
International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order

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Abstract

Hegemony and international law are often regarded as irreconcilable: international law is widely assumed to depend on a balance of power and to be eschewed by hegemons in favour of political tools. This corresponds to an often idealized contrast between international law and international politics, one reflecting reason and justice, the other brute power. Realists and critical legal scholars have long sought to counter this idealization, but often by merely reducing international law to power. This article seeks to go beyond these positions by analysing the multiple ways in which dominant states interact with international law. Drawing on international relations theory, it develops a model of this interaction and illustrates it with historical examples, taken mainly from Spanish, British and American phases of dominance. The typical pattern observed is one of instrumentalization and withdrawal, coupled with attempts at reshaping international law in a more hierarchical way and at replacing it with domestic legal tools that better accommodate formal hierarchies. The resulting picture should provide a starting point for critique and help us better understand why international law is simultaneously instrumental and resistant to the pursuit of power. International law is important for powerful states as a source of legitimacy, but in order to provide legitimacy, it needs to distance itself from power and has to resist its mere translation into law. International law then occupies an always precarious, but eventually secure position between the demands of the powerful and the ideals of justice held in international society.

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1 Introduction

International law and political dominance are often regarded as irreconcilable. Dominant states appear to be reluctant to use the forms and abide by the rules of international law; they seem to consider it as overly constraining, and turn to politics instead.¹ On the other hand, the international legal system also seems to distance itself from predominant power: based on sovereign equality, it is disinclined to grant formal recognition to structures of superiority and leaves them to the political realm.² Yet since it is always in need of power to enforce its norms, international law seems helpless in this situation – unable to constrain a powerful state on its own, it is assumed to depend for its effectiveness on a balance of power: ‘When there is neither community of interests nor balance of power, there is no international law.’³ As a result, international law often appears as the sphere of equality, in which reason and justice prevail, whereas power asymmetries are relegated to the sphere of politics where the law of the jungle seems to reign.

This dichotomy finds its classical expression in the respective roles of law and politics in the era of the Concert of Europe in the first half of the 19th century. In its relationship with weaker states, the Concert often operated through political rather than legal means; and international lawyers, in turn, were only too willing to exclude this dominance from their field.⁴ A similar picture of mutual exclusion is often used to describe the current turbulent relationship between international law and the United States. The US, reluctant to join treaties and ready to disregard inconvenient legal rules, appears as a ‘lawless’ hegemon,⁵ but in spite of that, international law among the rest of states seems to flourish on its way to realizing the values of the international community. Again, law and power seem to operate in different spheres.

The resulting picture of international law is obviously idealized, and realist scholars of international relations as well as Marxist and critical legal scholars have long pointed to the ways in which international law itself is instrumental to, and shaped by, power.⁶ Some have even written the history of international law as one of the

¹ See Schmitt, ‘USA. und die völkerrechtlichen Formen des modernen Imperialismus’, 8 *Königsberger Auslandsstudien* (1933) 117, esp. at 127.

² See Ginther, ‘Hegemony’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1986), ix, at 158–161; H. Mosler, *Die Großmachtstellung im Völkerrecht* (1949), esp. at 32–35 (regretting this fact). See also the distinction between factual and legalized hegemony in H. Triepel, *Die Hegemonie: ein Buch von führenden Staaten* (1938), at 202–206.

³ H.J. Morgenthau, ‘Positivism, Functionalism, and International Law’, 34 *AJIL* (1940) 260, at 274. See also *id.*, *Politics Among Nations* (1948), at 229; L. Oppenheim, *International Law* (1905), i, at 73; F. von Liszt, *Das Völkerrecht* (1898), at 15–38.

⁴ See, e.g., Oppenheim, *supra* note 3, at 162–164. See also *infra*, Section 4, B 2.

⁵ In this direction see also Vagts, ‘Hegemonic International Law’, 95 *AJIL* (2001) 843.

⁶ See, on the one hand, G. Schwarzenberger, *Power Politics: A Study of World Society* (3rd ed., 1964), at 199–203; Mearsheimer, ‘The False Promise of International Institutions’, 19 *International Security* (1994), 5, at 13; and (similarly, though on a rationalist rather than realist basis) J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2005). On the other hand, see M. Koskeniemi, *From Apology to Utopia* (1989); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); Chimni, ‘An Outline of a Marxist Course on Public International Law’, 17 *Leiden JIL* (2004) 1; see also S. Marks, ‘Empire’s Law’, 10 *Indiana Journal of Global Legal Studies* (2003) 449.

different epochs of great power dominance.⁷ This critique is important and often revealing, but it falls too easily into the trap of reducing international law to power, of regarding international law as just another tool of the powerful to exert their dominance. International law appears as either the nemesis of power or as its handmaiden.

In this paper, I seek to go beyond these positions and try to analyse in greater detail the complex ways in which powerful states interact with international law. Any deeper look at this interaction reveals that international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia.⁸ This double nature creates significant tensions and negotiations by dominant states with the international legal order, and, as I will argue, it typically leads to a four-tiered response. In some areas, powerful states tend to use international law as a means of regulation as well as of pacification and stabilization of their dominance; in other areas, faced with the hurdles of equality and stability that international law erects, they withdraw from it. Most of the interesting action, though, takes place between these two poles: in efforts at reshaping the international legal order so as to better reflect and accommodate superiority in power. Moreover, law does not end with withdrawal: oftentimes, dominant states merely pursue international law by other means – they replace it with domestic law, which makes it easier to establish hierarchies and to directly govern other states.

My inquiry focuses on dominant states in the international order – on hegemons – and primarily on Spain in the 16th, Britain in the 19th, and the US in the late 20th and early 21st centuries. It is also limited in that it mainly analyses the policies and strategies of these states rather than their actual and enduring impact on international law. Despite these limitations, though, the inquiry aims at elucidating the interaction of international law and unequal power in a more general way. Dominance and hegemony are merely extreme cases of material inequality, and many of the observations will also hold, *mutatis mutandis*, in cases where the difference in power is less accentuated. And the focus on strategies rather than results should expose instances of fundamental pressure on the international legal order and thus help us understand processes of fundamental change. Thus, the main goal of this article is to identify the central elements of the dynamic interaction between international law and power inequality, and thereby clarify in which ways international law is both receptive and resistant to superior power. This, in turn, should allow for some insights into the conditions for an effective international legal order in a world inextricably bound up with power asymmetries.

The analysis proceeds from a theoretical basis in international relations theory that is spelt out in Section 2 and that will generate a number of hypotheses for the relationship between international law and dominant power. These hypotheses are taken up in the remainder of the paper, though they will not be systematically tested. Their purpose is merely to structure the inquiry, to link the more specific discussions to the

⁷ W.G. Grewe, *Epochen der Völkerrechtsgeschichte* (2nd ed., 1988).

⁸ To use the words of Koskenniemi, *supra* note 6. In this article, I use 'power' and 'powerful' as referring primarily to a 'compulsory' (interactional, direct) form of power. Other, more indirect and constitutive, forms will be considered below as regards their importance for stable dominance and the role of law in them. On the concepts, see only Barnett and Duvall, 'Power in International Politics', 59 *Int Org* (2005) 39.

broader theoretical framework, and to suggest how this framework can give a plausible account of the relationship in question. The following parts will analyse and illustrate in greater detail the different elements of dominant states' international legal policies that I have mentioned above. Section 3 will deal with the dichotomy between instrumentalization and withdrawal; Section 4 is dedicated to the contours of efforts at reshaping international law; and Section 5 will focus on its substitution: at the turn to domestic law as an instrument of international governance.

2 International Law and Dominant States: Elements of a Theory

Quite surprisingly, the role of power inequality in the international legal system has rarely been studied systematically. As I pointed out in the introduction, neither the view that regards international law as an order of equality and thus as depending on a rough balance of power, nor the approach that sees international law as merely an instrument of power, can capture the complexity of the situation. Likewise, attempts at discerning different modes of international law – an 'international law of power' as opposed to a law of community or reciprocity⁹ – overemphasize the contrast and fail to bring out the internal links between these modes. On the other hand, recent scholarship trying to reconnect the disciplines of international law and international relations has to a large extent focused on questions of compliance; and studies of the political conditions of the *emergence* of international law, and especially of the role of power in it, have remained relatively rare.¹⁰ In this article, I cannot remedy this, but I will try to outline a possible theoretical basis that can serve as a framework for the further inquiry into the relationship of international law and hegemony.

A *The Value of Multilateral Institutions for Dominant States*

International law is a multilateral institution (broadly understood as including formal and informal norms, regimes and organizations¹¹), and it should thus be possible to draw upon recent theorizing about such institutions for its analysis. Yet, like the balance-of-power approaches of international lawyers, theories about international institutions have mostly assumed relative equality among states. This has allowed them to overcome the problems of realist approaches and hegemonic stability theory, but their focus on international affairs 'after hegemony'¹² has limited their

⁹ Schwarzenberger, *supra* note 6, at 199–203; taken up in H. Bull, *The Anarchical Society* (3rd ed., 2002), at 134.

¹⁰ For this observation, see also M. Byers, *Custom, Power, and the Power of Rules* (1999), at 35; Hurrell, 'Conclusion: International Law and the Changing Constitution of International Society', in M. Byers (ed.), *The Role of Law in International Politics* (2000), at 327, 329–331. For important exceptions, see Byers, *ibid.*; J.L. Goldstein *et al.* (eds.), *Legalization and World Politics* (2001) (originally in 54 *Int Org* (2000) 385); Goldsmith and Posner, *supra* note 6. For a general survey of attempts at linking international law and international relations, see Slaughter, Tulumello, and Wood, 'International Law and International Relations Theory: a New Generation of Interdisciplinary Scholarship', 92 *AJIL* (1998) 367; and Slaughter, 'International Law and International Relations', 285 *RdC* (2000) 9.

¹¹ See Ruggie, 'Multilateralism: the Anatomy of an Institution', 46 *Int Org* (1992) 561, at 568–574.

¹² Just see R. O. Keohane, *After Hegemony* (1984).

explanatory force in situations of inequality.¹³ While they see the value of institutions mostly in the solution of collaboration and coordination problems, dominant states usually have alternative means to solve these problems: in the first case, they can provide the good in question themselves and bring other states into line; in the second, their stance will often provide a focal point that others will go along with, even in the absence of institutions.¹⁴

1 Rationalism, Constructivism, and the Functions of Multilateral Institutions

The importance of institutions for dominant states is thus likely to lie elsewhere. On a similar rationalist basis as most institutionalist approaches, one can identify three primary functions of multilateral institutions in situations of hegemony: regulation, pacification and stabilization.¹⁵ First, by avoiding repeated negotiations with other states and by creating greater predictability, multilateral norms can significantly reduce the transaction costs of regulation.¹⁶ Second, negotiating international rules in multilateral fora gives weaker states greater influence, and this provides them with an incentive to follow the resulting agreements, leads to quasi-voluntary compliance, and thus lowers the costs of enforcement (pacification).¹⁷ And third, multilateral norms and institutions are less vulnerable to later shifts in power than ad hoc political relations; they will thus be relatively stable even if the hegemon declines, and will for some time preserve an order that reflects the hegemon's preferences (stabilization).¹⁸

Yet such a rationalist approach is unable to capture the distinctive value of international institutions for dominant states. It assumes that state behaviour generally follows an instrumental rationality, a calculation of costs and benefits based on preferences and identities that are fixed, i.e. exogenous to the international system.¹⁹ On this background, systems of rule in international affairs can only be based on coercion or self-interest: weak states follow powerful states either because they are forced to do so by threats or because they hope to derive overall benefits from following. Both options, however, are costly: the first often provokes resistance and thus

¹³ For critiques in this direction, see only Martin, 'Interests, Power, and Multilateralism', 46 *Int Org* (1992) 765, at 769; Abbott and Snidal, 'Why States Act through Formal International Organizations', 42 *J Conflict Resolution* (1998) 3, at 6; Woods, 'The United States and the International Financial Institutions: Power and Influence Within the World Bank and the IMF', in R. Foot, S.N. MacFarlane, and M. Mastanduno (eds.), *US Hegemony and International Organizations* (2003), 92, at 95; Hurrell, 'Power, Institutions, and the Production of Inequality', in M. Barnett and R. Duvall (eds.), *Power in Global Governance* (2005), at 33–58.

¹⁴ See Martin, *supra* note 13, at 768–777; see also Ruggie, *supra* note 11, at 592.

¹⁵ See Martin, *supra* note 13, at 783–789.

¹⁶ This appears as one of the major reasons for establishing multilateral trade regimes: see, e.g., Abbott, 'NAFTA and the Legalization of World Politics: A Case Study', in Goldstein *et al.*, *supra* note 10, at 135, 141–145.

¹⁷ This has been used to explain, e.g., the lack of balancing against the US after the end of the Cold War: see J. S. Nye, *The Paradox of American Power* (2002).

¹⁸ This was arguably the main motive behind US institution-building after World War II: see G. J. Ikenberry, *After Victory* (2000), at chap. 6.

¹⁹ On the methodological basis, see, e.g., Keohane, *supra* note 12, at chap. 1.

creates high enforcement costs; the second may be more stable, but depends on the provision of incentives and the solution of problems of free-riding.

