at 8.

14. *Id.*

15. Felicity Barringer & David E. Sanger, *Threats and Responses: Diplomacy; U.S. Says Hussein Must Cede Power to Head off War*, N.Y. TIMES, Mar. 1, 2003, at A1.

I. THE EROSION OF SECURITY COUNCIL AUTHORITY AND THE USE OF FORCE

It was easy to conclude, with President Bush, that failure to confront Iraq would cause the United Nations to "fade into history as an ineffective, irrelevant debating society"[16]—or would reduce it, in Prime Minister Tony Blair's words, to "League of Nations status."[17] In reality, however, the Council's fate was sealed long before a Second Gulf War arrived on its agenda. The Council was doomed when a configuration of power emerged in the world that was incompatible with its intended functioning. That configuration of power—unipolarity—was attended by cultural clashes and different attitudes about the use of force that had gradually eroded the Security Council's credibility. These conditions had permitted the Council to function adequately in tranquil times but proved incapacitating in a period of great stress. They were not the fault of any country, but rather, as a review of each reveals, an upshot of the inexorable development and evolution of the international system.

The first condition leading to the erosion of the Security Council's credibility was the existence of great disparities in power among states. The reaction to America's towering preeminence has been predictable: coalitions of competitors have emerged. Since the end of the Cold War, the French, Chinese, and Russians have worked tirelessly to return the world to a multipolar system. France's former foreign minister, Hubert Védrine, forthrightly identified multipolarity as a principal foreign policy objective of France. "We cannot accept...a politically unipolar world," Védrine had said in 1999, and "that is why we are fighting for a multipolar" world.[18] This has been French President Jacques Chirac's continuing "vision of how he'd like the world to be," according to Pierre Lellouche, who was Mr. Chirac's foreign affairs adviser in the early 1990s.[19] "He sees a multipolar world in which Europe is the counterweight to American political and military power."[20] Chirac himself has been candid about this aim. "Any community with only one dominant power is always a dangerous one and provokes reactions," he

16. Remarks at Naval Station Mayport in Jacksonville, 39 WEEKLY COMP. PRES. DOC. 200 (Feb. 13, 2003).

17. Warren Hoge, *Threats and Responses: Britain; Blair, Despite a Dubious Public, Sticks to Firm Stance on Iraq*, N.Y. TIMES, Feb. 4, 2003, at A12.

18. Christopher Layne, *America's Role; What's Built Up Must Come Down*, WASH. POST, Nov. 14, 1999, at B01.

19. Alan Riding, *Threats and Responses: The Europeans; With Iraq Stance, Chirac Strives for Relevance*, N.Y. TIMES, Feb. 23, 2003, § 1, at 1.

20. *Id.*

said.[21] "That's why I favor a multipolar world, in which Europe obviously has its place."[22] Paris and Moscow, said Russia's First Deputy Foreign Minister Alexander Avdeyev, "are equally interested in a multipolar world...."[23] This objective was formalized in a treaty between Russia and China in 2001 that confirmed their joint commitment to a multipolar world.[24] President Vladimir Putin said Russia's objective was the emergence of a multipolar, not unipolar, world.[25] China had joined in this vision for decades. Chinese President Jiang Zemin declared that China and Russia "believe that more active cooperation between our...countries...will enhance our efforts in building a multipolar world...."[26] Germany became a late but visible partner in the effort to end American hegemony. German Foreign Minister Joschka Fischer said in 2000 that "[t]he core concept of Europe after 1945 was and still is a rejection...of...the hegemonic ambitions of individual states...."[27] Even former German Chancellor Helmut Schmidt recently weighed in, opining that Germany and France "share a common interest in not delivering ourselves into the hegemony of our mighty ally, the United States."[28]

All know that the United States has formalized the objective of maintaining its preeminence. The Administration's national security strategy statement, released in September 2002, left no doubt about the U.S. intention to ensure that no other nation rivals the military power of the United States. It stated: "Our forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States."[29] But the new American policy went further, proclaiming a doctrine of preemption that was flatly at odds with the precepts of the United Nations Charter. Article 51 of the Charter permits the use of force in

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21. James Graff & Bruce Crumley, *France Is Not a Pacifist Country*, TIME, Feb. 24, 2003, at 32, 33 (interview with Jacques Chirac).

22. *News Analysis: Iraq War Brings About Profound Impact on World,* XINHUA General News Service, Apr. 24, 2003.

23. *Russian Foreign Minister Visits France,* ITAR-TASS News Agency, Feb. 15, 2002.

24. *Text of Sino-Russian Friendship Treaty,* BBC WORLDWIDE MONITORING, July 16, 2001.

25. Patrick Seale, *The Spreading Revolt Against U.S. Hegemony*, GULF NEWS, Feb. 14, 2003.

26. Nicholas Berry, *Treaty Sends a Message*, MOSCOW TIMES, July 20, 2001, at 7, *available at* LEXIS, News Group File.

27. Robert Kagan, *Power and Weakness*, POL'Y REV., June & July, 1, 2002, at 3, 15-16, *available at* LEXIS, News Group File.

28. *German Ex-Chancellor Says France and Germany Lack Europe Concept*, BBC MONITORING INT'L REP., Jan. 16, 2003.

