

Of Power and Justice

By Pål Wrangé*

A. Introduction

This spring, Florence was cluttered with peace flags, hanging out from private apartments, churches, official buildings, and businesses. One day in the middle of March, I counted as many as 50 *bandiere de la pace* in a single street crossing in the Oltrarno area, south of the river Arno. On 9 June 31 of them were still hanging there. At the time of my first count, it was obvious that the flags all meant “no” to the military action that was to begin in Iraq. What did they mean two months after the fall of Baghdad?

I believe that many of those who kept their flags up were worried about the implications the Iraq war would have for the international system.

What might the future world order look like? One vision, more or less forgotten now, is that of an emerging world government.¹ A second narrative (or set of narratives) describes a globalised, transnational, deterritorialised world, where states are no longer preeminent, and where power is diffused. Neither order seems fully relevant to the current debate over Iraq, and we will instead turn to two conceptions less utopian or dystopian.² The third is the liberal vision: the state is still the dominant entity, but “disaggregated”, and liberal countries live in peace with one another. A fourth alternative, which seems to be emerging out of the debris of World Trade Center, as suggested by thinkers *à la mode* in Washington, is a world of continued transnational intercourse, but where the states still form the basis, and where relations are often dangerous and security is an imperative concern.

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¹ See, e.g., Richard A. Falk, cited in endnote 15, *infra*.

² By that I mean that they look to a future that is less faraway, or is even the present.

B. The Divide

There is a common thread in some influential US writing these days, be it neo-conservative³ pundits or the US National Security Strategy (NSS):⁴ what matters is power.⁵ Power is the structuring category of international relations. International law is an element, but not a vital one, and at least in the last instance, it is just a function of power.

It has not been my habit, as a writer and a teacher, to discuss the role of single states. Of course, during the Cold War, it was necessary for writers of treatises to recount, as a matter of background, that the world was divided into two blocks, and from the 1960s and 70s, the emerging Third World was an essential part of the legal milieu. However, these were structural factors, relating to power-configurations at the level above single states. For sure, lawyers were not unaware of the special positions the US and the USSR, but the two superpowers were still treated as leaders and members of blocs rather than as singular power centres in and of themselves, which needed to be accounted for in detail.

From now on, it seems, things will be different. Not only is there a state with so much more power than others, that state also seems willing to use it. One may ask whether that position is a permanent feature, or if it is partly, at least when it comes to the political will, just an attribute of the present administration, and if the world would have been much different if things had gone another way in Dade or Palm Beach counties, Florida. Those two aspects cannot be fully separated, of course. The current administration is indeed the current administration, and may well remain so for the next five years. Besides, there are two more general features of the current situation: (a) the US will, in the short and medium term, be by far the most potent military actor; and (b) after September 11, there is no likelihood that the US will

³ On neoconservatism, *see, i.a.* JOHN EHRMAN, THE RISE OF NEOCONSERVATISM: INTELLECTUALS AND FOREIGN AFFAIRS 1945-1994 (1995) [a historical exposé], Elizabeth Drew, *The Neocons in Power*, L THE NEW YORK REVIEW OF BOOKS, NO 10, 20 (2003) [deals foremost with the neoconservatives linked to the administration and their planning for the war and the occupation] and *The shadow men* THE ECONOMIST, April 26th, 2003, 37. Neoconservative views are often expressed in *The National Interest* and in the *Weekly Standard*. *The Project for the New American Century* – to a large degree a neo-conservative project – has, among its signatories and supporters, Paul Wolfowitz, Donald Rumsfeld, Richard Cheney, Robert Kagan and Richard Perle. *See*, <www.fpif.org/papers/02right/index.html> accessed on 10 June 2003.

⁴ *See*, <<http://www.whitehouse.gov/nsc/nss.html>>. Despite all the explicit and implicit criticism that will be leveled against this document in this article, I should, in all honesty, admit that it also contains much that is positive. It takes a broad approach to security, which includes, for instance, environmental problems (20) and poverty (21-22).

⁵ What this means is that it is power, which is the ultimate factor that determines how nations behave. This does not mean that values are unimportant, only that the pursuit of values or other goals is, in the last instance, constrained by power rather than by norms or institutional arrangements.

turn to general isolationism. But, it is still open to debate whether these traits are genuinely American or just Republican,⁶ and that debate has political importance, because it concerns whether the US has a choice between, say, multilateralism and unilateralism, or if unilateralism is determined by systemic factors.

It is also open to debate whether there really is a fundamental divide between Europe and US in this respect. The differences in foreign policy are certainly there, and verifiable, as are the respective current sentiments on terrorism, the United Nations and other issues.⁷ And both European international lawyers and international relations scholars can identify themselves by what side of the Atlantic they are on.⁸ In current writing, the difference in outlook is sometimes portrayed as one between Hobbesians (US) and Kantians (Europe).⁹ However, I believe that that is not only a big simplification; it actually misrepresents what is happening. These debates are not easily defined in terms of realism and idealism, and the tables may turn for different issues.¹⁰ There are Hobbesians and Kantians on both sides of the Atlantic. The Hobbesians and the Kantians of the Old World are beyond the scope of this article. I will instead turn to US Hobbesians *and* Kantians, to see what it is that distinguishes them from one another.¹¹

⁶ One cannot attribute all of these views to the Republican Party as a whole, which encompasses a strong isolationist wing. Cf, James Kitfield, *The Folk Who Live on the Hill*, THE NATIONAL INTEREST, No 58, (Winter 1999/2000). The non-isolationists used to be called "internationalists," but that is, as far as I understand, *post-Iraq*, a derogatory term.

⁷ See, *i.a.*, William Pfaff, *The Osama bin Laden effect*, IHT (6 May 2003).

⁸ See, *e.g.*, the discussion on *Unilateralism in International Law: Its Role and Limits*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2000).

⁹ *Return of the Nation State – and the Leviathan*, INTERHEMISPHERIC RESOURCE CENTER <www.presentdanger.org/papers/leviathan.htm>, Robert Kagan, *Power and Weakness*, POLICY REVIEW No. 113 (June/July 2002), <www.policyreview.org/JUN02/kagan_print.html>. This is not undisputed in neo-conservative circles, though. Peter W. Rodman argued that it is Europe that has fallen into old balance-of-power thinking in the face of US Wilsonianism. Peter W. Rodman, *The World's Resentment*, NATIONAL INTEREST, No 60 (Summer 2000).

¹⁰ There are endless arguments regarding whether the action against the FRY was determined by idealism or power-politics. See, TARIQ ALI, *MASTERS OF THE UNIVERSE?: NATO'S BALKAN CRUSADE IMPRINT* (2000). At any rate, every decision will have to be rationalised both in terms of what is achievable (realism) and in terms of what is right and just (idealism).

¹¹ I will not bother myself with the question whether these various people are *truly* Hobbesian or Kantian. The terms are used in a stylized way, and the use of the two terms in this war goes back at least to Hedley Bull's famous trichotomy of Kantians, Grotians and Hobbesians. Perhaps the Europeans are better labeled as Grotians, but I leave that issue for others. For a review that deals with the "real" Kant in relation to Kantianism, see, Patric Crapps, *The Kantian Project in International Law*, in FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* (1998).

What follows is not an effort of explaining “the US perspective.” Instead, I will pursue a discussion of the implications of a few views widely held by US elites, and their potential implications for international law and world order. By-passing the task of mapping different strands of US thinking comprehensively, I have, in an essayistic, even speculative mode, (re)constructed¹² two currents, and tried to draw out the implications thereof.

C. Law and Order

It needs to be explained why this is relevant to international law. One of Carl Schmitt’s most important concepts, a rather late one, is the *Nomos*: *Nomos* is the shape of the political, social and religious order (“*Ordnung*”). It is the full immediacy of a legal force, which is not mediated through law; it is a constituting, historical instance (“*Ereignis*”), and an act of legitimacy, which makes sense of the legality of the law.¹³ Hence, *Nomos* is beyond but not unrelated to the law. While not being a source in the formal sense, it is in some respect a determinant and a source of meaning of the law.

According to Hedley Bull, an international order is “a pattern of activity that sustains the elementary or primary goals of the society of states, or international society.” It is “very closely connected with the conformity of human behaviour to rules of conduct, if not necessarily to rules of law.”¹⁴ For Nicholas Onuf, “[o]rder resides in orderly relations, ... but is abstracted from those relations...”¹⁵ While these definitions of order do not necessarily contradict Schmitt’s *Nomos*, it seems that the

¹² I put “re” within parenthesis to indicate that the juxtapositions of writers are my own, and may not necessarily be agreed upon by the subjects of my gentle, discursive force.

¹³ CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* 40, 42 (1950).

¹⁴ HEDLEY BULL *THE ANARCHICAL SOCIETY. A STUDY OF ORDER IN WORLD POLITICS*, 7 and 8 (1977). This should be distinguished from world order, which also encompasses also domestic order. “World order is wider than international order because to give an account of it we have to deal not only with order among states but also with order on a domestic or municipal scale, provided within particular states, and with order within the wider world political system of which the states system is only part.” *Ibid* at 22. As is well-known, the term “world order” is used by policy oriented jurists, as well as by many international relations scholars associated with radical second generation New Haven lawyers, such as Richard Falk; cf, *i.a.*, the World Order Models Project and its series *Studies on a Just World Order*. See, Friedrich Kratochwil, *Of Law and Human Action: A Jurisprudential Plea for a World Order*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 639 (1985) and Richard Falk, *A New Paradigm for International Legal Studies*, 84 *YALE L. J.* 96 (1975), which is reprinted, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 651.