Instead, stable systems of rule, both domestically and internationally, usually involve more than mere self-interest: they are based on authority.²⁰ Once dominance is regarded as legitimate – and thus turns into authority – obedience is no longer based on calculation, but on a conviction that it is necessary and right. On a rationalist basis, this is difficult to capture, as it depends on a central role of ideas that are socially constructed rather than fixed. Conceptions of legitimacy are formed not in an isolated way within one state, but through interaction with other states in international society, and they in turn shape the interests and identities of the states. These processes are at the core of constructivist theories of international politics that over the last 15 years have mounted an influential challenge to standard rationalist assumptions.²¹

For dominant states, this role of legitimacy and authority has consequences in two ways. On the one hand, we have to regard the interests and identities of dominant powers themselves as socially constructed. Their policies will not, then, be merely instrumental but embedded in the web of normative expectations that prevails in international society at a given time. Thus, for example, it would be inconceivable for a great power today to establish direct colonial rule over weaker states; and this probably results not from a mere calculation of interest, but from a sense that this option does not exist.²² Likewise, in the European Union today, even powerful states accept the constraints stemming from the common institutions as normal, instead of calculating costs and benefits of their participation anew in every instance.²³ International society socializes powerful states, and to the extent that they regard certain forms of international politics as ‘normal’, their policies will not be ones of choice in an instrumental sense. Thus, in many instances, compliance with international law, too, will be due to an internalization of the norms rather than a rational calculus.²⁴

Yet conceptions of legitimacy also shape the attitudes of other states towards hegemonic powers. This is particularly important for the interest of dominant states in pacification: if they can draw on existing ideas about legitimacy to justify their dominance, they will face far lower enforcement costs. Multilateral institutions can play a central role here, insofar as their design reflects shared standards of legitimacy, and in

²⁰ See Hurd, ‘Legitimacy and Authority in International Politics’, 53 *Int Org* (1999) 379, at 387–389; Wendt and Friedheim, ‘Hierarchy under Anarchy: Informal Empire and the East German State’, 49 *Int Org* (1995) 689, at 700–701; see also I. Clark, *Legitimacy in International Society* (2005).

²¹ See F. V. Kratochwil, *Rules, Norms, and Decisions* (1989); J. G. Ruggie, *Constructing the World Polity* (1998); A. Wendt, *Social Theory of International Politics* (2000); for constructivist approaches to international law, see also C. Reus-Smit (ed.), *The Politics of International Law* (2004).

²² See Hurd, *supra* note 20, at 397.

²³ See Martin, *supra* note 13, at 788.

²⁴ See Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’, 19 *Michigan J Int’l L* (1998) 345, at 354–356, 358–360; Brunnée and Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’, 39 *Columbia J Transnat’l L* (2000) 19, at 64–71.

particular if it is possible to draw upon the legitimacy of existing institutions.²⁵ Also, the mere fact that rule is exercised through means of international law might enhance its authority: the organization of an empire as informal rather than formal usually reduces the difficulties of maintaining the regime, just as basing an institution on consensus decision-making rather than weighted voting does.²⁶ Similarly, the construction of authority can be central to the stabilization of dominance into the future. The establishment of institutions, even if initially based on the converging self-interests of states, can transform the standards of legitimacy in international society and thus make later attempts by rising powers to change the institutional structure more difficult: other states have then become subject to hegemonic socialization.²⁷ The construction of a hegemonic ideology is usually central to projecting dominance into the future, and multilateral institutions are often very useful for this purpose.²⁸

If authority is thus central to stable dominance, this has significant repercussions for institutional design. In order to enjoy and produce legitimacy, institutions may not appear as mere tools of the dominant power, but must be shielded from its influence, at least to some degree.²⁹ This requires a certain independence of the institutions, which will in turn tend to produce constraints on the participants, and also on the hegemon itself. In using institutions, the latter thus faces a trade-off between enhanced legitimacy and wider constraints.

2 Variations in the Role of Multilateral Institutions

Within this general framework, the attitudes of dominant powers towards multilateral institutions vary significantly, and for a great number of reasons. The central variable is probably the attitude towards the status quo. If a dominant power regards the status quo as beneficial, it will usually have a far greater interest in its stabilization into the future, and it will feel less constrained in working through existing institutions. This is particularly likely if it expects to decline rather than rise. Thus, the US activism in multilateral institution-building after World War II has arguably been due, in part, to a sense that US predominance was ephemeral and would give way to a bipolar system in which, without a diffusion of power, peace would not last long.³⁰ In contrast, dominant powers that expect to rise further will often have a more revisionist attitude and are thus likely to value stabilization through institutions far

²⁵ As Thomas Franck puts it, legitimate norms exert a 'compliance pull': T.M. Franck, *The Power of Legitimacy among Nations* (1990), at 24.

²⁶ See Wendt and Friedheim, *supra* note 20, at 700–705; Steinberg, 'In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO', 56 *Int Org* (2002) 339, at 360–365.

²⁷ See Ikenberry and Kupchan, 'Socialization and Hegemonic Power', 44 *Int Org* (1990) 283. This could also be described as a form of 'constitutive' power: see Barnett and Duvall, *supra* note 8, at 52–57.

²⁸ See Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1, at 23–24; also Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics', 5 *EJIL* (1994) 313.

²⁹ Abbott and Snidal, *supra* note 13, at 16; see also Hurrell, *supra* note 10, at 344.

³⁰ See Martin, *supra* note 13, at 785; Weber, 'Shaping the Postwar Balance of Power: Multilateralism in NATO', 46 *Int Org* (1992) 633. For less structuralist accounts, see only Ruggie, *supra* note 11, at 584–593; J. W. Legro, 'Whence American Internationalism', 54 *Int Org* (2000) 253.

less. But revisionist attitudes can, of course, also derive from other sources, in particular from shifts in domestic ideologies, as they occur in revolutions.³¹

Another important variable would be the farsightedness of the dominant power: many of the benefits of institutions accrue only in a mid- or long-term perspective, and obtaining them may thus require foregoing short-term advantages.³² Yet farsightedness in itself depends on different factors, especially on the domestic political system, but also on systemic conditions. It has been argued, for example, that in bipolar systems, the concern for stability and thus an interest in institutions are more accentuated than in uni- or multipolar settings.³³

Yet variations in the role of multilateral institutions do not only depend on the attitudes of the dominant power itself, but also on the social environment and the different forms of legitimacy available. Conceptions of legitimacy change over time, and while unequal treaties or formal imperialism may have been conceivable in the past, they are far more difficult to justify today. Likewise, until the 19th century, there was hardly an expectation for dominant states to act through multilateral treaties; today, this has become the standard form of law-making and deviations require justification. And in 16th century Europe, every policy needed to be justified in religious or natural law terms. Opting out of this framework was hardly conceivable, whereas today these normative frameworks hardly play a role.

On the other hand, at any given time, different bases for legitimating rules are available, and the legitimacy deriving from process and institutions may be replaced by substantive ideologies or influential leaders. Multilateral institutions confer, in Max Weber's terms, a bureaucratic-legalistic type of legitimacy, but this may easily lose relevance once a more charismatic basis become available. Napoleon's international legal policies may be a case in point: for many Europeans, the substantive values of the French revolution trumped the legitimacy of the old international system, and it was thus much easier for France to attempt a far-reaching revision of the European order.³⁴

B *The Promise and Problems of International Law*

International law is a multilateral institution, and the general observations above thus apply to it as well, though not to all parts of international law to the same extent. Especially bilateral treaties, though embedded in the general international legal order through rules of interpretation, state responsibility etc., bear important characteristics of bilateralism. Yet despite these internal variations, international law has a number of common characteristics that significantly affect its value for dominant

³¹ See D. Armstrong, *Revolution and World Order: The Revolutionary State in International Society* (1993), at chaps. 3, 4, and 6.

³² Martin, *supra* note 13, at 784–786.

³³ See Martin, *supra* note 13, at 786–789; for a critical discussion of the influence of bipolarity on US multilateralism after World War II, see Ruggie, *supra* note 11, at 584–593.

³⁴ Armstrong, *supra* note 31, at 84–91, 207–219.

states, and their analysis should allow us to formulate some hypotheses on the relationship between both.

1 *Stability, Equality, Coherence: Resources and Constraints for Powerful Actors*

Like all law, international law is marked by a focus on the past: most of its sources refer to historical events, and in fact, many of its central elements have remained the same for a long time. This provides it with a particular stability and makes it a prime source of legitimacy, since it can claim century-long acceptance by international society. For dominant states, it thus presents a valuable tool for pacification. But international law is also extremely useful as an instrument of stabilization: it allows dominant states to project their visions of world order into the future, since once they are transformed into law, the backward-looking character of international law makes them reference points for future policies. And oftentimes, concepts strongly rooted in international legal norms create a new normality: over time, they modify the conceptions of legitimacy of international society, which makes later changes all the more difficult.

Yet the stability of international law also poses significant problems for dominant states. By focusing on the past, international law allows previous generations to rule over present ones, and this makes it difficult for powerful actors to remake the international legal order according to their own vision. In international law, this problem is especially acute because changes in international law require widespread consent and are usually slow and incremental. Using international law for purposes of pacification and stabilization therefore forces dominant states to accept far-reaching constraints; these constraints become ever more burdensome with the increasing reach and precision of the international legal order.

An even greater challenge for hegemonic actors stems from the relatively egalitarian character of international law.³⁵ The sovereign equality of states has, since the 17th century, become a building block of the international legal system, and even though it embodies only a very formal notion of equality, it poses significant obstacles to powerful states. This is true, on the one hand, for the rules on jurisdiction that flow from it: *par in parem non habet imperium* prevents the direct governance of other states by means of international law. On the other hand, sovereign equality leads to a formally equal position of all states in the law-making process, which makes it relatively difficult (though by no means impossible³⁶) for dominant states to embody their goals in international legal rules. In customary law, this has relatively mild effects, as the law-making process is flexible and customary rules are usually vague enough to

³⁵ For a closer analysis, see Krisch, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law', in M. Byers and G. Nolte (eds.), *Hegemony and the Foundations of International Law* (2003), at 135–175. But see also Triepel, *supra* note 2, at 206–218, who regards the impact of sovereign equality as more limited; and see G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), on the extent to which inequality has been legalized despite formal sovereign equality.

³⁶ See only Steinberg, *supra* note 26.

allow for a broad impact of power at the application stage.³⁷ Multilateral treaties, though, in particular those with precise rules and enforcement mechanisms, do not allow for this latitude, and the more they form the centre of the international legal system, the more constraining the effects of sovereign equality become for dominant states.

Yet even more irritating to powerful actors is another aspect of equality: the equal application of international legal rules to all states, or to all parties to a treaty. Since law-makers and subjects of international law are usually identical, the option of making law for others – of directly *ruling* them through law – is foreclosed. This does not bar the insertion of privileges in the law, but such privileges are anomalies requiring particular justification – in principle, most forms of international law demand a certain degree of internal coherence, thus rendering difficult the establishment of particular regimes merely according to political circumstances. In customary international law, in particular, arguments with respect to one situation are subject to generalization and equal application to other situations of the same nature, whether the states involved are powerful or weak. Of course, this erects mainly a formal barrier; it does not rule out unequal treatment on the level of substance. Yet taken together, the demands of stability, equality and coherence pose significant obstacles to transforming political dominance into international law.³⁸

2 International Law and Hegemonic Powers: Some Guiding Hypotheses

International law thus confronts dominant states with a dilemma. It offers them an excellent tool for international regulation and for the pacification and stabilization of their dominance, especially because of the high degree of legitimacy that action through legal forms and procedures enjoys.³⁹ Yet reaping these benefits requires accepting significant drawbacks: existing rules need to be honoured; new rules can only be created in a relatively egalitarian setting; and they place constraints on the hegemon as well.⁴⁰

This dilemma exists, of course, only insofar as international law is not ‘normalized’ – as powerful states do not already regard it as the normal mode of operation, over which there is little to choose. Yet outside that sphere, the dilemma pertains, and it is

³⁷ See Byers, *Custom, Power* *supra* note 10, at 37–40. But see also the opposite argument in Toope, ‘Powerful but Unpersuasive? The Role of the USA in the Evolution of Customary International Law’, in Byers and Nolte, *supra* note 35, at 287–316. See also Sandholtz and Stone Sweet, ‘Law, Politics, and International Governance’, in Reus-Smit, *supra* note 21, at 238, 257–258, who regard as constraining the fact that arguments for change in customary law have to take the form of analogies.

³⁸ In a similar argument, Byers, *Custom, Power* *supra* note 10, at chaps. 4–7, identifies jurisdiction, personality, reciprocity, and legitimate expectations as principles that resist the simple translation of power into customary international law. See also Eckersley, ‘Soft Law, Hard Politics, and the Climate Change Treaty’, in Reus-Smit, *supra* note 21, at 80–105, who identifies similar elements as regulative ideals in the treaty-making process.

³⁹ On the central role of legitimacy for the function of international law, see only Brunnée and Toope, *supra* note 24, at 70–71; Finnemore and Toope, ‘Alternatives to “Legalization”: Richer Views of Law and Politics’, 55 *Int Org* (2001) 743, at 749–750.

⁴⁰ For a similar picture, see Hurrell, *supra* note 10, at 344–345.

thus likely that dominant states' policies towards international law will oscillate between two poles: instrumentalization of and withdrawal from international law. We can expect that in some areas benefits will outweigh costs, for example because other states have similar interests and little compromise is necessary, or because the interest in regulating others trumps the desire to be unconstrained. In the case of the US, for example, both factors weighed in for increased legalization in the WTO, supported by hopes for positive domestic effects from international constraints. In other areas, dominant states are likely to withdraw from international law and to turn to other means of furthering their ends. This does not necessarily entail violations of existing law, but it will certainly include shifts away from legal mechanisms in areas central to the dominant state's interests, and in particular attempts at reducing the legal constraints on the tools of dominance, such as those on the use of force. The relationship between withdrawal and instrumentalization will vary significantly among dominant states, and it will depend, *inter alia*, on the factors I have outlined above: status quo orientation, farsightedness, and the availability of alternative forms of legitimacy. In Section 3, I will analyse the oscillation between these poles in some greater detail.

Yet the dichotomy instrumentalization/withdrawal is certainly overdrawn. International law is a highly complex, historically variable and by no means uniform structure, and not all parts of it present the same obstacles to the exercise of dominance. Thus the constraining effect of customary law is, because of the imprecision of customary norms, usually less severe than that of treaties, especially if the latter establish mechanisms of supervision and enforcement.⁴¹ Even less constraining are informal norms, such as standards and soft law;⁴² least constraining, though, are norms that are made only for others, as is possible in some institutional settings such as the World Bank. In the same vein, not all processes of international law-making are similarly egalitarian. Again, treaties, especially those with global participation, are established under conditions of the greatest and most formalized equality, whereas customary law-making will usually allow for stronger influence by important actors,⁴³ as will standard-setting or treaty-making on a bilateral or regional rather than global basis.⁴⁴ Even less egalitarian are processes of treaty elaboration and standard-setting by restricted 'clubs', or law-making through such exclusive bodies as the Security Council.