29. National Security Council, *The National Security Strategy of the United States of America*, at 30, *at* http://www.whitehouse.gov/nsc/nss.html (Sept. 2002) [hereinafter *National Security Strategy Statement*].

self-defense only "if an armed attack occurs against a Member of the United Nations...."[30] Yet the American policy proceeded from the premise that "[w]e cannot let our enemies strike first."[31] Therefore, "[t]o forestall or prevent...hostile acts by our adversaries," the statement announced, "the United States will, if necessary, act preemptively."[32]

Thus one fault line divided the United States from other power competitors. A second fault line ran deeper and longer. That fault line was cultural; it divided nations of the North and West from nations of the South and East on the most fundamental of issues: when use of force is appropriate. On September 20, 1999, Secretary-General Kofi Annan, in an historic speech, spoke of the need "to forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand."[33] On and off for weeks afterwards, delegates commented on the Secretary General's suggestion. About half of UN member states addressed his proposal. Of those, roughly a third appeared to favor humanitarian intervention under some circumstances, roughly a third appeared to oppose it under any circumstances, and the remaining third were equivocal or non-committal. The proponents were primarily Western democracies. The opponents were mostly states in Latin America, Africa, and the Arab world. On the basic issue of when use of force was appropriate, the nations of the North and West had little in common with the nations of the East and South.

The disagreement was not, it became clear, confined to humanitarian intervention. On February 22, 2003, foreign ministers from the Non-Aligned Movement, meeting in Kuala Lumpur, signed a declaration opposing use of force against Iraq. The movement, composed of 114 nations primarily from the developing world, represented 55 percent of the world's population and nearly two-thirds of the members of the United Nations.

As if the point needed underscoring, a recent poll surveyed the attitudes of respondents in fourteen countries in Africa, Asia, and the Middle East toward suicide bombing. Respondents were asked if they believed that "suicide bombing and other forms of violence against civilian targets are justified in order to defend Islam from its enemies."[34]

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30. U.N. CHARTER art. 51.

31. *National Security Strategy Statement, supra* note 29, at 15.

32. *Id.*

33. KOFI A. ANNAN, THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL at 39, U.N. Sales No. E.00.I.2 (1999) (Address to the 54th Session of the UN General Assembly, Sept. 20, 1999).

34. Adam Clymer, *World Survey Says Negative Views of U.S. Are Rising*, N.Y. TIMES, Dec.

Majorities said it was often or sometimes justified in Lebanon (73%) and Ivory Coast (56%).[35] More than 40% found it justified it in Bangladesh, Nigeria and Jordan.[36] More than 25% said it was justifiable in Pakistan, Indonesia, Ghana, Mali, Senegal, and Uganda.[37] To the extent, therefore, that the UN's formal use-of-force regime purported to represent a single view as to when violence was just and what form of violence was just—as of course it did, since it aspired to the status of universal law—that view was not the view of the states that comprise the United Nations, or of the peoples of those states. The extent of agreement on when force can be used is summarized accurately in the International Criminal Court's definition of the crime of aggression: there is no definition.

Cultural divisions concerning use of force do not merely separate the West from the rest, however; increasingly, they separate the United States from the rest of the West. On one key subject in particular, European and American attitudes diverge and are moving further apart by the day. That subject is the role of law in international relations. There are two sources of disagreement. The first concerns *who* should make the rules. Should rules be made by states themselves, or by supra-national institutions? Americans largely reject supra-nationalism. It is hard to imagine any circumstance in which the United States would permit an international fiscal regime to limit the size of its budget deficit, or an international monetary regime to control its currency and coinage, or an international court to decide the issue of gays in the U.S. military. Yet these and a host of other similar questions are regularly decided for European states by supra-national institutions of which they are members. "Americans," Francis Fukuyama has written, "tend not to see any source of democratic legitimacy higher than the nation-state."[38] But Europeans see democratic legitimacy as flowing from the will of the international community. Thus they comfortably submit to impingements on their sovereignty that Americans would find anathema. Security Council decisions limiting use of force are but one example.

The second level of disagreement concerns *when* rules should be made. Americans prefer after-the-fact, *corrective* rules. They tend to

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5, 2002, at A22.

35. *Id.*

36. *Id.*

37. *Id.*

38. Francis Fukuyama, *U.S. vs. Them; Opposition to American Policies Must Not Become the Chief Passion in Global Politics*, WASH. POST, Sept. 11, 2002, at A17.

favor leaving a field open to competition as long as possible and to regulating as a last resort, only after free markets have failed. Europeans, in contrast, prefer *preventive* rules aimed at averting crises and market failures before they occur. They like to identify ultimate goals, to try to anticipate future difficulties, and then to regulate in advance, before problems develop. Europeans favor greater stability and predictability; Americans are more comfortable with innovation and occasional chaos. Their contrasting responses to emerging high-technology and telecommunications industries are a prime example. So are their divergent reactions to use of force.

