Antinomies of Power and Law: A Comment on Robert Kagan

By Andreas Paulus[*]

A. Introduction

Robert Kagan's article and book on the future of transatlantic relations[1] have gained much prominence in the debate on the reasons for and impact of the transatlantic rift on the war against Iraq. However, and regrettably, Kagan's work confirms rather than challenges the prejudices and stereotypes of both sides. After putting Kagan's approach in a political perspective, I intend to show that the antinomies used by Kagan and other participants in the debate, such as might and right, unilateralism and multilateralism, prevention and repression, hegemony and sovereign equality, democratic imperialism and pluralism, constitute useful analytical tools, but do not in any way capture the divergence of values and interests between the United States and Europe. However, the result of such an analysis does not lead to the adoption of one or the other extreme, but to the realization that international law occupies the space between them,[2] allowing for the permanent re-negotiation of the place of "Mars" and "Venus" in international affairs.

B. A Schmittian Vision of the New International (Dis)Order

Kagan presents the United States and Europe as victims of their power capabilities. On the one hand, the United States is the new strongman of the international order, almost too strong to walk properly, whereas Europe is determined by its weakness, lulled into laziness and self-pity by unprecedented standards of living and military security, a security, however, which is largely provided by the United States. Kagan

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[1] Robert Kagan, *Power and Weakness*, 113 POLICY REVIEW (June & July 2002), http://www.policyreview.org (visited July 17, 2003); ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003).

[2] *But see* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 8-50 (1989) for the argument that such a space does not exist.

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tries to capture this relationship as one of *Power vs. Weakness* or *Mars vs. Venus*. Europe is living in a post-nationalist paradise in which a complex institutional design has triumphed over the "usual" competition between independent and jealous nation States. Instead of vying and fighting for first place, Europe's middle powers have agreed to a power-sharing structure in which, in most cases, the very *locus* of power is almost impossible to find. Europe may think of exporting its new institutions, which have served her well, but finds a cruel world in which military capabilities are more important than trade surpluses. The United States, on the other hand, finds itself in a much more uncomfortable position: It is the strongest country in the world and nonetheless cannot afford to encapsulate itself into the peace of the European oasis. As the most powerful State, it must, for better or for worse, fight for its security, and, on the way, it does the dirty work necessary to maintain the European paradise. In Kagan's view, America's is a Bismarckian world of blood and iron.

Kagan's theory reads like an application of Carl Schmitt's constitutional theory to the international level: The single superpower is the world's policeman, which is not bound by the rules which it enforces. It has no choice but to pursue "law and order" policies. The rest of the world benefits by either living in a protected paradise (Europe) or in a lawless anarchy which longs for the order made by the superpower (Third World). In Kagan's world, it is by and large power that drives the actors and determines their respective positions in the international system.

However, is this purportedly Realist version of the world a fairy tale, or is it a simplified but fitting description of current reality? The latter is quite doubtful. Of course, the power differential between Europe and the United States has seldom been so large. In particular, it seems to hinge on the technological superiority of the United States military, which makes it more and more difficult for European armies to even cooperate with their American counterpart. However, I am unconvinced that it is only America that makes order in the world. First of all, the description of the United States as the new Sparta does not quite correspond to the reality of contemporary American society. Those of us who have benefited from the U.S. university and library culture will not accept their presentation as military-like drill academies. In spite of the respect its army enjoys, the United States does not foster a warrior culture. In fact, modern military technology has less to do with a "pagan ethos" – as Kagan's alter ego Robert Kaplan will make us believe[3] – but with a high level of information technology. The hegemonic ambitions of some members of the military-industrial complex sometimes only mask the reality of a society that is

[3] ROBERT KAPLAN, WARRIOR POLITICS: WHY LEADERSHIP DEMANDS A PAGAN ETHOS (2001); *see, also*, David Sheffer, *Delusions About Leadership, Terrorism, and War*, 97 AJIL (2003) 209-215.

averse to the use of military power in distant places. At times, one has the suspicion that Kagan sells neoconservative domestic propaganda rather than the genuine attitudes of a majority of Americans.

On the other hand, Europe is much more ready to use military force than Kagan suggests. Not only is it the case that a considerable part of Europe backed the Iraq enterprise – not only "new Europe," in which the population was almost as much against the war as in Western Europe, but also some "old Europe" governments, such as Britain and Spain. In Africa, Europe was and is much more eager and ready to fulfil a policeman's function than the United States. The United Kingdom saved Sierra Leone from the abyss, and France was ready to intervene both in Rwanda and in Congo, in the latter case with the backing of the European Union and the United Nations, whereas the United States failed to act in Rwanda and Congo and is currently uncertain how much to support Liberia in spite of its historical responsibilities there. Neither is America like Rome, nor, and even less so, is Europe like Athens.

