The International Legal Order in Global Governance

Norms, Power and Policy

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ISBN 978-3-031-16056-1 ISBN 978-3-031-16057-8 (eBook)
https://doi.org/10.1007/978-3-031-16057-8

Cover illustration: Maram_shutterstock.com

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

To my parents,
For making everything possible

Preface

This book is the result of a process spanning fifteen years and the ideas developed therein have accompanied me throughout most of my academic and professional journey. It originated with a doctoral dissertation at the University of Frankfurt am Main, which sought to explore the complex interaction of law and politics in international relations, with the aim of uncovering the role of the international legal order in shaping social action.

The inaugural work was undertaken in the framework of a wider project of the Research Centre on "Normative Orders", whose remit consists in analysing the social dynamics in political, legal and economic orders, and how power affects these processes. It focuses in particular on contemporary social conflicts about a fair order of society in times of globalisation and seeks to probe the normative ideas underlying these conflicts and processes. The term "normative orders" here is understood as orders of justification based on particular narratives that favour certain legitimations. In this context, norms shape the range of legitimate action. These issues continue to be highly relevant, as evidenced by the current challenges to the prevailing international legal, political and economic orders, which are defended with power yet at the same time are still fragile.

The questions at the centre of this study are approached on a consciously interdisciplinary basis, involving international law, political science, economics, sociology and psychology. While my initial engagement with the subject was predominantly academic, it continued

throughout my professional career and the findings in this book represent the combined insights from scholarly research in Europe and the United States and almost twelve years in the diplomatic service. The thoughts developed in the following chapters, therefore, not only seek to reflect the state of the art from the vantage point of scholarship, but also in terms of a practical perspective covering the UN Security Council, the European Union, the World Trade Organisation, the International Criminal Court and acting as agent before the Court of Justice of the European Union.

In international life, even debates about issues that are essentially political are generally cast in legal terms and arguments are framed with reference to legal orders. Actors assert their actions as vindicated by, and contest the behaviour of others as incompatible with, existing norms. The conflicts and tensions giving rise to these debates remain acutely relevant, if only to name the discussions around collective security in the face of aggression, about strategic autonomy and the European Union's role in the international arena, on upholding accountability for international crimes, as well as concerning global equity and justice in the wake of the COVID-19 pandemic.

The perspective adopted in this book aims to be forward-looking in charting novel approaches to the role of international law in shaping behaviour, while remaining firmly grounded in the actual practice of contemporary international relations and relevant both for decision-makers and as an incentive for future research.

Brussels, Belgium — Alain Germeaux

Acknowledgements

Embarking on a venture of this scale inevitably entails a number of intellectual and personal debts.

I would like to mention two people in particular, who stand out for their singularly important contributions and unwavering support, and whose guidance I could always count on in setting the course for both my academic and professional life. It is not too much to say that this book would not have been possible without them.

From the earliest stages, my doctoral adviser Stefan Kadelbach encouraged me to chart and persist with an ambitious approach to this endeavour. I am immensely grateful for his wisdom, perseverance, trust and precious advice, which have shaped my thinking far beyond the remit of academic life.

Georges Friden has accompanied my journey in the diplomatic service from the very beginnings. He is a constant source of inspiration in my academic and professional work, and in my career generally. I feel exceptionally privileged to have learned from and worked with him over the years.

I am also deeply grateful to Kal Raustiala, Richard Steinberg and Aslı Bâli at UCLA, and Marc Weller at the University of Cambridge for their particularly valuable advice, which has helped widen my horizon and who have encouraged me to develop my ideas in distinctive ways.

The conversations and exchanges I had over the years are too many to name individually. Brigitte Stern at Université Paris I (Panthéon-Sorbonne) and Thomas Bruha at the University of Hamburg have sparked my interest in public international law and the conduct of international relations that led to this endeavour. Over the years, I have also benefited from the insights of Harold Koh, Joseph Weiler, Richard Dicker, Cordula Droege, as well as lively discussions about international law and justice with principals of the International Criminal Court, numerous colleagues at the European External Action Service, the European Commission, the Council Legal Service, NATO, the United Nations and my counterparts in other member states. I am further grateful for the perceptive comments of the members of the international legal theory workshop at UCLA and the international law discussion groups at Cambridge.

The editorial team at Palgrave were encouraging throughout the publishing process with friendly advice and admirable perseverance through the COVID-19 pandemic and the vicissitudes of multiple lock-downs. I would also like to thank the three reviewers for their helpful and constructive feedback.

The Max Planck Institute for Comparative Public and International Law (Heidelberg), as well as the Max Planck Institute for International, European and Regulatory Procedural Law (Luxembourg), warmly welcomed me at different periods of the project and graciously accorded access to their materials and resources.

The Luxembourg National Research Fund contributed to the funding of this project with a research grant.

My gratitude goes to all who had the dubious pleasure to read and edit parts of the manuscript at various stages of the project. It goes without saying that any remaining errors remain solely my own responsibility.

Last, but certainly not least, I would like to thank my family and friends who accompanied me throughout this journey, sharing the good and the hard times. I am sure they are as relieved as I am to see this book come to fruition.

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About the Author

Alain Germeaux joined the diplomatic service after working as research fellow at the Research Centre on Normative Orders, the University of California, Los Angeles, and the University of Cambridge. He is legal adviser to the Luxembourg foreign ministry and served on the UN Security Council, the European Union and as agent to the Court of Justice of the European Union and head of delegation to the International Criminal Court. He holds degrees in public international law and European Law from Université Paris I (Panthéon-Sorbonne) and the University of Hamburg, and a Ph.D. from the University of Frankfurt am Main.

Acronyms

ACT	Accountability, Coherence and Transparency
AIIB	Asian Infrastructure and Investment Bank
AJIL	American Journal of International Law
AML/CT	Anti-money laundering/countering terrorist financing
ASIL	American Society of International Law
ASP	Assembly of States Parties
ATT	Arms Trade Treaty
AVR	Archiv des Völkerrechts
BCBS	Basel Committee on Banking Supervision
BCR	Binding Corporate Rule
BIS	Bank of International Settlements
BYIL	British Yearbook of International Law
CFR	United States Code of Federal Regulations
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CLS	Critical Legal Studies
CONG. REC.	Congressional Records
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRS	Common Reporting Standard
E3+3	Group of countries involved in the negotiations on the Iranian nuclear programme (also called P5+1)
EEA	European Economic Area
EJIL	European Journal of International Law
FATCA	Foreign Tax Account Compliance Act
FATF	Financial Action Task Force

FCO	Foreign and Commonwealth Office
FR	Federal Register
G7	Group of Seven Industrialised Nations
G8	Group of Eight Industrialised Nations
G20	Group of Twenty major economies
GATT	General Agreement on Tariffs and Trade
GDPR	General Data Protection Regulation
GGE	United Nations Group of Governmental Experts
GYIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
IACHR	Inter-American Commission on Human Rights
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development (*thereafter The World Bank Group*)
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICT	Information and communication technology
ICTY	International Criminal Tribunal for the former Yugoslavia
IGN	Inter-governmental negotiations
IHL	International Humanitarian Law
ILC	International Law Commission
IMF	International Monetary Fund
IRMCT	International Residual Mechanism for Criminal Tribunals
ISIS	Islamic State in Iraq and Syria
JCPOA	Joint Comprehensive Plan of Action
LAWS	Lethal Autonomous Weapons Systems ("killer robots")
LGBTIQ+	Lesbian, gay, bisexual, transgender/transsexual, intersex and queer/questioning
L.N.T.S.	League of Nations Treaty Series
MDR	Mandatory Disclosure Rules
MFN	Most Favoured Nation
Michigan JIL	Michigan Journal of International Law
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NPT	Treaty on the non-proliferation of nuclear weapons
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development
OEWG	United Nations Open-ended Working Group
OFAC	Office of Foreign Assets Control
O.J.	Official Journal of the European Union

OPCW	Organisation for the Prohibition of Chemical Weapons
OPT	Office of the Prosecutor
P5	Permanent Members of the UN Security Council
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee
R2P	Responsibility to Protect
RC	Review Conference
RCAP	Regulatory Consistency Assessment Programme
RGDIP	Revue générale de droit international public
SCC	Standard Contractual Clause
SOFA	Status of Forces Agreement
START	Strategic Arms Reduction Treaty
SWGCA	Special Working Group on the Crime of Aggression
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
T.S.	United States Treaty Series
TTC	EU-US Trade and Technology Council
UNCLOS	United Nations Convention on the Law of the Sea
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UN R.I.A.A.	United Nations Reports of Arbitral Awards
U.N.T.S.	United Nations Treaty Series
U.S.C.	United States Code
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation
Yale JIL	Yale Journal of International Law
ZIB	Zeitschrift für internationale Beziehungen

Table of case law

1. *Arbitral Awards*

2. *Court of Justice of the European Union*

3. *European Court of Human Rights*

4. *International Court of Justice*

5. *International Criminal Court*

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CHAPTER 1

Introduction

The space occupied by international law in shaping social action is subject to much debate and controversy. Conceptualising the impact of international law on behaviour forms part of the enduring puzzle how law operates in the international system. The range of answers stretches from the vision of law as an ordering system in the international realm[1] to the view that international law is merely epiphenomenal to power.[2] Due to the absence of central authority, the "anarchic" international system, it is a fact of life that actors will always be tempted to evade norms when these do not fit their purposes. This is especially the case for powerful actors, endowed with the material capabilities and economic resources to shape realities in their favour. According to this view, international law is living a "moth-like existence", continuously circling around the precarious flame of power.[3] Yet even a quick glance reveals that actually, international law is all around us. It is involved, for instance, in the administration of public goods within the body politic, defines territorial delimitation and jurisdiction, regulates intellectual property, accords human rights and fundamental freedoms, and contributes to the establishment of transactional frameworks for actors in the international realm. Even in instances where actors seek to evade international law, they do not simply ignore it; they attempt to circumvent its limitations, sometimes with significant effort. The experience of arguably the most powerful actor in the current shape of international organisation, the United States, draws a

A. Germeaux, *The International Legal Order in Global Governance*,
https://doi.org/10.1007/978-3-031-16057-8_1

mitigated picture. Under the Trump administration, it attempted to undo itself from the inconvenient fetters of international law in favour of the unilateral "me-first" approach, announcing its withdrawal from the Paris Agreement on climate change, the Joint Comprehensive Plan of Action for the Iranian nuclear programme and the World Health Organisation.[4] Several years later though, it finds itself again as a party to the Paris Agreement, involved in negotiations to revive the Iranian nuclear agreement and cooperating within the global health architecture in devising pandemic responses and prevention. Despite vast material resources and economic leverage, raw power alone is not enough to sustain lasting influence over the international system in the long term. This is particularly the case for global issues that require collective solutions. Most major international challenges cannot be solved by any one actor individually and necessitate cooperation, which, in turn, requires a normative framework for actors to communicate, exchange claims and justify conduct.

The COVID-19 pandemic and the Russian aggression against Ukraine have placed the international legal order under renewed strain and the succession of these events has been characterised as the most significant challenge to the international community since the creation of the contemporary multilateral system. The resurgence of armed conflict in Europe through the invasion of a sovereign country shook the normative foundations of the system of collective security based on international law.[5] The response to the global health emergency raised acute issues of equity and justice with regard to the prevailing international legal order, notably concerning the provision of medical supplies, global vaccine distribution and intellectual property rights.[6] COVID-19 has shone a glaring light on the flaws of a system overly dependent on individual action, where "me-first" approaches stymie precisely those international cooperative efforts that are required to resolve a threat to the international community as a whole, as the virus does not spare the rich and powerful actors. In the face of a threat that no single actor can address alone, cooperation within an agreed, normative framework is essential, for instance in ensuring universal and equitable access to safe, efficacious and affordable vaccines, medicines and diagnostics.[7] Confronted with the limitations of unilateral approaches, actors' initial egocentric responses, therefore, progressively gave way to a more collaborative approach, culminating in the consensus decision of the 2021 World Health Assembly special session for the elaboration of an international instrument under the Constitution of the World Health Organisation aimed at protecting the

world from future infectious diseases.[8] While the normative framework to structure the indispensable collective action in fighting future pandemics is work in progress, actors have at least agreed to be guided by collective solidarity, anchored in the principles of fairness, inclusivity and transparency in ensuring more accountability and more shared responsibility in the international system.

At the same time, the temptation to evade international law for political expediency is not easily done away with. Following the decision of the United Kingdom to withdraw from the European Union, an agreement was negotiated between the parties and ratified in 2020 to formalise this process. The Withdrawal Agreement includes a section, or protocol, on Northern Ireland in order to ensure the unimpeded flow of goods with the Republic of Ireland. While the terms of the Withdrawal Agreement provide for the provisions of this treaty to supersede domestic law, several months after its entry into force, the United Kingdom tabled draft domestic legislation in Parliament, the Internal Market Bill, whose content contradicted the Withdrawal Agreement, and would, therefore, breach the United Kingdom's obligations under international law.[9] The European Commission responded by insisting that implementation of the Withdrawal Agreement is an "obligation under international law and a prerequisite for any future partnership".[10] The European Parliament as co-legislator likewise deplored what it considered a serious and unacceptable breach of international law.[11] The European Union viewed the tabling of the domestic legislation as an attempt at changing parts of an agreed international instrument unilaterally, breaching the Union customs code applicable to Northern Ireland in the process as well as overriding rules of state aid and the jurisdiction of the Court of Justice of the European Union that the United Kingdom had itself agreed to in the negotiations.[12] After an extraordinary meeting of the EU-UK Joint Committee, the European Commission consequently insisted that "the Withdrawal Agreement has legal effects under international law and neither the EU or the UK can unilaterally change, clarify, amend, interpret, disregard, or dis-apply the agreement".[13] The scenario repeated itself in 2022 but in both instances the European Union was not prepared to deviate from the Withdrawal Agreement, and international instrument negotiated in good faith and ratified by the national parliaments of all member states.

Other actors perceived what the United Kingdom government proclaimed "a relatively trivial set of adjustments" as a disconcerting willingness to renege on an international treaty when it does not meet its domestic political ends.[14] This was viewed in the international arena as an infringement to the rule of law indicating that the United Kingdom could not be trusted in negotiations, thereby entailing a potential direct impact on the United Kingdom's reputation and credibility. Breaking international law has reputational costs and repercussions in terms of increased transaction costs in the future. What is more immediately problematic, however, is the perception of double standards, of holding others to account by rules one disregards oneself, particularly in instances where cooperation is necessary for effective implementation. Furthermore, reneging on the Northern Ireland Protocol while proclaiming that other actors must respect and uphold international law is hardly a credible proposition and risks undermining the international legal order that the United Kingdom itself depends on. While international law may not be able to entirely supersede power, neither can actors entirely evade international law, as withdrawing from international obligations is not sustainable in the long term, even for dominant actors. Instantiating influence in the international sphere requires norms and ideas just as much as guns and money.

1 International Law and Political Science

The present enquiry seeks to probe the role of norms in determining social behaviour in the international system.[15] It is, in short, an attempt to explain how and why international law may impact the behaviour of actors in international relations, when there is no central authority to enact common rules for the international system and no centralised enforcement mechanism to provide for the uniform application of those rules. As such, it can be said that this project, though essentially concerned with the application of legal norms, is at the intersection of international law and political science, especially its subfield of international relations. While recent decades have seen a flourishing of interdisciplinary approaches to role of norms in the international realm,[16] it is commonly accepted that the field currently known as international relations essentially took shape in the period of 1919–1945 out of a sense of disillusionment of a group of Anglo-American legal scholars with the prevailing accounts of international law at the time.[17] After this split with international legal scholarship

in the post-1945 era, both disciplines pursued different analytic missions using different methods of inquiry. As the Cold War froze international law largely in a facilitative mode, international legal research centred on process and the interpretation of legal norms, whereas international relations tended to disregard international law altogether and focus on underlying forces such as power and interest[18]. Despite looking at the same subject matter—the factors determining the behaviour of actors in the international arena—both fields pursued different analytic missions. The antinomic frame of analysing law as an "ought" and politics as an "is", between factuality and validity, power and norms, led Jürgen Habermas to caution: "*Torn between factuality and validity, political science and legal science [tend to] fall into camps that hardly have anything to say to each other. The tension between normativist approaches, which are always in danger of losing contact with social reality, and objectivist approaches, which fade out all normative aspects, can be understood as a warning not to fixate on one disciplinary line of vision, but to keep oneself open to different methodological locations, different theoretical objectives, different role perspectives and research pragmatic attitudes*".[19] The appeal for providing a framework in analysing social phenomena that is inclusive of the wider spectrum of methodological approaches within the perspectival kaleidoscope, while maintaining the contextual criticality of the individual orientations, resonated throughout social and political theory.

The period following the end of the Cold War marked the beginning of a renewed mutual interest of both disciplines in the work of one another and an increasing interaction between the two. Based on an understanding that the frontier of social science research is about establishing evidence, not mutually exclusive theories, international law and international relations have "rediscovered" each other in an effort to provide more informed interpretations about the role of norms in international life. Yet this interdisciplinary dialogue has been viewed critically by some of its adherents for essentially moving in just one direction in the way that findings have been articulated, with the predominance of international relations approaches and methodologies being imported into the field of international law. This imbalance between the disciplines, in turn, creates friction, which has been attributed to different substantive theoretical approaches, different epistemologies and different conceptions of law.[20] In the decades following World War II, political science was essentially organised around clearly delineated theories of

international politics.[21] This rigid distinction of paradigms can be problematic when a combination of factors, such as norms and power, may shape behaviour, and is, therefore, increasingly abandoned in favour of more hybridised theories. Such approaches add complexity to the analysis by trading off parsimony for an expanded explanatory dimension,[22] while aiming to reverse the imbalance between international law and international relations in offering an analysis of normative phenomena in international relations based on a more thorough engagement with the practices of international law.[23] Efforts to uncover the ways in which international law operates often revolve around the notion of compliance, in the sense of whether behaviour aligns with norms. Purely compliance-based approaches do, however, suffer from inherent limitations. First, an assessment that actors largely comply with their international obligations does not account for the counterfactual difference that norms may exert.[24] In other words, it does not explain how international can be relevant for actors' behaviour distinct of the course of action they would have taken in the absence of international law's normative guidance.[25] Second, measuring compliance with international law does not account for the actual content of the rule in question, which may be shallow or merely restating pre-existing commitments, in short, it does not offer an account of the actual effectiveness of international law.[26]

2 International Law in Explanatory Schemes for Social Action

The question of whether international law is actually moulding external relations or political outcomes is open to much debate, but it is inherently difficult to deny the role of international law altogether. At its most basic, international law impacts external relations as a justification for political action, or in the words of a former legal adviser of the Foreign and Commonwealth Office: "*There is room for the view that all that States need for the general purposes of conducting their international relations is to be able to advance a legal justification for their conduct which is not demonstrably rubbish. Thereafter, political factors can take over, and the international acceptability or otherwise of a State's conduct can be left to be determined by considerations of international policy rather than of international law*[27]".

But is it really that simple? Philip Allott asserts that the fragmentation of the international legal order and power asymmetries have left us

with a "*legal wasteland*", a world that is essentially lawless since "*those involved in events and transactions can pick and choose among competing and conflicting legal systems to suit their purposes*".[28] While it can be presumed that actors are endowed with interests and that, at a minimum, they tend to act in pursuance of those interests, even more so for the most powerful actors, this at the very least still implies that actors are embedded in a social context structured by norms while relying on international law to justify their conduct in the international arena. As such, international law is not merely a normative guideline or a blueprint for norm-conforming behaviour; it is also a means of communication and justification for action. According to Friedrich Kratochwil, the indeterminacy of many norms of international law and the resulting need for actors to engage in interpretative exercises do not amount to norms being indifferent to behavioural outcomes. Rather, the explanatory schemes of social analysis have inadequately captured the pathways between norms and actions, given that in the broadest understanding, all social action is rule-governed since it can only make sense within the framework of norms that provide actors with meaning for an action: "*Norms are therefore not only 'guidance devices', but also the means which allow people to pursue goals, share meanings, communicate with each other, criticize assertions, and justify actions*".[29]

Even those actors endowed with vast material capabilities accordingly aim to justify their actions on the basis of international law. This might *prima facie* be due to the fact that operating under the cover of international legitimacy reduces transaction costs, optimises the administration of public goods within a social system and maximises international support for their actions.[30] This is at the heart of the realist vision of international relations, which views international law essentially as a means of facilitation and which may ultimately be dispensed with when it comes to essential security interests such as the recourse to force. However, communicative action theory has shown that this approach does not account for the importance of justification: actors seek to defend their actions by reference to a common normative framework. Although realism does account for this use of language, it maintains the assertion that actors can always find a rationale to give their actions the cover of legitimacy. Language, however, is not infinitely malleable, and not every choice is as good as any other. In the presence of norms open to interpretation, the existence of multiple possibilities, on the one hand, and the need for actors to justify their particular course of action, on the

other hand, may naturally induce some degree of conflict. It does not, however, validate the presence of a "legal wasteland" where anything goes. The absence of single right choices does not equate the nihilistic conclusion that faced with a plurality of possibilities, actors can simply pick and choose from an array of options, any of which being as valid as any other.[31] International law not merely empowers or impedes actors from making authoritative decisions in the international arena, but also conditions the ideas and identities of actors, thereby guiding their actions into certain behavioural paths aligning with the values and power relations prevailing within the social system.[32] The notion of international law impacting behaviour does not imply any physical or material restraint on actors; rather, the idea of constraint in the international arena is linked to actors being embedded within a social context structured by norms.[33]

As Christian Reus-Smit has argued, once policymakers engage themselves in the practice of legal justification, they enter into a distinctive language in which political actions are taken within a normative framework that is defined and redefined through actors' discursive interaction.[34] The range of arguments that actors can invoke is thus limited by the normative context, in that actors operate within this normative framework whose rules may be open to interpretation, but their meaning cannot be stretched indefinitely. Actors can correspondingly only legitimate a restricted range of options.[35] Naturally, powerful actors always retain the option of relying on their material capabilities by resorting to force. Yet despite this fact, actors reason and justify on the basis of norms, and one has to look very far for instances where actors openly acknowledge to be acting in violation of international law, which is why the United Kingdom's intention to act in breach of international law in relation to the Northern Ireland Protocol in the wake of Brexit was such a striking public acknowledgement. Even if it is to be assumed though, that the language of legal reasoning sets finite limits to what can be justified as lawful, the indeterminacy of the norms of international law still leaves room for disagreement, and thus opens space for policy-based rationales. Actors might agree on a common language in the form of international law, but this still leaves open the possibility for argument about the meaning, the interpretation and the application of particular provisions.

Communicative action theory has taken up this question, and previous research has shown that argumentative persuasion can have a measurable impact on behavioural outcomes. Drawing from social psychology and

the philosophy of language, these approaches have advanced a theory of communicative action that tries to capture the role of arguments in the international arena.[36] The key insight of these theories is that once actors engage in communicative action, they do not necessarily try to maximise their own interests, but become ready to succumb to argumentative persuasion and thus change their position.[37] There remains a conceptual heterogeneity among the adherents of these approaches, the central dividing line being the question whether a change in behaviour is due to a reformulation of the actor's interests through the interaction or if, following a rational logic, actors adapt their behaviour in light of new causal knowledge arising out of interaction, without inducing a change in interests. In other words, does international law have the power to alter actors' interests or are changes in behaviour simply the result of a rational adaptation to newly emerging causal information? At this stage, it shall not be determined whether either of these alternatives is necessarily right or wrong. Rather, the essential element is that through interaction, international law can have a decisive impact on behaviour, even if the actors concerned are materially capable of pursuing their interests without resorting to the cover of international legitimacy. The importance of social processes and norms has already been highlighted for international life, even in cases with asymmetrical relationships of power. But the communicative dynamics and the social construction of meaning in the international system merit a more comprehensive charting of the methodological landscape to generate clearer insights into revealing the factors relevant in decision processes.[38] Further, for the most part international legal research has centred predominantly on an abstract analysis of legal norms and doctrines, neglecting the actual role of international law in impacting behaviour in external relations. The former French judge of the International Court of Justice Guy de Lacharrière accordingly noted that "*there is a clear imbalance in favour of the abstract discipline (international law) to the detriment of a concrete approach in terms of the conduct of states and other subjects of international law, i.e. in terms of the conduct of decision-makers in the field*".[39]

On the basis of these insights, the present enquiry aims to develop a communicative action-based approach to probing the impact of international law on behaviour. Paul Kahn has identified the conceptual gambit in analysing the operation of law in a social system as the complex interplay of norms and power: "*The rule of law may be a fiction, but it is not merely fictional. It is a form of power – one that works from within the subject*

rather than as an external limit upon an already present subject". In this sense, an understanding of how international law operates requires "*an examination of the rule of law in its continuing struggle with alternative approaches of the political*".[40] For the purpose of this analysis, the argument advanced is that international law "matters" to actors by shaping their perception of the available courses of action through the dynamics of social interaction combined with rational interest-calculation. In his classic essay on "clouds and clocks", Karl Popper sought to develop an approach to the problem of rationality,[41] which was later translated to the study of politics.[42] He uses the metaphor of clouds and clocks to represent the notions of determinacy and indeterminacy in a system, whereby one should imagine a continuum from irregular, disorderly and unpredictable clouds to regular, orderly and predictable clocks. This conception of indeterminism allows for analysing empirical phenomena that do not correspond to a rational, calculated logic, since human behaviour can be inherently difficult to quantify. He follows with a general theory of abstraction, based on the role of abstractions and rule-governed systems of abstractions in structuring an indeterministic and uncertain world. For Popper, sceptical of scientific positivism, science in this understanding is an abstract, rule-governed and linguistic process that facilitates critical examination as a form of generating insights about the world.[43]

International law and international relations tend to adopt an analytical perspective that rests on a formal and logical view of the world, premised on actors behaving rationally in an environment operating like clocks.[44] Social reality, however, is constantly evolving. The social world, as experienced by actors in real life, may, therefore, be better thought of and analysed as cloud-like, with indeterminate edges and in constant flux.[45] Examining international law from the vantage points of not only legal theory and political science, but also social theory, cognitive psychology, behavioural economics and linguistics furthermore presents the advantage of offering insights from other fields of study and the possibility to look at an issue "from the outside in" or second-image reversed,[46] thus revealing conceptual links or challenging theoretical assumptions from existing approaches. To the extent that the investigation is essentially concerned with legal norms, it can be said that it is primarily on the epistemology of international law. To the extent that the focus is on interaction between different actors in the international system, it is a work on international relations. Finally, insofar as the analysis takes up some of the

major developments in international law and political science, it is a study of political theory.