More than anything else, however, it was the third difference—over the need to comply with the UN's use-of-force rules—that proved most disabling to the UN system. Since 1945, so many states have used armed force on so many occasions, in flagrant violation of the Charter, that it can only be said that the use-of-force regime has lapsed. In framing the Charter, the international community failed to anticipate accurately when use of force would be unacceptable and to apply sufficient disincentives to those uses. In a voluntarist system that depends ultimately upon state consent, such short-sightedness proved fatal. This conclusion can be expressed a number of different ways under traditional international legal doctrine. Massive violation of a treaty by numerous states over a prolonged period can be seen as casting that treaty into desuetude, as transforming its provisions to paper rules that are no longer binding. Or those violations can be regarded as subsequent custom that creates new law, supplanting the old treaty norms and permitting conduct that was once a violation. Or state practice can be considered to have created a *non liquet,* to have thrown the law into a state of confusion where legal rules are not clear and where no authoritative answer is possible. It makes no practical difference which analytic framework is applied. The "default position" of international law has long been that when no restriction can be authoritatively established, a state is seen as free to act. Whatever doctrinal formula is chosen, the conclusion is the same: "If you want to know whether a man is religious," Wittgenstein said, "don't ask him, observe him."[39] And so it is if you want to know what law a state accepts. If states had truly intended to make the use-of-force rules binding, they would have made the costs of violation greater than the costs of compliance.

39. DAVID EDMONDS & JOHN EIDINOW, WITTGENSTEIN'S POKER: THE STORY OF A TEN-MINUTE ARGUMENT BETWEEN TWO GREAT PHILOSOPHERS 11 (2001).

But they did not. Anyone who doubts this might consider precisely why North Korea so insistently seeks a non-aggression pact with the United States. Who would respond to the North Koreans with the assurance that no non-aggression pact is necessary because the UN Charter protects them? The Charter has gone the way of the Kellogg-Briand Pact, the 1928 treaty by which every major belligerent in World War I had solemnly committed itself not to resort to war as an instrument of national policy. The Pact, Thomas Bailey wrote, "proved to be a monument to illusion. It was not only delusive but dangerous, for...it...lulled the public...into a false sense of security."[40] After the winter of 2003, no rational state can be deluded into believing that the UN Charter protects its security.

Some international lawyers saw no reason for alarm. "What is happening today is exactly what the UN founders envisaged," wrote Anne-Marie Slaughter, President of the American Society of International Law—the Sunday before France and Russia declared their intent to cast a veto that the United States had announced it would ignore.[41] Others contend that, because states have not openly declared that the Charter's use of force rules are not binding, those rules must still be regarded as obligatory. But practice itself can provide evidence of what states regard as binding, as the International Court of Justice pointed out when it observed that an act can be "carried out in such a way" as to indicate whether a state actually believes the rule to be obligatory.[42] The truth is that no state—surely not the United States—has ever accepted a rule saying, in effect, that rules can be changed only by openly declaring the old rules to be dead. States simply do not behave that way. They avoid needless confrontation. To insist upon the high hurdle of explicit renunciation as a condition for modifying international norms would saddle the world with the same international rules that were in force fifty or one hundred years ago. Apparently, no state has "openly declared" that the Kellogg-Briand Pact is no longer good law, but few would seriously contend that it is.

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40. THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 650 (9th ed., Prentice-Hall, Inc., 1974) (1940).

41. Anne-Marie Slaughter, *Accused of Irrelevance and Deeply Divided over Iraq, the United Nations Has Never Mattered More*, WASH. POST, Mar. 2, 2003, at B01, *available at* LEXIS, News Group File; John Tagliabue, *Threats and Responses: Discord; France and Russia Ready to Use Veto Against Iraq War*, N.Y. TIMES, Mar. 6, 2003, at A1; *Face the Nation: Colin Powell Discusses the UN Resolution Telling Iraq to Disarm* (CBS television broadcast, Nov. 10, 2002) LEXIS, News Group File.

42. North Sea Continental Shelf (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

Another line of rebuttal suggests that the analysis outlined herein means giving up on the rule of law. The fact that public opinion forced the President to go to Congress and the United Nations, the argument proceeds, is a tribute to the power of law to shape power politics. But distinguishing working rules from paper rules is not the same as giving up on the rule of law. The effort to subject the use of force to the rule of law was the monumental internationalist experiment of the twentieth century. That experiment failed. Refusing to recognize that failure will not enhance prospects for another such experiment to succeed in the twenty-first century.

It came as no surprise, then, that the United States should have felt free to announce in the September 2002 strategy statement that it would no longer be bound by the Charter rules governing use of force.[43] The Charter's use-of-force regime had collapsed. It collapsed because it could not stand on the geopolitical foundation that underpinned it. The issue was no longer whether a given use of force was lawful. Lawful and unlawful had simply ceased to have any consistent meaning in the use of force context. As Secretary of State Powell said on October 20, "the President believes he now has the authority and with a new resolution with continued violation on the part of the Iraqis, the President has authority, as do other like-minded nations, just as we did in Kosovo."[44] *Just as we did in Kosovo.* There was, of course, no Security Council authorization for use of force by NATO against Yugoslavia. That action blatantly violated the United Nations Charter. There was no exception for humanitarian intervention, just as there is no exception for preventive war. But Secretary Powell was right: the United States had all the authority it needed to attack Iraq—not because the Security Council authorized it, but because there was no international law governing use of force, and in the absence of governing law it was impossible to act unlawfully. As Powell put it on January 26, "We continue to reserve our sovereign right to take military action against Iraq alone or in a coalition of the willing."[45] Power to use force had come to flow, once again, not from a multilateral treaty but from that most unilateral of sources, sovereignty itself.