While thus the costs of international law for a dominant state vary according to the specific form of the law, the same holds true for the benefits. Regulatory goals will be

⁴¹ See the conceptualization of different degrees of legalization in Abbott *et al.*, 'The Concept of Legalization', in Goldstein *et al.*, *supra* note 10, at 17–35; and of dispute resolution in Keohane, Moravcsik, and Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', in *ibid.*, at 73–104.

⁴² See Abbott and Snidal, 'Hard and Soft Law in International Governance', in Goldstein *et al.*, *supra* note 10, at 37, 52–56.

⁴³ But see, as mentioned before, Toope, *supra* note 37, for a different perspective.

⁴⁴ See Kahler, 'Multilateralism with Small and Large Numbers', 46 *Int Org* (1992) 681, esp. at 685–691; Steinberg, 'Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development', 91 *AJIL* (1997) 231, at 233, 265–266.

most effectively furthered by binding and precise treaty norms, even though non-binding standards can often fulfil a similar function.⁴⁵ Pacification and stabilization will likewise be achieved best by forms of law widely accepted as legitimate, especially those involving some form of consent (like treaties) or at least acquiescence (customary law). However, it is not clear that the benefits are just the inverse of the costs for a given form of law: soft law, for example, has often been found to be as effective in inducing compliance as hard law,⁴⁶ but it involves lower costs; and it might also be argued that law-making through a body such as the Security Council enjoys relatively high legitimacy despite its openly inegalitarian operation. Such forms of international law, combining high benefits with limited costs, are thus likely to be preferred by dominant states.⁴⁷ We can therefore expect dominant states to significantly reshape the structure of the international legal order: by pressing for forms that best accommodate their position, they will seek to modify the landscape of international law. In Section 4, I will try to show how this effort at reshaping international law has played out at different times.

However, the resulting picture of instrumentalization, withdrawal and reshaping, is still unduly narrow. It suggests that the withdrawal from international law is primarily a turn from law to politics; that the problems associated with international law drive hegemony into an abdication of the law as such. Yet this is implausible, given that a mere turn to politics would be detrimental to all the goals outlined above: to regulation, pacification, and stabilization. Dominant states are thus more likely to use another tool: their domestic law. Domestic law shares some of the advantages of international law, especially with respect to precise rules for regulation, and although it does not allow for pacification and stabilization in the way that international law does, it certainly performs better than mere politics in this respect: predictability, transparency, and the relative independence of judicial actors from the political branches often let it appear less as an instrument of power. In Section 5, I will thus inquire to what extent we can indeed observe a replacement of international law by domestic law, rather than a mere withdrawal from law to politics.

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Any approach that tries to discern patterns of behaviour of a broad range of actors over an extensive time span necessarily simplifies many issues, and so does the one chosen in this article. By focusing on one central variable (unequal power), it privileges structure over context, culture and agency; by depicting hegemony as generally

⁴⁵ See Abbott and Snidal, *supra* note 42, at 46–47; but see also the differences highlighted by Goldsmith and Posner, *supra* note 6, at 91–100.

⁴⁶ See Weiss, 'Conclusion: Understanding Compliance with Soft Law', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000), at 535–553.

⁴⁷ See Kahler, 'Conclusion: The Causes and Consequences of Legalization', in Goldstein *et al.*, *supra* note 10, at 277, 281–282; Abbott and Snidal, *supra* note 42, at 63–66. See also the findings of McCall Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts', 54 *Int Org* (2000) 137.

rational actors (yet within a constructivist framework), it neglects many of the subtleties of state behaviour; by starting from 'state' action, it passes over the differences between the many actors in domestic and international politics; and by depicting power as an attribute of certain actors, it undervalues the extent to which power is already part of the structure of society. With its relatively ahistorical and acontextual nature, such an approach certainly cannot grasp the fullness of the events it considers, and it cannot provide a deep understanding of the different forces at work in all of them.⁴⁸

I cannot discuss the epistemological and ontological questions connected with these problems in any detail here. I certainly share the scepticism towards a purely rationalist account of state behaviour, and I have tried to capture the importance of ideas and culture and the mutual constitution of structure and agents by adopting a broadly constructivist approach. I also believe that social science positivism has serious limitations, and that for a fuller grasp of historical (and contemporary) events, it needs to be complemented by a hermeneutic approach that seeks understanding rather than explanation. Yet this does not render attempts at explanation and generalization worthless. If they remain conscious of their limitations, such attempts can allow us important insights into social processes and thus provide starting points for further thinking about them.

On this background, this article does not attempt to explain (or understand) all the complexities of hegemonic attitudes towards international law over the last 500 years, or even to predict the action of dominant states in the future. Its aspiration is much more modest, in that it aims at providing one account of such attitudes that focuses particularly on the role of unequal power as a central factor in international legal strategies. It also does not attempt to test this account, but merely seeks to illustrate it with historical examples, in order to bring out commonalities as well as variations among different actors and periods. The success of this approach will depend on whether, on the whole, it provides a more plausible interpretation of events than competing approaches: on whether an interpretation of international legal policies as heavily determined by power inequality appears as more compelling than one that focuses mostly on contextual factors. Whether or not this is the case will only become clear once such competing approaches have been set forth and analysed.

3 Instrumentalization and Withdrawal: The Two Poles of Hegemonic Strategy

The international legal policies of dominant states oscillate between two poles: instrumentalization and withdrawal. But as was to be expected from the theoretical sketch above, their orientations are not uniform – they move towards one or the other of the poles depending on the character and aims of the respective state and on the shape of

⁴⁸ For a discussion of alternative approaches (many of which I regard with great sympathy), see S. Hobden and J. M. Hobson (eds.), *Historical Sociology and International Relations* (2002). See also Kratochwil, 'How Do Norms Matter?', in Byers, *The Role of Law*, *supra* note 10, at 35, 62–68.

the international legal order at a given time. Yet we can also observe striking commonalities among the policies of different hegemons at different times, especially in certain substantive areas of international law. This section seeks to outline some elements of the interplay between the use and evasion of international law by dominant states, and will thus provide the background for the more specific inquiries in later sections.

A Instrumentalization: Dominant States as Driving Forces behind the Development of International Law

Most predominant states have been active forces behind the development of international law, and they have made extensive use of the international legal order to stabilize and improve their position.⁴⁹ Yet these uses vary significantly not only from time to time, but also from one subject area to another.

In the 16th century, for example, Spain was particularly active with respect to rules on territorial acquisition, through which it sought to consolidate its early advantages in colonial expansion. It claimed essentially two legal bases for its right to territories overseas: the main one was the authorization in the papal bulls, which implied a general Christian right to rule the world, but was rejected by other European states with the decline of the authority of the Pope; and it posed problems also for Spain itself because of papal grants for its rival, Portugal. The other relied on discovery and would have yielded practically the same results, given that Spain had reached most territories in the Western hemisphere earlier than other European states. Its competitors – in particular France, Britain, and later the Netherlands – instead insisted on effective occupation, as this would have allowed them to benefit from their later rise in power.⁵⁰ However, all of them made international legal arguments to defend their position *vis-à-vis* non-European populations: whether they relied on *terra nullius* and discovery, a right to Christianize or a right to unhindered trade, they made significant efforts to translate their factual dominance into law, and thereby justify it.⁵¹ That titles to territory would be a focus of powerful states does not come as a surprise, of course: because of their exclusivity, they are particularly apt to consolidate dominance. This case, though, also highlights a particular trait of Spanish policies in the 16th century: Spain's power on the seas was increasingly challenged, and in order to maintain its position, it had to rely on a legal order that projected former advantages into the future. It had a stake in the stability of the status quo and was thus more interested in defending international law against revisions. This tendency also becomes evident in its arguments for a quasi-territorial order of

⁴⁹ See especially Grewe, *supra* note 7; and for international institutions in general, Ikenberry, *supra* note 18.

⁵⁰ See J. Fisch, *Die europäische Expansion und das Völkerrecht* (1984), at 45–75; A. Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (1995), at chaps. 1–3; R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999), at chaps. 1–4.

⁵¹ Fisch, *supra* note 50, at 47. On the conceptions and justifications of empire underlying these different claims, see Pagden, *supra* note 50.

the sea: for a *mare clausum*, that would have allowed Spain to exclude rising powers from the seas. Britain and especially the Netherlands opposed this move, and they eventually succeeded.⁵² But the case confirms the particular importance of territorial rules for a dominant power interested in defending an advantageous status quo.⁵³

A general interest in maintaining the existing order also characterized British international legal policies in the 19th century. Britain, though not necessarily dominant on the European continent, was by far the most powerful state when it came to the rest of the world, and it sought to preserve this advantage. Thus, it came to be known as a defender of the sanctity of treaties⁵⁴ – just as Spain had 300 years earlier, when it insisted on the implementation of peace treaties it had concluded with weaker states that later came to challenge them.⁵⁵ Britain was also a proponent of arbitration: throughout the 19th century, it was more often party to arbitral settlements than any other state, and was thus a central force behind the revival of arbitration that eventually led to the establishment of the Permanent Court of Arbitration in the early 20th century.⁵⁶ Overall, the faithful implementation of international law at the time was favourable for the British, but the arbitration system also had limitations that allowed them to evade it when necessary to preserve essential interests. In particular, unlike smaller states, Britain often had the means to dissuade other states from having recourse to arbitration, with the result that in fact binding arbitration was more binding for the weaker party than for the stronger.⁵⁷

In very different periods, a general proclivity towards international law among powerful states has prevailed in the area of the regulation of trade. European states used an alleged right to free trade to establish colonies in non-European territories, but they also used international law to exclude other Europeans from trade. Hugo Grotius argued in this sense to defend Dutch trade monopolies, but it became much more clearly a useful tool of dominance in British mercantilism and its ‘empire of free trade’.⁵⁸ Treaties with non-European rulers established European access to their markets, especially in the East, and increasingly so with the rise of power asymmetry.⁵⁹ In particular, European states and the US used treaties to consolidate their military successes in achieving access to markets in China, Japan and Siam – these ‘unequal’ treaties embodied far-reaching rights for the Western powers and allowed them to

⁵² See Grewe, *supra* note 7, at 300–322; Fisch, *supra* note 50, at 45–75; Tuck, *supra* note 50, at 63–65, 89–92, 111–113. On the Dutch-Portuguese dispute in this respect, see C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967), at chaps. 3 and 4; see also *ibid.*, at 71–77, on the Portuguese (and sometimes also Dutch) *cartazes* systems as another way of bringing the seas under control.

⁵³ See also Tuck, *supra* note 50, at 114, on the parallel reasons for the British turn to an argument for a *mare clausum* in the face of Dutch ascendancy.

⁵⁴ Grewe, *supra* note 7, at 605.

⁵⁵ See Fisch, *supra* note 50, at 57–66.

⁵⁶ Grewe, *supra* note 7, at 614; A. Nussbaum, *A Concise History of the Law of Nations* (1947), at 213–218.

⁵⁷ See the statement of the Swiss Federal Council in 1919, quoted in Grewe, *supra* note 7, at 614.

⁵⁸ See Fisch, *supra* note 50, at 77–79; Grewe, *supra* note 7, at 471–477; Tuck, *supra* note 50, at 92–94.

⁵⁹ See only Alexandrowicz, *supra* note 52, at chaps. 5–9.

exploit the dominance of their economies for several decades.⁶⁰ But also beyond that, the expansion of free trade in the 19th century was especially advantageous to the then dominant power, Britain; as has been noted, ‘with her great industrial lead, her large merchant marine, her financial expertise, [Britain] above all was uniquely suited to benefit from the greater exchange of commodities’.⁶¹

Likewise today, trade and economic matters are at the heart of US engagement with international law. After World War II, the US was in a much more general sense a driving force behind the development of international law and of international institutions, which might be explained in part by a desire to stabilize a favourable world order in the face of an expected decline, and in part by the exigencies of an emerging bipolar system.⁶² Today, as the US has risen to the status of the sole superpower, its attitude towards international law is much more mixed.⁶³ In the 1990s, it continued to be behind many central projects of international law-making, such as the World Trade Organization, the International Criminal Court, or the extension of the Non-Proliferation Treaty. Yet it has developed a sceptical attitude towards international institutions in general, and it has significantly lagged behind other states in ratifying international treaties, as we shall see below in greater detail. One area in which this general trend does not apply, though, is trade and investment. US efforts were central to reforming the GATT and establishing the WTO, as they were for the creation of NAFTA and a number of bilateral free-trade agreements; and negotiations for a Free Trade Area of the Americas were possible only because of significant US engagement.⁶⁴ Similarly, the US has been very active in concluding bilateral investment treaties, has unsuccessfully sought to conclude a Multilateral Agreement on Investment in the framework of the OECD and now attempts to include investment issues on the agenda of the WTO.⁶⁵ In the area of trade and investment, US scepticism towards international law and even international adjudication is muted – probably in part because of the near-equality in power of Europe, but certainly also because with respect to weaker states, formally equal rules on these matters usually have

⁶⁰ See G. Gong, *The Standard of ‘Civilization’ in International Society* (1984), at chaps. 5–7; R. Hyam, *Britain’s Imperial Century, 1815–1914* (3rd ed., 2002), at 123–133.

⁶¹ P. W. Kennedy, *The Rise and Fall of British Naval Mastery* (1976), at 152; on the mixture of unilateralism and bilateralism involved in British trade policy at the time, see Ruggie, *supra* note 11, at 580–582.

⁶² See Weber, *supra* note 30; Ikenberry, *supra* note 18, at chap. 6. But see also Ruggie, *supra* note 11, at 584–593, for a stronger emphasis on contextual factors, and Kahler, *supra* note 44, at 685–591, who points to the strong ‘minilateral’ and bilateral elements in US policy at the time.