The structure of the following chapters will follow the path traced by three interrelated questions that animate this investigation, namely where do we come from; how do make sense of where we are; and, where do we go from here? Chapter 2 begins with recounting the storyline of international legal and political theory, and their respective encounters in charting a way of how we got here. It then sketches out the methodological landscape that is before us in setting out the scene of where we are now. Chapter 3 is concerned with the ways of making sense of where we are. It delves into the rationalist-normativist conflict in canvassing a communicative action-based approach capable of explaining the impact of international law on behaviour even under the contingencies of an anarchic international system and characterised by asymmetrical power. Chapters 4 and 5 probe the role of norms in instances relating to the use of force in international relations and the assertion of international criminal accountability. Finally, the conclusion addresses the way forward, the path of where to go from here in facing the frontiers in international law and international relations research, tracing routes for further exploration in mobilising the meta-empirical evidence on the subject.

Notes

1. See, e.g., Hans Kelsen, *Peace through Law* (1944); Hersch Lauterpacht, The Grotian Tradition in International Law 23 *BYIL* (1946), 1–53; Andrew Hurrell, International Law and the Changing Constitution of International Society, *in* Byers (Ed.), *The Role of Law in International Politics* (1993).
2. See, e.g., Carl Schmitt, *The Concept of the Political* (trans. of DER BEGRIFF DES POLITISCHEN, 1933) (1976); Hans Morgenthau, *Politics Among Nations* (1948); Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (2005).
3. Julius Stone, Approaches to the Notion of International Justice, *in* Black/Falk (Eds.), *The Future of the International Legal Order, Vol. 1: Trends and Patterns* (1969), 388.
4. See Harold Hongju Koh, *The Trump Administration and International Law* (2019).
5. Philip Allott, Anarchy and Anachronism: An Existential Challenge for International Law, *EJIL Talk*, 1 April 2022: https://www.ejiltalk.org/anarchy-and-anachronism-an-existential-challenge-for-international-law/; see also Nico Krisch, After Hegemony: The Law on the Use of Force and

the Ukraine Crisis, *EJIL Talk*, 2 March 2022: https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis/.

6. See Security Council Report, *Global Governance post-Covid-19*, 31 August 2020: https://www.securitycouncilreport.org/monthly-forecast/2020-09/global-governance-post-covid-19.php; Security Council Report, *Covid-19*, 31 March 2022: https://www.securitycouncilreport.org/monthly-forecast/2022-04/covid-19-3.php.
7. The need for collective action was acknowledged in the statement by 25 heads of state or government and of international agencies on 30 March 2021, see "Covid-19 shows why united action is needed for more robust international health architecture": https://www.consilium.europa.eu/en/press/press-releases/2021/03/30/pandemic-treaty-op-ed/.
8. World Health Organisation, *The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response*, World Health Assembly, Second Special Session, 1 December 2021, SSA2(5).
9. According to Article 4 of the Withdrawal Agreement, the provisions of this treaty take legal precedence over UK domestic law. In clause 45 of the Internal Market Bill (IMB), however, it is stated that the provisions of this domestic legislation take effect "*notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent*". Clause 45 (4) of the IMB, in turn, defines "relevant international or domestic laws" as not only the Withdrawal Agreement and Northern Ireland Protocol, as well as any European Union or international law provision, but also "*any convention of rule of international law whatsoever*".
10. Tweet by European Commission President Ursula von der Leyen, 7 September 2020: https://twitter.com/vonderleyen/status/1302907498014408705.
11. European Parliament, Statement of the UK Coordination Group and the leaders of the political groups, 11 September 2020: https://www.europarl.europa.eu/news/en/press-room/20200907IPR86513/statement-of-the-uk-coordination-group-and-ep-political-group-leaders.
12. European Parliament, *UK Internal Market Bill and the Withdrawal Agreement*, 10 November 2020: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659359/EPRS_BRI(2020)659359_EN.pdf.
13. Statement by the European Commission following the extraordinary meeting of the EU-UK Joint Committee, 10 September 2020: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1607.
14. See Here we go again: Britain and the EU head towards a shutdown over the Northern Ireland Protocol, *The Economist*, 18 May 2022.
15. Dirk Pulkowski refers to the classic international relations definition of the "international system" as "a set of relationships among the world's states,

structured according to certain rules and patterns of interaction", *in* Dirk Pulkowsi, *The Law and Politics of International Regime Conflict* (2014), 82. Janina Dill, in turn, relies on the 'international system' as "a historically enacted and evolving structure of common understandings, rules, norms, and mutual expectations [that are] continued and reproduced in agents' practice", *in* Janina Dill, *Legitimate Targets ? Social Construction, International Law and US Bombing* (2015), 27.

16. See Dunoff/Pollack (Eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013).
17. Michael Byers, *Custom, Power and the Power of Rules*, 21.
18. Oona A. Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics*, 1.
19. Jürgen Habermas, *Faktizität und Geltung* (1992), 21 (my translation).
20. Dunoff/Pollack (Eds.), Interdisciplinary Perspectives on International Law and International Relations, supra, 11–21.
21. Emilie Hafner-Burton, David Victor and Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 *AJIL* (2012), 47; Gregory Schaffer and Tom Ginsburg, The Empirical Turn in International Legal Scholarship: A Review and Prospective, 106 *AJIL* (2012), 1.
22. Richard Steinberg, *Wanted – Dead or Alive: Realism in International Law, in* Dunoff/Pollack, supra, 148, 155.
23. Kenneth Abbott and Duncan Snidal, *Law, Legalisation, and Politics: An Agenda for the Next Generation of IL/IR Scholars*, *in* Dunoff/Pollack, supra, 33.
24. Janina Dill, *Legitimate Targets ? Social Construction, International Law and US Bombing* (2015), 44.
25. David Fearon, Counterfactuals and Hypothesis Testing in Political Science, 43 *World Politics* (1991), 169; Gary King, Robert Keohane and Sidney Verba, The Importance of Research Design in Political Science, 89 *American Political Science Review* (1995), 475.
26. Dill, ibid. The key question is thus whether, absent international law, actors would have behaved differently. In international relations theory, international law is often times considered as causally dependent, in that it does not provide independent reasons for action. Dill distinguishes between compliance, effectiveness and the normative success of international law. Compliance refers to whether actors' behaviour aligns with the norm, effectiveness relates to an effect of the norm on actors' behaviour that would not occur absent international law, whereas normative success denotes the achievement of the underlying objective pursued by enacting the norm. In Dill's example, international humanitarian law is effective

when actors behave differently than they would in its absence, but normative success is achieved only through a reduction of the overall level of violence in armed conflict.

27. Arthur Watts, The Importance of International Law, *in* Byers (Ed.), *The Role of Law in International Politics*, 8.
28. Philip Allott, A Lateral View of the International System: Responding to the Collapse of Global Government, *EJIL Talk*, 14 October 2021: https://www.ejiltalk.org/a-lateral-view-of-the-international-system-responding-to-the-collapse-of-global-government/.
29. Friedrich Kratochwil, *Rules, Norms and Decisions*, 11.
30. Public goods in the international sphere may include, for instance, which actors have access to power, the allocation of property rights and jurisdiction, and the creation of stable transactions frameworks for the conduct of international relations.
31. Friedrich Kratochwil, *Praxis: On Acting and Knowing* (2018), 160.
32. Marc Weller, Hope and the Gradual Self-Constituting of Mankind, *EJIL Talk*, 16 October 2021: https://www.ejiltalk.org/hope-and-the-gradual-self-constituting-of-mankind/.
33. Nicholas Wheeler, The Kosovo Bombing Campaign, *in* Reus-Smit (Ed.), *The Politics of International Law*, 190.
34. Christian Reus-Smit, *The Politics of International Law*, 3.
35. Quentin Skinner, Some Problems in the Analysis of Political Thought and Action, *in* Tully (Ed.), *Meaning and Context: Quentin Skinner and his Critics*, 117.
36. See, e.g., Thomas Risse, 'Let's Argue!': Communicative Action in World Politics, 54 *International Organization* (2000), 1–39; Cornelia Ulbert and Thomas Risse, Deliberately Changing Discourse: What Does Make Arguing Effective?, 40 *Acta Politica* (2005), 351–361; Nicole Deitelhoff, The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case, 63 *International Organization* (2009), 33–65.
37. Chrisitan Grobe, The Power of Words: Argumentative Persuasion in International Negotiations, 16 *European Journal of International Relations* (2010), 6.
38. See Christer Jönsson, Diplomacy, Bargaining and Negotiation, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations* (20,002), 220, 227; Friedrich Kratochwil, Thrasymachus Revisited: On the Relevance of Norms and the Study of Law for International Relations, 37 *Journal of International Affairs* (1984), 344.
39. Guy de Lacharrière, *Politique juridique extérieure* (1983), 8 (my translation).
40. Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (1997), 5.

41. Karl Popper, *Of Clouds and Clocks: An Approach to the Problem of Rationality*, *in* Objective Knowledge: An Evolutionary Approach (1972).
42. Gabriel Almond and Stephen Genco, Clouds, Clocks and the Study of Politics, 29 *World Politics* (1977), 489–522.
43. Stephen Thornton, Karl Popper, *in* Edward N. Zalta (Ed.) *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition): https://plato.stanford.edu/archives/fall2021/entries/popper/.
44. Richard Price, Detecting Ideas and their Effects, *in* Goodin/Tilly (Eds.), *The Oxford Handbook of Contextual Political Analysis*, 257.
45. Steinberg, supra (2013), 166–167.
46. In the field of political science, Peter Gourevitch's analysis of the "second image reversed" explores the pathways through which international politics shape domestic politics. Gourevitch contrasted this perspective with the "second-image" "or inside-out" approach, which relates to how domestic forces become reflected in international relations. He draws a revised perspective that looks "from the outside in". This approach made its way into international relations, but is only scarcely used in international law, thus potentially undervaluing the extent to which international factors, including international law, influence actors' behaviour. See Peter Gouvrevitch, The Second Image Reversed: The International Sources of Domestic Politics, 32 *International Organization* (1978), 881–912; Bartholomew H. Sparrow, *From the Outside In: World War II and the American State* (1996).

CHAPTER 2

The State of the Art

The aim of this chapter is to provide an overview of the approaches to the role of law in international relations, in other words, to present the "state of the art" on the field of international law and politics. While a review of the story of evolving theories can be organised into a number of different narratives, the approach chosen here is to provide a chronological account starting with the emergence and development of the discipline of contemporary international relations following World War I until the present day. At the same time, this allows for revisiting some of the major developments in international law and political science. This brief history of international law and politics is followed by an examination of the theoretical grid framing contemporary analysis of the role of international law in international relations.

1 The Storyline of International Law and Politics

1.1 The Emergence of Positivism

The years following the end of World War I saw the emergence of the theories that became widely known as "Positivism".[1] These theories then also became the prevalent approach to international law. While the term "positivism" is open to a wide range of legal approaches, there is nevertheless some common ground within these. The primary feature, which

A. Germeaux, *The International Legal Order in Global Governance*,
https://doi.org/10.1007/978-3-031-16057-8_2

characterises all positivist approaches, is the rejection of natural law.[2] The positivist school considers that, values and ideals, whether they are politically, ethically, sociologically or historically based, are outside the realm of law.[3] Contrary to the natural law theories, positivism advocates an empirical analysis of law, since the practical realities are paramount, not overarching principles which can be imprecise, if not ambiguous.[4] The most fundamental assumption of legal positivism is, therefore, a strict separation between law as is (*sein*), and law as it ought to be (*sollen*). Positivism, in that sense, can be seen as a reaction against the legal idealism in the years following World War I, and accordingly places central importance on stability and certainty, as well as the efficacy of the legal system in general and sanctions in particular.[5]

Hans Kelsen sought to place the traditional doctrine of international law on a new methodological foundation—to establish legal theory as an autonomous "scientific" field.[6] Kelsen's main critique was what he regarded as the inadequate methodological distinction between the *Sein* [Is] and *Sollen* [Ought], rendering impossible a scientific construction of public law.[7] According to Kelsen's strict methodological dualism, one could not derive from the "Is-statements" of sociology any conclusions that were relevant for law, as a theory of normative "Ought". The fundamental difference between the explanatory form of thinking of the "Is" and the normative imputation of the "Ought" revealed two irreconcilable "separate worlds".[8] Kelsen's aim was to establish law as an autonomous, purely normative discipline[9] by identifying a specifically legal concept of "Ought". His theoretical approach to law allowed him to distinguish legal science not only from sociological Is-statements, but also from non-legal "Ought"-statements.[10] Kelsen's *Pure Theory of Law*[11] reflected the process by which the field of law had attained autonomy in that it sought to shield legal science from externally imposed limitations.[12]

The pure theory uses the concept of a hierarchical structure of law and proceeds from the fundamental assumption that the legal system consists of a hierarchy of normative relations.[13] The strong hierarchical or pyramidal structure of the pure theory serves to structure international law—indeed it is Kelsen's primary aim to replace random by order and to transform multiplicity into unity. This result is achieved by Kelsen's requirement that each and every norm in a particular legal system derives its binding force from a superior norm, the so-called *Grundnorm*, or the highest fundamental norm.[14] This basic norm provides the foundation of the edifice, as the norms that can be traced back to it become legal norms.

In other words, the central element of positivism consists in the premise that the validity of a norm as "law" does not depend on the content or the relationship of the norm with justice, but rather on whether the norm derives from a recognised source.[15]

In the *General Theory of Law and State*, Kelsen identified the source for international law as based on custom, namely actors "ought to behave as they customarily behaved".[16] This entails that international law *is* international relations, since actors would behave as the customary norms of international law state they should.[17] The pure theory itself, however, defers the issue of the particular content of the basic norm to the realm of politics rather than law.[18] Kelsen defined law solely in terms of itself and rejected any element of justice, which would better fit within the discipline of political science. The pure theory was freed from elements of politics, sociology and history, in order to construct a logical unified structure grounded in formalism; international law is a normative science, consisting of norms laying down patterns of behaviour.[19] "*The 'science of law' as conceived by lawyers [...] understands law as a closed and autonomous system, whose development can only be understood according to its 'internal dynamics'. The claim to the absolute autonomy of legal thought and action is asserted in the constitution of a specific mode of thought, totally freed from social gravity*".[20]

The positivism of the Vienna school in general is neutral with regard to the exact content of the basic norm. Consequently, from the vantage point of international law as conceived by the pure theory the function of fundamental norm can be filled with various content and Alfred Verdross, one of Kelsen's main disciples, posited *pacta sunt servanda* as the basic norm for international law.[21] This "neutralism", however, also appears as one of positivism's major weaknesses. For the Pure Theory of Law, the fundamental norm is merely an analytical assumption and, as a consequence, is to a large extent divorced from social reality.[22] For Pierre Bourdieu "*Kelsen's attempt to establish a 'pure theory of law' constitutes only the very limit of the effort of the entire body of lawyers to construct a body of doctrines and rules that is totally independent of social constraints and pressures and finds its own foundations within itself*".[23]

Driven by its rigorous, dualistic-methodological impulse, positivism had infringed onto the fine line that separated a "purified" approach to international law from the discipline's inability to explain the multi-layered phenomenon of law in international relations.[24] Positivism had missed the behavioural revolution in social science, which exposed it to

attacks of inconsistency. Even if one were to take for granted that the pure theory takes as its point of departure a conception of law as it is and not as it ought to be, it is hard to escape the impression that proceeds from a predetermined kind of "is".[25] Kelsen's pure theory appears to be built not on the structure of the relations as they actually exist in the international arena, but on a set of assumptions, which might appear more like a postulate of international law's ontology than an explanation of how it impacts behaviour. This "large dissonance" from reality exposes positivism to the critique that it is in itself a form of legal "idealism": because the theory is agnostic to social phenomena it might come up with answers which are as fictitious as its own *a priori* assumption.[26]

Freeing law from non-legal elements was, however, not an end in itself, but arose from a nearly unconditional confidence in society's ability to change through the medium of law.[27] Kelsen saw law as a "social technique"[28] to shape and thus change social reality,[29] thereby realising political and social goals.[30] What this social reality should look like was, according to the Pure Theory of Law, beyond the scope of legal science.[31] The positivist theory of legal sources seeks to protect a particular relationship between politics and law, achieved by the doctrine of the hierarchical structure, whereby international law accepts the exercise of political influence only via legally established organs regulated by formal procedures—Kelsen's cosmopolitan ideal of a largely institutionalised system of universal law.[32] This ideal of establishing the rule of law in international relations, through formalised legal sources and international courts, was labelled "utopian" as early as the 1920s by the likes of Carl Schmitt and later E. H. Carr, who rejected any legal idealism in international politics for being impervious to the material constraints of power politics.[33]

Despite its limitations, positivism remains on the central approaches to law. Its strength is its internal logical consistency, that is able to explain the development of norms as well as the importance of validity which gives as if it were a mythical seal of approval to the whole structured process: "*Law consecrates the established order by consecrating a vision of this order that is a vision of the state, guaranteed by the state. It assigns to agents a guaranteed identity [...] and, above all, socially recognised powers (or capacities) [...] it validates all processes related to the acquisition, increase, transfer and withdrawal of these powers*".[34]

Positivism is well suited to illustrate how norm leads to norm as stage succeeds stage in a progression of norms forming a legal order.[35] While

very influential, the pure theory simultaneously signalled the end of that particular road, and the prevalence of the positivist approach progressively faded during the course of the twentieth century. International law came under pressure from the political realities at the dawn of World War II, and new theories to explain the role of law in international relations came to the fore, relying on more sociological and economic analyses.[36] Nonetheless, positivism remains central to international legal theory today and the definition of international law as a set of objectively determinable norms devoid of moral content and applicable to actors solely on the basis of their consent remains widely shared.

1.2 The Enduring Legacy of Realism

Contemporary international relations theory can be said to have emerged out of a sense of disillusioning with the prevailing accounts of international law in the period of 1919–1939. International relations established itself as an independent field of study in reaction to "utopian" expectations that, as a result of technical and economic progress, the rule of law would finally supersede power politics.[37] E. H. Carr identified "*utopian thinking*" as the belief in the natural harmony of interest and the perfectibility of the social order through the progressive development of law.[38] In this view, the development of the modern discipline of international relations, therefore, required a separation from international legal theory. In the wake of World War II, realism became the prevailing paradigm for the analysis of international relations. Reacting in part to what they regarded as the failed idealism of the inter-war period, adherents of realism sought to explain international politics as it really is, rather than how it ought to be. This was based on an anarchic conception of the international system (in the sense of a lack of centralised authority), thus considering states as the central actors in international politics. Realism is premised on the international system being comprised of states, which are endowed with interests that they pursue through the application of material resources.[39]

This is obviously not entirely new; rather, the classical realist tradition is traced back to the works of Thucydides,[40] Machiavelli[41] and Hobbes,[42] among others.[43] Throughout history there has been a complex relationship between realism and idealism, with international law torn between concreteness (*sein*) and oughtness (*sollen*),[44] and the debate as to whether legal theory should incorporate normative agendas or confine itself to a

positive analysis of international law is ongoing.[45] Yet the advent, especially in the United States, of what is currently referred to as "traditional realist theory"[46] traces to more recent sources: E. H. Carr's critique of "utopian" theory on the eve of World War II, *The Twenty Year's Crisis*,[47] and the subsequent publication of Hans J. Morgenthau's *Politics among Nations*[48] in 1948. Utopians, Carr argued, are inclined "to ignore what was and what is in contemplation of what should be". Realists, by contrast, are inclined "to deduce what should be from what was and what is",[49] acknowledging that while actors may agree among themselves on issues of common interest, they would also impose international law on weaker actors[50]: "*When one takes the opposite view of this kind of professional ideology (legal idealism) [...] it is to see law and jurisprudence as a direct reflection of existing power relations, where economic determinations, and in particular the interests of the dominant, are expressed*".[51]

Even in its early years though, the realist approach was not without its detractors. Its conception of international relations rapidly came under attack for providing an insufficiently nuanced account of behaviour. Structural realist theory, especially Kenneth Waltz's reconceptualisation of realism in his *Theory of International Politics*,[52] aims at providing a more rigorous and systematic approach to political realism. It differs from those that come before it in its emphasis on the structure of the international system as an independent force, which international law cannot contradict. In its most restrictive variant, by focusing on the structure, realism is seen as unconcerned with positive-sum possibilities. Actors are, therefore, focused on relative gains, translated in terms of maintaining or acquiring power. Self-interest and relative power shape the content of international law, which in turn drives related behaviour and outcomes. Structural realism, in this view, is agnostic about international law being capable of making all actors better off in absolute terms. This restrictive interpretation of Waltz's theory became the stylised view of realism in international legal and political circles, though realism itself swiftly relaxed the assumptions about the ends that actors pursue and the means they use to pursue them. It acknowledged that actors' interests might be broader than the restrictive view of structural theory indicates and recognised that they might take strategic decisions to facilitate international cooperation to create positive-sum outcomes.[53]

Contemporary versions of realist theory often combine its concepts with elements from other approaches, such as economic analysis or social constructivism, to yield more complex insights and increase its predictive

capabilities. While this can add complexity and diminish the parsimony of the realist approach, it expands the explanatory dimension of realist-oriented argumentation and can carve out more broadly effective roles for international law.[54]

1.3 The Behavioural Revolution

The phenomenon that became known as the cognitive or behavioural revolution traces back to a "foundational moment" in the social sciences, essentially originating in the United States during the period of the 1950s and 1960s. This movement consisted in the spreading of insights from cognitive psychology into the realm of the wider social sciences, such as economics, political science and international relations. It induced these disciplines to question existing rational actor models and increasingly apply behavioural elements in their analysis of decision-making, establishing new models to explain the behaviour of actors.[55] These elements then found their way into international law, likewise generating new approaches to explaining the actions of individual actors and groups in different social settings and relate their behaviour to the political system.[56] The questioning of rational actor models and utility theory was accompanied by increasing scepticism towards the premise of positivism that legal norms can be analysed in an abstract fashion, since behavioural insights evidenced the importance of actors' thinking and the wider social environment that norms operate in.[57]

This initial moment was followed by a second wave of the behavioural revolution that swept through legal theory with work of the likes of Jolls, Sunstein and Thaler, dovetailing the insights from behavioural economics in probing the implications of actual, not idealised, actor behaviour for the operation of international law.[58] The second behavioural revolution holds that existing rational models are insufficient in capturing the complete range of factors that shape actors' decision-making, given the frequency of instances where actors make decisions that are agnostic or even contrary to their interests.[59] Cognitive psychology and behavioural economics have evidenced the ways in which actors are likely to commit misjudgements, adopt decisions that are not necessary rational and fall into the traps of "two-level thinking" pioneered by Kahneman and Tversky.[60] Such observations point to the existence of systematic failures in actors' perception, thus highlighting the necessity of grounding observations

about actor behaviour more closely to neurological factors and advances in brain science.

The adherents of behavioural approaches to international law advocate the promise of more accurate descriptions how actors in actual decision-scenarios, as opposed to abstractions of rational models, actually interact with international law. The aim is to establish theoretical models based on more realistic foundations of how actors behave. These elements include improved assumptions about actors' propensities for risk, how actors form ideas about their social environment, and how these factors impact decision processes when actors incorporate available information into seeking Pareto-improving outcomes. A more behavioural international law is characterised by greater awareness of potential bias and two-level cognition, allowing to help better explain empirical puzzles such as why actors consent and conform to international law in the absence of central enforcement, what affects compliance with international legal obligations and how international law is interpreted.[61] At the same time, the promise of the behavioural revolution opens international law to criticism that it can be used in shaping public policy to create "choice architectures" for actors with the aim of directing them towards "socially desirable ends".[62] This normative agenda in international law might not be neutral, as the promotion of certain goals through "de-biased" analysis of actor behaviour could in itself be favouring the interests of those actors powerful enough to define the contours of desirable ends in the international system.