¹⁵ Nicholas Greenwood Onuf *International Legal Order as an Idea* 73 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 244 (1979).

Schmittian notion has an important additional element, namely the authority that establishes the order.¹⁶

Any account of international law, which assumes that international law and order are the same, is flawed. Even though law is a part of the order in wider terms, the two should never be confused.¹⁷ But, likewise, any presentation of international law, which does not take world order into account is deficient. The assessment of a military campaign in alleged self-defence is a technical question of the application of articles 31 and 32 of the Vienna Convention of the Law of Treaties to the UN Charter, but it is never only that. It is also a matter of *Ordnung*, or *Nomos*.¹⁸

D. Kant and Hobbes in Washington

Let us start the discussion by setting out the last two visions of world order, described above, in some more detail. In the 1990s the catchword in international politics was “democracy,” coupled with human rights and the market economy. The *ad hoc* tribunals for former Yugoslavia and Rwanda, the International Criminal Court (ICC), Kosovo and, at a more pedestrian level, various human rights and economic policy conditions for development co-operation, credits, trade, *etc.*, they all signaled that the new world was one where the relationships were to be determined by the state’s attitude towards democracy, the rights of the individual and economic freedom. The defining (or crowning) moment was 24 March 1999, the date of the Pinochet judgement of the House of Lords and the beginning of what many of us called a humanitarian intervention in Yugoslavia.¹⁹

¹⁶ Another particular and important element of Schmitt’s is spatiality (*Nomos* = *Ordnung* + *Ortung*). *Nomos* is applicable to a certain territory, which is the object of a taking, the *Landnahme*. That aspect could be used to discuss different kinds of rule, connected in different ways to territoriality. One could, for example, think of the orders established in Western and Eastern Europe after World War II, compare that with the liberal peace-advocates’ notions of zones of peace and zones of war (see texts mentioned in endnotes 22 and 24), and ask what sort of political geography there is in a globalised world.

¹⁷ See, MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 480 *et sequa* (2002).

¹⁸ To clarify: This does not suggest that law is not a separate system. Sociologically speaking it makes sense to think of it that way, and normatively speaking, it should so remain. *Nomos* is therefore, in *my* reading (which is probably different from Schmitt’s), a category of another order than law as legal system. However, in the interest of the relevance of law, one cannot discard the wider implications. I am sure that that can be expressed also in terms of, for instance, systems theory.

¹⁹ One could also say that this era was codified in the Warsaw Declaration of the first Community of Democracies meeting in 2000 (<www.state.gov/www/global/human_rights/democracy/000627_cdi_warsaw_decl.html>)

This was the liberal vision. It did not always disregard power, but it saw the ultimate possibility of a world not ruled by military might. It was a world where security concerns (weapons of mass destruction, terrorism) were present²⁰ but not overriding, and where security was defined in a broad sense and other considerations were given great weight.²¹

At that time, many of us declared scepticism about the neo-Kantian thesis of a democratic or liberal peace, proclaimed and developed mainly by US writers,²² indeed, even identified as part of the new main-stream of US international law discourse.²³ This was a thesis, which basically said that democratic (or liberal) nations do not go to war with one another. The implication was not that the world is presently peaceful and governed by international law, but that relations among democratic states are peaceful. This thesis was challenged on the facts, and more importantly, as to the purported normative consequences. This was the case both for the implication that all states should adopt a certain type of domestic system (liberal democracy) and the implication that relations inside and outside the circle of democratic states not only are different but also should be governed differently.²⁴ At a

²⁰ See, Secretary of State Madeleine Albright, *Press Conference on "Kosovo," 25 March 1999*, in *THE CRISIS IN KOSOVO 1989-1999 – INTERNATIONAL DOCUMENTS AND ANALYSIS* (Vol I) 416, 419 (Marc Weller ed, 1999); United States Senate, *NATO's 50th Anniversary Summit, Hearing before the Committee on Foreign Relations, 21 April 1999*, in *THE CRISIS IN KOSOVO 1989-1999 INTERNATIONAL DOCUMENTS AND ANALYSIS* (Vol I) 422 (Marc Weller ed, 1999).

²¹ See, e.g., the Secretary General's *Agenda for Peace: preventive diplomacy and related matters A/RES/47/120 A*, 18 December 1992.

²² The seminal article on democratic peace and its connection with the theses advanced by Kant in *Zum ewigen Frieden* in 1995 was □ Doyle, *Kant, Liberal Legacies and Foreign Affairs* 12 *PHILOSOPHY AND PUBLIC AFFAIRS* 205 (1983). The thesis of a democratic peace was further advanced in BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR ORDER* (1993). As the legal representative of this school, I have picked Anne-Marie Slaughter. There are other Kantians, like Fernando Teson, and other liberals, like Harold Koh or Thomas Franck. Slaughter is extremely prolific and enjoys a prominent profile, often appearing in the public debate.

²³ David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law* 94 *PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 104, 119-120 (2000).

²⁴ The arguably most consistent expression of this view in international law is: Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 503 (1995). For a very astute critique, see, SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* (2000). Other critiques, include, MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 483 *et squal* (2002), Outi Korhonen, *Liberalism and International Law: A Centre projecting a Periphery* 65 *NORDIC JOURNAL OF INTERNATIONAL LAW* 481 (1996), Euan MacDonald, *International Law, Democratic Governance and September the 11th*, 3 *GERMAN LAW JOURNAL* NO 9 (<www.germanlawjournal.com/past_issues:archive>). Though I have great sympathy for the liberal doctrine in practice, I also have some severe principled and theoretical difficulties, which I have expressed, *i.a.*, in *Liberalism and the end of international law?*, Paper presented at the International Studies Association Conference, Los Angeles 18 March 2000. For a thor-

moment when the world seemed to be taken over by a triumphant and not always culturally sophisticated liberal millenarianism, those sceptical remarks felt important. However, there was an important feature in the theory which often received less notice in critical circles (including by myself): it did indeed suggest that it was possible for international relations to be guided more by law and less by more overt forms of power, such as military force.²⁵

September 11, 2001, symbolised a change. Firstly, in the fight against al-Qaeda in Afghanistan, the new US administration quickly enrolled as allies a number of dubious regimes, which had been kept at arms length by the liberal governments of the 90s (the US, the EU and others). Hence, it seemed, the determining fact was not the human rights record but the relation to terrorism.²⁶ The second event was, of course, the doctrine of pre-emptive self-defence, presented by President Bush at his speech to the graduates at West Point on 1 June 2002 and developed in the NSS,²⁷ and in effect endorsed by the US Congress.²⁸

But the change had actually begun earlier than that.²⁹ On 17 July 1998, 120 countries chose to adopt the Rome Statute of the International Criminal Court (ICC). Six countries voted against, including one liberal democracy, the United States of

ough critique of Slaughter's description of the behaviour of liberal states, see, José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory* 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 183 (2001).

²⁵ This should not be taken to imply an idealistic view of power. Power works as law, as well. However, there is a difference between relations in which concrete actions are perceived to be guided by norms and relations overtly determined by political pressure. Rules are general in scope, and may, in different circumstances, work to the advantage of either side. Therefore, in a rule-governed relation, the rule may in many cases supply the weaker party with a means to resist pressure from the stronger.

²⁶ Cf, Harold Hongju Koh, *The Spirit of the Laws*, 43 HARVARD INTERNATIONAL LAW JOURNAL 23, 29 (2001). That is not unqualified, though, because according to neo-conservative foreign policy thinking, quite prevalent in the US Administration, there are immutable principles of universal justice, as will be discussed below (Andrew Hurrell, *There are no Rules' (George W. Bush): International Order after September 11*, 16 INTERNATIONAL RELATIONS 181, 185 (2002)). Cf, also several such references in the West Point speech (see, endnote 27, *infra*).

²⁷ *Remarks by the President at 2002 Graduation Exercise of the United States Military Academy*, 1 June, 2002, <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>>. See, also, *the National Security Strategy*, at <<http://www.whitehouse.gov/nsc/nss.html>>.

²⁸ *Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq*. <<http://www.whitehouse.gov/news/releases/2002/10/print/20021002-2.html>>

²⁹ The policy of the current administration is, in a sense, a continuation of that of the Reagan/Bush administration. Whether the policy of the Clinton years was an aberration, a continuation, a reaction to the circumstances or an expression of a different will, is beyond the scope of this text.