⁶³ See, in general, Krisch, ‘Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy’, in D. M. Malone and Y. F. Khong (eds.), *Unilateralism and U.S. Foreign Policy* (2003), at 41, 45–53; Scott, ‘Is There Room for International Law in Realpolitik?: Accounting for the US “Attitude” towards International Law’, 30 *Review of Int’l Studies* (2004) 71, at 71–73, 81–87; J. F. Murphy, *The United States and the Rule of Law in International Affairs* (2004).

⁶⁴ See Elliott and Hufbauer, ‘Ambivalent Multilateralism and the Emerging Backlash: The IMF and the WTO’, in S. Patrick and S. Forman (eds.), *Multilateralism and U.S. Foreign Policy* (2002), at 377–413.

⁶⁵ On bilateral investment treaties, see Congressional Research Service, Library of Congress (ed.), *Treaties and International Agreements: The Role of the United States Senate* (2001), at 266–269; on the MAI, see Canner, ‘The Multilateral Agreement on Investment’, 31 *Cornell Int’l LJ* (1998) 657, at 677–679.

favourable effects for a superior economy.⁶⁶ In matters of trade, the equality of the rules is hardly a threat to the powerful.

B Withdrawal: Evading a Defiant Legal Order

Even as they were shaping international law according to their views, predominant powers have always also had tendencies to withdraw from it: to evade its obligations, or to limit them in such a way that their constraining effect is minimized. This should be reflected primarily in violations of international law, but I won't address them here, mainly because it seems methodologically difficult to make any sound statement about the degree to which a state violates international law, or the extent to which these violations exceed those of other states. If this is extremely difficult for the US today,⁶⁷ it becomes practically unfeasible for former times for which less data are available and violations are even harder to identify because of the vagueness of international legal rules at the time. But withdrawals from international law need not take the form of violations: they can also consist in attempts at exempting oneself from the obligations that others incur; at removing certain relationships from the sphere of international law; or at pushing back international legal obligations in certain areas.

1 Limiting the Reach of International Law

The most radical withdrawal from international law probably consists in the exclusion of whole sets of relationships from the reach of international law: in their transfer from the international to the domestic sphere, as results from the establishment of formal empire. As long as the relations with a foreign entity remain on an international level, the means of controlling this entity are limited. They are particularly limited today, as sovereign equality excludes the establishment of formal superiority of one state over another; but even in times when international law allowed for more hierarchical relationships, as it did in Europe until the 17th century, maintaining *international* relations with another state implied at least some respect for its independence and autonomy in decision-making.⁶⁸ These limitations have often been too burdensome for dominant powers, and they have accordingly established formal control over weaker states by stripping them of their independence and making them provinces or colonies. Rome is the classical example for this process, but also in the modern period, the Spanish Empire was characterized mainly by such formal control, the French to a significant extent, and the British turned to it increasingly in the 19th

⁶⁶ On the extent to which the shape of the current trade regime reflects the influence of economically powerful states, see Steinberg, *supra* notes 26 and 44; Kwakwa, 'Regulating the International Economy: What Role for the State?', in Byers, *The Role of Law*, *supra* note 10, at 227, 232–240; Shaffer, 'Power, Governance, and the WTO: a Comparative Institutional Approach', in Barnett and Duvall, *supra* note 13, at 130, 133–139.

⁶⁷ See Scott, 'The Impact on International Law of US Non-compliance', in Byers and Nolte, *supra* note 35, at 427, 428–429.

⁶⁸ On the development of the principle of sovereign equality, see P. H. Kooijmans, *The Doctrine of the Legal Equality of States* (1964).

century.⁶⁹ The turn to formal empire, though, had considerable disadvantages in terms of both administrative costs and legitimacy; direct rule usually faced far greater resistance than informal rule, and the latter was thus often the preferred option as far as local political structures allowed.⁷⁰

Yet the turn to formal empire has not been the only case of dominant states' attempts at limiting the reach of international law. We can see a similar approach in the distinction of different spheres of law in early modernity: a sphere of law among Christians, and a different sphere between Christian and non-Christian societies, in which intervention for Christians was much easier.⁷¹ This distinction gained practical relevance, of course, mostly when European states had achieved superiority in power, but some caution might be in order before concluding on an explanation based on power: other religions, in particular Islam, knew similar distinctions; and the Christian doctrine dates back to a time when Christian superiority was far from achieved.⁷² In contrast, a much more clear-cut case of the exclusion of certain asymmetric relationships from international law was the 19th century. When during this period European states rose to overwhelming dominance also in Asia and Africa, sovereignty and recognition became central to the international legal order and Europeans reserved to themselves the judgment as to which entities should be recognized as sovereign and as members of the 'family of nations'.⁷³ The newly-independent American states were soon admitted, but most others were deemed not to have reached the 'standard of civilization' necessary to be equal partners. This removed them from the sphere of international law (from the *ius publicum Europaeum*), created much greater opportunities for intervention and occupation, and called the binding character of treaties with them into question.⁷⁴ Introducing this distinction thus allowed the circumvention of sovereign equality, which had come to play an increasingly central role in the European inter-state order.

Today we can observe a somewhat similar phenomenon: a division of the world into a sphere of peace, in which individual rights and democracy flourish, and an area of lawlessness, characterized by collapsed state structures, dictatorship and

⁶⁹ See M. W. Doyle, *Empires* (1986); Pagden, *supra* note 50, at chaps. 1–3.

⁷⁰ See Doyle, *supra* note 69, at 135–136, 341–344.

⁷¹ See Fisch, *supra* note 50, at 183–246; Pagden, *supra* note 50, at 24–28, and chap. 2.

⁷² Just see Fisch, *supra* note 50, at 183–186.

⁷³ See Gong, *supra* note 60, esp. chap. 3; Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard Int'l LJ* (1999) 1, at 22–57 (now also in Anghie, *supra* note 6, at chap. 2). However, the international society of the previous period was hardly more inclusive: see Bull, 'The Emergence of a Universal International Society', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (1986), at 117–120; E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002), at 26–29. For an account that places the distinction between European and non-European territories at the centre of the international legal order for the whole period from the 16th to the 19th centuries, see C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950).

⁷⁴ See Gong, *supra* note 60, esp. at 68; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of Modern International Law, 1870–1960* (2002), at 127–132, 136–143; on treaties, see also C. H. Alexandrowicz, *The European-African Confrontation: A Study in Treaty-Making* (1973), at 94–105. On the link between 'civilization' and the legal status of these relations, see also Keene, *supra* note 73, at chap. 4.

widespread violations of human rights. On the level of theory, this is most prominently reflected in John Rawls' conception of a *Law of Peoples*, in which 'outlaw states' enjoy only very limited protection, but it finds expression also in the ideas of a 'liberal international law' that were advanced throughout the 1990s.⁷⁵ In the practice of Western states, we can observe such tendencies in the new emphasis on democracy and human rights as conditions for full membership in the international community and for the protection from foreign or international intervention.⁷⁶ They are most obvious, however, in US attempts at creating a particular legal regime for so-called 'rogue states' that allegedly sponsor terrorism or develop weapons of mass destruction. These states have long been exposed to unilateral sanctions, but since 1996, their special status has been further formalized in legislation curtailing their immunity before US courts; and with the *National Security Strategy* of 2002, they have also become the potential objects of pre-emptive self-defence.⁷⁷ Similarly, certain 'rogue' individuals – alleged terrorists and 'unlawful combatants' – have been stripped of many of the rights they enjoy under international human rights and humanitarian law.⁷⁸ In a manner less open and sweeping than the formalization of empire or the outright denial of sovereignty, the US has thus undertaken attempts to create different categories of states and individuals and to limit the reach of international law to some of these.⁷⁹

2 Resistance to Multilateral Treaties

In the earlier periods of modern international law, rules were mostly customary and so vague that dominant states had great latitude in applying them, and withdrawal and interpretation were hardly distinguishable. And since the principle of sovereign equality was only beginning to take hold, formal hierarchies among states were still much more widespread. Thus, the need for dominant states to openly withdraw from international law was quite limited; it only grew once the international legal system posed clearer constraints on the exercise of dominance.

⁷⁵ See J. Rawls, *The Law of Peoples* (1999); F. R. Tesón, *A Philosophy of International Law* (1998); Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503. See also Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* (1990) 866.

⁷⁶ See Simpson, 'Two Liberalisms', 12 *EJIL* (2001) 537, at 556–570; B. R. Roth, *Governmental Illegitimacy in International Law* (1999).

⁷⁷ See P. Minnerop, *Paria-Staaten im Völkerrecht?* (2004), at chap. 2, and 'Legal Status of State Sponsors of Terrorism in US Law', in C. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law* (2004), at 733–786. For the National Security Strategy, see www.whitehouse.gov/nsc/nss.pdf (visited 23 Mar. 2005), at 13–15.

⁷⁸ See Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', 96 *AJIL* (2002) 891; Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War', 28 *Yale J Int'l L* (2003) 325; Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11', 15 *EJIL* (2004) 721, at 739–746. But see also the decisions of the US Supreme Court in *Rasul v Bush* and *Hamdi v Rumsfeld*, Nos. 03–334 and 03–6696 (decisions of 28 June 2004).

⁷⁹ On contemporary parallels with colonialist strategies of differentiation, see also Keene, *supra* note 73, at chap. 5; Allain, 'Orientalism and International Law: The Middle East as the Underclass of the International Legal Order', 17 *Leiden J Int'l L* (2004) 391.

It is therefore in the 19th century, and especially with the rise of multilateral treaties and British attempts to block them or refrain from them, that we can observe further forms of withdrawal. These attempts were most pronounced in the area of Britain's strongest dominance: the seas.⁸⁰ Here, especially in the second half of the century, many states sought to establish a regime for naval warfare, but they faced significant obstruction by the British.⁸¹ Thus, the Paris Declaration on the Law of the Sea of 1856 was adopted only after protracted negotiations to overcome British resistance, and the London Declaration on the Laws of Naval War of 1909 never entered into force because the House of Lords refused to ratify it.⁸² Similarly, Britain resisted the Hague neutrality conventions of 1907 and failed to ratify them; these, too, formed overly far-reaching constraints on its ability to bring its dominance to bear in wars. But the problems concerned not only substantial rules; Britain also had significant problems with multilateral negotiations as such. For example, its efforts early in the century to establish a system of maritime police against the slave trade failed when pursued in multilateral fora: from 1817 to 1822, several international conferences on the issue failed to produce palpable results, and Britain eventually succeeded only by means of bilateral treaties.⁸³ I will return to the issue of bilateralism; suffice it here to note that a legal order that gives each state a formally equal vote in law-making seems to erect obstacles that for a dominant state often appear as unjustified, resulting in its withdrawal.

This becomes far more manifest in the case of the US today. After the rejection of the Convention on Biodiversity, the Comprehensive Test Ban Treaty, the Convention on Landmines, the Statute of the International Criminal Court and the Kyoto Protocol—among others—it has become commonplace to state a particular US reluctance to enter into multilateral treaties. This reluctance appears even more marked in comparison with other states, and in particular with US allies. Since World War II, the US has become party to only 60 per cent of the treaties deposited with the UN Secretary-General that have been ratified by more than half of all states. In contrast, other states are, on average, party to 79 per cent of these treaties, and the other members of the G-8 to 93 per cent of them. However, it is so far unclear whether this trend has increased since the end of the Cold War, or whether it merely continues a development dating back to 1945 or even before.⁸⁴ In any event, US resistance to multilateral treaties manifests itself not only in their complete rejection, but also in the various ways to limit the obligations flowing from them, and especially in the frequent use of reservations. US reservations are often so extensive as to render treaty obligations meaningless, and both treaty supervision bodies and Western allies have raised

⁸⁰ On the extent of this dominance, see only Kennedy, *supra* note 61, at chaps. 6 and 7.

⁸¹ See Grewe, *supra* note 7, at 635, 647.

⁸² See B. Semmel, *Liberalism and Naval Strategy: Ideology, Interest, and Sea Power during the Pax Britannica* (1986), at chaps. 4 and 7, esp. on the British domestic debate.

⁸³ See Grewe, *supra* note 7, at 656–671; Semmel, *supra* note 82, at chap. 3; Kern, 'Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade', 6 *J Hist Int'l L* (2004) 233.

⁸⁴ Data as of Jan. 2004; see, in more detail, Krisch, *supra* note 63, at 45–47.

serious objections to them.⁸⁵ But the practice of reservations is so important to the US that the Senate has urged the President not to accept any treaty provisions excluding them;⁸⁶ and where a treaty in fact contains such a provision, as the ICC Statute and Landmine Convention do, the US has often refused to become a party. Other states are increasingly reluctant to accept the exceptionalist position of the US, and they not only rule out reservations, but also deny US requests to grant it specific exemptions.⁸⁷ Yet where the relatively egalitarian multilateral process poses too many obstacles, the US often decides to withdraw entirely; or, if necessary, it has recourse to bilateral treaties to remedy the outcome, as it has with respect to the ICC.⁸⁸ Of course, this attitude of the US does not necessarily result from its predominant position: US reluctance to international treaties has strong cultural roots, goes back to the late 18th century when the country was still weak, and finds expression in the high hurdles erected by the US Constitution for treaty ratification.⁸⁹ Yet it is significant that these hurdles have, in practice, been lowered for treaties deemed favourable – namely those of an economic character that are now usually concluded as executive agreements.⁹⁰ And the fact that treaties reflecting or supporting US dominance pass, while those that contain more significant constraints fail, indicates that cultural factors only play a limited role.⁹¹

4 Reshaping International Law: The Legalization of Inequality

Instrumentalization and withdrawal are the poles of the international legal policies of dominant states, yet most of their action lies between the two. They make use of international law, but preferably in ways that are less constraining and burdensome than the standard forms; they thus select forms that are more amenable to unequal power and seek to reshape the international legal order so as to allow for more inegalitarian elements. I have already pointed to one such instance: the *turn from multilateral to bilateral treaties* in both British efforts to establish a maritime police against the slave trade in the early 19th century and US attempts to limit the impact of the ICC on its own citizens.⁹² In the case of the US, this turn is apparent in a more general way:

⁸⁵ See UN Doc. CCPR/C/79/Add.50 (1995); see also Foot, 'Credibility at Stake: Domestic Supremacy in U.S. Human Rights Policy', in Malone and Khong, *supra* note 63, at 95–115; Redgwell, 'United States Reservations to Human Rights Treaties: All for One and None for All?', in Byers and Nolte, *supra* note 35, at 392–415.