1.4 The English School

The post-World War II split between political science and international law was less pronounced outside of the United States, especially in what has become known as the "English School" of international relations (also termed "international society tradition"). While drawing from some realist elements, this approach focuses on international society rather than individual actors, leading its adherents to place greater emphasis on international law than realists. Here, the image of law remains that of positive legal norms, having a modest, but nonetheless necessary role in structuring international life.[63] By contrast to classical realism, this stream, although it equally considers the international system as anarchic, remains heavily influenced by the Grotian legal tradition.[64] In his classic study on *The Anarchical Society*, Hedley Bull elaborated upon the connection

between the conception of an "international society" and international law: "*A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions*".[65]

The general stance of the English School towards international law may be summarised as providing a binding and efficacious framework necessary for the operation of large and complex social arrangements, such as international society. International law reduces the degree of unpredictability in international life by giving actors orientation about what behaviour is acceptable and what is not in a given circumstance, and how other actors will respond to their actions. The absence of a central legislature for the creation and amendment of legal norms likewise does not equate to international society being unable to generate normative change. International law, in this view, is comprised of norms that its addressees consider as binding with the purpose to facilitate iterated and ordered interactions in the international sphere.[66]

More recently, adherents of the English School have advanced a view of international society, which remains similar to the position of Bull, but recognises the importance and specific nature of legal obligations, based on actors' long-term interests in an international legal order that allows for some degree of distancing from their immediate situational imperatives. The idea of obligation and the normative force of international law can then take shape, as actors consider their interest in voluntarily subjecting themselves to common rules. In this international society, international law embodies the idea of binding obligations that operate independently of sanctions or coercion, and are based on a shared interest in mutual expectations of conduct.[67]

1.5 The New Haven School

On the side of international legal theory, the "New Haven School" of Myres McDougal,[68] Harold Lasswell[69] and Michael Reisman[70] at Yale University represents one of the early efforts to integrate the disciplines of international law and politics and reinvigorate the relevance of international law. Drawing from behavioural sciences, they sought to reconceptualise international law as informal and dynamic, aimed at the promotion of a certain goal value, conceived as maintaining a public order

of "human dignity".[71] Rejecting the formalism of positivism and a strict dissociation of law and politics, adherents of the New Haven School delinked the creation of law from traditional sources and processes, and minimised the role of coercion. The New Haven School considers law not as a normative construct, but as continuous process of decision-making. The flow of decisions as well as the legal framework in which they are made is seen as sets of policy options, sustained by effective power.[72] It thus makes little difference if a decision emanates from legal or political institutions since what matters is whether the decision furthers the interests of actors committed to a certain world order. Norms are devalued as mere indicators that may or may not further present or future trends. Their binding force is a juristic illusion since their normativity derives from their effectiveness in furthering social goals,[73] not from the validity conferred upon them by a source within a system.

The approach of the New Haven School might seem appealing at first sight, but is also inherently problematic, since a system centred on a concept as vague as "human dignity" endows actors with such a degree of discretion that it risks losing its contours as a legal system.[74] It gained considerable traction among those actors seeking the legitimacy of international law and the cause of human dignity, while simultaneously maintaining a significant freedom of action. In this view, the adherents of the New Haven School "*shared Morgenthau's critique that American thought about international law had ignored the behavioralist revolution […] Moreover, like Morgenthau, they were acutely aware of the dominant position of the United States in the postwar world. In that context, they sought to develop a jurisprudence that could help U.S. lawyers and policymakers meet their newfound responsibilities, advancing a just and democratic image*".[75]

This evident promotion of United States policy almost immediately drew criticism arguing that, since human dignity requires a political system with a "democratic core" and commitment to values such as "freedom, safety, and abundance", the analysis of international law was manipulated to fit this conclusion.[76] Thus, the postulation of a certain "goal value", together with the emphasis on the formative influence of the decision-making process on outcomes, is in constant danger of becoming an apology for the policies and preferences of the most powerful.[77] To this extent, law is neither able to mediate between different courses of action, nor to shape politics in a distinct way, as it constitutes more or less the political process itself.[78]

1.6 How Nations Behave

Most accounts of international law during the Cold War viewed norms and institutions as both reflecting and furthering interests, analysing the role of international law less in determining the outcome, but in rather in shaping or facilitating it. This approach may be seen as making a virtue of necessity, as the great power competition of the Cold War froze international law primarily in a facilitative mode.[79] In his study on *How Nations Behave*,[80] Louis Henkin aims to demonstrate the relevance of international law, and in response to both realism and the New Haven School, posits that it most often does indeed shape decisions. Building on the work of H. L. A. Hart, he argues that international law is not dependent on sanctions to qualify as law and places the focus on actual compliance,[81] stating that the issue is not one of enforcement, but of compliance, of impact on actors' behaviour, therefore "*whether international behaviour reflects stability and order*".[82]

While Henkin was primarily seeking to answer the claim of realists like Morgenthau and Kennan[83] that the lack of sanctions in international law allowed actors to ignore it when it was inconvenient to comply, he also offered a critique of Lasswell and McDougal's almost infinitely flexible concept of law as authoritative decision-making process.[84] Though conceding that law is dynamic and adaptable, Henkin drew an ultimate limit to its flexibility, thus at some point actors will need to make a choice between complying with international law and a particular policy.[85] Opting to comply with the policy, however, did not then transform the policy into law, nor did it render the latter irrelevant. Compliance with international law might entail a price, but in most cases actors would be willing to pay that price because they recognise the role of law in maintaining orderly international relations.[86] Thus, Henkin's aphorism that "*[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*".[87]

Henkin argues that actors resort to a cost-benefit analysis when their interests conflict with international law. In deciding whether to comply with international law, they do not only calculate the gain or loss resulting from their behaviour, but also consider how violating a norm might affect their reputation within the international community.[88]

1.7 Critical Legal Studies

Just as international legal theory was responding to the external critique from political science, an internal critique from within the field by critical legal theorists (CLS) began to pose a new challenge to international law. Growing out of the "postmodern" movement that emerged in Europe after World War II, critical theorists began to challenge basic assumptions about law. By the 1980s David Kennedy,[89] Antony Carty[90] and Martti Koskenniemi[91] then applied this challenge specifically to international law. Instead of considering the issue as one of unequal power, CLS argued that power itself was a problem for international law. For postmodern critics, it was not just the dominant actors, but the "Western" world in general that operated unconstrained, which also implied a critique that the changes of globalisation were not adequately reflected in international law. Starting from the 1970s, postmodern critics had depicted law as an instrument of domination; it was being used by the powerful to serve the aims of the powerful. Given that legal language is by nature ambiguous or open to interpretation, law can be turned to the advantage of the elite, keeping them in control and others out. For CLS, all assumptions of the foundations of law were suspect, including whether law is even "good". While a first wave of "deconstructivists" sought to deconstruct international law and demonstrate where its claims fell short, a second wave of theorists aimed at reforming the law after deconstruction given the premise that it might, after all, be endowed with positive features.[92]

CLS have much in common in their approach with, and observations of, international law to realism, but extend their critique to the very basis of sovereign prerogatives. With the likes of Carty, Kennedy and Koskenniemi a "*powerful critique of international law has emerged which questions liberal optimism and points to the inherent contradictions of international law and its potentialities for abuse. Indeed, it seems that international law serves no purpose but its abuse for the ideological purposes of the strong, that is, in Marxian terms, as [superstructure] of the interests of the powerful*".[93] This critique draws from the postmodern movement in philosophy, where authors such as Michel Foucault, Jacques Derrida and Jean-François Lyotard questioned the existence of objective reality, the notion of scientific and societal progress and the neutrality of language, as the latter tends to privilege the ideas and values of the powerful. According to this view, reality is a social construct or artefact, leading

postmodernists to display a more acute sensitivity to the role of dominant discourse in the assertion and maintenance of power. For CLS, the requirement for critical analysis applies both to the historical development of international law and the theoretical approaches that carry forward to this day.

In terms of ontology, it is held that international law is too indeterminate and its application and enforcement too arbitrary for it to be considered as law: "Legal argument may continue, however without any claim to authority. This would imply that political actors have no reason at all to listen to it".[94] The postmodern critique of international law has both an external and an internal dimension.[95] The external critique holds that international law essentially supports the aims of the powerful. This created an opening for considering international law not as law, but as just another incarnation of politics. Indeed, the postmodern critics have been compared with classical realism in international relations theory. If law cannot restrain power then only politics is left.[96] The internal critique holds that international law is not distinct from politics, but just an aspect of it and thus can be manipulated for political ends, being wielded by the already powerful to protect their power. There is an inherent contradiction in these two aspects of the CLS approach. If international law is powerful enough that its manipulation can perpetuate power, then it would seem to be something more than an extension of politics. If it were thus both distinctive and relevant, it would be available to all actors, not merely an exclusive prerogative of the powerful. International law then provides the very devices that give the poor and weak a medium of leverage.[97]

1.8 Regime Theory

As the Cold War drew to an end, international law started to come back to the fore through the vehicle of regime theory, while recognising the difficulties involved in attempting to explain all actor relations solely on the basis of relative degrees of power and short-term calculations of interest.[98] Regime theory posits that compliance with international law is possible, even likely, given that at least in areas of cooperation, norms and procedures developed by and between actors tend to acquire a life of their own, controlling, thereby mediating, the application of power.[99] Actors establish regimes when there is a long-term interest to cooperate,

which necessitates the presence of safeguards preventing short-term defection at the expense of other actors. With procedures in place assuring that other actors are cooperating and complying, each actor should then perceive an interest in following suit.[100] Focusing on interdependence in the international system, regime theory acknowledges Pareto-improving cooperation, but remains centred on the link between power relationships and the norms governing cooperation and power. The reason for this is found in the asymmetrical nature of interdependence: despite their dependence on each other, some actors remain more powerful than others.[101] Interdependence being both the reason for and the result of regimes, norms and procedures necessarily reflect the frequently asymmetrical character of international power relationships.[102] Further, since it focuses on areas of common interest for cooperation, regime theory requires neither formal institutions nor enforcement powers and hence remains essentially focused on informal cooperation, largely ignoring international law.[103]

Stephen Krasner's *International Regimes*[104] and its progeny, notably Robert Keohane's *After Hegemony*,[105] draw upon a number of the insights familiar to international law, but the classic definition of regimes as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actor's expectations converge in a given area of international relations"[106] hints at a blurring of normative categories, the word "law" being omitted altogether.[107] This can be problematic, especially as the terminologies and definitions from political science and legal analysis are not necessarily synonymous or compatible. International law circles, therefore, questioned the value of lumping "rules, norms, principles and decision-making procedures" together.[108]

1.9 Institutionalism

Institutionalist theory emerged as an approach to international relations during the Cold War as adherents of the realist tradition began to question realism's ability to account for flourishing of international institutions at a time of great power competition.[109] Institutionalism considers that actors largely behave on the basis of self-interest and it is premised on the assumption of an anarchic international system where the distribution of power is the underlying principle of politics. Drawing from the work of regime theorists, institutions have been defined as "[all] persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations".[110] Institutions exist in

order to facilitate cooperation or coordination and are being complied with largely because of the rational utility-maximising activity of actors pursuing their self-interest.[111]

Institutionalism has been given renewed attention through Jack Goldsmith and Eric Posner's assessment of *The Limits of International Law*.[112] Using rational choice methodology, they claim that international law serves more as a set of guidelines than legal obligations. International law may serve actors to coordinate the pursuit of their interests, but does not constrain them, since international law emerges from rational actors maximising their interests, with the only reference points being the perceived interests of other actors and the power distribution in the international system.[113] For Goldsmith and Posner, there really is no such thing as international *law*, only actors coordinating their efforts to maximise interests, and what we are seeing is "a special kind of politics", and not law at all.[114] Unlike John Austin's command theory,[115] however, they also distinguish international law from morality, implying that compliance with international law is not even virtuous, let alone obligatory. In this, their conclusions are far more reminiscent of Morgenthau's realism in questioning the ultimate authority of law having binding effect on actors. Dismissing any assumption that actors may follow international law for non-instrumental reasons from the outset, Goldsmith and Posner point to "a more sophisticated international law literature in the international relations subfield of political science"[116] and argue that "[i]nternational law emerges from states' pursuit of self-interested policies on the international stage. International law is, in this sense, endogenous to state interests. It is not a check on state self-interest; it is a product of state self-interest".[117] Through the lens of rational choice theory, they thus "assume that states act rationally to maximise their interests".[118] Rational choice approaches, however, are themselves far from being exempt of all criticism in international relations[119] and within international law theory the problem with using Goldsmith and Posner's version of rational choice analysis has been acute, particularly since the approach seems entirely devoted to denying international law any force.[120] The most obvious critique against the argument of Goldsmith and Posner is therefore that it is essentially tautological and biased in its premises. It excludes at the outset by mere assumption that actors may comply with international law for non-instrumental reasons. The finding that, unsurprisingly, compliance with international law is conditioned upon actors' interests then seems rather dubious. The conclusion is dependent on its assumption; by assuming that law is a special kind of politics, law then necessarily collapses into politics.[121]

1.10 Constructivism

Over time, interest-based models became criticised for having a overly narrow focus on calculations of political or economic interests while undervaluing the influence of ideas and norms.[122] The argument is thus that many approaches to international relations offer an incomplete description of the mechanisms by which actors operate in the international realm. How and why ideas matter, and the extent to which they influence international relations and international law, remains a source of disagreement.[123] The constructivist approach is characterised by a focus on how norms and ideas not only matter, but in fact "construct" the social environment which in turn feeds back into actors' identities and interests. The basic insight behind the constructivist approach can probably best be understood by unpacking the classic observation made by Alexander Wendt in his *Social Construction of Power Politics* that "500 British nuclear weapons are less threatening to the United States than 5 North Korean nuclear weapons".[124] This sentence contains elements of the features that distinguish constructivism from other approaches to international relations: the critique of pure materialism, an emphasis on the social construction of interests, the relationship between structures and agents, and the existence of multiple logics of anarchy.[125]

On the surface, the empirical puzzle embodied by the North Korean weapons seems easy to explain: as Wendt says, "the British are friends and the North Koreans are not".[126] This, however, implies an understanding of the categories of friend and enemy, and it is through this opening that constructivist theory analyses the social and relational construction of actors' identities and interests.[127] The puzzle begins to dissolve when one looks beyond the rationalist reference points of relative power and material capabilities, and realises that when evaluating a threat it is not just raw capabilities that are pertinent but how actors intend to use them. It is actors' intentions that matter, and these are dependent on their ideas and identity, which are social constructs, not static material objects. When Russia invaded Ukraine in 2022, Finland and Sweden were eager to join the NATO collective security alliance, even though they refrained from doing so throughout the Cold War period. While Russia's military capabilities remained constant at best or even diminished compared to the Soviet Union, what had changed were the perceived intentions of Russia to use them and therefore the nature of the threat as seen by other actors.[128] Due to Russia's apparent willingness to actually use military

force, the relation of Finland and Sweden with Russia had changed from peaceful coexistence to one with latent potential for armed conflict. In other words, actors content with the status quo are more amenable to friendly relations whereas actors intent on revisionism are likely to elicit enmity. Finland and Sweden's interests are constructed through social reality, namely their perception of Russia's intentions and their ideas about how to seek security. Constructivism emphasises that international law is a social construct, whose ontology cannot be equated to that of material objects, and accordingly highlights the importance of the *social* reality surrounding the actors operating with international law.[129] The approach has, however, been criticised for paying insufficient regard to power in international relations and its lack of parsimony, thus being less capable of producing predictions about behaviour than other approaches.[130]

Constructivist theory has since worked to respond to the claim that it is not a testable theory and developed forms of more "sophisticated" constructivist theory to measure compliance with, and effectiveness of, international law. The "spiral model" developed by Risse, Ropp and Sikkink combines constructivist theory with qualitative-comparative methods to explain how states internalise norms through a progression from repression to denial, tactical concessions, prescriptive status and ultimately norm-consistent behaviour.[131] This model has subsequently been revised to integrate elements of institutionalist theory in order to reflect the insights of quantitative scholarship and offer more accurate predictions of behaviour.[132] Other variants of constructivism have turned to sociology and social psychology to address the critique that in constructivism causes and their effects may be "mutually constitutive", or in other words circular.[133] These approaches thereby aim to account for the phenomenon of acculturation, which is defined as "the process by which actors adopt the beliefs and behavioural patterns of the surrounding culture" trough cognitive and social pressures, distinct from material inducement or persuasion.[134] A further strand of constructivist thought draws from the development of quantitative methods in international relations and combines qualitative-empirical approaches with quantitative data tools to offer more deep and objectively controllable assessments on the effect of legal norms.[135]

1.11 The Power of Legitimacy

By the end of the 1990s, international legal theory was starting to reinvigorate from its facilitative posture of the Cold War era. The fall of the Berlin Wall heralded the promise of a new world order based on multilateral cooperation. This seemed to signal the end of international law's defensive ontology, thus opening up new avenues for exploring the operation of law in the international sphere. Thomas Franck stated that "we are in a post-ontological era"[136] in introducing a new approach to the relevance of international law. Premised on a view that sanctions are not instrumental in securing compliance, the central argument laid out in *The Power of Legitimacy among Nations*[137] and later *Fairness in International Law and Institutions*[138] is that "in a community organised around rules, compliance is secured – to whatever degree it is – at least in part by the perception of the rule as legitimate by those to whom it is addressed".[139] Franck considers that legitimacy generates a cycle of causation between right process and the behaviour of actors.[140] While the legitimacy of norms and the process of norm-creation are important, the theory was also faced with resistance from the discipline of international relations, since from a rationalist-instrumentalist perspective, the argument is essentially circular[141]: Legitimacy induces compliance, but adherence to norms is itself also a measure of legitimacy.

1.12 The Ethics of Human Rights

In the 1990s, the classic conception of international law based on the interaction of sovereign states started to come under increasing criticism for being unable to serve as the normative framework for present-day international relations. Authors like Fernando Tesón and Carlos Nino argued that "new times call for a fresh conceptual and intellectual language"[142] to put forward a re-examination of the traditional foundations of international law under the premise of normative individualism. Outlining *A Philosophy of International Law*, Tesón draws from Immanuel Kant and John Rawls, positing that if international is to be universally legitimate, it must mandate that actors respect human rights as a precondition for joining the international community.[143] Thus, states are not deserving of respect *per se*, but only insofar as they are the agents empowered by free individuals to implement social cooperation based on respect for fundamental rights. And as actors want to see their actions, no

matter how self-interested, as legally justified, there is a reliance on legal discourse on the basis of which international law is to be rethought and reconstructed so as to incorporate human rights.[144]

Building on these new philosophical foundations, Carlos Nino's *Ethics of Human Rights*[145] aims at uncovering the moral justification for the concept and content of human rights.[146] Under Nino's account, human rights are derived from moral principles, which could secure agreement and reduce conflict under certain postulated conditions of discussion, setting constraints on what the moral principles can be like.[147] This "constructivist" enterprise of a "social practice of moral discourse" implies a normative conception of the individual as capable of enjoying those rights; it thus confers a high value on autonomy.[148] For Nino, this normative idea is implicit in moral reasoning; it is "necessarily assumed when we participate in the practice of moral discourse".[149] His approach, in positing that the social practice of discourse has the power to transform actors' preferences to more closely reflect certain ethics, comes near the outlook of Habermas' in attempting to bridge the gap between facts and norms, though Nino himself does not offer any elaborate communication-theoretical argument for it.[150]

This justification of the state's authority does not simply align the state with morally correct outcomes; it makes of the state a deliberative community that satisfies the condition of moral inquiry.[151] However, critics have come to argue that by reconstructing politics on the model of philosophical discourse, it eliminates from politics everything that makes it a distinct sphere of meaningful activity. The state exists in the ideal only, because it has no relationship to its own past. Accordingly, the theory has been attacked for flattening politics and eliminating the role of material factors in constructing actor's identities.[152] Further, it could be argued that as long as international peace and stability are secured, it does not matter how states are internally organised, or at least not so much as to make it a requirement for an enduring system of international law.[153] According to realism, all that can be aspired to is balance of power (or peace). Except as an occasional political instrument, concern for human rights does not belong in the realm of international relations because there is no centralised authority which alone can guarantee the rights of the subjects.[154] Most classic studies of international order thus regard concern for human rights as subservient to actors' interests, without any determining role in the formation and implementation of international law and policy.[155]

1.13 International Legal Process

Legal process approaches can be seen in the tradition of the New Haven School, as both share an emphasis on the role of legal interactions. The "managerial approach" represented most notably by Chayes and Chayes' *On Compliance*[156] and later *The New Sovereignty*,[157] can be characterised as "horizontal legal process" as it is centred on intergovernmental coordination.[158] It is deemed a managerial approach in that instances of non-compliance are essentially involuntary and can be addressed through increased transparency and capacity building. Legal process starts from the premise that compliance with norms is an entrenched behavioural feature, hence actors have a propensity to comply with their international commitments.[159] This results from three factors: First, since international law is largely the product of actors themselves, an assumption based on rational behaviour predicts that actors' interests coincide with compliance. Second, compliance is often the more efficient form of behaviour, as explicit calculations of costs and benefits for every decision are in themselves costly and thus inadequate for the vast majority of actions. Third, once norms are set, they induce a sense of obligation in actors to comply with international law.[160] Following Henkin, Chayes and Chayes conceive of compliance as a continuum whereby obedience with international law is managed through an interactive process of diplomatic explanation, justification and persuasion.[161]

1.14 Enforcement Theory

As a reaction to the "law without sanctions" approaches of Franck and later Chayes and Chayes, Downs, Rocke and Barsoom advanced what became known as enforcement theory of compliance.[162] Relying on quantitative techniques in their analysis of *Enforcement and the Evolution of Cooperation*,[163] they aim to demonstrate that sanctions are essential in securing compliance with international law. This approach, also termed political economy theory, is sceptical of actors' propensity for natural norm compliance, and instead stresses the central role of enforcement, the opportunistic element in compliance, as well as the endogenous nature of the norms of international law. The argument is that most international agreements are shallow in that they require actors to perform little more than they would do in the absence of a norm. International law is a creation of its actors, which, at the same time, are its subjects, and norms

are accordingly held to mostly coincide with actors' pre-existing interests.[164] As a consequence, international law will not influence behaviour without enforcement. The more norms require changes from the status quo, the more potential cooperation gains and incentives to violate the norm increase in parallel, since the affected interests and the costs and benefits involved are greater. Therefore, the more international law aims to significantly bear upon actors' behaviour, the more it requires strong enforcement mechanisms for it to be effective.[165] As the adherents of enforcement theory put it, the empirical findings of international legal process "are interesting and important but […] its policy inferences are dangerously contaminated by selection problems".[166]

The managerial versus enforcement debate reflects divergent visions about law's ontology, about substance and process, since international law is both an instrument of its creators and an autonomous entity. It highlights the need for empirical evidence, and the understanding of international law as coordination or enforcement problem entail divergent implications in terms of policy.[167] The focus of legal process and other approaches on compliance has come under criticism for being "ill-suited" to identify the causal effects at the heart of social science research. Lisa Martin[168] and Janina Dill[169] have argued that the concept of compliance falls short in explaining the influence of international law on behaviour, and argue that "effectiveness" or "behavioural relevance" are more accurate indicators of whether it achieves its intended objectives.