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43. *See generally National Security Strategy Statement, supra* note 29.

44. *This Week with George Stephanopoulos: National, International Issues Conversation with Colin Powell* (ABC television broadcast, Oct. 20, 2002).

45. *Threats and Responses; Powell on Iraq: 'We Reserve Our Sovereign Right to Take Military Action,'* N.Y. TIMES, Jan. 27, 2003, at A8.

II. CONSEQUENCES OF THE EROSION OF SECURITY COUNCIL POWER

These, then, were the principal forces that dismasted the Security Council. Other international institutions also snapped in the gale, including NATO during the Turkish crisis ("Welcome to the end of the Atlantic alliance," said the director of France's Foundation for Strategic Research, François Heisbourg).[46] How could the winds of power, culture, and security overturn legalist bulwarks that had been designed to weather the fiercest geopolitical storms? Consider the following sentence: "We have to keep defending our vital interests just as before; we can say no, alone, to anything that may be unacceptable."[47] It may come as a surprise that those were not the words of Paul Wolfowitz, Donald Rumsfeld, or John Bolton. They were written in 2000 by Hubert Védrine, the French foreign minister. Similarly, critics of American "hyperpower" might guess that the statement, "I do not feel obliged to other governments" must surely be American.[48] In fact, the statement was made by German Chancellor Gerhard Schroeder on February 10, 2003. The first and last geopolitical truth is that states pursue security by pursuing power, and that legalist institutions that manage that pursuit maladroitly are ultimately swept away.

If the cause of this dynamic is not hard to detect, neither are its effects. The least surprising consequence is that, in pursuing power, states will use those institutional tools that are available to them. For France, Russia, and China, one of those tools was the United Nations Security Council—and the veto that the Charter afforded them. France, Russia, and China could reasonably be expected to use their veto to advance the project that they had undertaken: to return the world to a multipolar system. During the Security Council debate on Iraq, the French were candid about their objective. The objective was not to disarm Iraq. "[T]he main and constant objective for France throughout the negotiations," said its UN ambassador, Jean-David Levitte, was to "strengthen[] the role and authority of the Security Council" (and, he might have added, of France).[49] Heisbourg praised the "skill with which...Paris...put French diplomacy at the center of Security Council

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46. Craig S. Smith & Richard Bernstein, *Threats and Responses: Diplomacy; 3 Members of NATO and Russia Resist U.S. on Iraq Plans*, N.Y. TIMES, Feb. 11, 2003, at A1.

47. HUBERT VÉDRINE & DOMINIQUE MOÏSI, FRANCE IN AN AGE OF GLOBALIZATION 30 (Philip H. Gordon, trans., The Brookings Institution 2001) (2000).

48. *German Leader Stresses Iraq Decision Crucial for Future of World Politics*, BBC WORLDWIDE MONITORING, Feb. 11, 2003.

49. *Threats and Responses; The Rationale for the U.N. Resolution on Iraq, in the Diplomats' Own Words*, N.Y. TIMES, Nov. 9, 2002, at A8.

negotiations."[50] France's interest lay in forcing the United States to back down, seemingly capitulating to the power of French diplomacy. The United States, on the other hand, could reasonably be expected to use the Council—or to avoid the Council or ignore it—to advance the project that it had undertaken: to maintain a unipolar system. "The course of this nation," President Bush said in his 2003 State of the Union speech, "does not depend on the decisions of others."[51] The United States thus made clear that it would not consider itself bound by a Security Council decision not to authorize use of force against Iraq. In the event of Iraqi breach of Resolution 1441, Secretary Powell said, the Security Council could "decide whether or not action is required," but the United States would "reserve our option of acting" and is "not bound" by any Security Council decisions at that point.[52] If France, Russia, or China had found itself in the position of the United States, it most likely would have used the Council—or threatened to ignore the Council—just as the United States did. If the United States had found itself in the position of France, Russia, or China, the United States most likely would have relied upon the veto just as they did. States act to enhance their own power, not that of potential competitors. This is no novel insight. It traces at least to Thucydides, who recorded the words of the Athenian generals to the hapless Melians: "[Y]ou or anybody else with the same power as ours would be acting in precisely the same way."[53] There is no normative judgment here; this is simply the way nations behave.

The truth is, therefore, that the Security Council's fate never turned on what it did or did not do concerning Iraq. Unipolarity, it turned out, was as debilitating to the Council during the post-Cold War era as the paralyzing bipolarity of the Cold War era. The old power structure had placed an incentive on the Soviet Union to deadlock the Council. The existing world power structure places an incentive on the United States to bypass the Council. That is and was the way states, in Hubert Védrine's phrase, "keep defending [their] vital interests."[54] If the Council had approved an American attack, it would have been seen as

50. François Heisbourg, *Do Not Expect France to Change Its Mind*, FIN. TIMES (LONDON), Feb. 7, 2003, at 17.

51. Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109 (Jan. 28, 2003).