⁸⁶ See US Library of Congress, *supra* note 65, at 274–276.

⁸⁷ Just see Malanczuk, 'The International Criminal Court and Landmines: What are the Consequences of Leaving the US Behind?', 11 *EJIL* (2000) 77, at 84–85.

⁸⁸ See Galbraith, 'The Bush Administration's Response to the International Criminal Court', 21 *Berkeley J Int'l L* (2003) 683.

⁸⁹ See only L. Henkin, *Foreign Affairs and the United States Constitution* (2nd ed., 1996), at 175–179.

⁹⁰ See Ackerman and Golove, 'Is NAFTA Constitutional?', 108 *Harvard L Rev* (1995) 799; Spiro, 'Treaties, Executive Agreements, and Constitutional Method', 79 *Texas L Rev* (2001) 961, at 993–1003.

⁹¹ For a largely realist interpretation of the US attitude towards international law, see also Scott, *supra* note 63.

⁹² See *supra*, Section 3, B 2.

while sceptical of multilateral instruments, the US has been proactive in concluding bilateral treaties on issues such as trade and investment, tax cooperation and legal assistance. And it privileges such treaties also on the domestic level: they are practically the only instruments to be granted self-executing character and thus to be enforceable in US courts.⁹³ This preference is easily explicable. Bilateral negotiations are far more likely to be influenced by the superior power of one party than are multilateral negotiations, in which other states can unite and counterbalance the dominant party – *divide et impera*, as reflected in the forms of international law.⁹⁴ The bilateral form is also more receptive to exceptional rules for powerful states. In multilateral instruments, especially in *traités-lois*, exceptions for powerful parties are always suspicious and in need of justification, as is manifest in, for example, the Nuclear Non-proliferation Treaty and the failed attempts of the US with respect to the ICC Statute.⁹⁵ Bilateral treaties do not pose such problems: because of their more direct reciprocity, they often do not create the same rights and obligations for both parties, and this is generally accepted; the lacking formal equality of the rules makes substantive inequalities less obvious. And through bilateral treaties, it is also easier for states to confer a position on one state that they refuse to confer on others; demands for coherence and equal treatment are much lower. Bilateral treaties are thus a much easier tool to reflect and translate dominance than multilateral ones.

A Limiting Constraints: The Quest for a Softer International Law

Apart from the turn from multilateral to bilateral treaties, attempts of dominant states to reshape international law take essentially two forms: they aim at a softer and more hierarchical international law.

The quest for a softer international law is most pronounced in powerful states on the rise: in those that do not have a general status quo orientation. For them, loosening their own constraints is often more important than having others tightly constrained. Yet, softer rules of international law are often beneficial to different kinds of dominant states, too: because of the greater latitude in application, they can bring their power more easily to bear, both in widening their own freedom of action and in circumscribing rules for others. Yet this only becomes an issue in a legal system that is not maximally soft in the first place, and here again, we can observe the phenomenon in its most accentuated form in recent times, in an environment of increasingly precise and detailed international legal rules and ever stronger implementation and enforcement mechanisms.

⁹³ See Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', 12 *EJIL* (2001) 183, at 194–198.

⁹⁴ See also Abbott and Snidal, *supra* note 42, at note 68; Kahler, *supra* note 44, at 681–682. On a particularly interesting case, see Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia J Int'l L* (1998) 639.

⁹⁵ See also Klein, 'The Effects of US Predominance on the Elaboration of Treaty Regimes and on the Evolution of the Law of Treaties', in Byers and Nolte, *supra* note 35, at 363, 371–376.

1 Towards a Weak Legal Order: Resisting Enforcement and Turning to Soft Law

These general points are most clearly reflected in dominant states' attitudes towards centralized adjudication and enforcement of international law. This was no issue in Europe in the early modern period, when arbitration had practically disappeared due to the decline of the Emperor and the Papacy as central institutions.⁹⁶ However, as we have seen, arbitration began to flourish again under British dominance in the 19th century. The British mostly regarded arbitration favourably, certainly in part because it helped enforce an international legal order that was beneficial for them overall. Here, the interest in defending the status quo trumped the desire to extend the freedom of action.⁹⁷ Yet this tendency was not uniform either. In the area of Britain's most pronounced dominance – the seas – it failed to accept the creation of a judicial body. Critics saw the International Prize Court agreed upon at the Hague Peace Conference of 1907 as 'a renewal of the conspiracy against British naval supremacy', and they eventually succeeded in blocking its ratification.⁹⁸

If reluctance towards judicial bodies was existent but muted in the British case, it is much more pronounced under current US dominance. The US has agreed to strong judicial mechanisms in a few areas, such as the WTO and NAFTA anti-dumping and investment disputes, but these merely mirror the areas in which US interest in international law is greatest anyway, and they remain exceptional.⁹⁹ The most well-known case of opposition to an enforcement mechanism in recent times has certainly been the US rejection of the ICC Statute,¹⁰⁰ yet the resistance reaches much further. The US has, for example, enacted significant hurdles in domestic law to the supervision mechanism of the Chemical Weapons Convention, and it has blocked a verification protocol to the Convention on Biological Weapons.¹⁰¹ In the area of human rights, it has chosen not to allow individual petitions to the Human Rights Committee through the Optional Protocol to the Covenant on Civil and Political Rights, which has now been accepted by 104 states, and it has made reservations to clauses in human rights instruments that establish the jurisdiction of the International Court of Justice for the settlement of disputes.¹⁰² The ICJ has been a focus of US resentment at least since its 1986 *Nicaragua* decision, which was highly critical of the US means to change the political landscape in Central America and led the US to terminate its acceptance of the Court's jurisdiction under the optional clause. In recent years, the US has defied the Court by disregarding provisional measures in the *Breard* and

⁹⁶ Grewe, *supra* note 7, at 235–236.

⁹⁷ See *supra*, Section 3, A, also for a caveat.

⁹⁸ Quoted in Semmel, *supra* note 82, at 110; see also *ibid.*, at 115.

⁹⁹ On the reasons for US acceptance of NAFTA dispute settlement, see Abbott, *supra* note 16, at 151–159.

¹⁰⁰ See Nolte, 'The United States and the International Criminal Court', in Malone and Khong, *supra* note 63, at 71–93; Malanczuk, *supra* note 87, at 80.

¹⁰¹ See Smithson, 'The Chemical Weapons Convention', in Patrick and Forman, *supra* note 64, at 247, 254–258; Kervers, 'Strengthening Compliance with the Biological Weapons Convention: The Protocol Negotiations', 7 *J Conflict and Security L* (2002) 275, at 289.

¹⁰² See Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker', 89 *AJIL* (1995) 314, at 344–345.

LaGrand cases; and, despite some cautious steps towards responding to the equally adverse *Avena* judgment, it has eventually withdrawn from the jurisdiction of the Court under the Consular Convention.¹⁰³ In sum, the US pushes for an international legal order with weak centralized enforcement and adjudication.

This is mirrored also in a shift from hard to soft law and from the typical forms of international law-making to informal policy networks of all kinds, which has been diagnosed in recent years.¹⁰⁴ Even if the immediate cause of this shift might be the need for effective coordination and regulation of international markets, it is significant that it coincides with the turn from a bipolar to a unipolar international system and thus a considerable gain in relative power of the US. Both the US resistance to enforcement and adjudication and the turn to soft law correspond with the general observation that powerful states are particularly reluctant to delegate power to international actors and that they usually prefer softer over harder forms of international law.¹⁰⁵ But as we have seen in the British case, this observation has limitations; it may not hold for powerful states with high stakes in preserving the status quo.

2 *Flexibilizing Legal Change: The Deformalization of International Law-making*

Attempts at softening the law are often also reflected in efforts by dominant states to flexibilize the law-making process, so as to be better able to reshape the law in their fashion. Here, too, the extent depends on different factors, and Britain in the 19th century certainly did not go as far in this respect as, for example, France under Napoleon, when it controlled large parts of Europe and turned from form to substance in determining what international law was. By introducing liberty and popular sovereignty as pillars of the international legal order, France could argue for a far-reaching revision of this order and it could, for example, claim broad intervention rights for itself, on the basis that the sovereignty of monarchical states was curtailed.¹⁰⁶ The use of substantive values to destabilize and rewrite international law was much more cautious in the case of the British, but it was still significant. It manifested itself most clearly in the introduction of ‘civilization’ as a key element of international law, which, though eventually a pan-European move, was strongly driven by Britain and British scholars.¹⁰⁷ As already mentioned, this allowed for much greater flexibility with respect to admission into the ‘family of nations’: the lines between ‘civilized’, ‘half-civilized’, and ‘barbaric’ societies were not precise and could

¹⁰³ See Paulus, ‘From Neglect to Defiance? The United States and International Adjudication’, 15 *EJIL* (2004) 783; Murphy, *supra* note 63, at chap. 7; Kirgis, ‘President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights’, *ASIL Insight*, Mar. 2005 and Addendum.

¹⁰⁴ See Shelton (ed.), *supra* note 46; A.-M. Slaughter, *The New World Order* (2004).

¹⁰⁵ See Abbott and Snidal, *supra* note 42, at 63–65; see also Kahler, *supra* note 47, at 281–282. On the US case in particular, see also Murphy, *supra* note 63, at 351.

¹⁰⁶ See Armstrong, *supra* note 31, at chaps. 3 and 6 (also for the turn to greater pragmatism after the first wave of the revolution); M. Bukovansky, *Legitimacy and Power Politics* (2002), at chap. 5; Grewe, *supra* note 7, at 485–495.

¹⁰⁷ See Grewe, *supra* note 7, at 526–535; see also Koskeniemi, *supra* note 74, at chap. 2, esp. at 127–132.

be redrawn by the dominant states according to political expediency.¹⁰⁸ Yet it also allowed for changes in substantive international law, and in particular in the law on the use of force, where a right to humanitarian intervention became widely recognized (and was heavily used by the British).¹⁰⁹ It also served to justify British attempts to redefine the law of the sea so as to allow for stronger enforcement of the prohibition on the slave trade – a prohibition which followed ‘the public voice, in all civilized countries’, but whose maritime enforcement would have allowed the British Navy to establish itself as a general police on the high seas.¹¹⁰

Similar tendencies have been prominent in international law since the end of the Cold War, connected mainly with a rise of the concept of an ‘international community’ of shared values and a particular emphasis on human rights.¹¹¹ And again, this has found strong reflection in the law on the use of force: NATO’s Kosovo intervention was defended mainly by reference to a ‘humanitarian emergency’, and even though this was most often not framed as a legal argument, it provided the main basis for nevertheless legitimizing the action. Also in another way, the ‘international community’ figured prominently in justifications of the use of force: wherever possible, the US and its allies portrayed their interventions as enforcements of the collective will, as expressed in resolutions of the Security Council, even if those resolutions did not authorize military force.¹¹² The wars in Afghanistan and in Iraq in 2001 and 2003 were even fought for ‘civilization’ against its enemies.¹¹³ But the law on the use of force is by far not the only field in which substantive values serve to generally reshape the law. The extension of international criminal law to internal conflicts by the International Criminal Tribunal for the Former Yugoslavia has proceeded under reference to ‘humanity’ and its values; and US courts have used the image of a *hostis humani generis*, an enemy of all mankind, to justify the trial of torturers from around the world before American courts, and to defend the restriction of state immunity of states that allegedly sponsor terrorism.¹¹⁴ Here, as in the French and British cases, substantive arguments have served to destabilize existing international law and to

¹⁰⁸ Koskenniemi, *supra* note 74, at 134–135; Gong, *supra* note 60, at 56, 61; Anghie, *supra* note 73, at 43–49, 52–54.

¹⁰⁹ Grewe, *supra* note 7, at 573–583.

¹¹⁰ See *supra*, Section 3, B 2. For the quotation from Castlereagh, see W. G. Grewe, *The Epochs of International Law* (trans. M. Byers) (2000), at 554.

¹¹¹ See Krisch, ‘Amerikanische Hegemonie und liberale Revolution im Völkerrecht’, 43 *Der Staat* (2004) 267, at 278–281, 283–285. On the concept of international community in general, see A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001); on a similar phenomenon – the current rise of ‘interstitial norms’ – see Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’, in Byers *The Role of Law*, *supra* note 10, at 207–226.

¹¹² See Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council’, 3 *Max Planck Yearbook of UN Law* (1999) 59.

¹¹³ See the speeches of the US President of 20 Sept. 2001 and 29 Jan. 2002, available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html and www.whitehouse.gov/news/releases/2002/01/20020129-11.html (visited on 23 Mar. 2005).

¹¹⁴ See International Criminal Tribunal for the Former Yugoslavia, Judgment of 2 Oct. 1995, in *Prosecutor v Tadic*, No. IT-94-1-AR72, 35 ILM (1996) 32, at paras. 119 and 97; *Filartiga v Peña-Irala*, 630 F 2d 876, 890 (2d Cir., 1980); *Flatow v Islamic Republic of Iran*, 999 F Supp 1, 23 (DDC, 1998).

thus pave the way for reshaping it in a way that better reflects the interests and values of the dominant powers – as Martti Koskenniemi has pointed out with respect to today’s situation, ‘what counts as law, or humanitarianism, or morality, is decided with conclusive authority by the sensibilities of the Western prince’.¹¹⁵

3 Challenging Constraints on the Use of Force

International law is most constraining for dominant states if it includes strict limitations on the use of force. It is in this area that dominance is usually most pronounced, and restrictions on military action affect powerful actors much more than weaker states that usually have little hope to prevail militarily anyway. Broader rights to use force, though in principle applicable to all states, usually benefit mainly the dominant ones.¹¹⁶ If force is widely admitted, this also makes an otherwise strict international legal order tolerable for powerful actors, since they can use force to readjust relations that have departed too far from material reality.¹¹⁷ It is thus not surprising that dominant states have frequently challenged international legal constraints on the use of force.