1.15 Transnational Legal Process

A second approach arising out of the legal process theories is embodied by the "transnational legal process" approach, represented most notably by Harold Hongju Koh.[170] According to this strand, the enmeshment of actors in a legitimate, repeated, and transnational process of norm production and legal interpretation conditions their behaviour towards international law. Contrary to enforcement theory, internalisation of norms, not coercion, is the main driver for compliance. In a review article on both Franck and the Chayeses, Koh goes on to ask *Why Do Nations Obey International Law [?]*[171] and lays out a transnational legal process approach, which aims to capture the managerial theory in a broader framework that includes the interaction between horizontal legal process among actors and "vertical legal process" in terms of norm diffusion from the international level down into the domestic law of individual

states. According to Koh, "obedience" is rule-induced behaviour when a party has "internalized [a] norm and incorporated it into its own value-system".[172] Norm internalisation generates patterns of compliance. Accordingly, compliance is motivated not by anticipation of enforcement, but through the incorporation of norms into legal systems.[173] Koh cites an analogy from domestic systems that people refrain from routinely stealing each other's belongings not because it is illegal, but because they have internalised a norm.[174] This incorporation results from "transnational legal process", a process of vertical norm internalisation consisting of three sequential elements: *interaction*, that leads to *interpretation*, which in turn promotes the *internalisation* of the international norm into domestic legal systems.[175]

International norms create default patterns of international law-compliant behaviour for all actors participating in the interactive process. The patterns can become "sticky" and thereby difficult to deviate from without sustained effort, which is in itself costly. Some have seen in Koh's approach less a theory of compliance with international law rather than an empirical pathway for the incorporation of international norms into domestic legal systems, as the process of norm internalisation both defines compliance and explains it.[176] A central implication of Koh's analysis consists in the focus on domestic law and structures as a crucial factor in promoting compliance with international law. Koh, however, considers that the effectiveness of norm internalisation depends primarily on the characteristics of the norm in question, rather than actors' domestic attributes, which, according to criticism arising from the political science field, could overlook a major explanatory factor.[177] Further, it could also be argued that in the case of international law, it is less the structure of domestic systems or the characteristics of norms that matter, but the interplay of domestic and international politics, which has been captured more accurately through the international relations perspective in Robert Putnam's *Logic of Two-Level Games*.[178]

1.16 Liberal Theory

The approach to international law and politics known as liberal theory[179] emerged in the late 1990s as a new "paradigm" to analyse international relations. Like realism and institutionalism, liberal theory is premised on actors behaving in pursuit of interests, but parts from both these approaches as it discards the precept that states can be regarded as rational

unitary actors. A key feature of liberal theory is that it views the origin of interests in domestic politics; it thus opens up the "black box" of the state (some liberal theorists refer to "disaggregating" the state) and places the focus on domestic political processes.[180] In other words, the central claim of this approach is that "domestic politics matter".[181] The intellectual antecedents of liberal theory can be traced back to Immanuel Kant, and specifically to the argument that "republican governments" (or representative democracies) behave differently from other forms of government.[182]

The essence of the liberal approach is captured in Andrew Moravcsik's *Taking Preferences Seriously*[183] and Anne-Marie Slaughters *A New World Order*.[184] According to Moravcsik, liberalism's fundamental premise is that social ideas, interests and institutions influence behaviour through shaping the "fundamental social purposes" that are underlying actors' strategic calculations when devising their actions.[185] This can be restated in terms of three core assumptions[186]: first, liberal theory rests on a "bottom-up" approach of politics, in that functionally different individuals and groups define material and ideational aims independent of politics, then seek to advance these aims through political means.[187] Second, states represent the demands of domestic individuals and social groups, on the basis of whose interests they define their interests and act instrumentally to manage international political interaction. States thus constitute the "transmission belt" by which the interest and social power of individuals and groups are translated into foreign policy.[188] Third, the behaviour of actors is shaped through a pattern of interdependence of their interests. This "policy interdependence" refers to the distribution and interaction of interests—that is, the extent to which the pursuit of one actor's interests necessarily imposes costs and benefits upon other actors, independent of the "transaction costs" imposed by the specific strategic means chosen to obtain them.[189]

Anne-Marie Slaughter takes this view to the analysis of international law and puts forward a legal theory of how norms are created and how they operate in a world not defined by the interaction of nation states, but by "transgovernmentalism": a set of multileveled international law, policy and politics operating across highly permeable national boundarie.[190] This liberal theory of international law is characterised by two strands: a distinction between liberal and illiberal states and, even further, de-emphasising the role of states altogether. The first strand generates a particular view of international law, not defined by sovereign equality,

but of law reinterpreted as a system whose subjects are to be differentiated for methodological and normative reasons. In short: liberal states comply, illiberal states defect. The task of international law is thus to promote liberal democracy in order to secure an internally generated culture of compliance. The second strand involves de-emphasising the state altogether in favour of "transgovernmentalism", abandoning the task of enforcing international norms in favour of developing networks and encouraging cooperation among liberal state institutions and government instrumentalities.[191]

While liberal theory is appealing in that it allows opening up the "black box" of the state and looking beyond the simplifying anthropomorphism of realism and institutionalism, the theory almost immediately came to face severe criticism as to some of its core assumptions. Most of this critique focuses on the claim of liberal theory that liberal and non-liberal states behave differently.[192] It has been argued that liberal states are themselves far from pacific in their relations with other states, including democracies, and that there may be reasons why liberal states actually have a greater propensity to go to war with other states than non-liberal states.[193] Thus, the importance of the distinction between liberal and illiberal states regarding their international behaviour may be far less relevant than generally advocated by adherents of liberal theory. Further, given the strong normative component of liberal theory ("democratic states behave better"), it is susceptible to the charge that although it can indeed provide explanations for actions after the fact, it has difficulty generating predictions *ex ante* and is thus not a positive theory like realism or institutionalism.[194] The emphasis on advocating liberal forms of government renders its claim that it is "nonideological and nonutopian"[195] rather questionable and might open liberal theory up to a similar critique as the New Haven School regarding its lack of neutrality.[196] Martti Koskenniemi even considers it premise a threat to "valid", non-functionalist international law, in that it draws "*a broad picture of (the real) new world order in which sovereign States are disaggregating while formal diplomacy and formal international organizations are being replaces by 'transnational networks' […] within which judges, government officials, company executives, and members of governmental and non-governmental organizations and interest groups meet to co-ordinate their policies and enhance the enforcement of laws in a fashion which, by comparison to formal inter-State cooperation, is 'fast, flexible, and effective'. Her vision of the 'end-of-State' sociology is nuanced and moderate but*

still conceives of statehood and sovereign equality as formalistic obstacles to the realization of the dynamic embedded in 'real life'. An absolutely central aspect of this sociology is the fact that it is normatively tinged. [It] does away with the image of valid law and thus leads lawyers to contemplate an agenda that is posed to them by an academic intelligentsia that has been thoroughly committed to smoothening the paths of the hegemon".[197]

The greatest difficulty in applying liberal theory, however, might result from the heterogeneity of states as actors in the international system.[198] Liberal democracies have emerged at different points in the course of history, from the late eighteenth century to the end of the Cold War, and this process continues until today. The current international system is characterised not by a clear distinction between liberal and illiberal states, but by large variety of organisation forms, ranging from the most liberal to the most illiberal. At what point should a state be considered as having crossed the line from illiberal to liberal? It is thus questionable whether the distinction in liberal theory between states according to their form of government can be put to use as a determining factor in the analysis of their foreign policy.

1.17 Feminist International Law and International Relations Theory

The emergence of *Feminist Approaches to International Law* is commonly traced back to the 1991 publication of Charlesworth, Chinkin and Wright's seminal article, which noted the conspicuous absence of women in the development of international law.[199] The consequence of this was the generation of norms and jurisprudence over time legitimising the unequal position of women rather than empowering them. Highlighting the existing *Boundaries of International Law*, Charlesworth and Chinkin thus advocate for a feminist analysis that requires "re-thinking of international law so that it can offer a more useful framework for international justice".[200] This was echoed by similar criticism in international relations theory that prevailing accounts ignore the impact of power on gender and that a complete picture of international life requires examining how relations of power sustain or contest prevailing assumptions about women and men, about femininity and masculinity, and the ways in which these concepts shape our study of elements like conflict, anarchy, peace or cooperation.[201] Feminist legal theory aims to expose the gender bias implicit in an apparently neutral system of norms by challenging the understanding

of international law as an abstract entity and highlights how law cannot be seen in distinction to the social system that it operates in.[202] It goes beyond a mere critique of inequality in the system and puts forward a contextual approach where legal analysis cannot be separated from actors' political, economic, historical and cultural environment.

Feminist legal and political theory is inherently multifaceted, and canvassing its variants evades any monolithic description.[203] Simplifying a necessarily more complex image, liberal feminism entails a focus on equality and the inclusion of women in legal and political processes by removing barriers to participation and according equal rights to women. Radical feminism concurs with the importance of equality, but this perspective centres on the functioning of the patriarchy and an analysis of the relations of gender inequality, uncovering the ways in which men seek to control women and shape their social role. Adherents of this approach argue that when the social world is organised to support the patriarchy, it inherently privileges masculine norms, thereby impacting how international law operates and how actors reason with it. Feminist postmodernism, in turn, centres on the philosophical foundations of normative claims and female roles in social hierarchies. It examines the impact of particular gender assumptions on how actors reason about international law and how it affects their capacity for agency in the international arena. This strand then seeks to deconstruct particular understandings and relationships as precondition for change. Feminist critical theory likewise examines prevailing assumptions about gender and the norms associated with femininity and masculinity, but instead of deconstructing prevailing understandings, focuses on the transformative aspect in addressing the relations of power underlying male privilege. Critical feminists advocate for enacting change through norms on sexual and reproductive rights, ending violence against women and strengthening LGBTIQ+ rights.

Despite the variations within feminist theory, there is significant room for engagement with the wider international law and international relations theory landscape. The concern with power, interest and norms is shared among many different approaches, with feminist theory bringing a different perspective to the analysis, as well as demanding increased objectivity and methodological rigour by challenging assumptions grounded in patriarchy. For feminist theory, how power operates in the international system, how it is sustained, cannot be adequately captured without addressing the role of gender and exploring the social configurations

that contribute to understandings about the role of women and men that prevail at a given place and time.[204] Power does not operate in isolation, but is socially constructed, just as male privilege is produced and reproduced through iterative social interaction. For instance, when examining situations of armed conflict, both women and men are actors, but their role and agency is viewed differently. Most traditional analyses of armed conflict adopt a vantage point centred on institutions and military capabilities, privileging the role of men, even though women and children represent the vast majority of those adversely affected by armed conflict and women and girls disproportionately are victims of sexual and gender-based violence. Feminist approaches highlight that this male-centric view of conflict contributes to sustaining patriarchal role conceptions, obscuring the agency of women in international relations.[205]

Feminist theory shares many elements with normative international legal and international relations approaches, such as the insight that reality is socially constructed, and its treatment of the agent-structure debate. In conjunction with constructivism and communicative action theory, some feminist approaches analyse how language conveys the idea of gender as a form of hegemonic discourse of difference that is reproduced through norms and identities. Other approaches favour an examination of the material structures based on, and sustaining, the patriarchy. For the latter, a transformative effect involves addressing the structure of hierarchy, whereas for the former it is about norms and ideas, thus changing the social meaning attributed to women and gender.[206] Feminist theory has also found its way into international law and international relations in developing conceptual analyses, for instance in establishing that power cannot be considered without examining gender as one of the elements generating differential social capabilities among actors for defining and pursuing their interests.[207]

What distinguishes feminist theory from other approaches is its commitment to including multiple vantage points in the analysis. It is also more self-reflexive about the potential exclusion of relevant perspectives. Feminist theory is acutely sensitive to power and how social relationships sustain the patriarchy, probing not only the role of the powerful, but also their relation to others.[208] In being inclusive of concepts like gender and open to non-western perspectives on international relations, feminist theory allows for correcting bias in international law and opening up new possibilities, such as through analysing gender as a social construct that is open to change, rather than to be taken as a given. Constructivism tends

to view the social construction of norms and identities in an analytically neutral fashion, thereby being at risk of simply reproducing the patterns of the patriarchy when examining aspects of international law or international relations. Conceiving of gender as the relational construction of feminine and masculine identities, and a reflection of power relations, allows for challenging existing norms of international law privileging the patriarchy. At the same time, gender can also be an analytical variable to identify patterns of inequality and better explain the behaviour of actors in the international system.

By helping to uncover the multiple dynamics of inclusion and exclusion in the international system, the development of feminist theory has contributed to the sociological analysis necessary for critical international legal and political theory. Feminist international law theory is also more practical orientated, as it draws from the concrete and immediate experience of the role of the legal system in generating and iterating the unequal position of women.[209] This entails its precepts to be continually scrutinised in terms of the impact on women in different social contexts and power relations. Feminist theory thus not merely allows for another perspective on the role of law in international relations, it infuses the field as a whole through attentiveness to inclusivity, self-reflection and critical examination of prevailing power relationships in challenging conventional wisdom.[210]

1.18 Transcivilisational Perspectives on International Law

Based on earlier groundwork laid by adherents of the Critical Legal Studies movement, in particular Martti Koskenniemi, authors like Yasuaki Onuma and Mark Mazower have taken up the argument that contemporary international law is essentially a product of western internationalism from the period following the Vienna Congress in 1815.[211] In this view, international law is an "idea" or language used by the dominant power at a given time to further the creation or development of institutions amenable to hegemonic projects. Rather than discard international law altogether as some CLS adherents would advocate, however, proponents of the present approach call for an adjustment of the existing discourses to an emerging multi-polar and multi-civilisational world.[212] If international law is to remain relevant and in a position to aspire to resolve issues that transcend national boundaries, it must be open to the interests, culture and politics of non-western civilisations.

Onuma conceives of the *Transcivilisational Perspective on International Law* as an alternative cognitive framework for understanding, interpreting and assessing international law, so as to expand the narrowly defined discursive space that characterises the west-centric discourse prevailing in contemporary international law.[213] Given that the latter is characterised by the "intellectual and informational hegemony" of the West, it is unable to adequately accommodate the rise of emerging actors and thus bound to clash with the reconfigurations of power in the international system. Further, when international law is no longer aligned with the realities of power distribution in the world, its legitimacy will come under increasing strain. Drawing in part from Franck's fairness theory, Onuma considers that international law derives its legitimacy from consistency, fairness, accountability and equality. Since much of international law has historically been shaped by the interests of powerful actors, both the sources and numerous fundamental concepts of international law suffer from a lack of "global legitimacy".[214] Hedley Bull's "international society", in this view, is the result of a process whereby "competing political entities were in various regions were forced to participate [through imposition and coerced negotiation] in the European, which is a *regional*, not a *global* international society".[215] The transcivilisational perspective, therefore, advocates for a genuine international perspective allowing for opening legal discourse to the changes in the configuration of power and emerging multi-polarity of world order.

While the theory is appealing in its aim of maintaining the legitimacy and relevance of international law, its proponents lack a convincing narrative as to how a transcivilisational perspective could be translated into practice.[216] International relations theory has long established that power in its various manifestations is a perennial feature in the international system and law will always reflect the currently prevailing forces to at least some extent. Even if a greater plurality of perspectives in international legal discourse could be achieved, however, it is not certain that this would automatically yield more inclusiveness, rather than a further fragmentation of international law.[217] If a multitude of established and emerging powers bring to bear competing claims to valid interpretations of international law, the result might be more conflict rather than a more consensual approach. Furthermore, the possibility that numerous human rights norms could have their universality contested by arguing that different cultures or "civilisations" value economic or spiritual rights higher than the "western" focus on individual liberties might expose

the transcivilisational approach to the critique that it merely serves as an intellectual cover for the policies and practices of authoritarian states.

The preceding paragraphs have aimed to condense the continually evolving stream of approaches to international law and international relations into a historical and chronological storyline, retracing the path of how we got to where we are now. The following sections will now delve in more detail into the range of interest-based and norm-based theories through which the interplay of international law and politics can be examined.

2 How is International Law Relevant?

2.1 The Realist View

At its simplest, the realist tradition treats politics as a struggle for material power among actors pursuing their interests in the international system.[218] While definitions of realism vary depending on the period and sub-school of realism that one may adopt, four central features seem to be emerging as common to all understandings of realism[219]:

Unitary entities. All variants of realism emphasise the interaction of rational unitary entities. International politics is characterised by conflict and cooperation between polities. To overcome the "state of nature", actors need the cohesion provided by group solidarity, yet that very same in-group cohesion generates the potential for conflict with other groups. *Self-interest*. The principal motive for political action is self-interest. Interests are exogenously determined or posited, and relate to material factors, mainly security and economic gain. The expression of actors' interests, however, can be moderated to some extent by norms. *Anarchy*. The nature of international politics is essentially shaped by the absence of overarching enforcement power. This anarchic political system both imposes distinctive constraints on the ability of international actors to achieve their purposes and exacerbates self-interest. *Power politics*. Actors are endowed with material power capabilities that impact international relations. The intersection of groups and self-interest in an environment of international anarchy results in international relations being largely a game of power and security, and the unequal or asymmetric distribution of power in international affairs creates a permanent underlying potential for conflict.[220] As a consequence, realism is agnostic about morality in international relations.

The "signature argument" of realism may thus be summarised in that the absence of central authority renders politics naturally conflictual, allowing actors in an environment of anarchy to use force in meeting their ends. This creates uncertainty about the present and future behaviour of others, leading actors to anticipate this contingency by arming themselves. Since all other actors do the same, the nature of politics changes with the constant risk of escalation and conflict spirals, creating an international arena that is inherently conflictual and problematic for actors' security.[221]

While all variants of realism share a number of common assumptions, the structural realist version represented notably by Kenneth Waltz's *Theory of International Politics*[222] and distilled most evidently in John Mearsheimer's argument on *The False Promise of International Institutions*[223] presents a more parsimonious theory for understanding international relations. Structural realism focuses on the structure of the international system. The aim of actors here is to maintain their relative power position in the system (i.e. vis-à-vis others), thus the focus is on relative gains. As relative power among actors varies, so does the structure over time.[224] This version of realism asserts that international law cannot contradict the structure of the international system, which has led to the stylised interpretation that law is epiphenomenal to underlying power and interests. Structural realism does not deny international law any role, however, it simply implies that an understanding of international behaviour cannot ignore the underlying power distribution in the international system.[225] Relative power among actors shapes the context and structure of international law, which in turn impacts back on "related behaviour and outcomes".[226]

Realism is sceptical about independent effects of norms on structure, but it is a common misconception that it considers international law *per se* as epiphenomenal. International law can moderate or regulate the expression of power so long as it does not conflict with actors' essential interests, notably in terms of security. That international law can be relied upon to regulate the exercise of territorial jurisdiction or the conduct of diplomatic and consular relations does, however, not imply that it can actually constrain actors' behaviour. For Hans Morgenthau, the existence of international law does not equal its effectiveness in regulating the competition for power on the international scene.[227]

Morgenthau then goes on to give his classic definition of the realism's conception of the role of law in international relations as dependent on the power competition characterising an anarchic international

society composed of actors whose jurisdiction is essentially territorial. The creation and operation of international law in such an environment require two complementary factors, namely that actors' interests align and an even distribution of power: "*Where there is neither community of interest nor balance of power, there is no international law*". Since no single actor can unilaterally and arbitrarily impose law on others, "*international law is overwhelmingly the result of objective social forces*".[228]

Realism is to be credited with highlighting the link between international law and politics, which implies that "law is not an abstraction. It cannot be understood independently of the political foundations on which it rests and of the political interests it serves".[229] Despite the stylised view of realism as considering law as epiphenomenal to power, the possibility that international law allows for positive-sum outcomes is consistent with all major strands in realist theory. Structural realists have generally remained sceptical about the independent force of normative considerations, but even the logic of this strand is open to the possibility that international law can leave all actors better off in absolute terms.[230] Under the realist paradigm, specific legal norms can, however, disproportionately favour the powerful actors. Robert Gilpin nuances Morgenthau's argument by asserting that the norms governing interactions in the international sphere may well result from shared interests, though their foundation nonetheless rests with the sustenance of the dominant group or actor's power in a social system.[231]

Even a century after the advent of the contemporary discipline of international relations, the study of international relations remains to a certain degree a debate about realism: the theory provides an ideal foil for arguments and approaches that international law matters. In response to Stephen Walt's question "*Why Do People Hate Realism So Much?*" in the face of continued "realism-bashing" sweeping through political theory,[232] Richard Steinberg holds that "*[realism] is the null hypothesis that enables international lawyers to show that their argument and life's work does have meaning. So, in a sense, even those who hate 'realism' actually love it – in the same way that prohibitionists hate alcohol, Joe McCarthy hated Communism, and family value conservatives hate pornography. What would they do without it?*"[233]

Realism remains central to the way that international relations is analysed and thought about.[234] It also has much to its credit as a tool for positive analysis of international law.[235] The perception of the international system as an environment where states remain the primary actors

bringing to bear power capabilities in pursuing their interests seems quite consistent with reality and reflects widely held assumptions about the nature of international politics. Moreover, realism has proved to be fairly parsimonious; as a theory, it is elegantly simple. It also has demonstrated a high degree of explanatory potential,[236] and although it has failed to predict the end of the Cold War,[237] for Stephen Walt there is still an argument about *The Enduring Relevance of the Realist Tradition*. Despite the criticisms directed at realism, the obituaries for its demise proved to be premature as other perspectives struggle to compete in width of perspective or depth of explanatory power. In the actual international arena, dominant actors "*remain acutely sensitive to the distribution of power, are wary of developments that might leave them vulnerable, and strive to enhance their positions at the expense of potential rivals*". Cooperation and the use of force both characterise international life, with actors having to navigate an insecure, anarchical world of power competition. This "core problem" of international relations remains acute, and by defining it realism has set the terms of the debate for both its adherents and detractors.[238]

Realism has typically been understood by its proponents and critics alike as a theory for positive scientific analysis that remains sceptical of normative approaches aiming to change the status quo, though it can also be seen as a set of prescriptions, based on a particular reading of political "reality", for how international relations ought to be conducted.[239] International relations, it is contended, are shorn of moral or normative considerations, as actors' interests are paramount. Such arguments, however, are in themselves ethical arguments. They concern *which* values are appropriate in international relations, not whether foreign policy is appropriately subject to normative evaluation.[240] In this context, it is worth recalling that realism emerged as a reaction against the "utopian" approaches of the inter-war period, which ultimately led to the outbreak of World War II. Thus, leading figures such as E. H. Carr cast their work as a critique of "idealism". The realist ethic may, therefore, be seen as a warning against the inappropriate application of moral standards to international political action (or of including normative agendas in international law aimed at changing the status quo),[241] while remaining inherently "moral" in advocating that among often-inconvenient alternatives, actors choose the option with the lesser long-term evil as the better alternative.[242] The resulting foreign policy may be "amoral" at best, in the sense that it is not shaped or directly judged by normative

considerations.[243] It is, however, neither "value free", nor beyond ethical or normative limits. There are limits as to how actors may legitimately pursue their interests and some of these limits arise from international law. Morgenthau has argued that "prudence – the weighing of the consequences of alternative political actions – [is] the supreme virtue in politics. Ethics in the abstract judges action by its conformity with the moral law; political ethics judges action by its political consequences".[244] This is a variant on Max Weber's famous distinction between an ethic of ultimate ends and an ethic of responsibility[245] or, in more contemporary terms, an embodiment of March and Olsen's "logic of consequences".[246]

While realism remains very much alive, the approach in its pure form nonetheless entails some limitations with regard to its explanatory power on the role of international law: it does not adequately elucidate the development of international law and does not offer a complete account of how it impacts behaviour and outcomes, notably how the evolution of international law can be distinct from the distribution of power.[247] The invasion of Ukraine by Russia in 2022 illustrates the difficulties of the realist perspective in incorporating normative issues into the analysis, as it is susceptible to overemphasising power relations among actors to the detriment of norms and institutions. When realism interprets events by asserting that a stronger Russia acted against a weaker Ukraine to enhance its relative power position in an international arena characterised by anarchy and latent conflict, it remains oblivious to the point that behaviour is contingent on a variety of factors, material power being only one among them. The structural realist lens also has blind spots at capturing agency. Russia and Ukraine cannot simply be viewed as puppets in an abstract structure of power relations, where conflict is pervasive; rather, the invasion was one actors' deliberate decision based on factors that may draw as much from internalised norms and ideas than material force. In addition, realism cannot fully explicate the reaction of the international community in upholding the normative framework, as considering that the international arena operates according to norms that simply reflect the interests of the powerful obscures the complex relation between norms and power. Further, by assuming that actors' identity and interests are exogenously determined, it cannot account for how normative shifts in the international system translate into international law over time. While realism is right about the importance of integrating power and actors' quest for security, as well as the effects of anarchy, into the analytical framework for international relations, it neglects to consider

how actors' ideas about the ways to seek power and security might change over time or depending on the situational circumstances. How actors pursue their interests is dependent on how they see themselves and their environment. For instance, acceding to a collective security alliance might be just as effective an approach in deterring threats by other actors than resorting to force. Realism finally often adopts a simplified conception of anarchy in the international system as a latent source for conflict, which does not take into account that anarchy may not necessarily be predetermined, but can have different logics ("*anarchy is what states make of it*").[248]

2.2 Institutionalism and The Economic Analysis of Law

Institutionalism can be seen as part of the "economic turn" in international relations theory. It draws upon economic theory, and especially the "new institutionalism" in economics that came to the fore in the 1980s by Ronald Coase,[249] Oliver Williamson,[250] and represented most notably by Douglass North's *Institutions, Institutional Change, and Economic Performance*.[251] According to these authors, markets may be ineffective because transaction and communication costs can be prohibitively high. The idea is that regulation can be more effective than market dynamics. "Institutions", therefore, introduce hierarchical relations to supersede markets and enhance efficiency by lowering transaction costs.[252] These premises from economic theory are then introduced into the analysis of international relations and international law.

Applied to the field of international relations, institutionalism asserts that institutions can affect behaviour in a variety of ways, from reducing transaction costs, increasing transparency and improving communication, to establishing standards of behaviour, all of which reduces the likelihood of defection and increases the incentives for cooperation that would not otherwise occur.[253] Institutions enable actors to engage in cooperation by restraining short-term power maximisation in favour of long-term aims and can improve the welfare of all actors by moving them closer to Pareto-efficiency.

A more recent version of institutionalism comes under the heading of the so-called rational choice approaches. At its most basic, rational choice is a methodological approach that explains social outcomes in terms of individual goal seeking under constraints.[254] In the framework of rational choice theories, rational actors seek to obtain optimal outcomes under

constraints, which may be institutional or result from interdependencies among actors' options. Rational choice likewise originates from economic theory and uses game theoretic models like the Prisoners Dilemma to illustrate how international law can solve coordination problems and become a Pareto-improving arrangement.

> The term *Pareto-improving* is derived from the notion of Pareto-efficiency, that denotes the state of allocated resources from which it is impossible to reallocate without leaving at least one individual or preference criterion worse off. A Pareto-improvement represents a change to a different allocation towards or at Pareto-efficiency without leaving any individual or preference criterion worse off ("positive-sum game").
>
> The *Prisoners dilemma*, in turn, relates to cooperation under conditions of incomplete information. In the classic example, two individuals get arrested and accused of committing a crime. If both remain silent, both walk free. If both confess, each will get a lenient sentence. In case only one confesses while the other remains silent, the latter gets a heavy sentence while the former walks free. The dilemma faced by the prisoners is thus that, independently of the other's actions, each is better off confessing than remaining silent. The outcome in case both confess, however, is worse for each then had both remained silent. This puzzle helps to illustrate the conflict between individual and group rationality. A group whose members act in rational self-interest may end up worse than a group whose members cooperate. For individuals just like actors in the international system, the key is, therefore, to get agents to cooperate. An important insight from economic theory here is that iteration leads to cooperation. If the game is played an infinite number of times ("infinite reiteration games"), opportunistic behaviour does not pay off, as the option of rational betrayal is foreclosed. The term "shadow of the future" in this context denotes the probability that at the end of a round the game continues. Institutions serve to lengthen the "shadow of the future" by structuring repeated interactions among actors.[255]
>
> This has been furthered by the *Nash equilibrium*, which represents a non-cooperative game scenario where none of the actors can do better by unilaterally changing her strategy. In international relations, one example is arms control during the Cold War period, where none of the major powers had an incentive to unilaterally reduce defence efforts. The Nash equilibrium can, however, also be used in a cooperative setting, to test whether actors with different interests can cooperate. The classic example is the stag hunt, where two hunters are only able to successfully hunt the stag by working together, or else resort to hunting the rabbit which, however, leaves them with less meat. If one suspects the other to have

different interests, she is better off by not expecting her to cooperate in the hunt for the stag and aim for the rabbit instead, in order to avoid the risk of losing out completely. The optimal approach for any given actor thus depends on the expectation of the behaviour of the other actors. Cooperation here makes all actors better off than acting in self-interest.