Of course, smaller powers like the European powers are much more interested and eager to work in common institutions. But the United States cannot simply "go it alone,"[4] as Joseph Nye has aptly remarked. The post-war problems in Iraq, the North Korea and African crisis all demonstrate how much the U.S. depends on friends and allies – a fact of life the Wolfowitz's and Kagan's are in the painful process of learning, as the recent, unanimous call for international involvement in the pacification and reconstruction of Iraq by the U.S. Senate demonstrates.[5] The importance of minimum standards of decency and respect for civil virtues, in particular in times of crisis, can be studied in the dreadful consequences of the lies and overstatements used for luring unwilling societies into war. Whatever else motivated the attack against Iraq, the threat emanating from weapons of mass destruction was overvalued at such a rate that one really wonders whether those relying on it really believed what they were saying – a failure which may have destroyed the Bush doctrine of pre-emptive self-defence shortly after it was applied for the first time.[6] If – and this is a big if – pre-emptive self-defence is to become lawful, it requires a perfect assessment of the facts – an assessment which seems to be impossible when secret services become mouthpieces of government policies.

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[4] JOSEPH NYE, THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE (2002).

[5] S. Amdt. No. 1190 to Amdt. No. 1136 to S. 925, 149 CONG. REC. S9161,9196-203 (daily ed. Jul. 10, 2003).

[6] For the speed with which some of the proponents of the war eat up their own opinions, *see*, J. Gedmin, *Dann wäre die Doktrin von der Präemption tot*, FRANKFURTER ALLGEMEINE ZEITUNG, Jul. 30, 2003, p. 10. *See, also*, Daniel Drezner, *Ounce of Prevention*, THE NEW REPUBLIC ONLINE, Jun. 11, 2003, available at http://www.tnr.com (visited Jul. 30, 2003).

Thus, the following lines have to be taken with a big grain of salt. Working with Kagan-like oppositions does not mean that one can associate one of them with the United States and the other with Europe. But to work with those oppositions may lead to a better understanding of the different options the United States and Europe are facing.

C. The International Order Between Law and Force

What is the role of international law in all of this? Just a method of the weak to bind the strong? A counter-weight in the fashion of French policies? The argument here will be different both from those who believe in Kagan's version of law as tool of the powerful and constraint for the weak, and from those who aim to use the law as a weapon of the weak against the strong, as a way to put the strong into the dismal position of the ever-immoral exercise of power. Rather, in the best of all worlds, "law" seems to combine both: the power of argument and persuasion which comes with moral superiority, and the moral of power, which comes with the capabilities to implement and execute the laws and nothing but the laws equal to all. Was the intervention in Iraq the death-knell for such a vision of international law? In the following, I intend to show that this is not the case, that indeed, Iraq demonstrates that power and morals are in urgent need of each other, and that international law may provide the forum for this eternal battle.

I. Might vs. Right

It has become quite popular among the opponents of the second Iraq war to present it as a question of "might versus right." According to this understanding, the war constitutes a severe setback for all attempts to "legalize" international relations[7] relating to the use of force. However, the drafters of the United Nations Charter did not have a Security Council in mind that would enforce international law. On the contrary, the goal was to maintain and, if necessary, restore international peace and security.[8] In fact, the Charter is not based on the primacy of law as such, but on the primordial necessity of ensuring collective security by providing for superpower

[7] On the alleged "legalization" of international relations, *see, e.g.*, O'Connell, *et al.*, *The Legalization of International Relations*, ASIL PROCEEDINGS 96 (2002), pp. 291-308; Goldstein, *et al.*, *Legalization and World Politics: A Special Issue of International Organization*, 54 INT'L ORG. 1 (2000).

[8] For details see INIS CLAUDE, SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 71-76 (4th ed., 1984); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 139-140 (1995); MORTON KAPLAN AND NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 216-7 (1961), ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT 287-292 (2001).

involvement and broad discretion of the Security Council, up to the point where the Council may suspend existing international legal obligations and is not bound by international law itself, but only by the "Purposes and Principles of the United Nations".[9] Even if one shares – as the present writer does – the estimate of former American Society of International Law President Anne-Marie Slaughter that about 80 % of international lawyers deemed the invasion unlawful under current international law,[10] it is just untrue that the United States and its coalition partners regarded international law as irrelevant. Instead, in communications to the Security Council, all of them argued that international law supported their conclusions.[11] Thus, the question was not so much "might versus right," but which concept of "might" and "right" should be adopted: a legalist position based on the UN Charter, which held that every use of force needed to be either an exercise of self-defense or mandated by the Security Council; a broader interpretation which allowed for the implementation of SC resolutions in case of inaction of the Council; or, at the other extreme, a position according to which the prohibition on the use of force had expired and was not good law any more.[12]

The latter position might have been adopted by many supporters of the current U.S. administration such as Richard Perle, but it does not constitute the official position of the administration itself. Otherwise, the U.S. letter to the Security Council, in which it justified its actions as conforming to international law, [13] would be a sheer exercise in hypocrisy. This is hardly what the administration wished to convey. What the administration has done, both in its National Security Strategy and in its