This was certainly the case for Spain in its conquest of the western hemisphere, and I have already mentioned some of the legal arguments it used. After the reference to papal authority proved to be ineffective, Spanish authors developed numerous new intervention rights, some on religious foundations, some on more secular grounds, such as the claims based on the right to unhindered trade.¹¹⁸ Several authors, including Vitoria, even went so far as to state that war could be subjectively just on both sides – a position that obviously favoured powerful states.¹¹⁹ The Spanish Government, though, hardly subscribed to that claim; at least once it saw its superiority challenged, it insisted on the strict implementation of ceasefires and peace treaties; and implicit in its claim to a *mare clausum* was an exclusive right to police the high seas.¹²⁰ Spain sought to establish rights to use force for itself, not to make war lawful for all states.¹²¹

The same held true for Britain in the 19th century, especially with respect to rights of force short of war. I have already mentioned the successful claims for a right to humanitarian intervention, and the attempts to establish ‘a system of maritime police

¹¹⁵ Koskenniemi, ‘“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law’, 65 *MLR* (2002) 159, at 171.

¹¹⁶ In this sense, see also Fisch, *supra* note 50, at 14.

¹¹⁷ But see also S. V. Scott, *International Law in World Politics: An Introduction* (2004), at 16, suggesting that the prohibition on the use of force usually benefits the powerful since it protects the status quo. Yet this holds only if indeed a hegemon is interested in the status quo, which is not to be assumed: see *supra*, Section 2, A 2.

¹¹⁸ For an overview, see Fisch, *supra* note 50, at 209–246.

¹¹⁹ See Grewe, *supra* note 7, at 240–247; Schmitt, *supra* note 73, at 124–126.

¹²⁰ See *supra*, Section 3, A.

¹²¹ In contrast, Schmitt, *supra* note 73, at 60–68, and, following him, Grewe, *supra* note 7, at 181–193, claim that Spain agreed that ‘no peace beyond the line’ of amity existed, and that thus, in most of the colonial world, force could be used without restrictions. Fisch, *supra* note 50, at chap. 2, esp. 57–66, 75–77, challenges this interpretation convincingly.

against the contraband slavetrade'.¹²² Through rights to visit and search, these latter attempts would have allowed the British navy to effectively police the high seas, and they were accordingly opposed by the US and France and for decades had only limited success.¹²³ Yet insofar as Britain did in fact enforce the prohibition on the slave trade, the resulting continuous presence of its warships significantly strengthened Britain's influence.¹²⁴ It was on the sea, in its area of greatest dominance, that Britain claimed the greatest freedom to use force; here, it also defended, for example, the pacific blockade. And it was again with a view to its sea wars that it sought to limit the rights of neutrals and argued for a broad definition of war which affected trade relations as well.¹²⁵ Britain's insistence on its own interpretation of maritime rights even offended its allies,¹²⁶ and where it ceded a position, this was often due largely to the rise in power of other states.¹²⁷

The last 15 years have again seen a flowering of new intervention rights, this time pushed forward mostly by the US; I have mentioned some of these already in the last section. The US and its allies have advanced claims for new rights to use force in three main areas: a right to unilaterally enforce Security Council authorizations in the interventions in the former Yugoslavia and Iraq; a broadened right to exercise self-defence against terrorist attacks in the missile attacks on Sudan and Afghanistan and later the war in Afghanistan; and a bold right to pre-emptive self-defence, so far only cautiously invoked in the war in Iraq.¹²⁸ In addition, NATO states have alluded to a right to humanitarian intervention in the Kosovo war; but they have stopped short of claiming a new right to this effect and have pointed to the exceptional character of the operation – yet the vagueness of the resulting rule is in itself mainly beneficial for the powerful who will be able to define its content in later situations as they please.¹²⁹ As other dominant states in earlier times, Western states and in particular the US have made the boldest moves to soften international law's constraints on them in the area of the use of force – the area in which constraints affect their dominance most.¹³⁰

¹²² Quoted in Grewe, *supra* note 7, at 657.

¹²³ See *supra*, Section 3, B 2. On the American and French objections, see esp. Semmel, *supra* note 82, at 33–34, 44–49; on the international debate in general, see Kern, *supra* note 83.

¹²⁴ Kennedy, *supra* note 61, at 166. But see also Kaufmann and Pape, 'Explaining Costly Moral Action: Britain's Sixty-year Campaign Against the Atlantic Slave Trade', 53 *Int Org* (1999) 631, at 637–638.

¹²⁵ See Semmel, *supra* note 82, at chaps. 4–7; Grewe, *supra* note 7, at 616–637, 647–648.

¹²⁶ On the latter point, see M. E. Chamberlain, 'Pax Britannica? *British Foreign Policy 1789–1914* (1988), at 7.

¹²⁷ See Semmel, *supra* note 82, at 152, on the importance of the US rise in sea power for the adoption of the Paris Declaration of 1856.

¹²⁸ See only Krisch, *supra* note 112; Byers, 'Terrorism, the Use of Force and International Law after 11 September', 51 *ICLQ* (2002) 401, at 406–410; Bothe, 'Terrorism and the Legality of Preemptive Force', 14 *EJIL* (2003) 227. See also, for a general overview, Murphy, *supra* note 63, at chap. 4.

¹²⁹ See Roth, 'Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the post-Cold War Era', in Byers and Nolte, *supra* note 35, at 232, 250–256.

¹³⁰ Benvenisti, 'The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies', 15 *EJIL* (2004) 677, sees these moves as an attempt to provide a public good (global security). This view is not incompatible with the one advanced here: international law is a constraint on the unilateral definition of global public goods, and dominant states will often find this constraint unjustified. The British attempts to eradicate the slave trade, for example, can be interpreted in the same way.

B Reintroducing Hierarchy in International Law

Softer rules favour powerful actors because they usually benefit more from a wider freedom of action than weaker states. But from a dominant state's perspective, they might frequently not be sufficient to reflect its superior position, or it might not be desirable or possible to loosen the rules for all states. In this case, dominance cannot be accommodated through equal rules for all; it has to be reflected in special rules for the powerful: in formal hierarchy and 'legalized hegemony'.¹³¹

1 Colonial Hierarchy and its Ambiguous Legal Status

Hierarchy was, of course, a defining feature of the legal order that preceded modern inter-state international law, and the mentioned reliance on papal authority in the 16th century still testifies to that. But even as equality took hold more strongly in the European legal order from the 17th century onwards, it remained conspicuously absent from the relations between European and non-European entities.¹³² This found expression, for example, in special intervention rights of Christians against non-Christians and in the exclusion of much of the non-European world from international law on the ground of its lacking 'civilization' in the 19th century.¹³³ In spite of this, the relations between Europeans and non-Europeans were always governed by law, only by a more hierarchical law than applied among Europeans. This becomes manifest in the treaties Europeans concluded with many rulers in Asia. This treaty practice dates back to the early days of European expansion to the East, and initially it often implied a subordination of Europeans – especially the various East India companies – under local rulers, in particular in the Moghul Empire in India. As the power relations shifted, however, the treaties were adapted, and they often came to provide for a far-reaching submission of the locals.¹³⁴ For example, in a treaty of 1803, a number of rulers promised to pay tributes and to 'always hold [themselves] in submission and loyal obedience to the Honorable [British] East India Company'. In the late 19th century, the British Crown had treaty relationships with 584 Indian states; and the practice in other regions, and that of other states, was similar.¹³⁵ Also in the scramble for Africa in the 19th century, most territorial acquisitions by Europeans were accompanied by treaties with native rulers. With the Europeans' rise in power, though, the status of these treaties was increasingly disputed: the non-European parties were no longer deemed to possess international legal personality,

¹³¹ On the latter concept, see Triepel, *supra* note 2, at 202–206; J. Markus, *Grandes puissances, petites nations et le problème de l'organisation internationale* (1947), at 47–55; Simpson, *supra* note 35, at 67–76.

¹³² See Keene, *supra* note 73, at chap. 3, on the contrast between unitary sovereignty and equality within Europe and 'divisible' sovereignty and hierarchy in the relations between Europe and the non-European world, especially Asia.

¹³³ See *supra*, Section 3, B 1.

¹³⁴ See in particular Alexandrowicz, *supra* note 52, at chaps. 8 and 9; J. Fisch, *Krieg und Frieden im Friedensvertrag* (1979), 554–556, 579–580, 589–590, 594–596; see also Keene, *supra* note 73, at 90–92, especially on the concept of 'paramountcy'. For similar developments in Africa, see Alexandrowicz, *supra* note 74; Fisch, *supra* this note, at 561–563.

¹³⁵ Poleman, 'The Indian Princes' Treaty Rights', 11 *Far Eastern Survey* (1942) 196, at 197; for the citation see 199.

and the treaties were often regarded as non-binding and formally irrelevant for the acquisition of territory under international law. Yet practically, they were of the greatest importance, as they legitimized the acquisition *vis-à-vis* other European states.¹³⁶ And the dispute over their status only highlights how Europeans sought to circumvent the egalitarian implications of international law: how they moved into another legality that allowed them to deny the sovereign equality of their counterparts and to introduce hierarchies into the international order.

2 Great Power Dominance and the Move to Legalized Hierarchy in Europe

Yet the European order was not free from hierarchies either, and with the growing density of international law, they were also increasingly translated into legal forms. The less space international law left for the exercise of dominance outside the law, the greater became the pressure of powerful states to introduce it into legal rules. This was still fairly ambiguous in the most institutionalized forms of dominance in the 19th century: the Holy Alliance and the Concert of Europe.¹³⁷ Both were not established by law in the sense that specific powers were conferred on the dominant states. Instead, the great powers merely assumed the right to order the affairs of Europe, but they exercised it in a highly legal framework. In the work of the congresses that took the main decisions, the great powers enjoyed far-reaching privileges; it was accepted that they made the decisions, and arguments arose mainly over questions of participation of affected states. However, only the treaties that were concluded to implement the decisions (and that formally respected equality) were undisputedly binding, while the legal character of the decisions of the congresses themselves remained doubtful. Many commentators regarded them as merely political events, of no legal value; others recognized that the Concert system had created a legalized hegemony in Europe.¹³⁸ Here again, the ambiguity of the legal status made possible deviations from principles of equality that otherwise would have been difficult to justify. And the international legal order at the time allowed for sufficient space to operate with such an ambiguity for decades.

This space shrunk with the establishment of formal international organizations and the concomitant legalization of international decision-making; and not surprisingly, dominant states insisted on the translation into legal rules of their political privileges. Yet this clashed much more openly with the principle of sovereign equality than the previous, ambiguous forms had, and many smaller states did not want to accept this shift. This tension came to the fore in 1907, when especially Latin American countries insisted on the formal equality of all states in the proposed Permanent Court of Arbitral Justice. This was unacceptable for the great powers, and the court never

¹³⁶ See Alexandrowicz, *supra* note 74, at 62–83, 94–105; Koskenniemi, *supra* note 74, at 136–143; Gong, *supra* note 60, at 54–63. On the shift in the 19th century, see also the concise statement in Bull, 'European States and African Political Communities', in Bull and Watson, *supra* note 73, at 99, 111–114.

¹³⁷ See Simpson, *supra* note 35, at chap. 4.

¹³⁸ See, on the one hand, Oppenheim, *supra* note 3, at 162–164; on the other, T.J. Lawrence, *Essays on Some Disputed Questions in Modern International Law* (1884), at 209, 230, 232. For a thoughtful survey of the debate at the time, see Simpson, *supra* note 35, at chap. 4.

came into existence. In contrast, already in 1919, there was widespread acceptance of some kind of formal inequality in the League of Nations; and this was taken even further in 1945 with the creation of the United Nations and the hierarchy reflected in the composition of the Security Council.¹³⁹

3 *The United States: Hierarchy by Other Means*

It is unsurprising, then, that we witness a push for greater hierarchy again after the rise of the US as the sole superpower. This is most evident in the revitalization of the Security Council and the significant broadening of its enforcement powers since the end of the Cold War, both actively furthered by US governments interested in the added legitimacy that Council actions and authorizations confer.¹⁴⁰ The Council has emerged as a central site of law-making and law-enforcement in matters related to peace and security, and its permanent members – and in particular the US – can of course control it much more easily than the typical processes of international law-making and -enforcement. The same holds true for the increased importance of the international financial institutions, in which Western states hold dominant voting power because of their financial contributions. In contrast to, for example, UNCTAD, both the World Bank and the IMF have, throughout the 1990s, vastly expanded their activities and have more than ever influenced the internal structure of many states through insistence on good governance and structural adjustment as conditions for aid.¹⁴¹

But it is not only the formal voting privileges in these institutions that are highly beneficial for the US and its allies: the Security Council and the international financial institutions also allow them to make law merely for others, without being bound themselves. The ICTY and ICTR are a case in point: the US pressed for their establishment by the Council, but eventually rejected the Statute of the ICC which, unlike the other tribunals, could also have turned against the US.¹⁴² Yet apart from these institutions, formal law-making for third states is difficult in international law, and the US has accordingly turned to other forms, especially to soft law. Soft law and standards do not only, as mentioned above, provide less constraining yet often similarly effective forms of rules, but they can also be created in more exclusive settings than binding norms. The OECD, for example, has emerged as a central site of worldwide regulation, and the standards it develops are often implemented by many

¹³⁹ On this change, see *ibid.*, at chaps. 5 and 6.

¹⁴⁰ See Malone, 'US-UN Relations in the UN Security Council in the Post-Cold War Era', in Foot, MacFarlane, and Mastanduno, *supra* note 13, at 73–91. On the Security Council as a hegemonic instrument, see Alvarez, 'Hegemonic International Law Revisited', 97 *AJIL* (2003) 873. For a concise survey of different interpretations of the Council's action, see Abbott and Snidal, *supra* note 13, at 27–29.