Applied to the international sphere, rational choice assumes that actors behave rationally to further their interests, taking into account their perception of the interests of other actors as well as their relative power position in the international system.[256]

These premises can be translated into the analysis of international law.[257] Like realism, institutionalism is based on rational, unitary actors driven by interests, but they are expected to cooperate in order to optimise outcomes and improve welfare. International law can, therefore, have independent effects on behaviour, which are like the effect of economic institutions, analysed in functional terms: "*Rules and institutions help stabilize expectations, reduce transaction costs and bargaining, raise the price of defection by lengthening the shadow of the future, increase the availability of information, provide or facilitate monitoring, settle disputes, increase audience costs of commitments, connect performance across different issues, and increase reputational costs and benefits related to conformity of behavior with rules*".[258]

Institutionalism emphasises the functional benefits of international law, while maintaining the importance of power and interests.[259] Under this theory, the pursuit of interests by rational actors remains the dominant explanation of behaviour, but norms may alter the costs and incentives in actors' calculations. International law can shape opportunities. Cast in economic terms, it affects choices like prices in a market. The implications of adopting an institutionalist perspective on international law consist in actors measuring the costs of non-compliance versus compliance. In instances where international law "*provides a means of achieving outcomes possible only through coordinated behaviour*", the behavioural impact of international law is accordingly dependent on the costs it imposes on actors.[260]

In his study on *How International Law Works*,[261] Andrew Guzman canvasses a rational choice-based view of actors' behaviour in the international sphere as a function of interests and power. In this framework of *A Compliance-Based Theory of International Law*,[262] drawing from

economic analysis, actors respond to enforcement as well as more indirect repercussions, such as effects on reputation, in deciding whether to comply with international law. They weigh these costs against the benefits they will obtain from compliance, and, based on this calculation, decide how to act.[263]

International law accordingly enters the calculation of governments in the cost-benefit analysis of their foreign policy. The analysis focuses on the strategic incentives contained in the Nash equilibrium, as faced by rational actors motivated by interests, and determining their actions according to the expected behaviour of others. When calculating the "costs" of their behaviour with regard to international law, actors take into account different variables: *reciprocity*, in that they may gain short-term benefits by violating international law, but may lose the long-term benefits of cooperation if other actors react in the same way; *retaliation* through sanctions, though in a decentralised system, the deterrent effect of sanctions depends not only on its magnitude and probability of enforcement, but also on the likelihood of it being imposed in the first place; *reputational incentives*, in that reliable actors may be able to extract higher returns for their cooperation, thus actors will comply with international law if the reputational gain outweighs the short-term benefit of a norm violation.[264] While such a calculation might appear appealing at first sight, the cost-benefit approach has to contend with the difficulty inherent in evaluating items like interests in quantitative terms suitable to economic analysis, given that they are intangible, elusive concepts that various actors might value differently.[265]

A further issue with institutionalist or rational choice theories is their reductionist nature, which limits the analysis to an economic model whereby all actors are more or less interchangeable and respond to rational calculations of interest, leaving out any distinctive role for norms. Actors modify their behaviour not out of an inherent respect for international law, but due to calculations regarding the impact of non-compliance, in particular on their reputation when transactions are iterated. The analysis seeks to reduce all costs and benefits to monetary terms in order to compare the result of the calculation mathematically. However, the decision-making process may be more complex than the utilitarian thinking that underpins economic models.[266] In the case of international law, the decision process can involve the comparison of several outcomes, which may not easily be cast in monetary terms.[267]

> In rational choice terms, decisions are subjected to *price theory*, which posits that, all things equal, actors will have a preference for the option entailing the lowest cost and the highest efficiency. Transaction costs, in this context, are costs associated with engaging in a transaction and these costs may prevent otherwise efficient transactions.

While Guzman is primarily interested in why actors comply with international law despite the absence of centralised enforcement mechanisms, Joel Trachtman is concerned with the explanation of the emergence of specific legal norms and seeks to uncover *The Economic Structure of International Law*.[268] His approach views international relations as a market for authority with international law constituting the institutional framework. The assets traded in this market are components of power. The analysis focuses on the concept of jurisdiction as the legal manifestation of power[269]; jurisdiction refers to the allocation of authority in terms of institutionalised exercise of power. According to Trachtman, international law is primarily concerned with issues of allocation of authority. Actors enter the market of international relations in order to obtain gains from exchange, and may engage in transactions in jurisdiction where a given element is more valuable to one than another.[270] The aim of jurisdictional norms is to internalise externalities by creating incentives to mitigate the effects of externalisation.

> In this context, the term *externality* refers to the effects of an action or inaction on third parties. This can be remedied through institutionalisation, whereby incentives are created for the actor to mitigate the effects of the externality (*internalisation of externalities*). However, rules regarding jurisdiction to internalise externalities can be expected to develop only when the gains of internalisation exceed the associated costs.
>
> Economic analysis based on the *Coase theorem* allows for the assessment of the possible efficiency and deficiency of particular allocations. The Coase theorem relates to the economic efficiency of a distributive allocation in the presence of externalities. If the externality can be traded and transaction costs are sufficiently low, bargaining will lead to a Pareto-efficient outcome regardless of the initial allocation.[271]

In the international "market", the assets traded are components of power ("jurisdiction"), which shape governmental incentives in order to internalise externalities among political units.[272] According to the Permanent Court of International Justice's 1927 judgement in the *Lotus*[273]

case, jurisdiction is generally territorial. However, as there is growing regulatory competition among actors, such an approach leads to an increase of externalities, there is thus a need for a different allocation of authority. Based on an analogy between property rights and jurisdiction, Trachtman's approach provides potential strategies, based on transaction costs, to explain the development of international norms on prescriptive jurisdiction.[274]

Institutionalism demonstrates that international law can solve coordination or cooperation problems in the international sphere, leading to outcomes that are beneficial for all actors involved. However, given its close links to economic theory, institutionalism has difficulties to adequately cover all aspects of international law, as it tends to lump all normative categories together under the single heading of "institution" as "*persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations*".[275] It has also been held that, since institutions are solutions to cooperation problems among rational actors, it could be expected that iterative cooperation problems—such as the stabilisation of territorial property rights—generate similar institutional practices whenever international "systems" form[276]; this has, however, not been the case.[277] In that sense, the rationalist analysis of actors strategically negotiating functional norms captures only one dimension of the impact of international law on politics, without exploring the potential role of international law in feeding back into actors' identities and interests. Institutionalism is premised on a view of politics consisting of strategic, utility-maximising action, whereby international law is a set of norms to optimise distributive outcomes. Assuming that interests and identities are exogenously given, institutionalism does not really account for the possibility of changes in identity caused by participation in international legal interactions.[278] Therefore, institutionalist arguments are most persuasive in issue-areas where it is at least plausible to assume the presence of clear, pre-existing material interests, such as security and trade.[279]

According to this logic, international law is relevant only when it is in the common interest of all actors or if there is a power configuration to enforce its norms. In areas of "non-political international law"—which benefits all actors regardless of international power distribution, and thus does not strike at core security concerns—such as trade, diplomatic relations and communication, the advantages of cooperation outweigh the benefits of unilateral action and international law does

impact on behaviour, since it contributes to reducing transaction costs and increasing the predictability of behaviour.[280] "Political international law", by contrast, can also be beneficial for all actors, but depends on a particular power constellation, given that it touches upon issues that relate to essential security concerns. Here, the factors determining behaviour are the underlying political and economic goals.[281] If international law coincides with core security interests, actors will appear to be acting in accordance with international law. However, where international law would run contrary to the underlying interests, the latter will prevail. In other words, non-political international law transcends the political sphere, whereas political international law is dependent on it.

While economic theory can significantly contribute to the understanding of how and under what conditions international law affects behaviour, rational choice methodology does, however, not offer a holistic explanation of the functioning of law in international relations, since it shares a blind spot common to all rationalist approaches with regard to interests.[282] Economic models are based upon the assumption that actors are endowed with interests, which are supposed to be constant, transitive and exogenously given.[283] There are, however, no indications about where these interests originate. It has been claimed that they are shaped by actors' identities.[284] They depend on the ideas which frame actor's reasoning, and these ideas are influenced by history, culture, language or the interaction with others.[285] If one accepts this ontological claim, then law has not only one, but two ways of affecting behaviour. In accordance with rational choice assumptions, it does so by influencing the transaction costs involved in actors' strategic options. Or, it can alter actor's interests by shaping their ideas—which owes at least as much to non-institutionalist explanations as to the rationalist framework.[286]

2.3 Fairness and Legitimacy in the International System

The fairness and legitimacy approaches do not refer to rational calculations of interests as the source of actors' decision to comply with international law, but instead to the perceived legitimacy and substantive fairness of legal norms. At the outset of these theories is the question: "What motivates states to follow international norms, rules, and commitments?"[287] The general framework of the answer has been defined in political science as a matter of *Legitimacy and Authority in International Politics*.[288] According to Ian Hurd, at the outset, any social system needs

to face the issue of getting actors to comply with norms, also termed the "problem of social control". This problem is even more acute for international relations, given the absence of an overarching political mechanism or centralisation of power to ensure enforcement.[289] At a generic level, three reasons can be given why an actor might obey a norm: fear of punishment by enforcers; coincidence of the norm with the actor's interests; or a sense of legitimacy by the actor who considers that the norm should be complied with.[290] The key factor inducing norm compliance is different in each of the three cases: in the first hypothesis, it is an asymmetry of material capacities; in the second, a specific distributional structure of incentives; in the third, normative representations of status and legitimacy. In institutionalist terms, the "currency" of power varies depending on the type of power relation. In political science, the mechanisms of social control that correspond to these currencies of power are termed respectively coercion, self-interest and legitimacy.[291]

Coercion, as a relation of asymmetrical power between agents, where this asymmetry is applied to changing the behaviour of the weaker agent, is a rather blunt form of social control, and for the central power tasked with it represents an inefficient mechanism.[292] The application of coercion to subjects tends to generate resentment and resistance, even as it induces compliance, because it operates at the normative impulses of the subordinated individual or group.[293] Consequently, each application of coercion involves an expenditure of limited social capital and material resources, and reduces the likelihood that the subject will comply without coercion in the future.[294] Coercion and sanction are thus costly mechanisms of control, and social orders based primarily on coercion either tend to collapse from their own instability and material overstretch—as has been observed with some totalitarian regimes—or over time reduce their coercive component by relaxing constraints and creating stable expectations among actors.[295] It is, therefore, uncommon for complex social orders to be primarily reliant on coercion, even though all social orders include use of force as a last resort option. Second, as to the view that calculations of self-interest are the foundation of social action, this suggests that norms compliance results from rational and calculated assessments of the net benefits of compliance versus the costs of non-compliance, with an instrumental attitude towards social structures and other agents. The problem with this model of agents as rational utility-maximisers is twofold: it is questionable whether actors always act rationally, and this model takes the actor's interests as exogenous.[296] It

thus assumes that at least certain interests are exogenously given, and that actors' strategies are based on maximisation their interests. Interests, however, are always situated in a context—legal, political, social—that may have decisive influence on their formation.[297]

The third mechanism of social control considers norm compliance to be motivated by a belief in the legitimacy or appropriateness of the norm, respectively, in the legitimating body that generated it. Legitimacy induces compliance in a more subtle way through providing the actor with an "internal" reason to conform her behaviour to a norm. Once an actor considers a norm to be legitimate, compliance no longer results from fear of retribution or by a calculation of self-interest, but instead is motivated by an internal sense of obligation: authority and norms are legitimate to the extent that they are approved or believed to be "right".[298] Legitimacy can be defined as the generalised perception among actors that a particular behaviour fits within a "*socially constructed system of norms, values, beliefs, and definitions*".[299]

This definition encompasses both the sense within the individual of the appropriateness of a body, and the contextual, cultural origin of the standards of appropriateness.[300] The operative process in legitimation is the internalisation of an external standard by the actor. Internalisation in turn is the process whereby the actor's perception of her own interests is partly constituted by elements external to the actor, namely norms present in the social system, existing at the intersubjective level. A norm can be said to become legitimate to a specific actor and therefore become behaviourally significant, once the actor internalises its content and readjusts her interests according to the norm.[301]

Political science has held that, as a device of social control, legitimacy may be less immediate in its effects than coercion, but comprises significant efficiency advantages in reducing the costs associated with enforcement and increasing the apparent freedom of "subordinates". Robert Dahl and Charles Lindblom have observed that "legitimacy is not indispensable to all control. Nevertheless, lack of legitimacy imposes heavy costs on the controllers. For legitimacy facilitates the operation of organisations requiring enthusiasm, loyalty, discretion, decentralisation, and careful judgment".[302] These efficiency advantages of authority might be at the origin of what Max Weber has described as "the generally observable need of any power, or even advantage of life, to justify itself".[303] This internalisation of external standards can also help to defuse

Mancur Olson's problem of collective action by causing actors to interpret the mutually cooperative option as also being the individually rational option, thus legitimacy may be an effective ordering instrument,[304] as the maintenance of social order depends on a set of internalised norms that actors consider as legitimate. These norms shape both actors' interests and the understandings of what are appropriate means to pursue them.[305]

In international law, H. L. A. Hart applies the premises of the positivist tradition of Hans Kelsen to a more sociological analysis and offers an account of *The Concept of Law*[306] that places central emphasis on legal legitimacy, arguing that the distinctive feature of law depends neither on moral principles nor on sanctions, but on the legitimacy of a norm within the particular context in which it exists.[307] Hart links the debate over international law's ontology to the work of legal theory on the sources of obligation (normativity), in order to uncover when and why law generates binding obligations.[308] As a legal system becomes more sophisticated, self-help in response to norm violations is limited and sanctions become increasingly centralised. While Hart considered the international legal order to be of a rather primitive nature, the lack of central authority does affect its legally binding nature, when "*there is general pressure for conformity to the rules; claims and admissions are based upon them*" and breaching the rules entails other actors justifying responsive actions or demands for compensation.[309]

Following the concept of law put forward by Hart, sanctions are not integral to the definition of legal norms. It is the fact of recognition or acceptance that makes them legal norms. As for the possibility of states being subject to law in the first place, Hart, like Kelsen, relies on the three-element doctrine, whereas states consist of a population living in a territory under a legal system.[310] Since it is international law that defines sovereignty and thus determines which entities are sovereign, law can bind even sovereign states. For Hart, the issue of international law's ontology is settled in the affirmative for when "*rules are in fact accepted as standards of conduct, and supported with appropriate forms of social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules*" and therefore valid law.[311] Hart's "*Concept of Law*" influenced legal theory for decades to come and laid the foundation of the theories of legal fairness and legitimacy that came to the fore in the 1990s.

Thomas Franck subsequently built a comprehensive approach to international law that focuses on fairness and legitimacy as the source of

legal obligation to explain why powerful actors obey powerless rules.[312] Franck's theory of legitimacy in international law is built on the perception of the non-coercive attributes of a norm by the addressees, which are inducing compliance. Consequently, his famous definition of *The Power of Legitimacy among Nations* focuses primarily on procedural attributes, whereby a norm or institution's legitimacy consists in inducing compliance by its addressees through the internalised idea that the norm or institution was created and operates pursuant to "*generally accepted principles of right process*".[313]

Franck thereafter expanded his framework and replaced his initially entirely procedural approach to legitimacy by a concept of *Fairness in International Law and Institutions*.[314] Franck now contends that the legitimacy of a norm, or procedural fairness, is not in itself sufficient and needs to be complemented by substantive fairness in that the effect of the norm leads to distributive justice.[315] Drawing from John Rawls' *Theory of Justice*[316] and Jürgen Habermas' theory of communicative action,[317] Franck now asserts that, to be legitimate, decisions must be the result of a legitimate procedure *and* be perceived as substantively "just". Both aspects of fairness—"*the substantive (distributive justice) and the procedural (right process)*"—do not necessarily align, since "*the former favours change and the latter stability and order*", creating a tension between change and stability. For Franck, *[f]airness is the rubric under which this tension is discursively managed*".[318] He then goes on to elaborate on his argument for legitimacy in asserting that for international law to be effective "*its decisions must be arrived at discursively in accordance with what is accepted by the parties as* right process". The substantive aspect in terms of distributive fairness is just as important, "*fairness of international law, as of any other legal system, will be judged […] by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits*", the reference to just distribution being based on moral values for the social system in which international law operates. In other words, actors have internalised the idea that pursuing distributive justice is the right thing to do. The combined perception by actors of the rules system's legitimacy and distributive fairness then induces compliance.[319]

While fairness is primarily a substantive concept built on the idea of distributive justice, Franck recognises that it is problematic to find common values or notions of justice in the international sphere and that in the absence of an objective concept of fairness; there might be no definition capable of generating consensus. Accordingly, he contends that

since any notion of fairness is contingent on history and cultural background, finding consensus on substantive notions of justice may prove elusive. Instead, he builds on the work of communicative action theory and conceives of fairness as a discursive process for deliberating, reasoning and negotiating in the allocation of resources,[320] with the aim of allowing actors to identify an agreed outcome among different possibilities for allocation.[321]

Legitimacy theories have allowed for acquiring a more comprehensive understanding of the mechanisms of social control operating in the international system, but Franck's theory of legitimacy became the subject of criticism from international relations, since from a rational perspective the argument is essentially circular and lacks a causal explanation. Robert Keohane thus argued that evaluating the legitimacy of norms according to the degree to which they induce compliance is essentially a circular argument, given that legitimacy at the same time is used to evaluate the capacity of norms to induce compliance: "When we seek to establish causality, we are left with an incomplete argument and empirical ambiguity".[322] Franck's fairness theory has also been criticised for being ethnocentric. Although he is aware of the problem of finding common values or notions of justice in the international sphere and avoids advancing an objective concept of fairness, Franck mainly relies on John Rawls as well as the wider Western liberal tradition of political thought to advance the notion of fairness as discursive process.[323] Franck does not suggest a need for consensus on particular moral values. However, his approach presumes the presence of tolerance for different perspectives and respect for cultural, while it simultaneously denies the necessity for consensus on substantive justice.[324] In this, however, Franck's attempt to rely on Rawls' discourse among equals is vulnerable to the same problem as finding agreement on a single 'formula' for assessing fairness. Different cultures may construct fairness discourses in different terms from the liberal philosophical tradition, which holds that politics is based on the principle that "all individuals are created equal" and the premise that actors are autonomously operating in a self-interested fashion to achieve their aims.[325] Franck's discourse might be perceived as out of place in different contexts and thus not gain acceptance.

Another issue with the analysis of substantive justice advanced by Franck is his apparent reliance on an essentially Western approach despite liberalism's respect for cultural difference. This has led to the question

whether in an international arena characterised by significant heterogeneity in moral values and political systems, "how can 'fairness' be anything more than a name for a culture-specific value-construct" that Franck proposes in an arbitrary fashion to deceivingly impose on adherents of different cultural and political beliefs through international law and institutions?[326] The latter highlights the political problems with Franck's approach, since a process-based approach relying on liberal values to determine what is "fair" might be perceived as unduly privileging the West and be considered as another form of cultural imperialism. It might thus be opposed simply because it is "Western".[327] On the other hand, the selective nature of liberal values as representing an arbitrarily western approach might be less pronounced than its critics argue. For instance, in June 2021, following the military coup in Myanmar, the UN General Assembly by a large cross-regional majority of member states adopted a resolution calling for the respect of human rights and upholding the population's right to democratic governance.[328]

The issue of cultural heterogeneity leads to a further problem with Franck's theory of legitimacy and fairness. Under some domestic conditions, legitimate authority is a naturally evolving, efficient mode of social control. In this view, social structures first emerge from relations of coercion or self-interest and then may develop into legitimacy-based structures. The precondition for this development, however, is that control is exercised over or within a society. Only to the extent that the international system is a "society" could it, therefore, be expected that a similar process of legitimation occur with international law.[329] While there are arguments for the emergence of certain patterns of an international society, the international system is fundamentally different from a domestic system and Hedley Bull's famous account of the international system as an "anarchical society"[330] points to the problems associated with the lack of overarching political authority. Franck's fairness theory builds on communicative action theory and presupposes the existence of a "community of nations" with a system of principles, norms and decision-making processes. In the realist view, however, the international system always comes back to states endowed with interests applying their power resources to further those interests. The notion of a "community", in this sense, could be considered as resting on rather shaky foundations.

Political science has further highlighted that the issue of legitimacy is not limited to legal aspects and has to be seen in a larger political context. Inis Claude's study on *Collective Legitimisation as a Political Function of*

the United Nations stresses that "*[t]he problem of legitimacy has a political dimension that goes beyond its legal and moral aspects*". In this view, legitimisation is perceived as an essentially political phenomenon, where international legal norms can shape outcomes, but not entirely determine them.[331]

2.4 Constructivism in International Law

Where constructivism is exactly situated in the larger international relations context is open to some debate. It is inherently difficult to provide a unified definition of constructivism, and some argue that constructivism is not so much a "paradigm" for analysing international relations than a multi-layered understanding of social reality.[332] Some adherents of the constructivist approach actually reject its qualification as a theory in the social sciences and instead advocate an orientation based on practical reasoning, as opposed to scientific reasoning, whereby rather than applying theory to issues, the latter are thought of in terms of puzzles to be worked through.[333] While there may be many versions of constructivist thought, it can be held that all strands of constructivism converge on an ontology that depicts the social world as consisting of meanings that are collectively attached to reality,[334] in other words the world of international relations is a *socially constructed world*.[335] In this world, according to Wendt, "material resources only acquire meaning for human action through the structure of shared knowledge in which they are embedded".[336] For constructivism, material structures matter, but they can only make sense through actors' intersubjective understandings that are attached to them. Social structures, in turn, do not exist in the material world, but only become reality through the underlying ideas that actors generate and perpetuate. The meanings attached to social reality are intersubjective in that they are shared among actors and reproduced in normative structures, such as the international legal order.[337]

A crucial implication following from constructivist approaches consists in the insight that an understanding of the world requires the attachment of collective meanings to social reality.[338] While realism and institutionalism consider the physical world as a given, in the sense that guns and money equal more power, constructivism highlights that material objects only acquire significance through the social meanings that actors attach to them. For instance, in the case of the demise of the former German Democratic Republic, tanks and guns were of no use in 1989 when the

legitimacy and purpose of the state became contested and its institutions commanding the material resources collapsed. This phenomenon could be observed again in the wake of the 2021 international withdrawal from Afghanistan. Despite its vastly superior material resources, the central government and armed forces quickly dissolved in the absence of a convincing social narrative about the aim and purpose of the afghan state and its institutions. More importantly, constructivism contends that the existence of social facts depends on actors' consciousness. Contrary to material objects, like rocks and flowers, social facts are intangible and only acquire meaning through collective social understandings. The institutional structure of the world that we see, consisting of states, international organisations and other entities interacting with each other, does not exist in the material sense. States are not "things out there". It is thus an artificial world, which has no existence and no significance on its own. It only becomes reality through the collective social understanding of actors. In other words, the social world is merely a representation that exists in the consciousness of actors. The ideas making up social facts, once established, are "sticky"; in the sense that they are resistant to change the deeper they are embedded in actors' consciousness. They are, however, not immutable to change and can be altered. These changes then impact on how actors define themselves, their interest and the environment that they operate in.[339]

Constructivism emphasises the importance of interaction. By referring to some actors as "self" and to other actors as "the other", interaction creates a notion of what is in "my" interest, as opposed to the "other's" interest.[340] Actors operate in the context of and with reference to a background of intersubjective understandings.[341] In Kratochwil's terms "things" never just "are", rather the way "things are" is always a function of the way we look at them, thus contingent on epistemology, on common history, on language and on how these enable actors to look at the world around them.[342] Translated to the analysis of international law, constructivism, in conjunction with social psychology, thus stresses the *social* and *relational* aspect in the construction of actors' identities and interests, which in turn allows for explanation of how norms shape behaviour in a fashion that is not simply epiphenomenal of power and interests. While it is inherently difficult to define constructivism, there is widespread agreement on the distinguishing features of constructivism's ontology. We have seen the classic statement of Alexander Wendt on the North Korean nuclear and ballistic missiles programme.[343] On the basis

of this observation, it becomes possible to outline the features that distinguish constructivism from other approaches and enable it to address issues that have been inaccessible through the prevailing models of international relations.