52. *Face the Nation: Colin Powell Discusses the UN Resolution Telling Iraq to Disarm* (CBS television broadcast, Nov. 10, 2002).

53. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 405 (Rex Warner, trans., Penguin Books 1972).

54. VÉDRINE & MOÏSI, *supra* note 47, at 30.

rubber-stamping what it could not stop. If the Council had tried to disapprove, the United States would have exercised its veto. If the Council had merely declined to approve, it would have been ignored. Disagreements over Iraq did not doom the Council. Geopolitical reality doomed the Council. That was the message of Secretary Powell's extraordinary declaration that the United States could not be considered bound by a decision of the Security Council—at the same time that Iraq could be in "material breach."[55]

It was argued that Resolution 1441 and its acceptance by Iraq somehow represented a victory for the United Nations and a triumph of the rule of law. But it did not. The Iraqis almost surely would have rejected the Resolution's new inspections regime had the United States not threatened Iraq with the use of force. Lest we forget, threats of force also violate the Charter. The Security Council never authorized the United States to announce a policy of regime change in Iraq or to take military steps in that direction. Under no plausible reading of Article 51 can a policy of regime change be said to constitute permissible self-defense. The "victory," such as it was, was a victory of diplomacy backed by force—or more accurately, of diplomacy backed by the threat of unilateral force in violation of the Charter. The unlawful threat of unilateralism had enabled the "legitimate" exercise of multilateralism. The Security Council reaped the benefit of the Charter's violation; American financial capital, in the form of the billions of dollars required to pressure Iraq militarily, became the Security Council's political capital.

As surely as Resolution 1441 was a triumph of American diplomacy, the Resolution represented a defeat for the international rule of law. Let us remember, again, why the Council deliberated for eight weeks. The meetings were triggered by an American request that the Council authorize use of force against Iraq. The Security Council responded to that request by speaking out of both sides of its mouth. After Resolution 1441 was adopted, French, Chinese, and Russian diplomats left the Council claiming that it had not authorized the United States to strike Iraq—that it contained no element of "automaticity."[56] American officials, however—speaking not for attribution—claimed that the Council *had* done precisely that.[57] And the language of Resolution 1441

55. S.C. Res. 1441, *supra* note 7.

56. *UN Iraq Resolution Rules Out Automatic Use of Force: China, France, Russia*, AGENCE FR. PRESSE, Nov. 9, 2002.

57. Julia Preston, *Threats and Responses: United Nations; Security Council Votes, 15-0, for Tough Iraq Resolution; Bush Calls It a 'Final Test'*, N.Y. TIMES, Nov. 9, 2002, at A1.

can accurately be said to lend support to both. This is not how great lawmakers make law. The first task of any lawmaker is to speak intelligibly, to lay down clear rules in words that all can understand and that have the same meaning for everyone. Members of the United Nations have an obligation under the Charter to comply with decisions of the Security Council. They therefore have a right to expect the Security Council to tell them clearly and unequivocally whether the Council has permitted the use of force against a member state. Shrinking from that task in the face of threats undermines the rule of law.

The second, February 24 resolution, whatever its diplomatic utility, confirmed the marginalization of the rule of law. Its vague terms were directed at attracting maximal support, but at the price of juridical vapidity. The Resolution's broad wording lent itself, as intended, to any possible interpretation. A legal instrument that means everything means nothing. But in its death throes, it had become more important that the Council merely say *something* rather than say something important. States could then claim, once again, that private, collateral understandings gave meaning to the Council's empty words, as they had when Resolution 1441 was adopted. Eighty-five years after Wilson's Fourteen Points, international law's most solemn obligations had come to be memorialized in winks and nods, in secret covenants, secretly arrived at.

III. THE DISTRIBUTION OF POWER IN A HEGEMONIC ERA

States as well as commentators, intent upon returning the world to a multipolar power structure, devised various strategies in responding to the Council's decline. Some European states such as France believed that the Security Council could bulldoze its way through the hurdle of power, cultural, and security disparities by acting as a supra-national check on American power. Or, to be more precise, they contemplated using the battering ram of the Security Council to permit *them* to check American power. This strategy would have returned the world to multipolarity *through* supra-nationalism. But in pursuing this approach they faced an inescapable dilemma: what would constitute success for European supra-nationalists? The French could, of course, veto America's Iraq project. But to succeed in this way would be to fail, because the declared American intent was to proceed anyway—and in the process break the only institutional chain with which France could hold the United States back. Their inability to resolve this dilemma

reduced the French to diplomatic ankle-biting. A French foreign minister could wave his finger in the face of an American secretary of state when cameras appeared, ambush him on Iraq in a meeting called on another subject, or propose that the Iraqis enact "legislation prohibiting the manufacture of weapons of mass destruction" (which Saddam Hussein summarily did—by decree).[58] But the inability of a Security Council veto to stop a war that France had clamorously opposed underscored French weakness as much as it did the impotence of the Security Council.