[9] Article 24 para. 2 of the UN Charter. *See, e.g.*,

[10] Anne-Marie Slaughter, *Is the U.S. at Risk of Violating International Law?*, Council of Foreign Relations, Mar. 3, 2003, available at http://www.cfr.org/publication.php?id=5646 (visited Jul. 21, 2003). "I think it is certainly true that eight out of 10 international lawyers would say that would be a violation of international law. That view would also be supported by the legal advisers of most other countries in the United Nations." *Id*. (answering the request to state her view on a statement by Richard Butler that an Iraq invasion without a specific Security Council authorization would constitute a violation of international law).

[11] *See, e.g.*, Attorney General Lord Goldsmith, Hansard, Mar. 17, 2003, Column WA 2-3, also available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/2857347.stm (visited Jul. 17, 2003); Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351, Mar. 21, 2003. For a presentation of the relevant documents, *see*, Sean Murphy (ed.), *Contemporary Practice of the United States Relating to International Law*, 97 AJIL 419-432 (2003).

[12] In this vein, *see*, in particular, Michael Glennon, *Why the Security Council Failed*, 82 FOREIGN AFFAIRS 16, (May/June 2003), available at http://www.foreignaffairs.org, (visited Jul. 30, 2003).

[13] Letter from the Permanent Representative of the United States of America to the United Nations, *supra* note 11.

public justifications of its actions, is to advance a position of how the law should change or at least be re-interpreted. On the one hand, President Bush has strongly argued that terrorism is an issue of national security and that the United States would not depend on any international body to decide on how to protect it. On the other hand, pre-emptive self-defence was advanced as protection from potential threats emanating from weapons of mass destruction and their proliferation, in particular in the hands of rogue States and terrorists. What the U.S. did not argue was that it may use force whenever it pleases – thus, Michael Glennon is just wrong to claim that the U.S. "felt free to announce in its national security document that it would no longer be bound by the charter's rules governing the use of force."[14] Instead, the National Security Strategy contained an elaborate argument to the effect that international law did, or at least should, allow pre-emptive self-defence against terrorism and weapons of mass destruction.[15]

And yet, if the law concerning the international use of force is not to become irrelevant and without consequences in practice, it must enjoy a minimum of effectiveness. A law that depends on voluntary compliance, such as international law, does not work in the simple matrix of Austinian command theory.[16] The disappointment of Glennon and others with international law largely stems from a lack of comprehension of the indirect effects of international law on the society of States, and on the world's public at large. The permanent mix of normativity and political reality lead to a misconception of both – the pretension that political reality was the ultimate test for normativity amounts not to an advocacy of strong norms, but to a negation of the normative character of international law.

It is also wrong that something like "might" without "right" could exist in a world in which every actor, even the only superpower, depends on others to further its own interests. The current international situation is a case in point: as much as the United States opposed any limits imposed by the Security Council on its invasion of Iraq, it insists on the implementation of other Security Council resolutions, in particular in the so-called war on terror. In the very period in which the United States attacked Iraq, it was also litigating before the International Court of Justice with another member of the so-called "axis of evil," namely Iran, involving questions of

[14] Michael Glennon, *supra*, note 12.

[15] The National Security Strategy of the United States of America, September 2002, available at http://www.whitehouse.gov/nsc/nss.pdf (visited June 6, 2003), at 15.

[16] *See*, famously, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 117-127 (Wilfried E. Rumble ed., 1995) for an exposition how international law can be accommodated in such a narrow view of law.

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self-defense.[17] In addition, the current security situation in Iraq seems to have compelled the United States to pursue an initiative for a U.N. resolution authorizing member States involvement into the administration of Iraq which it originally had abandoned in the fear of losing control to the United Nations.[18] Thus, there is no escape from some kind of law – the only question is whether international law translates hegemonic power into legal obligations, or whether it also constrains the superpower.

Glennon himself advances a proposal for the transformation of international law into an hegemonic enterprise: he proposes to do away with sovereign equality and the United Nations and wants the superpower to adopt a pick-and-choose approach, building coalitions of the willing instead of adopting long-term commitments and using force beyond the limits drawn by present-day international law. But even a coalition of the willing needs to translate its *ad hoc* aims into enforceable rules. This requires in turn a voluntary acceptance of U.S. prerogatives by other participants – an acceptance that will be based not only on power considerations, but also on perceptions of legitimacy. Thus, even a superpower cannot forever forego legal commitments to others. "Law" is not only a translation of power politics into fine print, but it also embodies a delicate compromise between reality and legitimacy.

Thus, what we have witnessed is the emergence of competing conceptions of the international legal order and an attempt by the United States to change existing law towards the admission of preventive use of force against States possessing weapons of mass destruction and/or harbouring and supporting terrorist activities – a claim that has not been generally accepted and therefore has not developed into law.[19] Iraq is not a question of "might versus right," but of who determines what the law is and how it is to be applied – by a hegemonic superpower or a quasi-constitutional system of checks and balances.