America, which up until Rome had been one of the driving forces for the Court. US opposition hardened after the inauguration of George W. Bush, and culminated (for the time being) in the adoption of resolution 1422, more or less forced upon 14 unwilling other Security Council members,³⁰ and in the conclusion of, to date (30 May 2003), 34 agreements with other states to the effect that these states are never to surrender US nationals to the ICC.³¹

To get a picture of what all of this *might* mean, we will take a look at what some influential writers have written, and the most conspicuous is, perhaps, Robert Kagan's article *Power and Weakness*, published in *Policy Review*, June 2002 (and now as a book published in 2003 by Knopf and translated in several languages).³² According to Kagan, there is a great difference between Europe (the EU) and the United States. The latter "remains mired in history, exercising power in the anarchic Hobbesian world where international laws and rules are unreliable and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might."³³ Europeans, by contrast, believe that what they have to offer the world is "not power, but the transcendence of power."³⁴ But Europe has not managed to create its peaceful microcosm for itself by itself. "By providing security from outside, the United States has rendered it unnecessary for Europe's supranational government to provide it. Europeans did not need power to achieve peace and they do not need power to preserve it."³⁵

³⁰ In resolution 1422, the Security Council *i.a.* "1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or commissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise; ... 3. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations." See, Pal Wrangé, *The Prince and the Discourse: On Commenting and Advising on International Law*, in *NORDIC COSMOPOLITANISM: ESSAYS FOR MARTTI KOSKENNIEMI* (Jarna Petman & Jan Klabbers eds, 2003 forthcoming); and Carsten Stahn, *The Ambiguities of Security Council Resolution 1422*, 14 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 85 (2002).

³¹ <www.iccnw.org>.

³² Other texts often mentioned are Max Boot, *The Case for American Empire*, *WEEKLY STANDARD* (15 October 2002) (see, endnote 110, *infra*) and ROBERT D. KAPLAN, *WARRIOR POLITICS: WHY LEADERSHIP DEMANDS A PAGAN ETHOS* (2002).

³³ Robert Kagan, *Power and Weakness*, *POLICY REVIEW* No. 113 (June/July 2002), www.policyreview.org/JUN02/kagan_print.html.

³⁴ *Ibid.*

³⁵ For a critique, see, Olaf Dilling, *Comment: 'If I had a Hammer' – A Review of Robert Kagan's 'Power and Weakness'*, 3 *GERMAN LAW JOURNAL*, No 12, December 2002 <www.germanlawjournal.com/past_issues.php?id=220> accessed on 31 January 2003. Reprinted in this issue of *German Law Journal*.

The problem, according to Kagan, "is that the United States must sometimes play by the rules of a Hobbesian world, even though in doing so it violates European norms. It must refuse to abide by certain international conventions that may constrain its ability to fight effectively in [the] jungle. ... It must live by a double standard. And it must sometimes act unilaterally, not out of a passion for unilateralism but ... because the United States has no choice *but* to act unilaterally."³⁶ Kagan does not openly condone this, but the acceptance follows from the realist credo (act according to the practices of the real world).³⁷ While he admonishes the US to "show more understanding for the sensibilities of others, a little generosity of spirit"³⁸ and "pay its respects to multilateralism and the rule of law,"³⁹ all of that is only for an instrumental purpose, namely to gather "international political capital for those moments when multilateralism is impossible and unilateral action unavoidable."⁴⁰

A not too different account of the world is given in a recent article in *Foreign Affairs* by Michael J. Glennon, an international law professor from the Fletcher school at Tufts University.⁴¹ In Glennon's view, what "brought the Security Council down" was "not the second Persian Gulf War,⁴² but rather an earlier shift in world power

³⁶ *Ibid*

³⁷ Cf, Jack Donnelly, *Twentieth-century realism*, in TRADITIONS OF INTERNATIONAL ETHICS 85, 104 *et sequat* (Terry Nardin & David R. Mapel eds., 1992).

³⁸ *Ibid*

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ Michael J. Glennon, *Why the Security Council Failed*, 81 FOREIGN AFFAIRS, May/June, 2003, accessed through www.foreignaffairs.com, 2003-05-10. Glennon's relation to neo-conservatism is not clear to this writer. There is certainly an affinity in the emphasis on power, and Glennon has published on the law of force for the *Weekly Standard*, which is a leading neo-conservative journal (Michael J. Glennon, *Preempting Terrorism: The case for anticipatory self-defence*, 7 THE WEEKLY STANDARD No. 19 (28 January 2002)). Some of Glennon's views might fit much less comfortably with neo-conservatives, such as his refusal to accept eternal truths and values, and his hopes for a binding agreement on the use of force (see, Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFFAIRS, No 3, 2 at 7 (1999)).

Apart from my critical account of Glennon, I must also say that the article contains a number of very acute observations. For instance, he notes that Iraqi compliance with Security Council resolution 1441 was actually predicated on an illegal US threat of force, and he also duly criticizes the Council for supplying a text able to "lend support to both claims. This is not the hallmark of great legislation."

⁴² On my count, the 2003 war was the third Gulf War. Two million people – Arabs and Iranians, for sure – died in the 1980-1988 Gulf War, many of them through US arms, supplied to Saddam Hussein. For examples of the denomination of that war as the Gulf War, see, Francis V. Russo, *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Law*, 19 OCEAN DEVELOPMENT 381 (1988); Ronzitti, *La Guerre du Golfe, le déminage et la circulation des navires* 33 ANNUAIRE FRANCAIS DE

toward a configuration that was simply incompatible with the way the UN was meant to function. It was the rise in American unipolarity ... that, along with cultural clashes and different attitudes toward the use of force, gradually eroded the council's credibility. ... The fault for this failure did not lie with any one country; rather, it was the largely inexorable upshot of the development and evolution of the international system."⁴³ While "[t]he old power structure gave the Soviet Union an incentive to deadlock the council; the current power structure encourages the United States to bypass it."⁴⁴ But why must the US yield to that temptation?

This is answered in completely realist terms: "The first and last geopolitical truth is that states pursue security by pursuing power. Legalist institutions that manage that pursuit maladroitly are ultimately swept away."⁴⁵ Glennon explains: "[R]ules must flow from the way states actually behave, not how they ought to behave."⁴⁶ Consequently, "international legalist institutions, regimes, and rules relating to international security ... are not autonomous, independent determinants of state behavior but are the effects of larger forces that shape that behavior."⁴⁷

Glennon sounds like a Realist (although still very lawyerly⁴⁸) while Kagan is a neo-conservative. Glennon does not believe in universal values, whereas that is a common feature of the work of the neo-conservatives. However, both hold that power is more important to state behaviour than law. Hence, to juxtapose them: both the substantive rules on the use of force (see further below) and the procedural role of the Security Council should be determined by or reflect power. International law, peaceful relations, *etc.*, are impossible without power (*i.e.*, military power) to back

DROIT INTERNATIONAL 247 (1987); *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War*, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 147-172, 394-613 (1988); Rainer Lagoni, *Gewaltverbot, Seekriegsrecht und Schifffahrtsfreiheit im Golfkrieg*, in FESTSCHRIFT FUER WOLFGANG ZEIDLER 1833 (1987).

⁴³ Michael J. Glennon, *Why the Security Council Failed*, 81 FOREIGN AFFAIRS, May/June, 2003, accessed through www.foreignaffairs.com, 2003-05-10.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* The full line of reasoning is not as crude as it looks. In Glennon's view, customary law consists mainly of what states actually do, in the limited sense of the verb "do". There is, thus, a jurisprudential explanation. However, that particular explanation does fit well with the interests of powerful states.

⁴⁸ He does not believe that international law is or should be irrelevant. He is not an apologist for naked power. He hopes that the world will be able to produce a new treaty regime on the law of force. However, his views on the present state of the law happen to fit very well with some agendas in Washington.

them up. In the jungle one must play by the rules of the jungle. This does not mean that values are unimportant, to neo-conservatives they are very important, but it does mean that the pursuit of those values is ultimately restricted by the power-configurations of the world, not by its laws.

E. International Law (or Non-law)

What does this entail for international law? The most immediately relevant texts are undoubtedly those delivered by the US Government, since it is the Government, not writers, who dispose of the enormous power of the United States. The final position with regard to Iraq, as set out by President Bush, was, however, not determined by a single line of thinking, and the justifications given were surely the result of the usual political-bureaucratic process. The documents issued and answers given by the State Department are a great deal more measured and traditional than statements coming out of the Pentagon or in writings by some people usually held to be influential in Washington. Depending on whom you read (and how you interpret), what it comes down to may amount to nothing more than a slightly different reading of the United Nations Charter or to something as radical as a usurpation of international authority. Since the purpose of this article is not to do the impossible and determine a coherent US policy-line, but to draw the consequences of certain ways of thinking, I will use statements from some influential intellectuals within and without the administration to flesh out the picture.⁴⁹

We will begin with sovereignty, that of the US and of others. This term is rarely used in European political discourse, at least not as a political resource. In the US the situation is different, but by no means monolithic. There are a great many authors who are critical of the idea of sovereignty.⁵⁰ The neo-Kantians think of sovereignty not as absolute but as relational, as the ability to participate in international intercourse.⁵¹ In conservative and neo-conservative circles, by contrast, there is another tone. For example, John Bolton, the neoconservative Under-Secretary of State, complained that the Rome Statute of the International Criminal Court is in-

⁴⁹ As mentioned in endnote 3, *supra*, Kagan, Pearle and Wolfowitz are all supporters of the *Project of a New American Century*.