Commentators, too, have developed verbal strategies to counter what they see as the American threat to the rule of law. These consist primarily of communitarian arguments to the effect that a state should act in the *common* interest, rather than, in the words of Védrine, "making decisions under its own interpretation and for its own interests" (for which Védrine faulted the United States).[59] The world needs the participation of the United States in the United Nations, argued Slaughter, because other nations "need a...forum...in which to...restrain the United States."[60] "What ever became," Hendrik Hertzberg asked, "of the conservative suspicion of untrammeled power...? Where is the conservative belief in limited government, in checks and balances?"[61] The United States, Hertzberg argued, should *voluntarily* relinquish power. The United States should voluntarily forego the option of hegemony in favor of a multipolar power structure in which the United States is equal with and balanced by other powers. The United States should offer other powers the opportunity to check it.

No one can doubt the utility of checks and balances, deployed domestically, to curb the exercise of arbitrary power. Setting ambition against ambition was the Framers' formula for preserving liberty. The difficulty with this approach in an international context, however, is that it in effect asks the United States to act against its own interest, to advance the interest of power competitors—and, indeed, power competitors whose values are very different from its own. It simply is not realistic to expect the United States to permit its power to be "checked" by that of China or Russia. Some may see that merely as another abject grab for power. But again, it is not unfair to ask whether

58. *CNN Live Event/Special: Colin Powell Addresses Security Council*, (CNN television broadcast, Feb. 5, 2003) (transcript # 020504CN.V54) LEXIS, News Group File.

59. Hector Carreon, *France Accuses the U.S. of Endangering the World*, LA VOZ DE AZTLAN, Feb. 7, 2002, *at* http://aztlan.net/franceus.htm.

60. Slaughter, *supra* note 41.

61. Hendrik Hertzberg, *Comment: Manifesto*, THE NEW YORKER, Oct. 14 & 21, 2002, at 63-64.

China, France, or Russia—or any other country—would voluntarily abandon preeminent power if it found itself in the position of the United States. The French project, let us remember, has been to narrow the power disparity between France and the United States, not the disparity between France and lesser powers that might check the power of France. That lesser European states should have had the audacity to support the United States and implicitly challenge French leadership was a "catastrophe," Heisbourg said.[62] Chirac denounced the Eastern European leaders who signed the letter, describing their decision at a news conference as "not well brought-up behaviour."[63] France, notwithstanding its indignant protestations to the contrary, turned out to be no more willing to have its power checked than was the United States.

Nor is it unfair to ask whether some new and untried locus of power, possibly under the influence of states with a long history of repression, would be more trustworthy than would the exercise of hegemonic power by the United States. Those who would entrust the planet's destiny to some nebulous guardian of global pluralism seem strangely oblivious of the age-old question: Who guards that guardian? And how would that guardian preserve international peace—by asking dictators to legislate prohibitions against weapons of mass destruction?

In one respect James Madison *is* on point, though the communitarians fail to note it. Madison and the Founding Fathers confronted very much the same dilemma that the world community confronts today in dealing with American hegemony. The question, as the Framers posed it, was why the powerful have any incentive to obey the law. Madison's answer, in the *Federalist*, was that the incentive lay in an assessment of their future circumstances—in the unnerving possibility that they might one day be weak and might then need the protection of the law, when power is not there to protect them. It is the "uncertainty of their condition," Madison wrote, that prompts the strong to obey the law.[64]

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62. Stryker McGuire et al., *Europe Splits*, NEWSWEEK, Feb. 10, 2003.

63. Stephen Castle, *The Threat of War: Divided Europe—Chirac Attacks Eastern Bloc Backing for Bush*, INDEPENDENT (LONDON), Feb. 18, 2003, at 2.

64. THE FEDERALIST NO. 51 (James Madison), at 324-25 (Clinton Rossiter ed., 1961). Authorship of No. 51 has been in dispute due to differing accounts given by Hamilton and Madison. Each lay claim to 18-20, 49-58, and 62-63. "A majority of modern scholars would agree only," according to Lance Banning, "that the internal evidence favors Madison's claim to all the disputed numbers." Lance Banning, *The Federalist Papers*, *in* 2 ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 565, 567 (Jack P. Greene ed., 1984). *See also* Frederick Mosteller, *A Statistical Study of the Writing Styles of the Authors of The Federalist Papers*, 131(2) PROC. OF THE AM. PHIL. SOC'Y 132, 139-40 (1987) (concluding that Madison is "extremely likely" to have written all of the disputed papers with perhaps the exception of No. 55).

But if the future is certain, or if the strong believe it is certain, and if that future is one of continued power, then the incentive is removed. Hegemony is in tension with the principle of equality under law. Hegemons have ever resisted subjecting their power to legal constraint. When Britannia ruled the waves, Whitehall opposed limits on the use of force to execute naval blockades—limits that were vigorously supported by the new United States and other weaker states. Any system dominated by a "hyperpower"[65] will have great difficulty in maintaining or establishing an authentic rule of law. That is the great Madisonian dilemma confronted by the international community today. And that is the dilemma that was played out so dramatically in the Security Council in the fateful clash this winter.

IV. LESSONS FROM THE SECOND GULF WAR

The high duty of the Security Council, assigned it by the Charter, was the maintenance of international peace and security. The Charter laid out a blueprint for managing the use of force under the Council's auspices. It constructed a gothic edifice of multiple levels, with grand porticos, ponderous buttresses, and lofty spires, replete with its full share of convincing façades and frightening gargoyles, to keep the evil spirits away.