The social construction of meaning. The source of the label "constructivism" traces back to the original insight that meaning is socially constructed. Wendt argues that constructivist social theory is premised on actors behaving towards objects (and other actors) based on the meanings that these have for them.[344] In a world that is socially constructed, the existence of structures, cause-and-effect relationships and actors themselves is, therefore, contingent on meanings and practices that constitute them. While these meanings and practices might be relatively stable or "sticky", they are never fixed and do not equate to permanent objects. As ideas and practices evolve over time and vary through space, structures that appear fixed may change as well.[345] These ideas giving shape to international relations can be intersubjective (shared among actors) and institutionalised (expressed in practices). That the United Kingdom is considered a "friend" while North Korea is not self-evident from a purely materialist perspective. The scale and sophistication of the nuclear weapons programmes of the United Kingdom far exceed the potential of the North Korean nuclear weapons. What distinguishes the two cases is that the United States considers North Korea to be more likely to act aggressively than the United Kingdom. This idea draws from interpretations of history, actors' rhetoric and behaviour, and it causes the expectation that a conflict with North Korea is more likely than a belligerent posture of the United Kingdom. This conviction then generates different policy strategies in response to the respective weapons programmes.[346]

The construction of actors' interests. While interests are relevant to all "paradigms" of foreign policy analysis, most theories contend that at the core of interests are actors' ideas about needs. These interests, which are exogenously given, are composed of the desires for security, power and economic development.[347] Thus, their material resources and respective position within the international system indicate the primary interests that motivate actors. Accordingly, actors like states can either be analysed through material forces or can be treated as a "black box", that is their construction does not relate to their exogenously given interests—they are "minimally constructed".[348] Constructivism, by contrast, contends that in the case of the North Korean nuclear weapons programme, the United

States responds not to the weapons as such, but to the social relationship between itself and the military resources of other actors, whether friend or enemy. These social relations are in flux and thus subject to change, and one cannot define the interest of the United States without analysing them. The behaviour of the United States proceeds from an interest in deterring North Korea, with which it perceives an inimical relationship; while in the case of United Kingdom, it perceives a friendly relationship and accordingly no necessity to contain a nuclear deterrent that is considered mutually beneficial.[349]

The mutual constitution of structures and agents. The issue of the social construction of interests and identities leads to the so-called agent-structure debate in international relations. This debate focuses on the nature of international reality; more precisely, whether what exists in international relations should revolve around actors, structures or both.[350] At the outset, the terms of this debate shall be briefly defined. *Structures* refer to the norms and intersubjective meanings constituting the context of international action (e. g. the international system), while *agent* denotes an entity that intervenes as an actor in that context (e. g. states). Applied to Wendt's illustration, the hostility between North Korea and the United States is not immutable. Rather, it is the result of the ongoing interaction both between the two actors and between the actors and the structure, in terms of social context. These interactions may result in reinforcing the relation of enmity or in altering it; they may also reinforce or alter the social structures, including norms, in which the actors exist. This mutual constitution indicates that actors' behaviour contributes to the creation of norms, and these norms in turn bear upon defining, socialising and influencing actors.[351] For the study of international law, actors are concerned both with adjusting their behaviour to norms and at the same time reconstructing the norms in order to justify their behaviour. Thus, when actors resort to force and defend themselves of doing so only in self-defence, they are reaffirming Articles 2 (4) and 51 UN Charter while at the same time reinterpreting these provisions through their understanding of the legal concepts of territorial sovereignty, aggression and self-defence.[352]

Multiple logics of anarchy. In international relations theory, "anarchy" refers not automatically to a violent state of nature, but rather describes a social system without centralised and legitimated institutions of authority. It is thus a formal rather than a substantive condition, in the sense that it depicts any social system that is not organised through hierarchical

structures of authority.[353] In the realist approach, a number of assumptions concerning the behaviour of units are derived from this condition of anarchy, namely that action is motivated by self-interest and aimed at the balancing of power given the primacy of security concerns.[354] These behavioural patterns, however, do not in themselves derive from the social structure being characterised as anarchy; rather, they result from realisms' assumption that actors consider themselves engaged in rivalry over limited material resources.[355] "Rivalry", in turn, is no objective concept, but a social relationship.[356] Returning to the nuclear weapons programmes, while North Korea and the United States consider each other as adversaries, this relationship is not simply given or immutable. The formal condition of anarchy taken in isolation does not reveal much about how actors will actually behave, or in the words of Wendt "an anarchy of friends differs from one of enemies".[357] Consequently, it is not the anarchical nature of the international system that makes the United States perceive the North Korean nuclear programme as a threat, but the perception that "the British are friends and the North Koreans are not".[358]

Central here is a concern for "reasons for action".[359] A reason is simultaneously an individual or collective motive (why an action is taken) and a justificatory claim (the reason given for taking the action) for engaging in a particular course of action.[360] Reasons thus have both an internal and external dimension, structures of norms and ideas are constitutive of actors' reasons in these two dimensions: through processes of socialisation they shape actors' definitions of their identity and interests; and through the requirement of justification they frame logics of argument.[361] Since reasons for action are socially constructed, they are subject to change.[362] Constructivism highlights the link between international law and the social context in which it operates, and further holds that norms constitute social identities and give actors' interests their content and meaning.[363] Therefore, *[international l]aw working in the world constitutes relationships as much as it delimits acceptable behaviour*.[364]

When emphasising the role of norms, the logic that stands in contradiction to realism and institutionalism's "logic of consequences" is that of "appropriateness". March and Olsen contend that agents following a "logic of appropriateness" do not choose between the most efficient option, but "follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more

general concepts of self and situations".[365] The argument here is that, unlike coercive material power that can change behaviour by compulsion, norms affect behaviour by changing an actor's motives and beliefs, that is, their understanding of their interests. Norms produce, therefore, not only a logic that spells out the consequences of what will happen if they are violated, but also a logic of what behaviour is appropriate, the point being that according to March and Olsen in the consciousness of actors the logic of appropriateness becomes prevalent versus the logic of consequences.[366] Since constructivism is concerned with understanding reasons for action, its focus is not just on the logic of appropriateness understood as the conformity of action with normative precepts, but also on a "logic of argumentation", which relates to how norms provide the framework of communicative action in which actors deliberate the legitimate means to achieve their ends.[367] According to Friedrich Kratochwil, this logic of argumentation requires that justifications for action must refer to some shared meaning among actors, since otherwise just about any claim would be as good as any other, making it impossible to account for any form of norms guiding behaviour.[368]

Constructivism, by treating norms and ideas as constitutive, not just constraining, and by stressing the importance of communication, and socialisation in framing social behaviour, offers an understanding of international law based on social communication. In this, constructivism builds on Jürgen Habermas' theory of communicative action.[369] Habermas notably posits that, unlike the underlying assumptions of rationalist approaches, actors do not transact along a purely cost and benefit calculation to achieve their desired outcomes. Rather, actors engage in communicative interaction to establish the validity of their arguments; this interaction in turn generates intersubjective understandings.[370]

It is often stated that while realism in its core is about materialism (actors responding to material incentives and power) and rationalism about instrumentalism (actors pursuing individual advantages by calculating costs and benefits), constructivism is characterised by norms and ideas.[371] Such an overly neat characterisation tends to eclipse what some consider being the most enlightening and appealing puzzle in international relations theory: the relationship between strategic actors and social or normative influences.[372] Constructivism indeed, as we have seen, accentuates the social and relational construction of actors' identity and interests.[373] This is not tantamount to this approach ignoring the role of power and interests, since all international relations theories are concerned

with power as motivation, cause or effect; and all may be used to analyse politics in terms of conflict or cooperation.[374] What differentiates them are the sources that they identify for actors' interests, and what those interests are. Constructivism's focus on international norms is, therefore, compatible with an analysis of strategic behaviour. The social construction of agents may well create rational, self-interested agents pursuing their aims at least in part by comparing costs and benefits, but their behaviour and the origin of their interests cannot be understood distinct from that process of social construction.[375] The material reality has no intrinsic meaning and enjoys causal powers only by virtue of the contingent social relationships in which it is embedded.[376]

The constructivist approach to international law holds that change happens when the "beliefs and identities of […] actors are altered thereby also altering rules and norms that are constitutive of their political practices".[377] How actors experience and engage with norms and their social context is thus crucial, but should not overshadow the role of power, since the social context itself may well reflect power relations.[378] Therefore, the "strange exclusion of power" has been criticised in some constructivist approaches.[379] Kratochwil's reliance on argumentative logics, by opposition to E. H. Carr's definition of politics as characterised by power and competition, can be seen as liable to ignoring the potential role of power as the most obvious explanation[380]: "Kratochwil elucidates in great detail how norms can be used to support political decisions. What he fails to analyse […] is how the norms themselves are already part of political decisions".[381] International law may also not necessarily be neutral, and Kratochwil himself seems to acquiesce that the characterisation of actions consists in an evaluation of facts according to normative considerations, not in performing a neutral description. In this sense, the notion of "objective fact" does not relate to the description of a thing, but rather to the intersubjective nature of a characterisation that is shared by actors.[382] The problem with this admission is the unqualified reliance on the social context to mitigate against bias and unfairness, as it simply does not imply that just because norms are shared that they are then necessarily right or just or fair.[383] This idea of social context would legitimise any and all action by reference to norms, but does not adequately account for the role of power relations or hierarchy.[384]

A further critique that has been addressed to constructivist approaches relates to the "agent-structure debate" in international relations.[385] Constructivism suggests that the interaction of agents can influence the

structure, and the structure in turn "feeds back" onto actors. Both the structure and the agents can be redefined in the process—they are mutually constitutive.[386] This adds a significant layer of understanding to international relations, since many empirical phenomena can be adequately analysed only by using a methodology that avoids considering agents as unchanging units in an international structure.[387] The problem with this mutually constitutive relationship, however, is that it may be difficult to determine how one is affecting the other. If the structure is influencing the agent and vice-versa, any assessment becomes exposed to the critique that the argument is essentially circular.[388]

If one were to emphasise structure over agency, agents would be entirely dependent on the ideational environment in which they find themselves[389]—in George Herbert Mead's terms, each would exist simply as a socially conditioned "Me", without the free-willed "I" capable of resisting the socialisation process.[390] In such a situation, there is thus no possibility for transformation of the structure through the actions of agents. The system would continually reproduce itself, precluding change across time through interaction, except for exogenous material shocks.[391]

Emphasising agency over structure,[392] in turn, leads to a notion of the actor as largely empowered.[393] This, however, fails to adequately account for the role of power within the structure. Actors can identify social norms and may even choose to disregard them, but the latter might be a very costly choice to make for weaker actors,[394] as they are limited by material and social limits, and need to evaluate the consequences of ignoring or defying them.[395] Arguing that the material is the limit goes some way to legitimising it by ignoring how the asymmetry of resources in international life is impacting the construction of actors. Such a view accordingly presents an inherent bias favouring the privileged and powerful, endowed with the means to establish the way things are as "reality".[396] If one were to follow Onuf's statement that the international arena is "*a world of our making*", it would imply that all actors are essentially the same and similarly located within the structure.[397] The idea that actors can "construct" their social world does, however, imply an extensive understanding of agency, which most often is simply not available to many actors.[398] When the powerful can use norms to enhance or maintain their position in the social world, it is a world that is made by the privileged and powerful, as only they have the power to re-make the world. It is a world of *their* making.[399]

3 Why and How Norms and Interest Matter

We have seen that interest-based theories essentially share a common assumption that actors are rational and operate in pursuance of their interests by calculating the costs and benefits of alternative courses of action in the international system. In this view, international law does not hold a privileged position. It is used to facilitate cooperation and solve coordination problems, but exists only if it is in the common interest of the relevant actors or if there is a constellation of power in the international system ready to give it effect. Otherwise, international law will not impact behaviour.[400] The two main variants of this model—realism and institutionalism—differ primarily in the types and sources of interest that they claim motivate actors' decisions. The realist approach adopts an analytical abstraction in viewing states as unified principal actors endowed with interests that are posited or exogenously given. In this framework, international law exists and is complied with only when it is in the interests of the most powerful actors, and may thus be imposed on others by coercing them to consent to it.[401] The institutionalist model is likewise premised on unitary self-interested actors, but draws from economic analysis to demonstrate how international law can facilitate cooperation that would not otherwise occur by reducing transaction costs and solving coordination problems.

Interest-based approaches are to be credited for having broad explanatory power in the international realm. They remain among the most useful theories for predicting the evolution of international relations. The strength of realism in particular is its parsimony; it uses relatively few variables and thus can deliver precise and clear predictions of behaviour.[402] Due to their nature, though, these approaches are centred on issues pertaining to material interests, such as security and trade. While interest-based approaches may have "blind spots" in identifying how international law affects behaviour and outcomes in the international system, and lack sensitivity to the social context, it is difficult to analyse decision processes at the international level without considering which actors are powerful and what their interests are. It can be held as an empirical fact that the state remains the central actor in international life, it is endowed with interests and material capabilities that are brought to bear in the effort to shape international relations. International law, therefore, is at least to some extent shaped by power. Many realist diplomats, legal advisers and academics remain wary of a stylised view of the international legal

order. For practitioners in a foreign ministry or international organisation, aiming to advance a particular objective, it would be quite inconceivable not to consider the interests of other concerned parties and the power position of all actors involved. To ignore these considerations when thinking about international law leaves decisions vulnerable to charges of being unrealistic or unworkable.[403]

Realism in particular is often viewed in a stylised fashion that denies any significant role to international law, which leads to a "straw man" version of realist thought in which it is asserted that international law is epiphenomenal to power and does not influence behaviour. This apparent "fiction" about realism naturally offers a foil, a null hypothesis backdrop, for arguments about how international law is important.[404] Such a perspective was a short-lived, however, and a more complex picture soon began to emerge in international relations. Most contemporary realists, as well as institutionalists, now consider that norms may reduce transaction costs and have Pareto-improving effects, although the distributive consequences from norm intervention are a reflection of power relationships among actors. International law may also be instrumentalised by providing dominant actors to create incentives for weaker actors to follow in the paths traced by the powerful.[405]

International relations are not a zero-sum game in which an increase in one actors' power is inevitably a loss for another, and the idea that international law can have positive-sum possibilities is consistent with all interest-based approaches. In this perspective, international law can be directly consequential to moving actors along the Pareto-equilibrium or towards it. The purpose of international law is seen here in creating self-enforcing equilibriums.[406] International law serves to reduce transaction costs, facilitate information flows and create incentives for cooperation. The terms of cooperation then influence who gains more or less. Power can determine which equilibrium prevails in that it is used to set the terms of cooperation. Given that power relations shape the context of international law, outcomes may well be Pareto-improving, but can disproportionately favour the powerful actors. Therefore, self-enforcing equilibriums enabled by international law privilege the powerful, since they are the ones setting the norms. In other words, while formally equal, international law can be characterised by asymmetry. It may yield distributive consequences that do not necessarily have to be accompanied by a Pareto-improvement, leaving some actors worse off than the status quo.[407] In international economic law, the creation of the World

Trade Organisation is not simply the result of a Pareto-improving arrangement for many of the participants. Rather, the creation of the organisation reflected highly asymmetrical power relations, given that the major actors in international trade are endowed with largely superior resources to shape market conditions in their favour.[408] The distributional consequences of power can result in international law that produces asymmetric outcomes privileging the powerful actors.

This latter element points to a misconception of international law when it comes to the concept of power in international relations. International legal theory has generally accorded scant attention to power, and when using the concept, it is usually transposed from political science in the blunt form: the ability of dominant actors to achieve their ends.[409] The prevailing conception of power in international law, therefore, often remains relatively flat and uniform, centred on material capabilities. By contrast, contemporary political science more readily looks at the ways that power interacts with other forces to shape outcomes.[410] Social science has come to distinguish three "faces of power".[411] The first is power in its most obvious form: the ability of the stronger to determine the conduct of the weaker actor. The second "face" is the ability to influence the range of available options, as seen in the above example on international economic law. The third face is the ability to shape actors' interests and identities through norms, making them believe that a particular conduct is in their interest.

Power in its most obvious form is the ability to get another actor to do something that it would not otherwise do.[412] Initially, it was argued that power largely determined international outcomes, which gave rise to the view that international law is epiphenomenal to power.[413] In international relations, however, it is considered that while power may explain decisions; international law can shape how actors use their power.[414] At the same time, international law and institutions often reflect underlying power.[415] The UN Security Council accords the five permanent members a right to veto. The International Monetary Fund operates with Special Drawing Rights, whereby economically powerful states have a larger share of votes. And the regular voting procedure in the Council of the European Union is by qualified majority vote (QMV), whereby adoption requires a majority representing at least 55% of member states and at least 65% of the Union's population. Under this "double majority rule",[416] each member state is allocated a percentage value relative to its population size, thereby endowing larger member states with greater weight

in QMV decisions. Political science has also looked into the translation of power into influence. The key attribute here is that power is relative: the power of a given actor depends on the power of actors. Power is inherently difficult to measure, as it depends not only on the resources available to any one actor, but also on the alternatives available to other actors.[417] For some issues, an array of alternative options may also amplify the power that seemingly weaker actors can exert on outcomes. In institutions that require universal adherence to norms, for example, defection by even the smallest entity can undermine the aims of the agreement and thus enhance the power position of weaker actors.[418]

The second face of power is the ability to shape the range of available options for other actors, to influence what is actually decided and what is not decided.[419] Political science has linked the exercise of power to the ability of setting the agenda, finding the causal mechanisms that predict both who sets agendas and how agenda setting does, or does not, change behaviour. Powerful actors can constrain or expand the bargaining space, and control over information and superior expertise may favour or impede the development of norms.[420] Weaker actors will have a hard time pursuing an outcome that is simply not available to them. Decisions often reflect underlying power as stronger actors can resort to a variety of mechanisms to pressure weaker actors into acquiescing to a particular outcome.

The third face of power endows international law with the ability to create normative pathways and expectations of behaviour. In this area, international relations and international law have looked into ways of conceptualising power as other than material resources and explored the causal mechanisms that could explain the influence of law on behaviour. Both fields have developed theoretical approaches that seek to explain how norms become seen as legitimate and thus more influential and how international law's effects are distinct from coercion.[421] The field of international relations has also introduced the concept of "soft power",[422] the ability to affect the preferences of other actors trough intangible power resources such as "culture, ideology, and institutions", as distinguished from "the hard command power usually associated with tangible resources like military and economic strength".[423]

There are still differences remaining between a number of political science and international law approaches, the latter often conceiving of law as a reflection of normative aspirations for how the international system ought to be organised. For interest-based approaches, the key

"ought" message, by contrast, is that actors should make judgements based on political prudence and assess the consequences of their actions. The strict application of international law to a particular situation incurs the risk of producing outcomes contrary to the objectives the norms in question seek to realise. More explicitly, the message is that ignoring power and interests can be destabilising and counterproductive.[424] That is the classic warning of E. H. Carr in *The Twenty Years Crisis*, of the dangers of idealism, which during the inter-war period of 1919–1939 actually led to the recurrence of war.[425]

This does, however, not equal to a lack of relevance regarding the role of international law, since political science and international law look at political reality from different angles which are complementary rather than mutually exclusive. While a sound analysis of behaviour in the international sphere cannot ignore international law, it is equally short-sighted to simply disregard political reality. Law that bears no connection to the underlying political forces stands on perilous grounds, as its norms may never translate into real life. An "ought" makes sense only if it stands a realistic chance of becoming an "is".[426] The aim of international law is not to predict or to find causal explanations for political action, but to establish guidance for decisions; otherwise, law could not shape behaviour, but would only describe it[427]—which is the aim of political science, not international law.[428] Power shapes international law, but international law discourse and processes shape the exercise of power by constructing and reinforcing actor identities.[429]

Norm-based approaches accordingly concur in the premise that canvassing a complete image of the behaviour of actors in the international arena requires analysis of ideas and norms. In constructivist theory, we have seen that the identities of actors are formed through interaction, but they are persistent (or "sticky"); and structures, though mutable, are resistant to reconstruction. The key for international law here is how norms shape identities and persuades actors to alter their behaviour—in other words, how norms shape actions.[430] The structure of the international system being conceived as a social structure, it is ultimately actors' perception of the international structure that matters, given that it determines how the structure affects actors and the meaning of power.[431] In short, the structure is what actors believe it to be.[432]

According to these theories, actors' identities and interests can undergo change through the process of interaction. *Prima facie*, it appears that actors generally engage in rational calculations to realise their aims. How

actors define their aims depends upon how they perceive their identity, which in turn is shaped by interaction with others actors, international law being one of the factors shaping and altering actors' identities over time.[433] On the point of "whether" ideas matter, the gap between interest-based and norm-based accounts is in fact quite narrow, as the logics of both approaches converge on actors opting for a particular course of action based on their ideas about the world they are operating in.[434] Norms narrow the range of available options and set the parameters within which actors pursue their interests.[435] Where both approaches diverge is on "how" norms matter, and the respective emphasis these accord to material factors versus norms.[436]

It can accordingly be difficult to delineate any clear-cut distinction between a rational logic of consequences and a norm-following logic of appropriateness. How actors calculate consequences may not be easily separable from their understanding of international law.[437] Moreover, an understanding of how the logics of consequences and of appropriateness interrelate involves considering the role of time and process. While actors continuously need to arbitrate between consequentialist calculations and normative appropriateness, over time, certain norms may become such an accepted part of the international system that they become integral to actors' calculation of consequences.[438] An indication for this phenomenon may be found in Article 53 of the 1969 Vienna Convention on the Law of Treaties,[439] which codifies the concept of peremptory norm, or *jus cogens*,[440] in international law, defined as "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[441] Peremptory norms thus prevail not because the actors involved have so decided, but because they are intrinsically superior and cannot be dispensed with by means of transaction. The rationale of *jus cogens* is thus that such norms are "mandatory and imperative in all circumstances",[442] in other words, they have to apply whatever actors' circumstantial interests.[443] Given the fact that norms such as the principle of non-aggression in Article 2 UN Charter may not legally be dispensed with, they may become an integral part of actors' "logic" when calculating the consequences of their behaviour.

A more challenging issue relates to the link between norms and causation. If one considers international law not simply a set of prescriptions,

but a means for actors to "pursue goals, to communicate, to share meanings, to criticise claims and justify actions",[444] it does not so much determine outcomes, as shape or facilitate them. Following Kratochwil, international law is unable to inform practical action; rather, it operates so as to provide "reasons for action".[445] The relation between norms and causality thus becomes a rather tortuous one, since there are many routes to explaining social action, or in the classic statement of Friedrich Kratochwil with John Ruggie: "*Norms may 'guide' behaviour, they may 'inspire' behaviour, they may 'rationalise' or 'justify' behaviour, they may express 'mutual expectations' about behaviour, or they may be ignored. But they do not effect cause in the sense that a bullet through the heart causes death or an uncontrolled surge in the money supply causes price inflation*".[446]

This assessment in turn feeds back into law's ontology.[447] Actors may frame interests in terms of international law for instrumental reasons to legitimise a course of action according to seemingly impartial motives. Engaging in communicative interaction and accepting particular principles, ideas and arguments, however, shapes and narrows the sorts of arguments that can be made in the future. As the density and complexity of the international legal order increases, so the process becomes more difficult for even powerful actors to control and acquire a logic of its own. In international law, like in any other normative structure, actions may initiate disputes, whether among equals or involving power asymmetries, whose outcome feeds back into the norms. They may be reinforced or weakened, more or less explicit in their guidance. The normative structure, ever so slightly, changed and presents a revised contextual framework for future courses of action. The cycle then continues, creating layer upon layer of norms shaping actors' ideas and identities.[448] Although they may be resistant to change, or "sticky", the pre-existing norms and social understandings are not immutable. As a result, the actors deliberately seeking to create and shape international law are thus not engaged in an abstract "game", but in a process where norms both condition the range of options reasonably available and at the same time shape the norm-creating process.[449]

In the end, returning to the issue of "How do norms matter?", there are compelling reasons for not viewing the rivalry between norm-based and interest-based accounts as a zero-sum game, since actors' behaviour can be shaped by both norms and interests. The degree of norm internalisation may vary among actors, and the same actor may internalise

one norm more than she internalises another. The theoretical challenge is, therefore, not one of mutually exclusive explanations, but rather of identifying the conditions of how norms impact behaviour.[450]

With regard to international law, there is accordingly no fixed and static relationship between agent and structure, or between the material and the normative. International law can influence international relations just as it is itself the product of a political process.[451] While it is not "ideas, all the way down", in that material factors play no role in international law, it is worth recalling John Searle's statement that while material facts do matter and necessarily come before institutional facts, *how* material facts matter depends on norms and ideas.[452]

Notes

1. The field covered by the term positivism is extremely vast, due to the fact that the concept of positivism usually is very loosely defined. The very elastic character of "positivism" may be illustrated by five different meanings of positivism which, according to H. L. A. Hart, "are bandied about in contemporary jurisprudence: (1) the contention that laws are commands of human beings; (2) the contention that there is no necessary connection between the law and morals and law as it is and ought to be; (3) the contention that the analysis of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, 'functions', or otherwise; (4) the contention that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards; and (5) the contention that moral judgment cannot be established or defended as statements of fact, by rational argument, evidence or proof (non-cognitivism in ethics)". H. L. A. Hart, Positivism and the Separation of Law and Morals, 71 *Harvard Law Review* (1958), 593–629.
2. Joseph Raz, The Purity of the Pure Theory, *in* Paulson and Paulson (Eds.), *Normativity and Norms*, 239–241.
3. G. H. van Hoof, *Rethinking the Sources of International Law* (1983), 35.
4. H. L. A. Hart, ibid., 593.
5. Van Hoof, ibid.

6. Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (2010), 44.
7. Ibid., 45.
8. Kelsen, *Hauptprobleme der Staatsrechtslehre* (1923), 8; see also G. H. von Wright, "Is and Ought", *in* Paulson and Paulson (Eds.), *Normativity and Norms* (1998), 365–367.
9. Wolfgang Schluchter, *Rationalismsus der Weltbeherrschung: Studien zu Max Weber* (1983).
10. Von Bernstorff, supra, 47.
11. Hans Kelsen, *Pure Theory of Law* (transl. of Reine Rechtslehre, 1934), 1967.
12. Von Bernstorff, supra, 48.
13. Von Bernstorff, supra, 165; see also William Ebenstein, The Pure Theory of Law: Demythologizing Legal Thought, 59 *California Law Review* (1971), 643.
14. Kelsen, *General Theory of Law and State* (1945).
15. Janina Dill (2015), 32.
16. Kelsen, supra, 369–370; Kelsen, *Principles of International Law* (1956), 418.
17. H. L. A. Hart, for instance, characterises the proclaimed basic norm of international law that states should behave as they customarily behaved as "a mere useless reduplication of the fact that a set of rules are accepted by states as binding rules", see Hart, *The Concept of Law* (1960), 230.
18. Van Hoof, supra, 37.
19. Kelsen, *Pure Theory of Law*, 474, 477–485.
20. Pierre Bourdieu, La force du droit—Éléments pour une sociologie du champ juridique, 64 *Actes de la recherche en sciences sociales* (1986), 3 (my translation).
21. Alfred Verdross, *Die Quellen des universellen Völkerrechts* (1973), 24. For Kelsen, *pacta sunt servanda* created international treaty law by endowing international treaties with binding legal force, see Kelsen, Contribution à la théorie du Traité international, 10 *Revue internationale de la théorie du droit* (1936), 255.
22. Kelsen himself has described the *Grundnorm* as "a constitution in the transcendental-logical sense, as distinct from the constitution in the positive legal sense. The latter is the constitution posited by human acts of will, the validity of which is based on the assumed (*vorausgesetzte*) basic norm", *quoted by* Wolfgang Friedmann, *Legal Theory* (1967), 277.
23. Bourdieu, supra, 3 (my translation).
24. Von Bernstorff, supra, 49.
25. Van Hoof, supra, 38.
26. Hersch Lauterpacht, *International Law, Collected Papers, Vol. I: The General Works* (1970), 54–55.