⁵⁰ To take two more or less random but still very prominent examples: LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8, 252 (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 3 (1995).

⁵¹ Anne-Marie Slaughter, *In Memoriam: Abram Chayes* 114 *HARVARD LAW REVIEW* (2001) 682, 685. See, also, Robert Keohane, *Ironies of Sovereignty: the European Union and the United States*, 40 *JCMS* 743, 748-749, 754-755 (2002).

compatible with “fundamental American notions of sovereignty.”⁵² As Robert Keohane notes, September 11 further reinforced the US commitment to a “modernist, classical conception of external sovereignty, linked traditionally to military power,”⁵³ and it was in that mode that President Bush, on 17 March 2003, invoked his “sovereign authority” to use force. Certain aspects of this conception and valuation of sovereignty are structural, in the sense of being linked to the US position in the world. For instance, a reluctance to submit its armed forces to international criminal law scrutiny may not be far-fetched for a country with wide exposure. But even that is a matter of choice, and a great number of US Congressmen take a positive stance on the International Criminal Court.⁵⁴

But not only is the US asserting its own sovereignty. If one draws the ultimate consequences of various statements, it could even be averred that the US is conditioning the sovereignty of others.⁵⁵ Firstly, sovereignty is linked to power. The implication is that sovereignty is not something that follows *ipso jure* from the fact of independence; it is not an on/off concept, but a gradual one.⁵⁶ On this view, only very strong nations can be really sovereign. There is absolute sovereignty and conditional sovereignty,⁵⁷ and weak nations are sovereign only in as far as the strong

⁵² John Bolton, *The United States and the International Criminal Court, Remarks to the Federalist Society, Washington, DC, USA* (November 14, 2002) (<www.state.gov/t/us/rm/15158.htm>). See, also, generally – but not in every detail applicable to the writers covered here – P. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFFAIRS, NO 6 (2000).

⁵³ Robert Keohane, *Ironies of Sovereignty: the European Union and the United States*, 40 JCMS 743, 758 (2002).

⁵⁴ Cf, also, David Scheffer, *Don't Forfeit the Global Criminal Court*, accessed at <groups.yahoo.com/group/icc-info/message/1166> on 10 June 2003.

⁵⁵ For a full and bold statement of this argument, see, Linda S. Bishai *The exception Proves the Rule: America's Defection from the West*, paper for 44th Annual International Studies Association Convention, Portland, Oregon, February 25 – March 1, 2003, on file with the author. See, also, for a similar, but conservative, argument, Ivan Eland, *The Empire Strikes Out: The 'New Imperialism' and Its Fatal Flaws*, POLICY ANALYSIS, No 459 (26 November 2002), Cato Institute, Washington, DC, USA, at 13. Cf also Generally, see also Stanley Hoffman, *America Goes Backward*, L THE NEW YORK REVIEW OF BOOKS, NO 10, 74 at 78 (2003)

⁵⁶ For instance, the National Security Strategy speaks of the prospect of US help to Colombia for its extension of “effective sovereignty over the entire national territory.” From a legal point of view, that expression is near nonsense, since no one has challenged Colombian sovereignty.

This gradual, analogical conception of sovereignty is typical for international relations, whereas international law works with a digital (yes/no) conception of sovereignty.

⁵⁷ Tom Barry, *Return of the Nation State – and the Leviathan*, INTERHEMISPHERIC RESOURCE CENTER <www.presentdanger.org/papers/leviathan.htm> accessed on 10 June 2003.

nations allow it.⁵⁸ Secondly, by implication from the foregoing and more importantly, sovereignty is conditional on the acceptance of certain fundamental values and norms.⁵⁹ As President Bush says in the introduction to the NSS, “[f]or freedom to thrive, accountability must be expected and required,” and, consequently, in the President’s speech to the UN General Assembly, Saddam Hussein was warned that “a regime that has lost its legitimacy will also lose its power.”⁶⁰

And this brings us over to the buzzwords regime change. In line with current thinking, the US may want regime change both as a part of the campaign against terrorism and because that would further the cause of freedom, *i.e.*, both for reasons of security and for more idealistic reasons. In Kosovo, the humanitarian goal was evident and prevalent (together with the aim of retaining the credibility of NATO).⁶¹ While many of the Bush-administrators and supporters were sympathetic with that action,⁶² nevertheless, in the Hobbesian world, security seems to be more important, particularly after September 11.⁶³

⁵⁸ With that in mind, it is important to note that for the US, it is necessary to “build and maintain our defenses beyond challenge.” (NSS at 29) “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” (NSS at 30). Other states should not have that right, however. For instance, China is advised that “[i]n pursuing advanced military capabilities that can threaten its neighbors in the Asia-Pacific region, China is following an outdated path that, in the end, will hamper its own pursuit of national greatness.” (NSS at 27)

⁵⁹ Tom Barry, *Return of the Nation State – and the Leviathan*, INTERHEMISPHERIC RESOURCE CENTER <www.presentdanger.org/papers/leviathan.htm>

⁶⁰ <<http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>>

⁶¹ See, e.g., *President Clinton’s Address to the Nation, 24 March 1999*, in THE CRISIS IN KOSOVI 1989-1999, INTERNATIONAL DOCUMENTS AND ANALYSIS (Vol I) 415 (Marc Weller ed, 1999). There was not much legal justification done, however, except some scant references to the Security Council’s resolutions 1160, 1199 and 1203 (Secretary of State Madeleine Albright, *Press Conference on “Kosovo,” 25 March 1999*, in THE CRISIS IN KOSOVI 1989-1999, INTERNATIONAL DOCUMENTS AND ANALYSIS (Vol I) 416, 419 (Marc Weller ed, 1999)). It was also made clear that there was no need for an authorization. (*United States Senate, NATO’s 50th Anniversary Summit, Hearing before the Committee on Foreign Relations, 21 April 1999*, in THE CRISIS IN KOSOVI 1989-1999, INTERNATIONAL DOCUMENTS AND ANALYSIS (Vol I) 422 (Marc Weller ed, 1999)). The Kosovo action was not about regime change in Belgrade, but it was about change in Kosovo.

⁶² See, e.g., Max Boot, *The Case for American Empire* WEEKLY STANDARD (15 October 2002) (see, endnote 110, *infra*).

⁶³ While Wolfowitz undoubtedly is an earnest champion of democracy, he writes about it in realist language: “[n]othing could be less realistic than the version of the ‘realist’ view of foreign policy that dismisses human rights as an important tool of American foreign policy.” *Remembering the Future*, THE NATIONAL INTEREST, No 59 (Spring 2000). The introduction to the NSS says that the “duty of protecting these values [of freedom] against their enemies is the common calling of freedom-loving people across the globe and across the ages.” However, “[d]efending our Nation against its enemies is the first and

The US has not explicitly declared that regime change is a legitimate goal as such for military intervention. Even though it has gradually surfaced as a justification in political rhetorics in the Iraq case, legally speaking regime change has never been held to be anything but incidental to the purportedly legal goal of ridding Iraq of weapons of mass destruction, *i.e.*, to the security concern, that justifies military force (which will be treated below in relation to pre-emption). To what extent the US Government is prepared to use force solely to further freedom, is unclear, and the NSS is vague in this respect. While it states that the US will “actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world,”⁶⁴ it says nothing about whether force may be used for that purpose alone. However, one could read into the document at least a readiness to intervene in domestic strife in a way in which traditional international law would not have allowed: “We will champion the cause of human dignity and oppose those who resist it.” “Where and when people are ready to do their part, we will be willing to move decisively.”⁶⁵ This reading may not conform with the intentions of all parts of the administration, but it suggests itself in cross-reading with some remarks from Deputy Secretary of Defence Paul Wolfowitz and his programmatic (earlier) article *Remembering the Future*.⁶⁶ In this mode of thinking, sovereign equality is no longer a corner stone of international law and international order. Some are clearly more equal than others.

Force can be used for regime change, but also to act against threats to the United States, and that leads us to the doctrine of pre-emption. The National Security Strategy states:

“For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legality of pre-emption on the existence of an imminent threat –

fundamental commitment of the Federal Government.” Of course, sometimes those two interests can be claimed to point in the same direction.

⁶⁴ Introduction to the NSS. *Cf. also*: “Freedom is the non-negotiable demand of human dignity” and “[t]he United States welcomes our responsibility to lead in this great mission.”

⁶⁵ NSS at 4 & 9.