II. Unilateralism vs. Multilateralism

This leads us to the second pair of opposites that may shape the future of international law in the age of U.S. hegemony. How far are States obliged – or, should be

[17] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Oral Pleadings available at http://www.icj-cij.org/icjwww/idocket.htm (visited Jul. 21, 2003).

[18] Peter Slevin and Bradley Graham, *U.S. Renews Bid To Involve More Nations in Iraq*, WASHINGTON POST, Aug. 21, 2003; p. A01.

[19] Michael Reisman, who is advocating such change, seems to admit as much, *see*, Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AJIL 82, 90 (2003).

obliged – to work through multilateral institutions to pursue their interests. There is also little doubt that the alternative between unilateralism and multilateralism does not exist in such an unambiguous manner. The Iraq example shows that even the United States favoured, at first, the exploration of multilateral avenues. It is also obvious that, in some cases at least, the failure of multilateral institutions cannot be the last word. Sometimes, unilateral action cannot be avoided. Still, there seems to be no agreement at the moment as to when unilateral action is permitted.

The balance struck by the Charter is well-known. Article 39 gives the Security Council great latitude in determining when a threat to international peace and security or even a breach of the peace or a war of aggression has occurred.[20] The Council also enjoys broad powers to adopt sanctions which are binding on all UN member States. The only real check on the exercise of its power is the veto of the permanent members, combined with the requirement of nine positive votes from the fifteen members of the Security Council for the adoption of a resolution. On the other hand, the use of force without Security Council authorization is limited by Article 51 to instances of self-defence – an interpretation which is confirmed by the requirement of SC authorization for enforcement action of regional arrangements contained in Article 53 of the Charter.[21]

The change in international law proposed by the United States in its National Security Strategy 2002 would give to States so broad a latitude for unilateral action that this would undermine the prohibition on the use of force and the authority of the Security Council altogether. If the mere possibility of the proliferation of weapons of mass destruction to terrorists would suffice to justify the unilateral use of force without international authorization or even debate, any State suspected of possessing or developing weapons of mass destruction would become a target for the unilateral use of force. If applied to all States, such a re-interpretation of the law on the use of force might have disastrous consequences for whole regions such as the Indian peninsula or the Middle East.

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[20] Charter Art. 39 reads: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

[21] Art. 51 of the Charter reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Next to unilateral action, the Bush administration has advanced a counter-image to permanent institutions such as the United Nations or NATO: The "coalition of the willing". Others speak of "multilateralism à la carte."[22] Accordingly, the superpower builds coalitions *ad hoc* to complete certain tasks. Sometimes, an organization as a whole may be enlisted. Usually, however, coalitions of the willing will be composed of States. For the most powerful nation, finding support among weaker States is not too difficult – it has enough carrots and sticks at its disposal. The American argument for inter-State cooperation seems to come along as endorsement of national sovereignty.[23] In reality, coalitions *ad hoc* will always favour the strongest State, whereas institutional decision-making, whether in the United Nations or NATO, requires a larger consensus or unanimity so that each partner can exert influence on any collective decision.

Violence unleashed by States is of a special character, and brings with it more dangers and risks than foresight can predict. Long-term consequences of military action are almost impossible to ascertain anyway. International legitimacy provided by international institutions constitutes not only a legal or moral, but also a quite real asset to receive broad assistance and to tame the long-term consequences of the use of force. Institutional responses to new threats, for instance by inspections worthy that name, may prove more effective than the unilateral use of force of doubtful legitimacy – which may teach the wrong lesson, namely that only the possession of WMD combined with a sincere threat to use them will protect one from international scrutiny, as North Korea seems to believe.

Nevertheless, international law must find a way to renegotiate the relationship between multilateral and unilateral action, in particular when dealing with large crimes against international law and new threats emanating from non-State sources. Whereas multilateral legitimation is always preferable, it seems that unilateral emergency action cannot be excluded in case of institutional apathy or inertia. In that debate, power will be one, but not the only consideration.

III. Prevention vs. Repression

The argument in favour of prevention seems compelling. Even before the invention of weapons of mass destruction, would it not have been preferable to attack Hitler in 1936 before he was able to build the Reichswehr to its war strength? Would it not have been far preferable to attack Al-Quaida before it could implement the attacks

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[22] The term is generally attributed to R. Haas, director of policy planning at the State Department.