27. Von Bernstorff, supra, 56.
28. Kelsen, *Pure Theory of Law*, 28.
29. Kelsen, *Hauptprobleme der Staatsrechtslehre*, 14.
30. Kelsen, The Law as a Specific Social Technique, 9 *University of Chicago Law Review* (1941), 80.
31. See Kelsen, Eine Grundlegung der Rechtssoziologie, *Archiv für Sozialwissenschaft und Sozialpolitik* (1915), 871.
32. Von Bernstorff, supra, 180.
33. Carl Schmitt, *Die Kernfrage des Völkerbundes* (1926), 50; E. H. Carr, *The Twenty Years' Crisis*, 62, 98.
34. Bourdieu, supra, 13 (my translation).
35. Shaw, *International Law*, 51.
36. Ibid., 52.
37. Friedrich Kratochwil, How Do Norms Matter?, *in* Byers (Ed.), *The Role of Law in International Politics*, 37.
38. Carr, *The Twenty Years' Crisis*, 25, 42.
39. Oona Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics*, 27.
40. Thucydides, *History of the Peloponnesian War* (transl.), Vol. 1 (1832).
41. Niccoló Machivavelli, *The Prince* (transl. of Il Principe, 1513) (1998).
42. Thomas Hobbes, *Leviathan* (1651).
43. For this identification, see, e.g., Richard Steinberg, Wanted—Dead Or Alive: Realism in International Law, *in* Dunoff/Pollack, supra, 147; Michael Smith, *Realist Thought from Weber to Kissinger* (1986), 4; George Lichtheim, *The Concept of Ideology and other Essays* (1967), 142–146. If one begins with Thucydides, his analysis of political realities seems to anticipate the realist attempt to grasp the realities as they really are rather than how they ought to be. Moreover, the account of the Peloponnesian War also seems to indicate an affinity with some of the central themes of realism, such as an extreme scepticism of individuals' motives and the suggestion that it is ultimately the relative power position of states which is central in their relations, see Michael Doyle, Thucydidean Realism, 16 *Review of International Studies* (1990), 223–237. As to Machiavelli and Hobbes, their work can be interpreted in three principal ways which might provide a basis to read realism: as a scientific phenomenon, the precursor to a positivist social science, unencumbered by moral distractions; as a doctrine of power politics, the justification of states' power, position and policy; and as a doctrine of *raison d'état*, the doctrine of the privileged community prioritised over all other goods, see, e.g., Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (2006), 156–160; Quentin Skinner, Hobbes's Leviathan, 7 *The Historical Journa*l (1964), 321–333. Realism can, on this basis, be represented either as the abstraction of the political

from the moral, as the politicisation of the moral, or as the moralisation of the political—the role that Machiavelli and Hobbes play in representations of realism is ultimately a function of the extent to which they provide a basis for the multiplicity of diverse conceptions of realist thought. This has, however, also opened up the association of these three authors with the origins of realism up to criticism, in that "Thucydides, Machiavelli and Hobbes have effectively become stereotypes in support of a stereotypical reading of realism", unable to provide an adequate reflection of both realism and classical thought in all their complexities: Alastair J. H. Murray, *Reconstructing Realism* (1997), 33.

44. Janina Dill (2015), 50–51.
45. Shaw, 49.
46. Steinberg distinguishes between classical realism associated with Thucydides, early-modern realism associated with Machiavelli, traditional realism associated with Morgenthau and structural realism associated with Waltz, see Steinberg, Realism in International Law, supra.
47. E. H. Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (1939) (2001).
48. Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948) (2006).
49. Carr, supra, 12.
50. Hathaway/Koh, supra, 27.
51. Bourdieu, supra, 3 (my translation).
52. Kenneth Waltz, *Theory of International Politics* (1979).
53. Hathaway/Koh, 28.
54. Steinberg, supra (2013), 148.
55. See Richard Thaler, *Misbehaving: The Making of Behavioral Economics* (2015).
56. Anne van Aaken, Behavioral International Law and Economics, 53 *Harvard International Law Journal* (2014), 421.
57. On the limitations of utility theory and rational models, see Amos Tversky and Daniel Kahneman, Judgment under uncertainty: heuristics and biases, 185 *Science* (1974), 1124–1131. Daniel Kahneman and Amos Tversky, Prospect theory: an analysis of decision under risk, 47 Econometrics (1979), 263–291.
58. Christine Jolls, Cass Sunstein and Richard Thaler, A Behavioral Approach to Law and Economics, 50 *Stanford Law Review* (1998), 1471.
59. Emilie M. Hafner-Burton, Stephan Haggard, David Lake and David Victor, The Behavioral Revolution and International Relations, 71 *International Organization* (2017), 1–31.
60. Daniel Kahneman, *Thinking, Fast and Slow* (2015); Daniel Kahneman and Amos Tversky, On the reality of cognitive illusions, 103 *Psychol. Rev.* (1996), 582–591.

61. Jeffrey Dunoff and Mark Pollack, Experimenting with International Law, 28 *EJIL* (2017), 1332.
62. Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (2009); Christine Jolls and Cass Sunstein, Debiasing through Law, 35 *Journal of Legal Studies* (2006), 199.
63. Hathaway/Koh, *Foundations of International Law and Politics*, 22; see also Tim Dunne, The English School, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008).
64. See Lauterpacht, The Grotian Tradition in International Law, supra.
65. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 13.
66. Peter Wilson, The English School and the Sociology of International Law: Strengths and Limitations, unpublished manuscript (2003), quoted *in* Hathaway/Koh, *Foundations of International Law and Politics*, 22–23.
67. Andrew Hurrell, International Society and the Study of Regimes, *in* Rittberger (Ed.), *Regime Theory and International Relations* (1993), 60.
68. Myres McDougal, International Law, Power and Policy: A Contemporary Conception, 82 *Recueil des Cours* (1953), 137–259; Myres McDougal, Some Basic Theoretical Concepts about International Law: A Policy Oriented Framework of Inquiry, *in* Falk/Mendlovitz (Eds.), *The Strategy of World Order*, Vol. II, International Law (1966).
69. Myres McDougal and Harold Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, *in* Falk/Mendlovitz (Eds.), *The Strategy of World Order*, Vol. II, International Law (1966).
70. Myres MacDougal and W. Michael Reisman, The Prescribing Function in the World Constitutive Process: How International Law is Made, 6 *Yale Studies in World Public Order* (1980), 249–284.
71. W. Michael Reisman, Sanctions and Enforcement, *in* Black/Falk (Eds.), *The Future of the International Legal Order* (1971), 392–393.
72. W. Michael Reisman, A Theory About Law From the Policy Perspective, *in* Weisstub (Ed.) *Law and Policy* (1976), 75–76.
73. See W. Michael Reisman, Sanctions and Enforcement, *in* Black/Falk (Eds.), supra (1971), 273: "[E]nforcement involves the continuous communication of a capacity to assemble and apply sanctions in order to realize the value allocations decreed by authoritative prescriptions and decisions".
74. O'Connell, *The Power and Purpose of International Law*, 70.
75. Richard H. Steinberg and Jonathan M. Zasloff, Power and International Law, 100 *AJIL* (2006), 74.
76. O'Connell, supra, 70.

77. Oscar Schachter, McDougal's Jurisprudence: Utility, Influence, Controversy, 79 *Proceedings of the American Society of International Law* (1985), 271.
78. Friedrich Kratochwil, How Do Norms Matter? *in* Byers (Ed.), *The Role of Law in International Politics*, 42.
79. Kal Raustiala and Anne-Marie Slaughter, International Law, International Relations, and Compliance, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 540.
80. Louis Henkin, *How Nations Behave* (1979).
81. O'Connell, supra, 71.
82. Henkin, *How Nations Behave*, 26.
83. Morgenthau, *Politics Among Nations* (1948); George Kennan, *American Diplomacy 1900–1950* (1951), 95–99.
84. Henkin, supra, 40–41.
85. O'Connell, *The Power and Purpose of International Law*, 75.
86. Henkin, *How Nations Behave*, 50.
87. Ibid., 47.
88. This is at the core of the argument later put forward by institutionalism and the economic analysis of international law. See Andrew Guzman, *How International Works* (2008).
89. David Kennedy, *International Legal Structures* (1987).
90. Antony Carty, *The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986).
91. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).
92. O'Connell, *The Power and Purpose of International Law*, 91.
93. Andreas Paulus, International Law After Postmodernism: Towards Renewal or Decline of International Law?, 14 *Leiden Journal of International Law* (2001), 729.
94. Paulus, supra, 735.
95. O'Connell, supra, 93.
96. Ibid.
97. O'Connell, supra, 94.
98. Byers, *Custom, Power and the Power of Rules*, 25.
99. Ibid.
100. Raustiala and Slaughter, International Law, International Relations and Compliance, *in* Carlsnaes/Risse/Simmons (Eds.), supra, 540.
101. Keohane and Nye, *Power and Interdependence* (1977), 10–11.
102. See Keohane, *After Hegemony* (1984); Byers, supra, 26.
103. Hathaway/Koh, supra, 50.
104. Stephen Krasner, *International Regimes* (1983).
105. Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

106. Krasner, *International Regimes*, supra, 2.
107. Dirk Pulkowski, by reference to Krasner's terminology, highlights that the definitions of "principles", "norms" and "rules" in regime theory do not necessarily coincide with legal terms. For regime theory, principles are "beliefs of fact, causation, and rectitude"; norms relate to "standards of behaviour defined in terms of rights and obligations"; and rules are "specific prescriptions or proscriptions for action". See Pulkowsi, *The Law and Politics of International Regime Conflict* (2014), 89.
108. See Andrew Hurrell, International Society and the Study of Regimes, *in* Rittberger (Ed.), *Regime Theory and International Relations* (1993), 61: "[International society being] a political system, states will seek to interpret obligations to their own advantage. But being a legal system that is built on the consent of other parties, they will be constrained by the necessity of justifying their actions in legal terms. It is for those reasons that it is important to make a clearer distinction than is common in regime theory between specifically legal rules and the workings of the legal system within which they operate on the one hand, and the wide variety of other formal and informal norms and rules and the processes of negotiation, bargaining, or imposition that underpin them on the other".
109. Hathaway/Koh, supra, 49.
110. While this definition might appear similar to that of international regimes, the concept of institution is in fact far more comprehensive and includes regimes as one of its 'layers', see Keohane, Neoliberal Institutionalism: A Perspective on World Politics, *in* Keohane (Ed.), *International Relations and State Power* (1989), 3–4.
111. Hathaway/Koh, supra, 50.
112. Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (2005).
113. Ibid., 3.
114. Ibid., 202.
115. John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, Vol. I, 5th Ed. (1911).
116. Goldsmith/Posner, 15.
117. Ibid., 13.
118. Ibid., 7.
119. See, e.g., Niels Petersen, How Rational Is International Law?, 20 *EJIL* (2009), 1247–1262 (1258).
120. Anne van Aaken, To Do Away with International Law? Some Limits to the Limits of International Law, 17 *EJIL* (2006), 289–308.
121. Beth Simmons, Review Article: The Power and Purpose of International Law, 103 *AJIL* (2009), 39.
122. Hathaway/Koh, supra, 111.

123. Dietrich Rueschemeyer, Why and How Ideas Matter, *in* Goodin/Tilly (Eds.), *The Oxford Handbook of Contextual Political Analysis*, 227–251.
124. Alexander Wendt, Anarchy is what States Make of It: The Social Construction of Power Politics, 46 International Organization (1992), 397; see also Wendt, Constructing International Politics, 20 *International Security* (1995), 73.
125. Ian Hurd, Constructivism, *in* Reus-Smit/Snidal (Eds.), supra, 298.
126. Wendt, Constructing International Politics, supra, 73.
127. Friedrich Kratochwil, *Rules, Norms and Decisions* (1989); Nicholas Onuf, *World of Our Making* (1989); John Gerard Ruggie, What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge, 52 *International Organization* (1998), 855–886; Ian Hurd, Constructivism, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008).
128. Stephen Walt, What are Sweden and Finland Thinking?, *Foreign Policy*, 18 May 2022: https://foreignpolicy.com/2022/05/18/nato-sweden-finland-russia-balance-threat/.
129. Carlo Focarelli, *International Law as Social Construct. The Struggle for Global Justice* (2012), 2.
130. Martha Finnemore and Kathryn Sikkink, Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics, 4 *Annual Review of Political Science* (2001), 401. The debate also extends within constructivism itself, some scholars arguing that it is not a positive theory and thus not able to distinguish what 'is' from what "ought", see Ian Hurd, Constructivism, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008), 307, 308.
131. Thomas Risse, Stephen Ropp and Kathryn Sikkink (Eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (2013).
132. Ibid., 12–20.
133. According the Goodman and Jinks, the conflation of cause and effect in constructivism is due to insufficient distinction between explanatory and outcome variables, leading to an apparent circularity. Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (2013), 13–16.
134. Ibid., 25–28.
135. Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: From Commitment to Compliance* (2014).
136. Thomas Franck, *Fairness in International Law and Institutions* (1995), 6.
137. Franck, *The Power of Legitimacy Among Nations* (1990).
138. Franck, *Fairness in International Law and Institutions*, supra.
139. Thomas Franck, Legitimacy in the International System, 82 *AJIL* (1988), 706. According to Franck, the concept of "legitimacy" is defined

by four elements: textual determinacy, symbolic validation, coherence and adherence. Together, these characteristics determine "right process" which, by creating the perception of legitimacy, induces compliance.

140. O'Connell, *The Power and Purpose of International Law*, 85.
141. Robert Keohane, International Relations and International Law: Two Optics, 38 *Harvard JIL* (1997), 493.
142. Fernando Tesón, *A Philosophy of International Law* (1998), 1.
143. Ibid., 2.
144. Ibid., 16.
145. Carlos Nino, *The Ethics of Human Rights* (1991).
146. Harold Hongju Koh and Ronald C. Slye, *Deliberative Democracy and Human Rights* (1999), 5.
147. Nino, *Ethics of Human Rights*, 72–73.
148. Koh and Slye, supra, 5.
149. Nino, *Ethics of Human Rights*, 112.
150. Bernard Williams, In the Beginning was the Deed, *in* Koh/Slye (Eds.), supra, 52.
151. Nino, *The Constitution of Deliberative Democracy* (1996), 107. 144.
152. Paul W. Kahn, Democracy and Philosophy, *in* Koh/Slye (Eds.), supra 249.
153. Tesón, supra, 9.
154. See the critical discussions *in* Stanley Hoffmann, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (1981); Marshall Cohen, Moral Skepticism and International Relations, 13 *Philosophy and International Affairs* (1984), 299–346.
155. See e.g. Morgenthau, *Politics Among Nations* (1948); Kenneth Waltz, *Man, the State, and War* (1959); Hedley Bull, *The Anarchical Society* (1977).
156. Abram Chayes and Antonia Handler Chayes, On Compliance, 47 *International Organization* (1993), 175–205.
157. Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1998).
158. Hathaway/Koh, supra, 153.
159. Chayes and Chayes, *The New Sovereignty*, 8.
160. Raustiala/Slaughter, supra, 542–543.
161. Ibid., 543. Chayes and Chayes elaborate their argument in the following terms: "[T]he interpretation, elaboration, application and ultimately enforcement of international rules is accomplished through a process of (mostly verbal) interchange among interested parties" by means of "diplomatic conversation—explanation and justification, persuasion and dissuasion, approval and condemnation […]. In this discourse [of international relations], the role of legal norms is large". *The New Sovereignty*, 118–119.

162. George Downs, David Rocke and Peter Barsoom, Is the Good News About Compliance Good News About Cooperation? 50 *International Organization* (1996), 379–406.
163. George Downs, Enforcement and the Evolution of Cooperation, 19 *Michigan Journal of International Law* (1998), 319–344.
164. Raustiala/Slaughter, supra, 543.
165. Downs/Rocke/Barsoom, supra, 399.
166. Ibid., 379–380.
167. Raustiala/Slaughter, supra, 534–544.
168. Lisa Martin, Against Compliance, *in* Dunoff/Pollack (Eds.), *Interdisciplinary Perspectives on International Law and International Relations* (2013), 591.
169. Janina Dill, Legitimate Targets? Social Construction, International Law and US Bombing (2015), 9, 12.
170. Harold Hongju Koh, Transnational Legal Process, 75 *Nebraska Law Review* (1996), 181–207.
171. Harold Hongju Koh, Why Do Nations Obey International Law? 106 *Yale Law Journal* (1997), 2599–2659.
172. Harold Hongju Koh, Bringing International Law Home, 35 *Houston Law Review* (1998), 628.
173. Koh in fact refers to the process of socialisation of actors to norms: "As governmental and non-governmental actors repeatedly interact within the transnational legal process, the generate and interpret international norms and then seek to internalise those norms domestically […] It is through this transnational legal process, this repeated cycle of interaction, interpretation and internalisation, that international law acquires its 'stickiness', that nation-states acquire their identity and that nations come to 'obey' international law out of perceived self-interest". See Why Do Nations Obey International Law? supra, 2651.
174. Harold Hongju Koh, *The Trump Administration and International Law* (2018), 7.
175. According to Koh, this internalisation is part of a continuous process or circle, since once norms are internalised, new norms are created: "[From the] process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again. Thus, the concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey". See Harold Hongju Koh, Transnational Legal Process, supra, 184.
176. Raustiala/Slaughter, supra, 544.

177. See the Liberal Theory approach, *infra*; Anne-Marie Slaughter, A Liberal Theory of International Law, 94 *Proceedings of the American Society of International Law* (2000), 240–249.
178. See Robert Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 *International Organization* (1988), 427–460.
179. Also termed "liberal institutionalism" or "institutional liberalism".
180. On the interaction between domestic and international politics, see Peter Gourevitch, Domestic Politics and International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations* (2002).
181. Hathaway/Koh, Foundations of International Law and Politics, 78.
182. See Michael Doyle, Liberalism and World Politics, 80 *American Political Science Review* (1986), 1151–1169.
183. Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, 51 *International Organization* (1997), 512–553.
184. Anne-Marie Slaughter, *A New World Order* (2004).
185. Moravcsik, supra, 513.
186. Andrew Moravcsik, The New Liberalism, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008), 236–239.
187. There has, however, long been a contrary argument in international relations that it is in fact international pressures that impact on domestic politics, which in turn "feed back" into the international arena, see Peter Gourevitch, The Second Image Reversed: International Sources of Domestic Politics, 32 *International Organization* (1988), 881–911.
188. In this view, state preferences, the ultimate ends of foreign policy behaviour, are distinct from "strategies"—the specific policy goals, bargaining demands, institutional arrangements, tactical stances, military or diplomatic doctrines that states adopt, advocate or accept in everyday international politics.
189. Moravcsik, *in* Reus-Smit/Snidal, 239.
190. Anne-Marie Slaughter, International Law in a World of Liberal States, 6 *EJIL* (1995), 503–538.
191. Gerry Simpson, The Ethics of the New Liberalism, *in* Reus-Smit/Snidal, supra, 259.
192. See Jose E. Alvarez, Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory, 12 *EJIL* (2001), 183–246.
193. Simpson, supra, 258–259.
194. Hathaway/Koh, supra, 110.
195. Moravcsik, Taking Preferences Seriously, 512.
196. The emphasis on the centrality of American exceptionalism in recent work within the liberal paradigm sits rather uneasy with the theory's claim to neutrality, and raises some preoccupation with liberalism as an ideological programme, see John Ikenberry and Anne-Marie Slaughter,

Forging a World of Liberty under Law: U.S. National Security in the 21st Century, Final Report of the Princeton Project on National Security (2006); Anne-Marie Slaughter, America's Edge: Power in the Networked Century, 88 *Foreign Affairs* (2009), 94–113.

197. Martti Koskenniemi, Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations, *in* Byers (Ed.), *The Role of Law in International Politics*, 33–34.
198. See Koh, Why Do Nations Obey International Law, supra, 2650 (arguing that liberal theory does not take into account that states can turn from liberal to illiberal and vice versa).
199. Hilary Charlesworth, Christine Chinkin and Shelley Wright, Feminist Approaches to International Law, 85 *AJIL* (1991), 613–645.
200. Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis (2000)*.
201. Sandra Whitworth, Feminism, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008), 391.
202. Jacqui True, The Ethics of Feminism, *in* Reus-Smit/Snidal (Eds.), supra, 408–409.
203. Whitworth, Feminism, supra, 393–395.
204. Ibid., 398.
205. Sandra Whitworth, *Men, Militarism, and UN Peacekeeping: A Gendered Analysis* (2004).
206. Jacqui True, The Ethics of Feminism, supra, 415.
207. Ibid., 417.
208. Sandra Whitworth, Feminism, supra, 397, 399; Jacqui True, The Ethics of Feminism, supra, 409.
209. Charlesworth, Chinkin and Wright, supra, 413.
210. Jacqui True, The Ethics of Feminism, supra, 419.
211. See Jochen von Bernstorff, Review Article: Mark Mazower. Governing the World. The History of an Idea, 25 *EJIL* (2014), 599.
212. A similar argument is made by Carlo Focarelli who describes international law as a "social construct" crafted upon western civilisation and perceived by others as an oppressive system in which they are forced to 'believe' by virtue of the dominant powers that shape the law: "[T]here can be little hope for the construction of a credible international law without building on the legal traditions of all the peoples concerned. It is proposed […] to get out of the Western domination of the discipline, both epistemologically and politically, by starting a serious analysis of international law from a legal comparative perspective". See Carlo Focarelli, *International Law as a Social Construct: The Struggle for Global Justice* (2012), 3.
213. Yausaki Onuma, *A Transcivilizational Perspective on International Law* (2010), 11.
214. Ibid., 219.

215. Ibid., 366.
216. Dawood Ahmed, Review Article: Yasuaki Onuma. A Transcivilizational Perspective on International Law, 24 *EJIL* (2013), 717.
217. International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Report of the Study Group of the ILC, finalised by Martti Koskenniemi*, UN Doc. A/CN.4/L.682 (13 April 2006).
218. William C. Wohlforth, Realism, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations*, 132.

    While the tradition of thought of political realism stretches back centuries, its application to the field of international relations can be divided into four different periods: an early inter-war stage most closely associated with the critique of legalism and appeasement policy by E. H. Carr; an early Cold War period embodied by Hans Morgenthau and George Kennan; a late Cold War generation symbolised by the structural realist approach of Kenneth Waltz, and further developed by Stephen Krasner; and a post-Cold War stage led by John Mearsheimer's study on *The Tragedy of Great Power Politics.*
219. Peter Katzenstein, Robert Keohane and Stephen Krasner, International Organization and the Study of World Politics, 52 *International Organization* (1998), 658; see also Wolforth, supra.
220. Katzenstein, Keohane and Krasner, International Organization and the Study of World Politics, supra, 658.
221. Wohlforth, supra, 135.
222. Waltz, *Theory of International Politics* (1979).
223. John Mearsheimer, The False Promise of International Institutions, 19 *International Security* (1994–1995), 5–49.
224. Steinberg, supra (2013), 153.
225. Arend, *Legal Rules and International Society*, 115.
226. Stephen Krasner. Structural Causes and Regime Consequences: Regimes as Intervening Variables, *in* Krasner (Ed), *International Regimes* (1983), 6–7.
227. Morgenthau, *Politics Among Nations*, 285.
228. Ibid., 285–286.
229. E. H. Carr, *The Twenty Years' Crisis*, 179.
230. Steinberg, supra (2013), 154.
231. Robert Gilpin, *War and Change in World Politics* (1981), 35.
232. Stephen Walt, Why do People hate Realism so much? *Foreign Policy*, 13 June 2022: https://foreignpolicy.com/2022/06/13/why-do-people-hate-realism-so-much/.
233. Steinberg, supra (2013), 146.
234. Wohlforth, supra, 131.

235. August Comte described the epistemological perspective of positivism as a circular dependence of theory and observations, whereby certain (positive) knowledge is based on empirical evidence interpreted through reason and logic. See Stanford Encyclopedia of Philosophy: https://plato.stanford.edu/entries/comte/.
236. Robert J. Lieber, *No Common Power* (2001), 34–88.
237. *See* John L. Gaddis, International Relations Theory and the End of the Cold War, 17 *International Security* (1993), 5–38.
238. Stephen Walt, The Enduring Relevance of the Realist Tradition, *in* Katznelson/Milner (Eds.), *Political Science: The State of the Discipline*, Vol. 3 (2002), 197–234.
239. Jack Donnelly, The Ethics of Realism, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations*, 151.
240. Ibid., 154.
241. Steinberg, supra (2013), 147.
242. Hans Morgenthau, *Scientific Man Versus Power Politics* (1946), 202.
243. See Greg Russell, *Hans J. Morgenthau and the Ethics of American Statecraft* (1990), 51: "Unlike the solitary individual who may claim the right to judge political action by universal ethical guidelines, the statesman will always make his decision on the basis of the state's interest".
244. Morgenthau, *Politics Among Nations*, 9.
245. Max Weber, *Politics as a Vocation* (transl. of Politik als Beruf, 1919) (2004).
246. March and Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (1989).
247. Reus-Smit, *The Politics of International Law*, 17.
248. Alexander Wendt, Anarchy is what States Make of it: The Social Construction of Power Politics, 46 *International Organization* (1992), 391.
249. Donald Coase, *The Firm, The Market, and The Law* (1988).
250. Oliver Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (1985).
251. Douglass North, *Institutions, Institutional Change, and Economic Performance* (1990).
252. Markus Burgstaller, *Theories of Compliance with International Law*, 99.
253. Robert Keohane, *After Hegemony*, 244–245.
254. Duncan Snidal, Rational Choice and International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 74.
255. Robert Axelrod and Robert Keohane, Achieving Cooperation under Anarchy: Strategies and Institutions, 38 *World Politics* (1985), 233–234.
256. See Goldsmith/Posner, *The Limits of International Law*, 2.
257. Jeffrey Dunoff and Joel Trachtman, Economic Analysis of International Law, 24 *Yale Journal of International Law* (1999), 1–59.