⁶⁶ *Remembering the Future*, The NATIONAL INTEREST, No 59 (Spring 2000). For instance, Wolfowitz wrote that “Kennedy’s failure to make good on his pledges to the Cubans at the Bay of Pigs, like Clinton’s abandonment of the Iraqi opposition in 1996, was a moral failure that was also costly to American power and credibility.” For Wolfowitz’s remarks on Iraq, *see*, Robin Cook, *Britain must not let Iran become the next Iraq*, IHT p. 8 (4 June 2003). Neo-conservatives have always been divided on the issue to what extent the US government should work to spread democracy. *See*, JOHN EHRMAN, THE RISE OF NEOCONSERVATISM: INTELLECTUALS AND FOREIGN AFFAIRS 1945-1994 184 (1995).

most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."⁶⁷

While the US has never unambiguously claimed other exceptions to the prohibition of force than those explicitly mentioned in the United Nations Charter, it has always had a very relaxed conception of the right of self-defence. The doctrine of pre-emption can be interpreted to take this one step further. To W. Michael Reisman and many others, it means that the time frame has been extended significantly compared to the slightly more established notion of anticipatory self-defence in case of an imminent danger. Since the claim for pre-emption "can only point to a possibility, a contingency," it may "lead to great resort to international violence," which is a systemic danger.⁶⁸ But as one can understand the somewhat tendentious⁶⁹ account in the NSS, and remarks by the legal advisor to the Secretary of State, William Howard Taft IV, we are to think that pre-emption is not a new concept, distinct to anticipatory self-defence; it is only a reinterpretation of the traditional concept of "imminent threat," in the context of the weapons and tactics of US contemporary adversaries.⁷⁰ At any rate, Taft stated that the doctrine did not come into play with regard to Iraq.⁷¹

⁶⁷ NSS at 15. See, also, *ibid.*: "The United States of America is fighting a war against terrorists of global reach" (p 5), and "we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country" (p 6).

⁶⁸ Remarks by W. Michael Reisman, in the debate at the Association of the Bar of the City of New York *Preemptive Force: When can it be used?*, 13 January, 2003, <www.fpa.org/topics_info2414/topics_info_show.htm?doc_id=142893> accessed on 10 June 2003.

⁶⁹ What international law has said "for centuries" should be irrelevant to any state party to the United Nations Charter, a treaty which changed the law of force fundamentally. For sure, the word "inherent" in Article 51 implies that old international law comes in through the back-door, but the law that reigned "centuries" ago did not specifically allow war for purposes of self-defence, since there was no prohibition of war whatsoever. Further, the invocation of what "[l]egal scholars and international jurists often" do is misleading, because most often, they do not allow anticipatory self-defence at all.

⁷⁰ Remarks by William Howard Taft IV, in the debate at the Association of the Bar of the City of New York, *Preemptive Force: When can it be used?*, 13 January, 2003, <www.fpa.org/topics_info2414/topics_info_show.htm?doc_id=142893>, accessed on 10 June 2003.

⁷¹ Taft, *Ibid.*, The letter to the President of the Security Council of 20 March did portray the action as a sort of defence, but that was not explicitly made as a legal argument (www.un.international/usa/03iraqltr0320.htm accessed on 10 June 2003). (The actions "are necessary steps to defend the United States and the international community from the threat posed by Iraq...") What sort of discussions had occurred between the lawyers of the Pentagon and State Department is anybody's guess.

Some writers have come to much more radical conclusions. Michael J. Glennon interpreted the NSS to mean that the United States “would no longer be bound by the Charter’s rules governing the use of force. Those rules have collapsed. “‘Lawful’ and ‘unlawful’ have ceased to be meaningful terms as applied to the use of force.”⁷² He explains it thus: “[s]ince 1945, so many states have used armed force on so many occasions, in flagrant violation of the charter, that the regime can only be said to have collapsed.”⁷³ He mentions a number of different ways to explain this under “traditional international legal doctrine”: desuetude; subsequent custom or “a non liquet, ... no authoritative answer is possible.”⁷⁴ To conclude, the doctrine of pre-emption may imply a huge shift, or only a small modification, depending on how it is applied.

Both the use of force and regime change implicates the Security Council. Most observers were convinced, from the summer of 2002, that the US was going to go ahead against Iraq with or without the support of the Security Council.⁷⁵ But the official statements suggest a slightly different picture. In his televised speech on 17 March 2003, President Bush referred to resolutions 678, 687 and 1441 as giving him legal power to pursue the war with Iraq, and that was also confirmed in the customary US letter to the President of the Security Council under Article 51 after the military action had commenced.⁷⁶ In fact the draft resolution presented by the US,

⁷² Michael J. Glennon, *Why the Security Council Failed*, 81 FOREIGN AFFAIRS, May/June, 2003, accessed through www.foreignaffairs.com, 2003-05-10.

⁷³ *Ibid.*

⁷⁴ *Ibid.* Glennon bypasses the simplest explanation of this extensive use of force, namely that the actions were just illegal and were usually held to be such by the great majority of states. Cf. Anna-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARVARD INTERNATIONAL LAW JOURNAL 1 (2002). Glennon continues: “In effect, however, 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 country is considered free to act. Whatever doctrinal formula is chosen to describe the current crisis, therefore, the conclusion is the same. ‘If you want to know whether a man is religious,’ Wittgenstein said, ‘don’t ask him, observe him.’ And so it is if you want to know what law a state accepts. If countries had ever truly intended to make the UN’s use-of-force rules binding, they would have made the costs of violation greater than the costs of compliance.” *Ibid.* For a fuller, and hence more convincing treatment of the issue, see, Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 539 (2002).

⁷⁵ Even in the speech to the General Assembly on 12 September 2002, the unilateralist resolve was spelt out, though in somewhat veiled language: “But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced ... or action will be unavoidable.” <<http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>>

⁷⁶ *President Says Saddam Hussein Must Leave Iraq Within 48 Hours*, Remarks by the President in Address to the Nation, accessed from <www.whitehouse.gov/news/releases/2003/03/print/20030317-7.htm> on 18 March 2003.

the UK and Spain in February, which was never put to a vote, proceeded from the assumption that the proposed Security Council resolution was not legally necessary, and that the old resolutions were applicable. A Security Council-friendly interpretation would therefore be that the US believed itself to be acting under the authority of the Council.⁷⁷

But it is also possible to interpret events differently. President Bush said in his speech on March 17 that the Security Council “had not lived up to its responsibilities.”⁷⁸ To determine what that might entail legally, one might look at the US attitude towards the United Nations after the war. It was made abundantly clear during the conflict that the United Nations was not going to get a decisive role in post-war Iraq. On the US view, the legitimate power to govern the country came not from the United Nations but from the fact of victory in war.⁷⁹ For sure, it could (again) be argued, that the war was itself authorised by the UN, but it seemed hard to claim that that authorisation included a mandate to continue to govern the country beyond the limited authority of an occupying power under the laws of war. In resolution 1483, the UN was given a role in the management of Iraq, but the key role is still played by “the Authority,” the occupying powers, as the Council noted, but not conferred on them.

This fits well with what Richard Perle, the then Chairman of the Pentagon’s Defense Policy Board, wrote in the Guardian on 21 March, namely that we had just seen the death of “the fantasy of the United Nations as the foundation of a new world order.” This was “the intellectual wreckage of the liberal conceit of safety

⁷⁷ The best and most succinct justification for the Iraq war set out in the UK Attorney-General’s brief (<www.parliament.the-stationary-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/30317w01.htm>, accessed on 10 June 2003). My view on these matters conforms with those of a number of (other) teachers of international law in a letter to the Guardian on 7 March 2003. My own analysis is presented, *i.a.*, in *The American and British Bombings of Iraq and International Law*, 39 SCANDINAVIAN STUDIES IN LAW 491-514 (2000). My article was written after the December bombings of 1998, but the only intervening circumstance since then – resolution 1441 – does not change the legal situation significantly, even if it does make the US and the UK arguments a bit stronger. See, also, the works cited in my article, in particular the excellent Serge Sur, *La résolution 687 (3 avril 1991) du conseil de sécurité dans l’affaire du Golfe: Problèmes de rétablissement et de garantie de la paix*, 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 25 (1991) as well as Jean-Marc Thouvenin, *Le jour le plus triste pour les Nations Unies, les frappes anglo-américains de décembre sur l’Iraq*, 44 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 209 (1998)).

⁷⁸ *President Says Saddam Hussein Must Leave Iraq Within 48 Hours*, Remarks by the President in Address to the Nation, accessed from www.whitehouse.gov/news/releases/2003/03/print/20030317-7.htm on 18 March 2003.

⁷⁹ The Fourth Hague Convention gives authority to an occupying power to do certain things, but not to change government. Another question is whether an occupying force is not obliged to change domestic legislation and practices which contravene human rights. I tend to believe that they should.

through international law administered by international institutions.”⁸⁰ As Glennon explains, on “September 12, 2002, ... President George W. Bush, ... brought his case against Iraq to the General Assembly and challenged the UN to take action against Baghdad for failing to disarm. ... But he warned that he would act alone if the UN failed to cooperate.”⁸¹ Glennon continued, “at this point it was easy to conclude, as did President Bush, that the UN's failure to confront Iraq would cause the world body to ‘fade into history as an ineffective, irrelevant debating society.’”⁸²

So, on the one hand, the US was invading in the alleged fulfillment of a string of UN resolutions. On the other hand, its authority over Iraq was asserted outside the framework of the UN, and at least one chief advisor of the US administration rejoiced in the powerlessness of the Council.⁸³ After all, the Council had not lived up to its responsibilities, and therefore had to be toppled as a source of legality (and of political legitimacy).