[23] *See, e.g.*, Remarks as delivered by Secretary of Defense Donald H. Rumsfeld, Garmisch, Germany, Wednesday, Jun. 11, 2003, available at http://www.defenselink.mil (visited Jun. 13, 2003).

of September 11th, 2001? And do not weapons of mass destruction render the problem more urgent, any use of them having horrendous consequences?[24]

However, the real question has little to do with these arguments. Everybody agrees that prevention is preferable by far to after-the-fact reactions. The real problem is two-fold: First, how to ascertain the facts? And second, who shall decide? Unilateral decisions lead to a jungle in which self-serving explanations of the use of force will abound. One need only think of the "preventive" killings of alleged Palestinian terrorists by Israel or of "preventive" Indian actions in Kashmir. Thus, the question seems to be wrongly put. Rather, one should ask whether prevention by multilateral means works. Or can it at least be made to work? Here, the United States does not find itself on solid ground. It is the United States who has, at the eleventh hour, prevented the adoption of a protocol on biological weapons which would have introduced a control and inspection regime similar to that of the Nuclear Non-Proliferation Treaty and the Chemical Weapons Convention.[25] Concerning the latter, U.S. cooperation seems to be wanting, in spite of the reluctant ratification during the Clinton administration. The U.S. Senate has blocked the Comprehensive Nuclear Test-Ban Treaty, and the Landmines Convention will not be ratified by the United States any time soon. Thus, the lack of an effective non-proliferation regime is not only due to the existence of "rogue States," but just as much to the U.S. reluctance to build on the existing institutions to control the further spread of WMD. As to the repressive side, the Rome conference was unable to agree on an effective system of criminal prosecution of the proliferation of WMD.[26] Only if multilateral processes do not work in a specific case, must prevention by unilateral action be considered.

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[24] *See, e.g.*, Michael Glennon, *supra*, note 12.

[25] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *signed* Apr. 10, 1972, *entry into force* Mar. 26, 1975, UNTS 1015, p. 163. Recently, the Bush administration has refused to agree to an optional protocol to this Convention establishing an inspection system in spite of the anthrax attacks against members of the U.S. Senate and other public figures. The U.S. alternative proposal rather relies on traditional international criminal law concepts and on the after the fact-investigation of suspicious outbreaks or allegations of biological weapons use. *See*, Statement by the President, *Strengthening the International Regime against Biological Weapons*, Nov. 1, 2001, available at http://www.whitehouse.gov (last visited Jul. 21, 2003). *See, also*, J. Miller, *U.S. Publicly Accusing 5 Countries of Violating Germ-Weapons Treaty*, NEW YORK TIMES, Nov. 19, 2001. For U.S. criticism, *see*, *OPED -- An Enforceable Ban on Bioterror*, NEW YORK TIMES, Nov. 3, 2001.

[26] Article 8 (2) (b) of the Rome Statute on war crimes in an international conflict limits itself to the use of weapons already prohibited by the Hague Regulations and the 1925 Geneva Protocol (xvii and xviii). In addition, in subpara. (xx), it refers to an annex in which further weapons running counter to the Martens clause, that is, causing unnecessary suffering, are to be penalized, but this Annex does not yet exist and needs to be adopted as a formal treaty amendment.

However, this does not give an answer to the question of when it is appropriate to unilaterally "pre-empt" a regime from using WMD or supporting terrorist acts. Substantive criteria seem difficult to develop. The *Caroline* formula[27] draws a relatively narrow line. Whilst this may be satisfactory for individual action, it might indeed, as the National Security Strategy asserts, be too late for effectively preventing the potential harm in time. The differences between the approaches of the United States and "Europe," old or new, seem to lie not so much in substance, but in form. In the European view, the "first line of "defence" is to be determined multilaterally, through international organisations and in partnership with the United States.[28]

Thus, the debate on pre-emption shows that the necessity of both repression – by means such as the International Criminal Court, mixed international/domestic tribunals or even military tribunals – and pre-emption are accepted on both sides of the Atlantic. What is in dispute, however, is whether permanent institutions such as the UN and the ICC should be authoritatively involved or whether unilateral decisions – if necessary in "coalitions of the willing" – are sufficient for legitimating the use of force in cases of threats emanating from terrorists or weapons of mass destruction.

IV. Hegemony vs. Sovereign Equality

Others criticize the Charter principle of sovereign equality as a chimera[29] which prevents international law from addressing the real problems of hegemony. Both the problem and its novelty seem to be overstated. Sovereign equality as a legal principle does not depend entirely on the underlying power rationale, but also on perceptions of legitimacy. If it does not wish to give up its separate existence altogether, international law must not simply reflect political power, but tame it with the necessity of respect for other actors.[30] On the other hand, under international

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[27] *See*, R. Jennings, *The* Caroline *and* McLeod Cases, 32 AJIL 82, 89 (1938).

[28] Javier Solana, *A Secure Europe in a Better World*, Doc. S0138/03, available at http://ue.eu.int/pressdata/EN/reports/76255.pdf (visited Jun 27, 2003), at 8, 15. The draft was presented at the Thessaloniki meeting of the European Council on Jun. 20, 2003. The final version is to be adopted at the December meeting of the European Council, see Presidency Conclusions, available at http://ue.eu.int/pressData/en/ec/76279.pdf (visited Jun 27, 2003), at 17, para. 54.