In the winter of 2003, that entire edifice came crashing down. It is tempting, in searching for reasons, to return to the blueprints. Surely, one might think, the architecture was at fault. Just as surely, a better blueprint can yield a better architectural plan capable of withstanding the stresses that brought about the Council's collapse.

But the reasons for the collapse do not lie in a failure of architecture. They lie in the shifting ground beneath the construct. The world discovered in 2003 that the ground on which the UN's temple rested was shot through with fault lines. That ground was unable to support humanity's lofty legalist shrine. Power disparities, cultural disparities, and differing views on the use of force toppled the temple. The Security Council therefore proved incapable of maintaining international peace and security.

At their best, international legalist institutions, regimes, and rules relating to international security are epiphenomenal. They are not autonomous, independent causes of state behavior but are primarily *effects* of the larger forces that shape that behavior. As the deeper

65. VÉDRINE & MOÏSI, *supra* note 47, at viii.

currents shift and as new realities and new relations (new "phenomena") emerge, states reposition themselves to take advantage of new opportunities for enhancing their power. Violations of security rules occur when that repositioning leaves states out of sync with fixed, non-adaptive legalist institutions. What were once working rules become paper rules. This is true of the best security rules, those that once reflected underlying geopolitical dynamics. The worst rules—drafted without regard to those dynamics—often are discarded immediately, as soon as compliance is required. In either case, validity ultimately proves ephemeral, as the UN's decline illustrated. Its Military Staff Committee died almost immediately. The Charter's use-of-force regime petered out over a period of years. The Security Council itself hobbled along during the Cold War, underwent a brief resurgence in the 1990s, and then flamed out with Kosovo and Iraq.

Some day policymakers will return to the drawing board. When they do, the first lesson of the security system's breakdown is the first truth of institutional engineering: what the design *should* look like must be a function of what the design *can* look like. A new international legal order, if it is to function effectively, must reflect the underlying dynamics of power, culture, and security needs. If it does not—if its norms are again unrealistic and do not reflect the way states actually behave and the real forces to which they respond—the community of nations will again end up with paper rules. The system's dysfunctionality was not, at bottom, a legal problem. It was a geopolitical problem. The juridical distortions that proved debilitating were effects, not causes. "The UN was founded on the premise," Slaughter has observed in its defense, "that some truths transcend politics."[66] Precisely—and therein lay its problem. If they are to comprise working rules rather than paper rules, legalist institutions—and the "truths" on which they act—must flow from political commitments, not vice versa.

A second, related lesson is that rules must flow from the way states actually behave, not from the way they ought to behave. "The first requirement of a sound body of law," wrote Oliver Wendell Holmes, "is that it should correspond with the actual feelings and demands of the community, whether right or wrong."[67] This insight will be anathema to continuing believers in natural law, the arm-chair philosophers who "know" what principles must control states, whether states accept those

66. Slaughter, *supra* note 41.
67. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41 (1881).

principles or not. But these idealists might remind themselves that the international legal system is, again, voluntarist. For better or worse, its rules are based upon state consent. States are not bound to rules to which they do not agree. Like it or not, that is the Westphalian system, and that system is still very much with us. Pretending that the system is based upon abstract notions of morality will not make it so.

Architects of an authentic new world order must therefore move beyond castles in the air—beyond imaginary truths that transcend politics—such as, for example, just war theory, and the notion of the sovereign equality of states. These and other stale dogmas rest upon archaic notions of universal truth, justice, and morality. The planet today is fractured as seldom before by competing ideas of transcendent truth, by true believers on all continents who think, with Shaw's Caesar, "that the customs of his tribe and island are the laws of nature."[68] Antiquated ideas about natural law and natural rights ("nonsense upon stilts," Bentham called them) do little more than provide convenient labels for enculturated preferences—yet serve as rallying cries for belligerents everywhere.[69] As the world moves into a new, transitional era, the old moralist vocabulary is best cleared away so that decision-makers can focus pragmatically on what is really at stake. The real issues in achieving international peace and security are clear-cut: What are our objectives? What means have we chosen to meet those objectives? Are those means working? If not, why not? Are better alternatives available? If so, what tradeoffs are required? Are we willing to make those tradeoffs? What are the costs and benefits of competing alternatives? What support would they command?

Answering those questions does not require an overarching legalist metaphysic. There is no need for grand theory and no place for self-righteousness. The life of the law, Holmes said, is not logic but experience.[70] Humanity need not achieve an ultimate consensus on good and evil. The task before it is empirical, not theoretical. Getting to a consensus will be accelerated by dropping abstractions, moving beyond the polemical rhetoric of "right" and "wrong," and focusing pragmatically upon the concrete needs and preferences of real people who endure suffering that may be unnecessary. Policymakers may not

68. GEORGE BERNARD SHAW, *Caesar and Cleopatra*, *in* THREE PLAYS FOR PURITANS act 2, at 119 (Brentano's, 1906).

69. JEREMY BENTHAM, *Nonsense Upon Stilts*, *in* THE COLLECTED WORKS OF JEREMY BENTHAM: RIGHTS, REPRESENTATION, AND REFORM 317, 330 (Philip Schofield et al. eds., 2002).