For many of us, there seems to be a lurking contradiction here: who is it then, if not the Security Council, that determines that the US has the right to invade and later govern Iraq? Certainly not the Constitution, neither the US, nor the Iraqi. And that brings us over to the overriding issue, the conception of the international legal order. Other states, and most of all other liberal democratic states, are used to thinking of international law as a framework for their foreign policy or even an international constitution. That is particularly true of the members of the European Union, much of whose foreign policy is no longer really foreign but institutional policy within the Union.⁸⁴ The US, by contrast, has a very strong domestic constitution,

⁸⁰ Richard Perle, *THE GUARDIAN* (21 March 2003).

⁸¹ Michael J. Glennon, *Why the Security Council Failed*, 81 *FOREIGN AFFAIRS*, May/June, 2003, accessed through www.foreignaffairs.com, 2003-05-10.

⁸² The word “irrelevant” was used in President Bush’s speech at the UN General Assembly on 12 September 2002. <<http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>>

⁸³ See *supra*, endnote 80

⁸⁴ For constitutionalism in European international law, see, *i.e.*, VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT. THEORIE UND PRAXIS 58 et sequat* (3 ed, 1984). See, also, Andreas Fischer-Lescano, *Emergenz der Globalverfassung*, *HEIDELBERG JOURNAL OF INTERNATIONAL LAW* (2003, forthcoming) and Andreas Fischer-Lescano, *Themis sapiens*, in *CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE* (Christian Joerges, Inger-Johanne Sand, Günther Teubner eds., 2003; forthcoming). Critically, on the idea of the United Nations Charter as a constitution, see, Prosper Weil, 44 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*. Among the many recent texts on a constitution of and constitutional discourse in the European Union, see, *i.a.*, JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE* (1999). For a general perspective, see, Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in *THE EUROPEAN CONSTITUTION: A FESTSCHRIFT* (J. Weiler & M. Winder, eds; forthcoming); Neil Walker, *The Idea of Constitutional Pluralism*, 65 *MODERN LAW REVIEW* 317 (2002).

but does not view the international arena in constitutional terms. The NSS states reassuringly that “[i]n all cases, international obligations are to be taken seriously.” On the other hand, the quote continues: “[t]hey are not to be undertaken symbolically to rally support for an ideal without furthering its attainment,” which seems to imply a certain scepticism towards the entertainment of new obligations. And this is confirmed: “[t]he US national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests.”⁸⁵ In the NSS there are only brief references to the United Nations, as one of several, potentially useful multilateral fora,⁸⁶ and there is no talk of the United Nations Charter or of international law in general as a framework or a basis of international politics.⁸⁷ The Under-Secretary of State, John R. Bolton, even believes that international law is not legally binding.⁸⁸

None of this necessarily entails that the US does not regard itself officially to be bound by international law. As already implied by Kagan, however, international rules that constrain sovereignty cannot always be applied by the United States,⁸⁹ and Kagan even writes in another text that there is a “broad and deep American consensus” about the vision of “the unilateralist fist inside the multilateralist velvet glove.”⁹⁰ It is still a reflex for governments to justify the use of force legally.⁹¹ One can therefore imagine that any future operation might be explained by strained references to the right of self-defence, without excessive worry over whether the arguments will be accepted by non-US international lawyers.

⁸⁵ NSS, in the Introduction and at 1, respectively.

⁸⁶ See, e.g., NSS, at 7.

⁸⁷ Not even in the President’s speech to the UN General Assembly on 12 September are there any such reverences. <www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html> Generally, see also Stanley Hoffman, *America Goes Backward*, L THE NEW YORK REVIEW OF BOOKS, NO 10, 74 at 77 (2003)

⁸⁸ John R. Bolton, *The Global Prosecutors: Hunting War Criminals in the Name of Utopia*, 78 FOREIGN AFFAIRS, No 1, 157, 158-159 (1999).

⁸⁹ Tom Barry, *Return of the Nation State – and the Leviathan*, INTERHEMISPHERIC RESOURCE CENTER <www.presentdanger.org/papers/leviathan.htm>

⁹⁰ Robert Kagan, *Multilateralism, American Style*, THE WASHINGTON POST (13 September 2002), accessed from <www.newamericancentury.org/global-091302.htm> on 29 May 2003. Barry confirms this tactical view of multilateralism, but accredits it to “conservative internationalists”. Tom Barry, *Return of the Nation State – and the Leviathan*, INTERHEMISPHERIC RESOURCE CENTER <www.presentdanger.org/papers/leviathan.htm>

⁹¹ Kosovo was never seriously justified under international law, but even in this case, there were legal arguments presented.

Further, and as a natural complement to the wide-spread scepticism of international law, the US does not want to be held down by new global arrangements for accountability, like the Rome Statute of the ICC, which, according to Under-Secretary of State John Bolton, is a “stealth approach to eroding constitutionalism,” US constitutionalism, that is.⁹² Glennon adds that “[t]he problem with applying [checks and balances] in the international arena ... is that it would require the United States to act against its own interests, to advance the cause of its power competitors – and, indeed, of power competitors whose values are very different from its own.”⁹³

Still, current US foreign policy discourse is not devoid of legal and normative language. One of the things held against the enemies of the US is that they “display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party.”⁹⁴ Further, the NSS abounds with invocation of “nonnegotiable demands” of human dignity, *etc.*, which implies that there are fundamental substantive rules, legal or not.⁹⁵ Perhaps ultimately the world constitution is not one of law but of political and legal rules combined, or an amalgam of authority *cum* power, legality and – as an intermediate category – legitimacy. Part of this debate appeared in the context of Kosovo. And with that we call the Kantians back on the stage.

F. Kantians and Hobbesians in a Unipolar World

There is, for sure, a difference between neo-conservatives and traditional realists; for the neo-conservatives the pursuit of values has a much higher place on the political agenda. However, in a post September 11 world, in which security once again has risen to the top of the agenda, that difference may not necessarily be all-important. And, as implied, they have in common the view that power is much more important for state behaviour than international law. Therefore, it appears, at least for Kagan, that the denomination “Hobbesians” fits both groups.

⁹² John Bolton, *Summary of Statement Before the Senate Foreign Relations Committee*, from Gary Schmitt, *Memorandum to opinion leaders: International Criminal Court*, accessed from <www.newamericancentury.org/global-0201.htm> on 2003-05-29.

⁹³ Michael J. Glennon, *Why the Security Council Failed*, 81 FOREIGN AFFAIRS, May/June, 2003, accessed through www.foreignaffairs.com, 2003-05-10.

⁹⁴ NSS, at 18.

⁹⁵ “America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.” (NSS at 3).

What about the relation between neoconservative Hobbesians and liberal Kantians? They all hold that values should matter in foreign policy (which makes these Hobbesians less Hobbesian), and that there is an important difference between democracies and other states. The world, as presented by the liberal, Anne-Marie Slaughter, is a divided one, in which relations with and between illiberal nations are to be guided by different rules than those between liberal ones, and the NSS seems to concur, by and large.⁹⁶ It is probably the view of neo-conservatives that the non-liberal world is even beyond the law, at least when it comes to rogue states, who “display no regard for international law” or who might even be “outlaws”.⁹⁷ To Kantians, by contrast, there is no world outside law, just worlds of different legal rules. International law applies also to illiberal states, albeit with a somewhat different content.⁹⁸

However, the difference is not so sharp even in this respect. Anne-Marie Slaughter, for instance, thought that the armed action against the Federal Republic of Yugoslavia was legitimate. In her Hague lectures of 2000, she has a very nuanced and interesting discussion on humanitarian intervention. She maps various arguments, and tries to trace the assumptions underlying them. In the development of a “common position”, the position sought is one of policy, not black letter law, and the commonality is traced between six American writers and one Australian. Not exactly a global consensus.⁹⁹

⁹⁶ “America will encourage the advancement of democracy and economic openness in both nations [Russia and China], because these are the best foundations for domestic stability and international order.” NSS, introduction. Neo-conservatives are a bit more nuanced than some Kantians, though: “Even though democracies are not as irenic as the extreme proponents of ‘democratic peace’ like to argue, a China that governs its own peoples by force is more likely to try to impose its will on its neighbors.” Paul Wolfowitz, *Remembering the Future*, THE NATIONAL INTEREST, No 59 (Spring 2000).

⁹⁷ For an example of the use of the term “outlaw”, see, John Bolton, *The International Aspects of Terrorism and Weapons of Mass destruction*, Remarks to the second Global Conference on Nuclear, Bio/Chem Terrorism: Mitigation and Response, The Hudson Institute, Washington, DC, USA (1 November 2002), accessed from <www.state.gov/t/us/rm/14848.htm> on 10 June 2003.

⁹⁸ Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 503, 506 (1995). Cf. also, *ibid* at 536. (The fact that Kantians and Hobbesians explain the peace between the members states of the European Union differently – the structures of the domestic societies of the member states or the order provided by the United States – is less important for the present discussion.). In an interesting and creative recent article, Slaughter and William Burke-White argue for a new formulation of article 2(4) of the United Nations Charter, which would forbid the use of force between states and against civilians. Anna-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARVARD INTERNATIONAL LAW JOURNAL 1 (2002). The argument is too important – and partly problematic – to deal with in this context.

⁹⁹ Anne-Marie Slaughter, *International Law and International Relations* 285 RECEUIL DES COURS 13 at 55 *et sequat*, in particular 89-93 (2000).