[29] *See*, Nico Krisch, *More equal than the rest? Hierarchy, Equality and US Predominance in International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 173-175 (Michael Byers and Georg Nolte eds., 2003).

[30] Cf., Michel Cosnard, *Sovereign Equality* – The Wimbledon *Sails On*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 117, 119 (Michael Byers and Georg Nolte eds., 2003) ("The analysis of sovereignty does not aim to describe the extent of one State's power, but to explain why a subject of international law is legally empowered. … Sovereignty is a legal quality of power, recognized by international law as belonging to *every* State …").

law, sovereignty has never been absolute. The Charter itself contains the most important legal limit to the equality of States, namely the binding force of Security Council resolutions, as provided for by Article 25 of the UN Charter, including the privileges of the permanent members of the Security Council.

It must be permitted to ask, however, whether sovereign equality can be maintained for long if not only the distribution of power does not conform to it – which has never been the case – , but when the most powerful member does not recognize the authority of the common institutions any more.[31] When U.S. President Bush, in his State of the Union speech of 2003, emphasized that "the course of this nation does not depend on the decisions of others,"[32] he effectively denied the existence of multilateral checks on U.S. action, whether military or otherwise. He thus confirmed his earlier challenges to the United Nations in his address of September 12, 2002 – either you do what we want, or otherwise we will do it alone anyway[33] – and to all other States dating from September 20, 2001 – "[e]ither you are with us, or you are with the terrorists."[34]

However, this does not necessarily entail the opposite – a hegemonic international law in which one set of rules is valid for the superpower and the other for the rest of the world.[35] Nico Krisch interprets the use of mechanisms by the U.S. which exempt it from assuming binding obligations as resulting in "a far-reaching hierarchical system which enables the United States to subordinate other States to law it has

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[31] Cf., George Fox, *Comment*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 187, 189-90 (Michael Byers and Georg Nolte eds., 2003).

[32] 'President Delivers State of the Union', January 8, 2003, available at http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html (visited Jun. 27, 2003). The full passage reads: "America's purpose is more than to follow a process -- it is to achieve a result: the end of terrible threats to the civilized world. All free nations have a stake in preventing sudden and catastrophic attacks. And we're asking them to join us, and many are doing so. Yet the course of this nation does not depend on the decisions of others. … Whatever action is required, whenever action is necessary, I will defend the freedom and security of the American people. … ."

[33] President's Remarks at the United Nations General Assembly, Sept. 12, 2002, available at http://www.whitehouse.gov (visited Jun. 8, 2003).

[34] George W. Bush, *Address to the Nation by the President of the United States*, 147 CONGRESSIONAL RECORD H5737, 5859, 5861 (daily edn. 20 Sept. 2001).

[35] *See*, Detlev Vagts, *Hegemonic International Law*, 95 AJIL 843 (2001); Krisch, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135 (Michael Byers and Georg Nolte eds., 2003). The latter presents such a version of an hegemonic law. However, it remains unclear whether this is the description of an "is", an "ought", or simply the U.S. perspective.

itself created – which enables the United States, in effect, to govern other States."[36] Indeed, the United States insists on the fulfillment of the obligations of other States under Article 25 of the Charter, in particular regarding the anti-terrorism measures contained in SC Res. 1373 (2001) and in the subsequent decisions of the Counter-Terrorism Committee of the Security Council – mechanisms it has itself contributed to create. The United States practices a strategic and, at times, tactical use of international law – trying to impose obligations on others while remaining unrestricted itself. Being the single superpower, it can make the most out of the sovereign rights extended to it by the international legal system. Nevertheless, other actors do exactly the same – look at the recriminations against France because of its threat of veto to short-change all attempts by the United States and Britain to receive the backing of the Security Council for their invasion of Iraq. Nevertheless, the separation of law and power has it that the United States may (ab)use international prerogatives or violate international law, but it cannot make international law for itself. As Michael Reisman – a staunch defender of the United States using its power to extend human dignity around the world – has put it, pre-emptive self-defence will only become legal if and to the extent the U.S. claim is accepted by other States.[37]

Thus, "sovereign equality" does not constitute a utopian description of a world-to-be in which all States are equal in power and well-being, but a principle how to create and enforce norms binding on other States. Sovereign equality always was a legal fiction, but is, as Pierre-Marie Dupuy has observed, nothing less than the "constituent" fiction of international law.[38]

At the very moment when the most powerful member, which has so-far maintained the system in the first place, questions the binding character of international law, and thus the binding character of its own formal pronouncements (treaties) and actions accompanied by conviction of their legal character (customary law), international law becomes threatened as such.[39] This would not extend to the United States the characteristics of a world government,[40] but of an imperial power that imposes

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[36] Krisch, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 136 (Michael Byers and Georg Nolte eds., 2003).