¹⁴¹ On the US role in these institutions, see Woods, *supra* note 13, at 92–114; on their expansion of activity, see M. Miller-Adams, *The World Bank: New Agendas in a Changing World* (1999), at 100–133; E. Riesenhuber, *The International Monetary Fund under Constraint* (2001), at 36–59. For critical analyses, see Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', 32 *NYU J Int'l L and Pol* (2000) 243; B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003), at chap. 5.

¹⁴² See Nolte, *supra* note 100; Murphy, *supra* note 63, at 312–318; Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council', 15 *EJIL* (2004) 701, at 712–720.

non-member states as well, just because adherence to them facilitates market access to the industrialized states that set the standards.¹⁴³ This is particularly obvious in the OECD's Financial Action Task Force on Money Laundering (FATF), which supervises the implementation of its 'Forty Recommendations' not only by member states, but worldwide, and non-compliant states have to face different forms of sanctions.¹⁴⁴ As a result, third states seek to implement the recommendations, and they have even set up numerous international bodies for this purpose. Informal law-making for third states is, however, not limited to the OECD; it also takes place in many other bodies, for example in the Basle Committee on Banking Supervision.¹⁴⁵ And even if they are less exclusive, informal bodies 'privilege[] the expertise and superior resources of US government institutions in many ways'.¹⁴⁶ Informality allows the strictures of sovereign equality to be circumvented in the formal law-making process, and it thus is a far more suitable tool of hierarchy.

Yet law-making for third states has also gained strength in binding international law, even beyond the formally hierarchical institutions discussed above, and mainly as a result of recent US exceptionalism. As shown above, the US is very reluctant to ratify multilateral treaties; yet it is at the same time a driving force behind their adoption, as in the cases of the ICC, the Kyoto Protocol, the Convention on Landmines, or the Biosafety Protocol. This leads to an order in which the US heavily influences the content of the rules, but eventually remains free while other states are bound. This is further accentuated by the widespread use of reservations and by bilateral attempts to limit the effects of treaties, as we can observe with the ICC Statute. Where the international legal process fails to accept the formal superiority of the US, the US withdraws and thereby creates a bifurcated order: international law binding on others, but not the US.¹⁴⁷ The result is not much different from that achieved in the Non-Proliferation Treaty or in the composition of the Security Council: the US increasingly ceases to be subject to international law and takes a position above it.¹⁴⁸

¹⁴³ See Salzman, 'Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development', 21 *Michigan J Int'l L* (2001) 769.

¹⁴⁴ See Simmons, 'International Efforts against Money Laundering', in Shelton, *supra* note 46, at 244, 255–260.

¹⁴⁵ Just see Slaughter, *supra* note 104; Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', 33 *Texas Int'l LJ* (1998) 281. For a critique, see Delonis, 'International Financial Standards and Codes: Mandatory Regulation without Representation', 36 *NYU J Int'l L and Pol* (2004) 563.

¹⁴⁶ Slaughter, 'Governing the Global Economy through Government Networks', in Byers, *The Role of Law* *supra* note 10, at 177, 205.

¹⁴⁷ For a defence of this position, see only Rubinfeld, 'Unilateralism and Constitutionalism', 79 *NYU LR* (2004) 1971. This is reinforced by a tendency further to restrict international law's (already weak) role in US domestic law; see only Bradley and Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 *Harvard LR* (1997) 815. On that role in general, see Bianchi, 'International Law and US Courts: The Myth of Lohengrin Revisited', 15 *EJIL* (2004) 751.

¹⁴⁸ For a similar analysis (with different explanations), see Scott, *supra* note 63; Cohen, 'The American Challenge to International Law: A Tentative Framework for Debate', 28 *Yale J Int'l L* (2003) 551. For a more extensive discussion, see Krisch, *supra* note 35, at 156–173.

5 Replacing International Law: Domestic Law as an Instrument of International Dominance

Dominant states oscillate between instrumentalizing and evading international law, and they usually seek to reshape international law as a softer and more hierarchical order. Yet softening international law is often insufficient for powerful states as it poses limits on controlling other states, and hierarchical forms are frequently difficult to achieve: international law's insistence on sovereign equality poses obstacles to the legalization of dominance and thus pushes powerful states into withdrawal.

Withdrawal is, however, not just an abdication of law. Much in contrast to the conventional picture and its dichotomy between international law and politics, the turn away from international law is often a turn towards another form of law: *domestic* law. While lacking much of the legitimating force of international law, domestic law can fulfil its regulatory functions, and it already embodies the hierarchies that dominant states find so difficult to establish on the international plane. Unlike international law, domestic law is openly an instrument of government.

However, it only becomes an instrument of *international* government if it is able to regulate states and individuals beyond the borders of a given state, and this is difficult because of the jurisdictional limits imposed by international law. As will become clear, dominant states have found ways around this problem, but as a result of these limits, much of the governing force of domestic law has to rely on factual rather than formal subjection. *De iure*, states and foreign individuals are usually not required to accept the demands of a dominant state's domestic law, or at least not more than they need to accept those of any other state – after all, most states use their domestic law for international purposes, and normally this does not appear as an attempt at governing others. Yet dominant states tend to use it to a greater extent, and their domestic law 'governs' because other states *de facto* have no choice but to follow it: because of political or economic dependence, or because of the authority the dominant state can command. It is its breadth and actual effectiveness that distinguish it and turn a hegemon's domestic law from a policy tool among equals into an instrument of international government.

A International Government: Ruling Others through Domestic Law

Difficulties with jurisdictional limits do not arise in the most extreme form of using domestic law for international government: the establishment of formal empire.¹⁴⁹ I have already mentioned some of the cases and causes of the turn to formal empire, and it is significant that in this most far-reaching case of withdrawal from international law, dominant states did not evade law altogether, but in fact turned to an order of tight legal regulation.¹⁵⁰ Yet the formalization of empire did not necessarily

¹⁴⁹ As Alexandrowicz, *supra* note 74, at 127, puts it with respect to Africa in the 19th century: '[i]nternational law disappears from the scene and the various European municipal laws take its place . . . '.

¹⁵⁰ See in particular L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002); W.J. Mommsen and J.A. de Moor (eds.), *European Expansion and Law* (1992).

imply the full integration of the respective entities into the legal order of the metropolis. In most settings, metropolitan law was initially applied only to Europeans, and where local populations came under European control, they usually continued to be governed by their own, often customary, law administered in native courts. This reflected the jurisdictional complexity of multicultural settings in European states themselves, but also responded to the desire to keep the costs of colonial administration low and helped avoid conferring equal status on the locals. Over time, though, the impact of European law grew, in part because locals made increasing use of European courts, but also because of the desire of Europeans to subject a growing number of issues to tighter control. This initially concerned mostly transactions central to trade, but soon extended to issues related to the collection of revenues. Later, especially in the 19th century with its 'civilizing mission', Europeans increasingly sought to use their own law and courts to change indigenous practices, though often with limited success.¹⁵¹ The extent to which metropolitan domestic law pervaded or superseded local laws varied considerably among times, regions and empires. It was strongest in Spanish America – in part because of the strong unitary ideology behind the Spanish Empire – and somewhat milder in British North America, where at least the settlers operated with considerable legislative autonomy.¹⁵² France based its empire on similarly unitarian conceptions as Spain, yet in practice deviated from them to a large extent, while Britain upheld indirect rule in principle and often practiced deference to local institutions, even though direct intervention became increasingly frequent.¹⁵³ In general, control through metropolitan domestic law was weakest in Asia and Africa, where European expansion had begun with mere trading posts and had left local structures intact for a long time, even after the establishment of formal empire.¹⁵⁴ Yet everywhere, the move from an international to a domestic, intra-imperial level provided central legal tools for the exercise of control.

The use of domestic law was, however, also widespread in informal empires, in particular through regimes of capitulations and consular jurisdiction. These were initially established in relationships of relative equality of the parties and ensured that

¹⁵¹ See Benton, *supra* note 150, at 127–128 and *passim*; Fisch, 'Law as a Means and an End: Some Remarks on the Function of European and non-European Law in the Process of European Expansion', in Mommsen and de Moor, *supra* note 150, at 15–38.

¹⁵² On the contrast in principle, see Pagden, *supra* note 50, at chap. 5. On the actual deviation from the unitary theory in the initial period of Spanish America, see Benton, *supra* note 150, at 81–86.

¹⁵³ See Benton, *supra* note 150, at chap. 4; and on France, Pagden, *supra* note 50, at 149–152; on Britain, Burroughs, 'Imperial Institutions and the Government of Empire', in A. Porter and A. Low (eds.), *The Oxford History of the British Empire, Vol. III: The Nineteenth Century* (1999), at 170–197. On deliberate British attempts at legal change, see Engels, 'Wives, Widows and Workers: Women and the Law in Colonial India', in Mommsen and de Moor, *supra* note 150, at 159–178; Simensen, 'Jurisdiction as Politics: The Gold Coast During the Colonial Period', in *ibid.*, at 257–277.

¹⁵⁴ See Benton, *supra* note 150, at 127–166 on British India and French West Africa, and 114–124 on Portuguese Goa; Leue, 'Legal Expansion in the Age of the Companies: Aspects of the Administration of Justice in the English and Dutch Settlements of Maritime Asia, c. 1600–1750', in Mommsen and de Moor, *supra* note 150, at 129–158. On problems in using metropolitan law, see Fasseur, 'Colonial Dilemma: Van Vollenhoven and the Struggle Between Adat Law and Western Law in Indonesia', in *ibid.*, at 237–256; Chanock, 'The Law Market: The Legal Encounter in British East and Central Africa', in *ibid.*, at 279–305.

Europeans were governed by the laws of the home rather than the host state, and that they were subject to consular, not local jurisdiction. Over time, though, as power relationships shifted and the overseas activities of Europeans expanded, the capitulations covered ever greater parts of social and economic life and essentially removed them from control by the local rulers.¹⁵⁵ This extension of European law and jurisdiction established functional enclaves in many countries and allowed for a far-reaching governance of global trade by Europeans. The practice continued until decolonization and even had a peak in the late 19th century when it became central to ensuring access to Chinese, Japanese and Siamese markets.¹⁵⁶ But it was increasingly regarded as a discriminatory tool of European imperialism and was abolished with the independence of the colonies.¹⁵⁷ In both formal empires and the capitulation regimes, the use of domestic law and of metropolitan courts was closely intertwined; and oftentimes, the metropolitan courts were even attractive to the local population in order to overcome deficits of customary judicial systems.¹⁵⁸ Control over the flowering multiplicity of courts at the periphery was sometimes achieved through rights of appeal to judicial bodies with metropolitan judges,¹⁵⁹ or to metropolitan institutions such as the Judicial Committee of the Privy Council in the British case, which in effect came to act, until very recently, as a global appeals court for large parts of the former British empire.¹⁶⁰

Both the projection of domestic law worldwide and the establishment of global appeals courts reappear today in the case of the US, even though in a less formalized shape than in the European empires. Because the formal imposition of rules on other countries faces jurisdictional limitations, the use of domestic law for international government today comes more often in the form of conditions for aid and market access.¹⁶¹ Yet since many states in fact depend on these benefits, the effects are often similar to those of a formal imposition. This is most clearly visible in the use by the US of certification mechanisms to influence other states' behaviour. Such mechanisms now cover large areas, ranging from human rights and environmental protection to arms control and the prevention of terrorism, and they usually require the US President

¹⁵⁵ See, in general, Alexandrowicz, *supra* note 52, at chap. 6, and *supra* note 74, at 83–91, 125–126.

¹⁵⁶ See Gong, *supra* note 60, at chaps. 5–7; Ch'en, 'The Treaty System and European Law in China: A Study of the Exercise of British Jurisdiction in Late Imperial China', in Mommsen and de Moor, *supra* note 150, at 83–100; see also Benton, *supra* note 150, at 246–251.

¹⁵⁷ For possible contemporary analogues, see Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization', 35 *Texas Int'l LJ* (2000) 387.

¹⁵⁸ See Benton, *supra* note 150, at chaps. 4 and 5; Price, 'The "Popularity" of the Imperial Courts of Law: Three Views of the Anglo-Indian Legal Encounter', in Mommsen and de Moor, *supra* note 150, at 179–200.

¹⁵⁹ See, e.g., Benton, *supra* note 150, at 136, on the establishment of the British Supreme Court of Judicature in India.

¹⁶⁰ See P. A. Howell, *The Judicial Committee of the Privy Council 1833–1867* (1979); on the later debate over the Committee's role and its shrinking jurisdiction, see D. B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (1987).

¹⁶¹ On the forms of unilateral alternatives in the area of the environment, see Brunnée, 'The United States and International Environmental Law: Living with an Elephant', 15 *EJIL* (2004) 617, at 630–636.

to report periodically on the compliance of other states with rules set by the US Congress.¹⁶² These rules often – though by no means always – mirror international legal rules,¹⁶³ but through unilateral application the US retains far greater control over their content and also avoids being scrutinized itself. International implementation would have disadvantages in both respects, and so it is unsurprising that, for example, the US prefers the proactive unilateral enforcement of human rights to the establishment of effective international bodies. The US certification mechanisms are also highly effective: the annual country report on human rights now covers 196 countries and carefully lists human rights violations around the world.¹⁶⁴ Most states in the world can hardly afford to ignore it, and not only because of reputational interests: it is particularly through the combination with sanctions that the certification mechanism acquires teeth. Unilateral sanctions, however, are used much more broadly by the US; they have become a standard instrument of foreign policy.¹⁶⁵ Sometimes they serve to enforce rules of international law, as in the case of Section 301 of the Trade Act, which provides for countermeasures against violations of trade agreements.¹⁶⁶ Yet in other areas, such as the environment, they follow a domestic assessment of necessity rather than international norms.¹⁶⁷ And in some fields, especially those of extraterritorial application, US unilateral sanctions themselves are of dubious international legality.¹⁶⁸

For the US, the exercise of extraterritorial jurisdiction is a tool of international government in a more general way. In the economic field, and particularly in competition law, the US took an early lead in applying its own law to situations with little connection to itself other than a widely defined ‘effect’, and it has succeeded in reshaping (or at least destabilizing) jurisdictional rules in this area.¹⁶⁹ Since the early 1980s, this has been complemented by a rising activity of US courts in other extraterritorial matters, mostly spurred by a reinterpretation of the Alien Tort Claims Act and strengthened by the Torture Victim Protection Act of 1991, so that today, US courts assume a function of global appeals courts, especially in human rights

¹⁶² See Chinen, ‘Presidential Certifications in U.S. Foreign Policy Legislation’, 31 *NYU J Int’l L and Pol* (1999) 217; on a particularly comprehensive regime, see Akech, ‘The African Growth and Opportunity Act: Implications for Kenya’s Trade and Development’, 33 *NYU J Int’l L and Pol* (2001) 651, at 663–670.