On March 18 this year Slaughter concluded in an Op-Ed in the *New York Times* that a US invasion would be contrary to the United Nations Charter, but she also argued that “insisting on formal legality” with regard to Iraq might be counterproductive.¹⁰⁰ She reasoned: “The better way to understand what has happened is that neither side can command a majority without a veto.”¹⁰¹ The United Nations, she explained, “cannot be a straightjacket, preventing nations from defending themselves or pursuing what they perceive to be their vital national interests.”¹⁰² She called the invasion “illegal but [possibly] legitimate,” depending on whether the allies would be welcomed by the Iraqis and whether there actually were weapons of mass destruction.¹⁰³ She advised the UN to approve the invasion after the fact.

While Slaughter clearly is UN friendly at heart, in the choice between the constraints of the UN Charter and US “vital national interests,” she evidently opts for the latter. This is a view that discards the legalism of the formalistic interpretation of the UN Charter for an approach that not only acknowledges that international lawyers have to make policy choices, but also actually propagates the policy approach to lawyering. Further, it is an approach that resorts to legitimacy when legality cannot be attained. And lastly, it seeks a retroactive stamp of approval from the UN Security Council. This is not too different from Michael Glennon’s characterisation of the US approach: “[W]hen international rules should be made, Americans prefer after-the-fact, corrective laws. [They] tend to favor leaving the field open to competition as long as possible and view regulations as a last resort, to be employed only after free markets have failed. Europeans, in contrast, prefer preventive rules aimed at averting crises and market failures before they take place.”¹⁰⁴

But we should not fool ourselves. This is a debate, which is not totally unfamiliar to Europeans, either. Four years ago, we were also there (including this writer), when we tried to find legal arguments or doctrines to justify the Kosovo action.¹⁰⁵

¹⁰⁰ Anne-Marie Slaughter, *Good Reasons for Going Around the UN*, NEW YORK TIMES (18 March 2003).

¹⁰¹ This of course, ignored the fact that the US could not muster even a simple majority, like it ignored the rules of the Charter.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Michael J. Glennon, *Why the Security Council Failed*, 81 FOREIGN AFFAIRS, May/June, 2003, accessed through www.foreignaffairs.com, 2003-05-10.

¹⁰⁵ It is of course not difficult to find differences between the Kosovo debates of 1999 in the respective European and American Journals of International Law. The point is, though, that not even Europeans are afraid of thinking in policy terms. Cf. *European Journal of International Law*, vol. 10, no. 1 and 4 (1999) and vol. 12, no. 3 (2001); the *American Journal of International Law*, vol. 93 no. 4 (1999); the *Revue interna-*

Kantians (as liberals) and Hobbesians (as realists) might give different accounts of how the world functions.¹⁰⁶ What ultimately interests an international lawyer, however, is the normative implications of the theories. In the context of international relations, liberals value liberal principles of government and want to spread them to as large a part of the world as possible, while realists value national security. However, traces of both can be found in the influential group of writers known as neo-conservatives, and at any rate, one cannot draw very certain policy-conclusions from these simply formulated premises. Many liberal idealists have been realistic about the constraints in the world in which they want to realise their ideals.¹⁰⁷ Conversely, realists may believe that it would be beneficial to security if all states were constituted along liberal lines. Further, there are signs that the two lines of thought are being forged in real politics. After the end of the Cold War, it is less likely that liberals will feel constrained by “realist” concerns. And, after September 11 it is more likely that realists will believe that US security may require regime change or change of policy in a number of foreign states.¹⁰⁸ Robert Kagan and the former deputy assistant secretary of state under Clinton, Robert Asmus, claim that the US has “a duty to ourselves and to the world to use our power to spread democratic principles and deter and defeat the opponents of our civilization.”¹⁰⁹ In a Hobbe-

tionale de la Croix-Rouge, March 2000, no. 837; the *Revue général du droit international public*, vol. 104, no. 1 (2000); the *NATO Review*, vol. 47, no. 3 (1999);

¹⁰⁶ The liberal vision captured something essential, namely the possibility of ordered relations in a world where military conflict seemed impossible. However, it often erred on the factual side, by not taking account of the factor of power within the liberal community (most of all as exercised by the US), and it therefore presented a too rosy picture, which seemed to assume a liberal harmony of interests (that often happened to coincide with those of the US). The Hobbesian vision is equally one-sided – reminding us of military power, but exaggerating its importance.

¹⁰⁷ Cf. Jack Donnelly, *Twentieth-Century Realism*, in *TRADITIONS OF INTERNATIONAL ETHICS* 85, 113 (Terry Nardin & David R. Mapel eds, 1992) and Jack Donnelly, *Realism and the Academic Study of International Relations*, in *POLITICAL SCIENCE IN HISTORY: RESEARCH PROGRAMS AND POLITICAL TRADITIONS*, 175, 185 (James Farr, John S. Dyzek and Stephen T. Leonard eds, 1995). Donnelly portrays Robert W. Tucker – one of the spiritual grandfathers of neo-conservatism – as a realist; *ibid* at 187. He also explains Reagan – who employed several neo-conservatives – as a President who both emphasized power (like realists) and was ideological, and thus “antithetical to classical realism” (*ibid* at 192).

Cf. also, Max Boot on “the exigencies of the Cold War”; see, Boot, endnote 110, *infra*.

¹⁰⁸ Eland discusses the two driving forces of the “neo-imperialists”: “an imperial imperative” and “imperial virtue.” Ivan Eland, *The Empire Strikes Out: The ‘New Imperialism’ and Its Fatal Flaws*, *POLICY ANALYSIS*, No 459 (26 November 2002), Cato Institute, Washington, DC, USA, at 3.

¹⁰⁹ Ronald D. Asmus & Robert Kagan, *Commit for the Long Run*, *WASHINGTON POST* (29 January 2002), quoted from Ivan Eland, *The Empire Strikes Out: The ‘New Imperialism’ and Its Fatal Flaws*, *POLICY ANALYSIS*, No 459 (26 November 2002), Cato Institute, Washington, DC, USA, at 19.

sian world, it is necessary to act like a Hobbesian, at least if survival is important (and who could say that it isn't). But even the Kantians à l'américain actually believe that a bit of Hobbesianism is necessary, and justified, at least against the rogues. In the words of the neo-conservative Max Boot, the leaders of the US and the West should make a pledge to establish "a liberal world order."¹¹⁰

G. Law and/or Power

The US campaign against the ICC and its struggle against al-Qaeda and Saddam Hussein have a symbolic significance, which some would read thusly: The most powerful nation in history from now on measures every relationship mainly by one yardstick, threats to itself, and is further prepared to use all the means at its disposal to go after its enemies, but does not wish to be held accountable. Or, in more Schmittian terms: "The Empire"¹¹¹ has *expressis verbis* asserted the right to decide on the exception,¹¹² on its view of universal "moral truth."¹¹³ Reading Richard Perle, the constituting, historical instance ("*Ereignis*") was the invasion of Iraq in defiance of firm opposition in the Security Council, as well as in world opinion. What law, if any, will come out of it, we do not yet know.

¹¹⁰ Max Boot, *The Case for American Empire* WEEKLY STANDARD (15 October 2002), <www.weeklystandard.com/Content/Public/Articles/000/000/000/318qpvmc.asp>. Cf, also, Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States and the Case for American Empire*, FOREIGN AFFAIRS (March/April 2002), <www.foreignaffairs.org/20020301facomment7967/sebastian-mallaby/the-reluctant-imperialist-terrorism-failed-states-and-the-case-for-american-empire.html?mode=print>.

¹¹¹ This term is a citation from current political discourse. It is widely taken to denote the US, but I do not claim that it is appropriate. A quick search at 'www.google.com' gave more than 78.100 returns for 'empire' and 'United States'. A sample indicated that roughly 25% concerned suggestions that the US is an Empire. The term is not used only as a derogatory word, but also in a positive sense, by neoconservative writers like Charles Krauthammer and in the *Weekly Standard* (Emily Eakin, *It Takes an Empire*, IHT (2 April 2002)). Cf, also, Max Boot, *The Case for American Empire* WEEKLY STANDARD (15 October 2002), endnote 110, *supra*. The term has been most famously used in MICHAEL HARDT & ANTONIO NEGRO, *EMPIRE* (2000), in a quite peculiar way. For a discussion focusing on Hardt's and Negro's work, see, Tarak Barkawi & Mark Laffey, *Retrieving the Imperial: Empire and International Relations*, 31 MILLENIUM 109-127 (2002).

¹¹² This is, of course, an allusion – but no more - to Carl Schmitt's formula "Sovereign is he who decides on the exception." See, CARL SCHMITT, *POLITICAL THEOLOGY* 5 (first published 1934) (2 ed, translated by George Schwab, 1985). Political theology is, by the way, not a completely unjustified term in this context.

¹¹³ This is a citation from the West-Point speech: "Moral truth is the same in every culture, in every time, and in every place. Targeting innocent civilians for murder is always and everywhere wrong. (Applause.) Brutality against women is always and everywhere wrong." (Applause.) See, endnote 27, *supra*.