[37] *See*, Reisman, *supra*, note 19.

[38] P.-M. Dupuy, *Comment*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 176, 178-79 (Michael Byers and Georg Nolte eds., 2003).

[39] Similarly, Dupuy, *supra*, note 38, at 183.

[40] *But see* Krisch, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 166 (Michael Byers and Georg Nolte eds., 2003), still with a question mark. *But, see, ibid*., at 173 ("[D]espite the caveats above, the United States still operates in a fashion similar to a world government.").

its commands and laws on others without being bound by them itself[41] – a Hobbesian sovereign indeed.[42] But as Hobbes is not any more acceptable in a democratic society under the "rule of law," modern international law could neither accept a world government by the single superpower without legal checks and balances.

Michael Byers warns of such a development as a consequence of the justification of the so-called pre-emptive self-defense: "the effort to change the rules concerning the use of force … is an effort to alter dramatically this important area of international law in favor of the United States. If the effort succeeds, the United States will be able to justify a substantial portion of its military action on the basis of a modified customary international law right of self-defense – one that is not subject to the constraints of the UN Charter. … The result would – at least with regard to the rules on the use of force – amount to an imperial system of international law."[43] Byers' ensuing claim that the U.S. attempts show that to change the rules is by far preferable to an open defiance of their relevance, may however be too optimistic. The U.S. has made it abundantly clear that it will not regard itself as bound by rules which do not conform to what it perceives as its security interests. Thus, international law in a hegemonic sense will either not contain any limits to U.S. power, or it will be disregarded. In either case, international law as such will be irrelevant as a factor in U.S. decision-making.

This need not remain so. And indeed, Byers is right that the U.S. does both – openly disregard rules of international law it considers inimical to the pursuit of the "war on terrorism" and the former "axis of evil," and put forward a claim how to change the rules on the use of force to allow for unilateral pre-emptive self-defense. The more the United States understands that it has a long-term interest in the existence of a strong international law to fight international terrorism and the spread of weapons of mass destruction, the more it will be ready to accept certain constraints on itself. And indeed, it is the task of the rest of the world, in particular the Euro-

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[41] Krisch's assertion that a government is not bound by rules (Krisch, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 169 (Michael Byers and Georg Nolte eds., 2003)) flies in the face of the Western tradition as encapsulated in John Adams' pleading for a "government of laws, and not of men." John Adams, Boston Gazette 1774 No. 7. For a transfer of this adage to the international sphere, *see*, Elihu Root, *Letter of the Honorable Elihu Root to Senator Henry Cabot Lodge regarding the Covenant of the League of Nations, 19 June 1919*, 13 AJIL 596, 597 (1919); Bruno Simma, *International Adjudication and U.S. Policy – Past, Present, and Future*, *in* DEMOCRACY AND THE RULE OF LAW 39, 56 (N. Dorsen and P. Gifford eds., 2001).

[42] Krisch, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 170 (Michael Byers and Georg Nolte eds., 2003).

[43] M. Byers, *Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change*, 11 JOURNAL OF POLITICAL PHILOSOPHY 171, 189 (2003).

pean allies, to make the case that respect for international law is the best avenue to achieve global co-operation on these vital issues. Ultimately, U.S. hegemony is very strong regarding military means, but in other areas such as the economy or human rights, U.S. leadership is quite far from being globally recognized and accepted. Thus, the relationship between military hegemony and international legitimacy, between power and law needs to be permanently negotiated and re-negotiated. International institutions, in particular the Security Council, still constitute the best *locus* for this process of negotiation and adjustment.

V. Democratic Imperialism vs. Pluralism

Closely related to, but nevertheless distinct from, the question of "hegemony versus sovereign equality" is the cultural and ethical dimension. The argument in favour of "regime change" in Iraq is closely linked to the claim of the primacy of "Western" or even "U.S." values. This value optimism is not limited to the Bush administration. Since the end of the Cold War, liberal and neoliberal philosophers and international lawyers are increasingly looking for an international law that would not treat each State alike. Nobody less than John Rawls has embraced a distinction between "liberal" and "non-liberal" States, with "authoritarian" but not "totalitarian" States in the middle.[44] Others view a "democratic caucus" within the UN as more apt in deciding on the use of force for humanitarian purposes than the Security Council.[45] However, if the use of force shall be based on the consent of the larger part of the community, and not only of States deemed "democratic", it seems almost impossible to draw a line between democratic and non-democratic rather than between peaceful (or, in the language of Article 4 of the Charter, "peace-loving") and non-peaceful States.

However, the emphasis of the Charter on the primordial value of peace allows for an argument based on the more peaceful nature of "democratic" States. The step from the theory of "democratic peace"[46] to the justification of intervention in "non-liberal" States is a small, but significant one. The "democratic peace" thesis originates in an analysis of State interests and behaviour: Liberal and democratic States

[44] John Rawls, *The Law of Peoples*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 41, 44 et seq. (S. Shute and S. Hurley eds., 1993); see, also, John Rawls, THE LAW OF PEOPLES WITH THE IDEA OF PUBLIC REASON REVISITED 3-128 (1999).