¹⁶³ Cleveland, ‘Norm Internalization and U.S. Economic Sanctions’, 26 *Yale J Int’l L* (2001) 1, at 70–73.

¹⁶⁴ For the 2004 report, see www.state.gov/g/drl/rls/hrrpt/2004/index.htm (visited on 23 Mar. 2005).

¹⁶⁵ See M. P. Malloy, *United States Economic Sanctions: Theory and Practice* (2001).

¹⁶⁶ See Puckett and Reynolds, ‘Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?’, 90 *AJIL* (1996) 675.

¹⁶⁷ See DeSombre, ‘Environmental Sanctions in U.S. Foreign Policy’, in P. G. Harris (ed.), *The Environment, International Relations, and U.S. Foreign Policy* (2001).

¹⁶⁸ See Stern, ‘Vers la mondialisation juridique? Les lois Helms-Burton et D’Amato-Kennedy’, 100 *Revue Générale de Droit International Public* (1996) 979, at 996. As to the limits to unilateral sanctions under WTO law, especially in environmental matters, see only M. J. Trebilcock and R. Howse, *The Regulation of International Trade* (2nd ed., 1999), at 428–432.

¹⁶⁹ See Mattei and Lena, ‘U.S. Jurisdiction over Conflicts Arising Outside the United States: Some Hegemonic Implications’, 24 *Hastings Int’l and Comp LR* (2001) 381.

matters.¹⁷⁰ This has particular importance for corporate actors that need to compete on the US market and whose assets are therefore highly vulnerable to US court action. But it is not limited to private actors: since Congress restricted the immunity of ‘state sponsors of terrorism’ in 1996, US courts can (and do) also sit in judgment over other states.¹⁷¹

B *Informality, Privatization and the Evasion of Jurisdictional Limits*

While international law is only a limited tool for global dominance because of the constraints of sovereign equality in law-making and -application, domestic law is limited because of jurisdictional rules. They prohibit the direct rule-making and adjudication for other states and force dominant states into strategies of evasion. One of them, as we have seen, is the move from imposition to conditionality, but this is tied to material incentives and is thus costly; in addition, some forms of conditionality today face obstacles of WTO law.

One way to escape these difficulties is a turn to informality. The direct enactment of rules for other states, backed by sanctions, creates a constant image of domination, which is difficult to legitimate and to enforce. The informal diffusion of rules avoids such problems: by relying on the free acceptance of norms, it reinstates the image of equality and sovereignty. Yet it depends on either a self-interest of others in following the rules of the dominant state or on their belief in the superior quality of these rules and thus on the authority of the dominant state.

This latter factor is most evident in the slow, but pervasive processes of normalization of a hegemonic ideology. Once the ideas of the centre have been recognized as valid by the periphery, the impression of domination disappears entirely. We can observe this today, for example, in the internalization of ideas of ‘good governance’ by elites of developing countries, or in the spread of American (and European) ideas of the separation of powers and the rule of law, and in particular a strong role of courts; as a result, American and European court decisions on these issues are increasingly cited around the world.¹⁷² In former times, similar processes have, for example, changed the self-understanding of many non-Europeans under the influence of the ‘standard of civilization’ and have thereby facilitated European rule and the acceptance of European concepts and standards.¹⁷³

¹⁷⁰ See B. Stephens and M. Ratner, *International Human Rights Litigation in U.S. Courts* (1996); Rosen, ‘The Alien Tort Claims Act and the Foreign Sovereign Immunities Act’, 6 *Cardozo J Int’l and Comp L* (1998) 461. But see also the cautious reaffirmation of the use of the Alien Tort Claims Act, as well as the restriction of its scope, by the US Supreme Court in *Sosa v Alvarez-Machain*, No. 03–339 (decision of 29 June 2004).

¹⁷¹ See *supra*, Section 3, B 1.

¹⁷² See Mattei, ‘A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance’, 10 *Indiana J Global Legal Studies* (2003) 383; Slaughter, ‘Judicial Globalization’, 40 *Virginia J Int’l L* (2000) 1103.

¹⁷³ In this sense, see only A. Loomba, *Colonialism – Postcolonialism* (1998), at chap. 2; on the imagery of superiority, see also Hyam, *supra* note 60, at 301–310. On the particularly interesting case of Japan, see Gong, *supra* note 60, at 174–187, but see also *ibid.*, at 98–100.

Yet such processes of fundamental change are slow, and many instances of the informal diffusion of norms take place in more mundane areas, but also with greater precision and speed. They are often related to market regulation and have in the past involved, for example, the acceptance of metropolitan measures and weights, sometimes also money, by the periphery. Today, because of the dominant position of the US economy and the widely recognized expertise of US regulators, US rules on the operation of markets often exceed their formal confines and begin to function as global rules. Thus, in a study of 13 areas of economic regulation, John Braithwaite and Peter Drahos have identified the US as the most or one of the most influential actors in each of these areas, and as by far the most influential single actor overall. US norms become model norms for other states' regulatory efforts, in particular when it comes to technical standards: for example, rules on securities or air safety today follow heavily the standards set by the US Security and Exchange Commission and the Federal Aviation Administration.¹⁷⁴

The informal diffusion of rules has many benefits, but it is often slow and depends on a strong basis of authority. Powerful states have thus often turned to another strategy to escape jurisdictional limits: the privatization of international rule. Unlike states, private actors are not bound by rules on jurisdiction and can thus act freely on the global plane, especially if rules on free trade prevent states from denying them access to their territories. They are subject to the domestic law of the states they are operating in, but this, too, may pose few constraints. Between the 16th and the early 20th centuries, due to the system of capitulations that prevailed at the time, European private actors in many non-European states were subject only to their home laws.¹⁷⁵ And today, the ability of states to regulate foreign private actors is limited in fact by the forces of the global market, and in law by the limits of trade and investment agreements and by the intricacies of multiple incorporations with the resulting opportunities for tax and regulation evasion. Here, the instrumentalization of international law by dominant states for purposes of free trade¹⁷⁶ reappears as an element that facilitates the privatization of international rule.

Historically, the most obvious use of private actors for international rule has been the use of private trade companies in the construction of the European empires, the most well known of which were the British and Dutch East and West India companies.¹⁷⁷ Their main advantage lay in the private assumption of risk, and internationally they often acted on behalf and under charter of their state of origin, which significantly blurred their private character. Yet their status remained ambiguous, as is reflected in the insistence on the part of a number of Asian rulers to conclude treaties with

¹⁷⁴ J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), at 157–158, 457–460, 475–477, 578–601; for further examples taken from the regulation of capital markets, see Simmons, 'The International Politics of Harmonization: The Case of Capital Market Regulation', 55 *Int Org* (2001) 589, at 601–615.

¹⁷⁵ See *supra*, Section 5, A.

¹⁷⁶ See *supra*, Section 3, A.

¹⁷⁷ See Fisch, *supra* note 50, at 2–3; Doyle, *supra* note 69, at 110–113.

sovereigns and kings instead.¹⁷⁸ But this ambiguous status also had advantages: it was, for example, easier for them to subordinate themselves to Asian rulers, as was often necessary for pragmatic reasons, than it would have been for a European sovereign.

Private actors are today less openly associated with their home states, but they are crucial for the overwhelming dominance of the US and Europe in the international system. This is in part because private companies are the vehicles through which powerful economies take advantage of a system of free trade that, though possibly beneficial for all, usually benefits strong economies most: the ‘imperialism of free trade’¹⁷⁹ requires private activity. Yet even more important for our purposes is the role of private actors in international rule-making. In large parts of international affairs, and in particular in those related to the economy, many rules are today set by associations of private actors rather than states; we can witness ‘the emergence of private authority in international relations’.¹⁸⁰ Examples include the *lex mercatoria*, the thousands of standards promulgated by the private International Standardization Organization (ISO), but also numerous codes of conduct on environmental, labour and human rights issues.¹⁸¹ The latter ones often result from cooperation by corporate actors and NGOs, but whatever the precise organization, the central actors here – including the NGOs – are mostly from the economically powerful countries.¹⁸² In this way, Western standards and conceptions spread globally without the limits that state-centred international law poses. A particularly powerful example of private regulation is that of the internet by ICANN, the Internet Corporation for Assigned Names and Numbers.¹⁸³ ICANN is a private organization and has recently made significant steps towards global accountability, but it is established under Californian law and under contract with the US federal government. This gives the US administration special powers, even beyond the general influence on ICANN that American (and more generally Western) actors have. Another striking example of private regulation are the bond-rating agencies, which assess the security of debt repayments, and thus determine the cost of borrowing money.¹⁸⁴ Since many states today depend

¹⁷⁸ See Alexandrowicz, *supra* note 52, at 26–38. On the situation in Africa, see Alexandrowicz, *supra* note 74, at 41–43.

¹⁷⁹ See only Gallagher and Robinson, ‘The Imperialism of Free Trade’, 6 *Economic History Review* (1953) 1.

¹⁸⁰ See R. B. Hall and T. Biersteker (eds.), *The Emergence of Private Authority in Global Governance* (2003). On the rise of private judicial actors, see Mattli, ‘Private Justice in a Global Economy: From Litigation to Arbitration’, 55 *Int Org* (2001) 919.

¹⁸¹ See only G. Teubner (ed.), *Global Law Without a State* (1996); Mattli and Büthe, ‘Setting International Standards: Technological Rationality or Primacy of Power?’, 56 *World Politics* (2003) 1; Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’, in D. Helm and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (2003).

¹⁸² Mattli and Büthe, *supra* note 181, also reach this conclusion, though they find that domestic institutional settings have an important impact in determining which of the powerful actors prevails. Thus, in the case of ISO, Europeans appear to be more successful than Americans.

¹⁸³ See Mayer, ‘Europe and the Internet: The Old World and the New Medium’, 11 *EJIL* (2000) 149. See also Kwakwa, ‘The International Community, International Law and the United States: Three in One, Two Against One, or One and the Same?’, in Byers and Nolte, *supra* note 35, at 25, 49–51.

¹⁸⁴ See only S. Sassen, *Losing Control?* (1996), at 15–16.

on the ability to incur debt at reasonable cost, bond-rating agencies in fact set the parameters for government action, especially in economic matters, and thus perform regulatory functions over them. In this area, regulation is largely privatized – and is heavily dominated by American companies. The privatization of international rule thus often results in its Americanization (or at least Westernization), without the jurisdictional limits of state boundaries.

6 Conclusion

Not merely a tool of power nor its counterpart, international law assumes an uneasy position in times of hegemony. As this article has sought to show, international law's relationship with dominant states is complex and multifaceted: sometimes it is instrumentalized, sometimes withdrawn from, most of the time reshaped, and often replaced with (or at least complemented by) domestic law. The legal order arising in situations of hegemony thus bears a structure quite dissimilar to that typically ascribed to international law: constantly under pressure, it tends to become softer and more hierarchical, and probably more fragmented; after all, the power differential translates very differently into different areas of the law. In the process, the sovereign equality of states is increasingly challenged: not only because its formality contrasts so starkly with the facts of international life, but also because even in formal terms, sovereign equality is more and more eroded, as the hegemon comes to occupy a position above the law, not under it. Yet characteristically, the international legal system resists that development; it insists on stability, equality and coherence, and dominant states thus often prefer other forms of international government, thereby creating a global legal order with a more limited role of international law as such.

This picture only sketches the broad framework in which the relationship between hegemony and international law is situated, and it allows for much variation. Moreover, so far it only represents a hypothesis with historical illustrations and is necessarily provisional. Much more detailed, contextual work is needed in order to gain a clear picture of this relationship in different historical periods, and only then will we be able to assess whether it is indeed characterized by the general patterns I have outlined. In this sense, this article is intended as a starting point for reflection and further research.

But insofar as the thesis advanced in this article bears theoretical and historical plausibility, it may also open up further avenues for thinking about international law. For example, it may open up space for critique: if dominant power typically works to soften international law, we may ask whether the current move towards soft law is indeed mainly due to the need for more efficient and flexible forms of law-making, or whether perhaps broader structural reasons play a more important role. Or, if broader rights to use force are regularly associated with a hegemonic situation, we may want to think twice before assessing the right to humanitarian intervention purely on humanitarian terms, just as we need to think twice before accepting that the British move to police the prohibition on the slave trade in the 19th century was merely part of a moral movement. Such a critique is, of course, not normatively

conclusive: acknowledging that power plays a large role does not necessarily have any bearing on the justification *vel non* of an action or development. But it may give us some greater distance in assessing them.

The insights into the interplay between hegemony and international law may also take us further as regards the role of law in international politics, in that they reflect the ambivalent position of international law as both a tool for the exercise of dominance and as an element of resistance to it. Both functions are interdependent: without the resistance – its stable, egalitarian and coherent character – international law could not provide the benefits of pacification, stabilization and legitimation for powerful states. But without providing these benefits to the powerful, international law would lose much of its effectiveness: international relations are marked by inequality, and if international law were simply an order of equals, its role would be weak indeed. Power relations are inevitably inscribed into international law, as they are into all forms of law, sometimes more, sometimes less visibly.

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