To not evoke anti-American sentiments and to set the perspective straight:¹¹⁴ The United States of America is a vital democracy. And even if it sometimes has forgotten to act like one, after Vietnam it no longer seems likely to forget it on a large scale. Whatever quagmire in which it will find itself in Iraq, Iraq will not be another Chechnya.¹¹⁵ And regardless of the differences in defence spending, NATO will never look like the Warsaw Pact. But benign as this Leviathan is, the current situation nevertheless entails a danger to international law, as we know it, for three reasons. First, while any US administration by and large holds as sacred the same values as would the Europeans (and many others), and as they are enshrined in the global human rights conventions, the current administration seems to have forgotten that even dear values are contested.¹¹⁶ As Jürgen Habermas has pointed out, it makes a great difference whether the supposedly universal, common values are held to be valid through a sort of natural law or as a matter of positive law, created in an orderly and legitimate procedure.¹¹⁷ The US is, as is well known, not party to some of the most important human rights conventions, and is reluctant to submit itself to the scrutiny of international human rights bodies. It does not accept economic and social rights, and it seems to have a thin conception of democracy (held in common by neoconservatives and Kantians alike).¹¹⁸ Secondly, regardless of its

¹¹⁴ Is this anti-American? No, for three reasons. A) In this “unipolar moment”, it is necessary to deal with the position of the world’s lone superpower. As a related matter, while I have much greater faith in the US than in most of its actual or potential protagonists, none of them can alter the structure of international relations the way the US can. This fact is a very good deal of the real basis of all the concern, which has been showed by governments and public and popular opinion around the world. B) I am not anti-American. In fact, I cherish much about the US, and that applies also to its political traditions. That is true also for a great number of the many people who are worried about the present situation. C) While there is certainly a propensity to be critical about the US for many who came of age during the Vietnam war (like I did), such sentiments are not an uneradicable disease. They depend upon what the United States of America actually does. And however such sentiments actually work, in public and academic discourse, judgments of the behaviour or goals of the United States or any other country have to be justified in reasoned, commonly accessible terms. Yet another reason, of a different kind, is that by and large the same explicit and implicit criticisms turn up often in US writing, including conservative circles. See, e.g., Ivan Eland, *The Empire Strikes Out: The ‘New Imperialism’ and Its Fatal Flaws*, POLICY ANALYSIS, No 459 (26 November 2002), Cato Institute, Washington, DC, USA.

¹¹⁵ I, by and large, accept the argument to that effect by JOHN LEWIS GADDIS, *WE NOW KNOW: RETHINKING COLD WAR HISTORY* (1997).

¹¹⁶ At West-Point, President Bush said that “[m]oral truth is the same in every culture, in every time, and in every place” (“Remarks by the President at 2002 Graduation Exercise of the United States Military Academy”, 1 June, 2002, <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>>), This is echoed in the NSS.

¹¹⁷ DIE ZEIT, No 16, 1999.

¹¹⁸ See, Marks, endnote 24, *supra*, at 50 *et sequa* and *passim*. For the conclusion that Europe has a “thicker” view, see, Steven Wheatly, *Democracy in International Law: A European Perspective*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 225 (2002).

commitment to values shared by many others, the National Security Strategy, as well as the actual policies pursued by the last few Republican administrations, makes it abundantly clear that US security concerns have the place of priority in its security policy.¹¹⁹ Primacy of security is not particular for the US, but the strength of the US concern for security coupled with the military strength to pursue this security, is unique. Thirdly, and most importantly, while unilateralism is not an invention of new or old conservatives, in the words of one commentator, “the Bush administration has taken this whole approach to a different, almost philosophical plain.”¹²⁰ And all of this is coupled with the “unparalleled” US power.¹²¹

It is easy enough to scoff at the celebration of power. It seems simple, unsophisticated, even atavistic. And we know that as a matter of fact, there is no such thing as naked power; it is always mediated, negotiated, embedded.¹²² Further, the talk of legitimacy flowing out of an Iraq where oil fields but not hospitals and cultural treasures are secured, has a different and somewhat more soure taste than the legitimacy that many of us granted to the Kosovo operation.¹²³

As any international lawyer knows, the relation between law and power is paradoxical, and filled with complex (in the Freudian sense). First of all, law and power are not mutually exclusive categories, and law is a form of exercise of power. Secondly, if we think of power as different from law, as extra-legal capacities to impose one’s will (military might, economic strength or ideological influence) the

¹¹⁹ “Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government” (NSS, Introduction). Richard Perle, explained that ‘if I have to choose between some abstract concept of the international community and protecting the citizens of this country, there’s no question what comes first.’ (*Striking first*, A Jim Lehrer NewsHour, 1 July, 2002, <<http://www.tni.org/archives/bennis/newshour.htm>>). The background is that on the one hand, “[w]ith the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation”, but on the other hand “new deadly challenges have emerged from rogue states and terrorists.” (NSS at 13)

¹²⁰ Michael Cox, *Meanings of Victory: American Power after the Towers*, in *WORLDS IN COLLISION: TERROR AND THE FUTURE OF GLOBAL ORDER* 152, 159 (Ken Booth and Tim Dunne eds, 2002).

¹²¹ The word is used in NSS, in the introduction and at p 29.

¹²² This is a point of Michel Foucault’s. See, for example, *FOUCAULT, POWER/KNOWLEDGE* 142 (1980).

¹²³ On Kosovo, see, the works cited in endnotes 20 and 61, and the Dutch HUMANITARIAN INTERVENTION by the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law (AIV report; no. 13, the Hague: AIV, 2000), the International Commission on Intervention and State Sovereignty (ICISS), mainly sponsored by Canada (<http://www.ciise-iciss.gc.ca/menu-e.asp>) and HUMANITARIAN INTERVENTION by the Danish Institute of International Affairs, København: DUPI (1999).

relation is paradoxical. While law needs power as a backing to be relevant, it also needs to contain power, in order to be law (normativity).¹²⁴

One must also admit and regret the lack of attention to power shown by many international lawyers, not least Europeans. International law is presented as a normative system, and to the extent that the external world is taken into account, it is generally done in a progressive mode, to advocate why international law should consider the “real” need in the world out there, like those of the environment or humanitarian exigencies. Rarely are power and differences in power dealt with and conceptualised directly.¹²⁵ To a European like me, it is therefore almost shocking to read writers such as Michael J. Glennon, who unwaveringly contends that there is no longer a prohibition on the use of force. For sure, we can retort by invoking libraries of doctrine and judgments of the ICJ. But to what avail? What counts to those with power and will is evidently the actions of those with power and will, not the objections of the many who have neither.

It is impossible to say that nothing has happened. The *Nomos* is not the same as before the turn of the millennium. The genie is out of the bottle, since well before this Third Gulf War, and many of us took part in helping it out, back in 1999.¹²⁶ There are important differences between Kosovo and Iraq: the altruistic, humanitarian motives for Kosovo were widely accepted, and there was a broad consensus for the action, particularly in the region, both at the level of governments and among the general public. Still, it was fairly clear to the vast majority of commentators that the action was in contravention of international law, and the justifications given were, to be honest, beyond the *lex lata*, ranging from *ad hoc* humanitarian-political motivations to wishes that there would, eventually, develop a (circumscribed) right of humanitarian intervention.¹²⁷

This is a time of crisis for international law, and not only because of the lack of respect for law as such in some circles. After all, it is difficult to duck the charges that the Security Council is unrepresentative, that international law unduly protects

¹²⁴ Cf. the instructive – and necessarily inconclusive – discussion in MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, 480 *et sequa*(2002).

¹²⁵ A notable exception, a North-American, is Michael Byers; see MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* (1999).

¹²⁶ Cf. Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 *FOREIGN AFFAIRS*, No 3, 2 at 4 (1999). I have no regrets, but I do have reasons to ponder. For an exemplary concerns about the systemic effects of Kosovo, see, Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law* 11 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 19 at 28 (2000).

¹²⁷ See, endnotes 20 and 61, *supra*.

human rights abusing dictators and that the Council even neglects to ensure that its own resolutions be enforced. In times of crisis, we have to scrutinise the very foundations of our own systems of thought. Acknowledging power might look like giving in, if it means that the Security Council should be an office for rubber stamping decisions taken elsewhere, or if it means the abandonment of the core norms on the use of force. But the choice is not between ignoring power and succumbing to it. The evocation of power should instead be countered with a refutation of the premises of that evocation. We should strengthen the legitimacy and popular appeal of international law, and give alternative responses to the questions asked in the United States today. In trying to answer them, we might just add some of our own: Yes, the UN Security Council is unrepresentative, but is it power or people that should be represented? Yes, the UN Security Council has been unable to implement its decisions, so why not submit troops at its disposal, and why not build up a UN supervisory machinery? Yes, the United Nations and international law have made human rights abuses possible, but why should only some human rights be enforced? And with that our questions have only begun.

The United Nations was founded on the premise that world peace was the primary concern. The concern for peace cannot be isolated, however. Italy is home not only to the peace flag, but also to the forceful NGO “No Peace without Justice.”¹²⁸ While we have to ask “what justice?”, we cannot forget to ask. Without justice, there can be no peace, no security, and – ultimately – no viable power.

¹²⁸ *No Peace Without Justice* has been very active in the promotion of the International Criminal Court.