70. HOLMES, *supra* note 67, at 1.

yet be able to answer these questions. The forces that brought down the United Nations—the "deeper sources of international instability," in George Kennan's words—will not go away.[71] But at least policymakers can get the questions right.

One particularly pernicious outgrowth of natural law is the idea that states are sovereign equals. As Kennan pointed out, the notion of sovereign equality is a myth; disparities among states "make a mockery" of the concept.[72] Applied to states, the proposition that all are equal is belied by evidence everywhere that they are not—not in their power, or their wealth, or in their respect for international order, or for human rights. Yet the principle of sovereign equality animates the entire structure of the United Nations—and disables it from effectively addressing emerging crises, such as equal access to weapons of mass destruction, that derive precisely from the presupposition of sovereign equality. Treating states as equals prevents treating individuals as equals. Thus, if Yugoslavia enjoyed a right to non-intervention equal to that of every other state, its citizens would be denied human rights equal to those of individuals in other states, because their human rights could be vindicated only by intervention. The irrationality of treating states as equals was brought home as never before when it emerged that the will of the United Nations could be determined by Angola, Guinea, or Cameroon—whose representatives sat side-by-side, and exercised an equal voice and vote, with those of Spain, Pakistan, and Germany. (India, Indonesia, and numerous other major states were not represented at all.) Thus the third great lesson of last winter: institutions cannot be expected to resolve problems that their own structures embody.

These realities provide little reason to believe that the Security Council will soon be resuscitated to tackle nerve-center security issues, whatever the aftermath of the Second Gulf War. If the United States discovers Iraqi weapons of mass destruction that supposedly did not exist, and if nation-building in Iraq goes well, there likely will be little impulse to revive the Council. In that event the Council will, as the official guardian of international peace and security, have gone the way of the League of Nations. American decision-makers will thereafter react to the Council much as they did to NATO following Kosovo: never again. If on the other hand the aftermath of the war is long and

71. George F. Kennan, *Diplomacy in the Modern World, in* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 99, 104 (Robert J. Beck et al. eds., 1996).

72. GEORGE F. KENNAN, AROUND THE CRAGGED HILL: A PERSONAL AND POLITICAL PHILOSOPHY 89 (1993).

bloody, if the United States does not discover Iraqi weapons of mass destruction, and if nation-building in Iraq falters, the war's opponents will benefit, claiming that the United States would not have run aground if only it had abided by the Charter. But the Security Council will not profit from American ill fortune. Coalitions of adversaries will then emerge and harden, lying in wait in the Council and making it, paradoxically, all the more difficult for the United States to participate dutifully in a forum where an increasingly ready veto awaits it. The Security Council will still prove useful on occasion for dealing with matters that do not bear directly upon the upper hierarchy of world power. Every major power faces imminent danger from terrorism and a new surge of proliferation of weapons of mass destruction. None will gain by permitting these threats to reach fruition. Yet even when the required remedy is non-military, enduring suspicions among the permanent members and the loss of credibility the Council has suffered inevitably will impair its effectiveness in dealing with these issues.

However the post-war efforts in Iraq turn out, the United States will likely confront pressures to curb the use of force. These it must resist. Chirac's admonitions notwithstanding, war is not "always, always, the worst solution."[73] Use of force was a better solution than diplomacy in dealing with numerous tyrants from Milosevic to Hitler. It may, regrettably, emerge as the only and therefore the best solution in dealing with Kim Jong Il. If the suffering of non-combatants is the test, the use of force can often be a more humane solution than economic sanctions, which starve more children than soldiers (as their application to Iraq demonstrated). The greater danger after the Second Gulf War is not that the United States will use force when it should not, but that, chastened by a post-war nation-building quagmire, the public's opposition, and the economy's contractions, it will not use force when it must. That the world is at risk of cascading disorder places a greater rather than a lesser responsibility upon the United States to use its power assertively to halt or slow the pace of disintegration.

All who believe in the rule of law are eager to see the great caravan of humanity resume its march. In moving against the centers of disorder, the United States could profit from a beneficent sharing of its power to construct new international mechanisms directed at that objective. American hegemony will not likely last forever. Prudence counsels the desirability of realistically structured institutions capable of

73. Charles M. Sennott, *War a 'Last Resort,' European Leaders Declare at Summit*, BOSTON GLOBE, Feb. 18, 2003, at A1.

protecting or advancing U.S. national interests when military power is unavailable or unsuitable. Such institutions could enhance American preeminence, potentially prolonging the period of unipolarity.

Yet legalists must be hard-headed about the possibility of soon devising a new institutional framework to replace the battered structure of the Security Council. The forces that led to the Council's undoing will not disappear. Neither a triumphant nor a chastened United States will have sufficient incentive to resubmit to old constraints in new contexts. Neither vindicated nor humbled power competitors will have sufficient disincentive to forego efforts to impose those constraints. States will continue to seek greater power and security at the expense of other states. States will continue to disagree on when force should be used. Like it or not, that is the way of the world. When the march of humanity toward the rule of law is resumed, recognizing that reality will be the first step.