[45] Anne-Marie Slaughter, *Präzisionswaffe Völkerrecht, Die Demokratien müssen sich verbünden – zu einer neuen Kraft innerhalb der UN*, DIE ZEIT Nr. 28, Jul. 3, 2003, p. 11. See also Creation of UN Democracy Group Urged, http://www.freedomhouse.org/media/pressrel/081203.htm (visited Aug. 21, 2003).

[46] *See, only*, Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHILOSOPHY AND PUBLIC AFFAIRS 205 (1983); BRUSS RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST COLD-WAR WORLD (1993).

loathe war because it hurts their own populations and interests as much as those of the enemy. This description is turned into a prescription for unilateral intervention: only if the world becomes liberal and democratic in the Western image, will it live in peace. Wilson's "War to End all Wars" comes into mind.[47] The "democratic peace" approach, whether it is grounded in evidence or not,[48] can however not guarantee peace in a world which is still less dominated by liberal and democratic States than one may wish. When it is used to justify the use of force, it will easily lead to the opposite, namely a global war for Western values with truly disastrous consequences.

The claim that democratic and liberal values are the only ones that count is and remains problematic in a pluralist world. International law has always been the space where conflicts of values (and interests) have been negotiated. Contemporary international law contains a whole set of values which are deemed primordial – or *ius cogens*. Democratic governance, however, does not belong to them, because the precise definition and implications of "democracy" are still in dispute. In principle, this forbids a democratic imperialism that would use force to implement democracy. Nevertheless, the promotion of liberal and democratic values by itself is, of course, permissible and even required, as evident by reading the International Human Rights Covenants. If used parsimoniously, and not as implying a close copying of the U.S. or other Western constitutions, liberal and democratic values can lead to the expression of pluralism rather than its suppression by force. However, credibility is won with great difficulty, but easily lost. Thus, it should be in the self-interest of liberal and democratic States to use force only in extreme cases, when their own security or the core values of the whole international community are at stake.

Again, international law does not deliver ready-made solutions. It may, however, provide a basic framework for the peaceful exchange and balancing of often-conflicting values. In that respect, it appears more relevant than ever, and its observance does not constitute a sign of weakness, but of an understanding of the need for mutual trust and cross-cultural understanding.

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[47] Cf., THOMAS J. KNOCK, TO END ALL WARS. WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER (1992).

[48] For a balanced assessment, *see*, John N. Moore, *Solving the War Puzzle*, 97 AJIL 282 (2003); for a sharp critique, *see*, Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EJIL 449, 463-67 (1997).

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D. Conclusion

The Iraq conflict has divided "the West" more than any other since the end of the Second World War. However, it also provides us with a set of conflicting views about international law and international relations, both in the argument for the invasion as in the argument against it. What does this tell us for the future of international law? And what for the future of transatlantic ties?

There exists an inherent danger to throw out the baby with the bathwater. The Iraq conflict was a momentous event, certainly, but not the first instance where the world superpower has disregarded the international rules on the use of force – to the contrary, international textbooks are replete with examples, from Grenada to Sudan. International law has always been weak on enforcement. But, arguably, it has lost, in the Iraq war, nothing of its usefulness in a world grappling with an hegemonic, if benevolent, power, on the one hand, and the value of pluralism in a multi-faceted world, on the other.

The rest of the world, and Europe in particular, depends on a United States that is willing to employ its huge military and economical capabilities for issues of global concern and the implementation of international law. Without the power of the hegemon, international law remains a dead letter. In the absence of a world State with a world police force – a nightmare rather than a dream – the enforcement of international rules and principles simply cannot do without "coalitions of the willing" acting with the support of the single superpower. However, if power and legitimacy shall not remain apart, they need to negotiate with each other. To take up Kagan's image, the relationship between Venus and Mars may be tempestuous, but neither can live without the other, even if they may not meet at the Four Seasons Hotel, but rather in a shabby place at the East River.

Power without international recognition and legitimacy will not be viable. Legality without power will remain a dead letter. The compromise between law and power has to be negotiated and re-negotiated. The global institutions where this permanent negotiation takes place may be slow, bureaucratic, burdensome, cynical. But if they did not exist, we would have to invent them. Certainly, there is space for reform. Issues of democratic legitimacy are increasingly playing a role in the recognition of governments, and we should greet this development with cautious support. But the new compromises can only be found and implemented when based on the very consensus that is the precondition for the existence of an international community – and the law which provides the language and terms of its existence. That is not a matter of weakness of strength. It is because, and not although, rationales of power and morals are in a permanent process of change and re-adjustment, that

international law remains an indispensable tool both for the strong and the weak in the pursuit of a more peaceful and just world.

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