258. Benedict Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 *Michigan Journal of International Law* (1998), 352.
259. Janina Dill (2015), 21.
260. Oona A. Hathaway, Do Human Rights Treaties Make A Difference? 111 *Yale Law Journal* (2002), 1936.
261. Andrew Guzman, *How International Law Works* (2008).
262. Guzman, A Compliance-Based Theory of International Law, 90 *California Law Review* (2002), 1823–1887.
263. Hathaway/Koh, supra, 51.
264. Andrew Guzman, *How International Law Works*, 32–33.
265. Hanspeter Neuhold, The Foreign Policy Cost–Benefit Analysis Revisited, 42 *GYIL* (1999), 123–124.
266. See e.g. Steven Kelman, Cost–Benefit Analysis—An Ethical Critique, 10 *Regulation* (1981), 33–40.
267. Burgstaller, supra, 110–111.
268. Joel P. Trachtman, *The Economic Structure of International Law* (2008).
269. Trachtman, supra, x.
270. Trachtman, supra, 11.
271. Ronald Coase, The Problem of Social Cost, 56 *Journal of Law and Economics* (2013), 837.
272. Trachtman, supra, 10–13.
273. *S.S.Lotus*, PCIJ (Ser. A) No. 10, 7 September 1927, 19: "[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention".
274. Trachtman, supra, 39–40.
275. Robert Keohane, Neoliberal Institutionalism: A Perspective on World Politics, *in* Keohane (Ed.), *International Institutions and State Power* (1989), 3.
276. Reus-Smit, *The Politics of International Law*, 19.
277. Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (1999).
278. Arend, *Legal Rules and International Society*, 124.
279. Reus-Smit, supra, 20.
280. See Robert Keohane, Neoliberal Institutionalism: A Perspective on World Politics, *in* Keohane (Ed.), International Institutions and State Power, 3–4: "[Conventions] enable actors to understand one another and […] coordinate their behavior". They are thus "especially appropriate for situations […] where it is in everyone's interest to behave in a particular way

as long as others also do so" States conform to these conventions because "non-conformity to the expectations of others entails costs".

On the distinction between "political" and "non-political" international law, see Hans Morgenthau, Positivism, Functionalism, and International Law, 34 *AJIL* (1940), 279.

281. Krasner, supra, 185.
282. Niels Petersen, How Rational is International Law? 20 *EJIL* (2009), 1247–1262 (1258).
283. Duncan Snidal, Rational Choice and International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 75, 84; see also Goldsmith/Posner, *The Limits of International Law*, 7, according to which a standard premise of rational choice theory is that "the preferences about outcomes embedded in the state interest are consistent, complete, and transitive".
284. Emanuel Adler, Constructivism and International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 103–104.
285. Jennifer A. Hochschild, How Ideas Affect Actions, *in* Goodin/Tilly (Eds.), *The Oxford Handbook of Contextual Political Analysis* (2006), 284–296.
286. Petersen, supra, 1259; there has been some research in international relations which suggests that the formation of preferences may be influenced by legal norms, see, e.g., Thomas Risse, International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area, 27 *Politics & Society* (1999), 529–559; Joseph H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, 35 *Journal of World Trade* (2001), 191–207.
287. Ian Hurd, Legitimacy and Authority in International Politics, 53 *International Organization* (1999), 379.
288. Ibid.
289. Ibid.
290. Hurd, ibid.; Burgstaller, supra, 86.
291. Ibid.; see also Wendt, *Social Theory of International Politics*, 247.
292. Burgstaller, 86.
293. Hurd, supra, 379.
294. Burgstaller, 86.
295. Friedrich Kratochwil, The Force of Prescriptions, 38 *International Organization* (1984), 690–692.
296. Burgstaller, 90–91; see also Jeffrey Dunoff and Joel Trachtman, Economic Analysis of International Law, 24 *Yale Journal of International Law* (1999), 1–48.
297. Kenneth Arrow, *Social Choice and Individual Values* (1963), 21.

298. Robert Dahl and Charles Lindblom, *Politics, Markets, and Welfare: Planning and Politico-Economic Systems Resolved into Basic Social Processes* (1992), 114.
299. Mark Suchman, Managing Legitimacy: Strategic and Institutional Approaches, 20 *Academy of Management Review* (1995), 574; see also Jürgen Habermas, *Communication and the Evolution of Society* (1991), Chapter 5.
300. Hurd, supra, 379.
301. Hurd, supra, 388.
302. Dahl and Lindblom, supra, 115.
303. Max Weber, *Economy and Society* (transl. of Wirtchaft Und Gelsellschaft 1921) (1978), 953.
304. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965).
305. Michael Hechter, *Principles of Group Solidarity* (1987), 3; see also Talcott Parsons, *The Social System* (1951).
306. H. L. A. Hart, *The Concept of Law* (1961).
307. Hathaway/Koh, supra, 135.
308. Contrary to natural law theorists, Hart considers that law does not operate as a set of morally infused principles that transcend time and place, waiting to be uncovered and neither does he subscribe to John Austin's "command theory" which holds that legal rules are a sovereign's commands or, put differently, the expression of an expectation of behaviour, backed by threat.
309. Hart, supra, 214–215.
310. Ibid., 216.
311. Ibid., 229.
312. Thomas Frank, *The Power of Legitimacy Among Nations* (1990), 3.
313. Franck, supra, 24.
314. Thomas Franck, *Fairness in International Law and Institutions* (1995).
315. Burgstaller, 122.
316. John Rawls, *A Theory of Justice* (1971).
317. See e.g. Jürgen Habermas, *Between Facts and Norms* (1996).
318. Thomas Franck, *Fairness in International Law and Institutions* (1995), 7.
319. Ibid., 7–8.
320. Burgstaller, 134.
321. Franck, *Fairness in International Law and Institutions*, 14.
322. Robert Keohane, International Relations and International Law: Two Optics, 38 *Harvard ILJ* (1997), 493–494.
323. Frank considers that this fairness discourse needs to intervene within a community that shares a common understanding about the meaning of fairness, whereby the discourse refers to "the process by which the law,

and those who make the law, seek to integrate [both legitimacy and distributive justice], recognising the tension between the community's desire for both order (legitimacy) and change (justice), as well as the tensions between differing notions of what constitutes good order and good change in concrete instances". Frank, supra, 25–26.

324. Burgstaller, 134.
325. Ibid., 135.
326. John Tasioulas, International Law and the Limits of Fairness, 13 *EJIL* (2002), 993.
327. Burgstaller, 136.
328. UN General Assembly, 75th session, 83rd plenary meeting, A/75/PV.83, with resolution *The Situation in Myanmar* under UN Doc. A/RES/75/287 (18 June 2021).
329. Ibid.
330. Hedley Bull, *The Anarchical Society* (1977), 44–48.
331. Inis Claude, Collective Legitimization as a Political Function of the United Nations, 20 *International Organization* (1966), 369.
332. Adler, supra, 96.
333. Friedrich Kratochwil, *The Puzzles of Politics* (2010).
334. Adler, supra, 100.
335. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (2014).
336. Alexander Wendt, Constructing International Politics, 20 *International Security* (1995), 73.
337. Andrew Hurrell, *On Global Order* (2007), 17.
338. John Searle, *The Construction of Social Reality* (1997).
339. Adler, supra, 100.
340. Ibid.
341. Harry Gould, What Is at Stake in the Agent-Structure Debate, *in* Kubalkova/Onuf/Kowert (Eds.), *International Relations in a Constructed World* (1998), 79–98 (81).
342. Kratochwil, *The Role of Law in World Society*, 25.
343. Wendt, supra (1995), 73.
344. Wendt, supra (1992), 396–397.
345. Ian Hurd, Constructivism, *in* Reus-Smit/Snidal, *The Oxford Handbook of International Relations* (2008), 300.
346. Ibid., 301.
347. Ibid., 302.
348. Stephen Brooks and William Wohlforth, *World Out of Balance: International Relations Theory and the Challenge of American Primacy* (2007).
349. See also Wendt, *Social Theory of International Politics*, 247.

350. Adler, supra, 104; Alexander Wendt, The Agent-Structure Problem in International Relations Theory, 41 *International Organization* (1987), 335.
351. Hurd, supra (2008), 304.
352. Ian Hurd, Breaking and Making Norms: American Revisionism and Crises of Legitimacy, 44 *International Politics* (2007), 194–213.
353. See Helen Milner, The Assumption of Anarchy in International Relations Theory: A Critique, 17 *Review of International Studies* (1991), 67–85.
354. Waltz, *Theory of International Politics* (1979).
355. Hurd, supra (2008), 305.
356. Wendt, *Social Theory of International Politics*, 283.
357. Wendt, supra (1995), 78.
358. Ibid., 73.
359. Kratochwil, *Rules, Norms and Decisions*, 9.
360. Kratochwil argues that there is not necessarily an instrumental connection in the causal link between norms and behaviour, rather "a connection is established if we think along the lines of 'building a bridge' which allows us to get from 'here' to 'there'. This is what we do when we provide an account in terms of purposes or goals, or when we cite the relevant rule that provides the missing element, showing us the reasons which motivated us to act in a certain way. […] We reconstruct a situation, view it from the perspective of the actor, and impute purposes and values based on the evidence provided by the actor himself. This, in turn, provides us with an intelligible account of the reasons for acting". See How do Norms Matter, *in* Byers (Ed.), supra, 66.
361. Reus-Smit, *The Politics of International Law*, 22.
362. Janina Dill (2015), 47.
363. Christian Reus-Smit, Politics and International Legal Obligation, 9 *European Journal of International Relations* (2003), 592.
364. Martha Finnemore and Stephen Toope, Alternatives to "Legalization": Richer Views of Law and Politics, 55 *International Organization* (2001), 743–745.
365. March and Olsen, The Institutional Dynamics of International Political Orders, 52 *International Organization* (1998), 951.
366. Ibid.
367. Reus-Smit, *The Politics of International Law*, 23.
368. Kratochwil, *Rules, Norms and Decisions*, 12.
369. Jürgen Habermas, *Theorie des kommunikativen Handelns: Handlungsrationalität und gesellschaftliche Rationalisierung* (1981).
370. Risse, Communicative Action in World Politics, 54 *International Organization* (2000), 9–10.
371. Hurd, Constructivism, supra, 299.
372. Hurd, supra (2008), 310.

373. In other terms, what actors are and what they want are dependent on the social context and the interaction with other actors.
374. Hurd, ibid., 299.
375. Janina Dill (2015), 24. In the terms of March and Olsen, there is thus no reason to entirely separate the study of the logic of consequences from that of the logic of appropriateness; see also Fearon and Wendt, Rationalism v. Constructivism: A Skeptical View, *in* Carlsnaes/Risse/Simmons (Eds.), supra, 61.
376. Dill, ibid.
377. Koslowski and Kratochwil, *Understanding Change in International Politics*, 216.
378. Adriana Sinclair, *International Relations Theory and International Law* (2010), 23.
379. Maja Zehfuss, *Constructivism in International Relations: The Politics of Reality* (2002), 148.
380. Sinclair, supra, 25.
381. Ibid., 148.
382. Kratochwil, *Rules, Norms, and Decisions*, 229.
383. Sinclair, supra, 32.
384. Ibid., 31.
385. Alexander Wendt, The Agent-Structure Problem in International Relations, 41 *International Organization* (1987), 335.
386. Wendt, Anarchy Is What States Make of It, supra, 46.
387. Hurd, supra (2008), 304.
388. Arend, *Legal Rules and International Society*, 133.
389. Dale C. Copeland, The Constructivist Challenge to Structural Realism, 25 *International Security* (2000), 197.
390. George Herbert Mead, *Mind, Self and Society* (1934), Chapter 3.
391. Copeland, ibid.; see also Jeffrey Legro, The Transformation of Policy Ideas, 44 *American Journal of Political Science* (2000), 419–432.
392. Kratochwil describes the importance of agency in international relations as follows: "Actors are not only programmed by rules and norms, by they reproduce and change by their practice the normative structures by which they are able to act, share meanings, communicate intentions, criticise claims and justify choices. Thus one of the most important sources of change […] is the practice of the actors themselves and its concomitant process of interstitial law-making in the international arena". *In* Kratochwil, Rules, Norms and Decisions, supra, 61.
393. Sinclair, supra, 12, 26.
394. Ibid., 26.
395. Onuf, A Constructivist Manifesto, *in* Burch/Denemark (Eds.), *Constituting International Political Economy* (1997), 9.
396. Zehfuss, supra, 195.

397. Sinclair, supra, 11.
398. Ibid., 12, 15.
399. Ibid., 13.
400. Hathaway/Koh, *Foundations of International Law and Politics*, 26.
401. Steinberg, supra (2013), 147.
402. Ibid., 166.
403. Richard Steinberg, Realism in International Law, 96 *Proceedings of the American Society of International Law* (2002), 260.
404. Goldstein/Keohane, *Ideas and Foreign Policy*, 3.
405. Stephen Krasner, Global Communications and National Power: Life on the Pareto Frontier, 43 *World Politics* (1991), 336; Richard Steinberg, In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO, 56 *International Organization* (2002), 339–374.
406. Stephen Krasner, Realist Views of International Law, 96 *ASIL Proceedings* (2002), 265.
407. Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (2000).
408. See Richard Steinberg, Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism, 29 *Law and Policy in International Business* (1998), 205–256.
409. See, e.g., Georg Schwarzenberger, *Power Politics* (1964), 14: "*Power* is the mean between influence and force. All three are different ways of establishing a social nexus on a footing regarded as desirable by the active agent in such relations. Power distinguishes itself, however, from *influence* by reliance on external pressure as a background threat, and from *force* by preference for achieving its ends without the actual use of physical pressure. Thus, *power* may be defined as capacity to impose one's will on others by reliance on effective sanctions in case of non-compliance".
410. See, e.g., Kenneth Waltz, *Theory of International Politics* (1979), 191–192: "To define 'power' as 'cause' confuses power with outcome. To identify power with control is to assert that only power is needed in order to get one's way. That is obviously false, else what would there be for political and military strategists to do? To use power is to apply one's capabilities in an attempt to change someone else's behavior in certain ways […] Power is one cause among others, from which it cannot be isolated. The common relational definition of power omits consideration of how acts and relations are affected by the structure of action".
411. David Baldwin, Power and International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 179; Steven Lukes, *Power: A Radical View* (1976).

412. Robert Dahl, The Concept of Power, 2 *Systems Research and Behavioral Science* (1957), 201.
413. See, e.g., Richard Steinberg and Jonathan Zasloff, Power and International Law, 100 *AJIL* (2006), 72–73 (with further references).
414. See, e.g., John Ikenberry, Institutions, Strategic Restraint, and the Persistence of American Postwar Order, 23 *International Security* (1998), 43–78; Robert Pape, Soft Balancing against the United States, 30 *International Security* (2005), 7–45; Stephen Krasner, Sharing Sovereignty: New Institutions for Collapsed and Failing States, 29 *International Security* (2004), 85–120; William Wohlforth, The Stability of a Unipolar World, 24 *International Security* (1999), 5–41.
415. Steinberg, supra (2013), 161.
416. Council of the European Union, Voting system, Qualified majority: https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/.
417. The United States, as the only actor on the U.N. Security Council with a large array of options outside the Security Council, has its power magnified within that institution.
418. Emilie Hafner-Burton, David Victor and Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AJIL (2012), 83; Orde F. Kittrie, Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Loosing Its Deterrence Capacity and How to Restore It, 28 *Michigan Journal of International Law* (2006), 337–430; Amy Smithson, Implementing the Chemical Weapons Convention, 36 *Survival* (1994), 80–95.
419. David Baldwin, Power and International Relations, supra, 179.
420. Hafner-Burton, Victor and Lupu, supra, 53.
421. See, e.g., Koh, Why Do Nations Obey International Law?, 106 *Yale Law Journal* (1997), 2599; Chayes and Chayes, *The New Sovereignty* (1995); Thomas Franck, *The Power of Legitimacy Among Nations* (1990); Ryan Goodman and Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 *Duke Law Journal* (2005), 621–703.
422. Joseph S. Nye, *Soft Power*, 5.
423. Joseph Nye, *Bound to Lead: The Changing Nature of American Power (1990)*, 31–32.
424. Krasner, supra, 268.
425. E. H. Carr, *The Twenty Years' Crisis*, 27–31.
426. Andreas Paulus, Realism and International Law: Two Optics in Need of Each Other, 96 *ASIL Proceedings* (2002), 272.
427. Paulus, supra, 272; but see Martti Koskenniemi, *From Apology to Utopia* (1989), 486.

428. See also Harold Lasswell, *Politics: Who Gets What, When, and How* (1936).
429. Richard Steinberg, Realism in International Law, 96 *ASIL Proceedings* (2002), 262.
430. Jutta Brunnée and Stephen Toope, International Law and Constructivism: Elements of an Interactional Theory of International Law, 39 *Columbia Journal of Transnational Law* (2000), 33.
431. Andrew Hurrell, *On Global Order*, 17.
432. Alexander Wendt, Constructing International Politics, supra, 72, 78.
433. Ibid., 136.
434. Chayes and Chayes argue that a key role of international law consists in "modifying preferences, generating new options, persuading the parties to move toward increasing compliance with (norms) and guiding the evolution of the normative structure in the direction of the overall objectives of the [legal] regime". *The New Sovereignty*, 22.
435. Fearon and Wendt, Rationalism v. Constructivism, *in* Carlsnaes/Risse/Simmons (Eds.), supra, 59.
436. Dill, supra, 46–48.
437. Reus-Smit, *The Politics of International Law*, 22.
438. Hurrell, Norms and Ethics in International Relations, supra, 144.
439. Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 U.N.T.S. 331 (1969).
440. Stefan Kadelbach, *Zwingendes Völkerrecht*, 24.
441. VCLT, supra, Article 53.
442. Sir Gerald Fitzmaurice, *Third Report on the Law of Treaties*, UN Doc. A/CN.4/115 and Corr.1 (F), *in* Yearbook of the International Law Commission (1958), Vol. II, 40.
443. As such, the concept of *jus cogens* has been described, by analogy to non-derogatory norms in private international law, as a form of international *ordre public*.
444. Kratochwil, *Rules, Norms and Decisions*, 11.
445. Ibid.
446. Friedrich Kratochwil and John Ruggie, International Organization: A State of the Art on an Art of the State, 40 *International Organization* (1986), 767.
447. For instance, Kratochwil relies on Ludwig Wittgenstein and defines international law by reference to a "language game", with different elements undergoing different uses, depending on context and the practical situation. Kratochwil, *The Status of Law in World Society* (2014).
448. Wayne Sandholtz and Alec Stone Sweet, Law, Politics, and International Governance, *in* Reus/Smit (Ed.), *The Politics of International Law*, 258.
449. Michael Byers, International Law, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations*, 626.

450. Fearon and Wendt, Rationalism v. Constructivism: A Skeptical View, *in* Carlsanes/Risse/Simmons (Eds.), *Handbook of International Relations*, 61.
451. Byers, International Law, supra, 623.
452. Searle, supra, 345.

CHAPTER 3

The Role of Law in International Relations

1 Methodology

1.1 Communicative Action and Rationality

The present enquiry aims at applying the critical theory of communicative action pioneered essentially by Jürgen Habermas[1] to the analysis of the decision-making process in the international arena. Communicative action theories place central importance on the role of social communication, which not only enables social understandings to diffuse across time and place; it also empowers agents to determine the meanings of material reality.[2] When fixing these meanings, agents seek from "a *horizon* of possibilities".[3] The main idea behind Habermas' theory of communicative action is that social actors do not conduct cost-benefit trade-offs to achieve the ends conforming to their interests—as rational approaches would maintain. Rather, they engage in communicative interaction to establish the validity of their arguments, which in turn promotes collective meanings.[4]

Following the so-called "linguistic turn" in philosophy and social theory, this approach, focusing on the role of language and social interaction, has made its entry into the analysis of law and foreign policy.[5] The main strand of this movement contends that "the framework of meaning within which [external relations take] place is seen as the basis of the way in which interests and goals are constructed".[6] The approach

A. Germeaux, *The International Legal Order in Global Governance*,
https://doi.org/10.1007/978-3-031-16057-8_3

thus shares with the linguistic or norms-oriented sub-strands of constructivism a belief that, because of the primacy of epistemology, understanding social reality means uncovering the processes by which social facts are constituted by language and norms.[7] The emphasis on language for understanding social phenomena is founded in linguistic analysis deriving from Ludwig Wittgenstein, as further developed by John Searle for the field of social theory, and Friedrich Kratochwil for international law and international relations theory. The basic question about norm guidance is encapsulated in Wittgenstein's philosophical investigations: "*A rule stands there like a sign post. Does the sign-post leave no doubt about the way I have to go? […] And if there were, not a single sign-post, but a chain of adjacent ones or of chalk marks on the ground—is there only one way of interpreting them? – So I can say, the sign-post does after all leave no room for doubt. Or rather: it sometimes leaves room for doubt and sometimes not. And now this is no longer a philosophical proposition, but an empirical one*".[8] However, while constructivism may be inherently well-suited for the analysis of normative phenomena, including international law, there remains a controversy about the theory's approach to rationality. The starting point for this is commonly traced to the debate that took place in the 1990s in the international relations journal *Zeitschrift für Internationale Beziehungen* (ZIB-Debate).[9] At the core of this debate lay the question whether the concept of strategic rationality predominant in rational choice approaches is sufficient to analyse real-world negotiations or whether it needs to be complemented by Habermas' concept of communicative rationality.[10] Evidence from social psychology has shown that compliance and deviance operate in ways that could not be adequately captured by rational choice models, notably because these do not sufficiently take into account that rules and social facts need to be interpreted by actors.[11]

In a first response within constructivism, led by Thomas Risse, it has been held that the "logic of consequences" should not only be confronted with the normative "logic of appropriateness", but also by adopting Habermas' "logic of arguing".[12] This was followed by a second strand, led by Jeffrey Checkel, which somewhat relaxed the assumptions of the "logic of arguing" and merely states that actors reformulate their interests through new emerging empirical knowledge, without additionally requiring that this change in interests be traced to an interactional orientation of the agent.[13] Despite these conceptual differences, Risse and Checkel have in common the assumption that the argumentative process can alter the relevant actors' interests. In other words, unlike

the rationalist precept that actors merely aim to maximise their self-interest, these approaches hold that actors are ready to succumb to the "better argument", even if this requires reformulating their interests through interaction.[14] In doing so, however, they fail to address what has been identified as the "basic epistemological question", namely whether, pursuant to an observable change in the context that an actor operates in, the behaviour of the actor or of a set of actors is indeed the result of altered interests or identities, rather than merely actors adjusting their strategy to meet their ends in a new environment with interests remaining unchanged.[15]

For instance, it has been questioned whether some constructivist approaches to international law adequately consider whether ideational factors may be deliberately deployed and manipulated by actors. In other words, there has been relatively little inquiry into "whether, and how, rules and other normative structures might strategically be 'constructed' through a combination of power, principled persuasion, and moral suasion".[16] This, in turn, raises the question whether the social, non-rationalist elements of international relations—the identities, interests and collective meanings described by constructivism—are any more resistant to political manipulation than those elements of international relations traditionally examined by rationalism? In the affirmative, international law could be regarded as largely distinct from, and uninfluenced by, power. Taking the example of customary international law, it has, however, been argued that *opinio juris* involves two kinds of will, depending on each actors' "*power situation in the international order*". Some actors will feel bound because they feel freely consented to be, while other states "*will feel bound because they cannot be bound, because the rule is imposed on them*"; as a result, "*a customary international rule is one which is considered as such by the will of states which can impose their point of view*". The conclusion is that *opinio juris* "*accordingly reflects the dominant ideology of international society, integrated by all, if desired by some and suffered by others*".[17] This then implies a more nuanced view as to the role of consent in the making of international law: "*That international law depends on consent is a claim, not a statement. It is a condition of the legitimacy of that law, not its positivity. Legal policies, which pride themselves on being realistic, are by no means unaware of the many instances of legal provisions imposed by force, including armed force. They are certainly not averse to adding to this list, provided that the force in question is wielded by them and not imposed on them*".[18]

To this extent, any normative construct can never be innocent of politics and the exercise of power, and constructivism might underestimate how power can shape international law. This returns us to the question at the outset regarding the application of communicative action theory to international law: Does communicative interaction indeed have the power to alter actors' interests or are changes in behaviour simply the result of a rational adaptation to newly emerging causal knowledge? For the purpose of this enquiry, the argument advanced is that, from a rational, utility-maximising perspective, actors can choose from a number of different courses of action to pursue their interests, depending on their position of power in the international system. Being embedded in the discourse of international law, however, places limitations on the choice sets regarding these courses of action by the requirement of justification and the structural constraints inherent in legal language. International law then shapes outcomes, rather than determining them, by narrowing down the "horizon" of possibilities available to actors when determining their behaviour in the international arena.

1.2 Experimental, Quantitative, and Qualitative-Empirical Approaches in Social Science

In terms of the methodology used for this enquiry, we should note that international law and international relations theory have traditionally conceived of actors as engaged in rational, strategic interactions under conditions of anarchy (in the sense of an absence of centralised authority). Based on institutional economics, rational choice approaches posit international law as a solution to game-theoretic puzzles and collective-action problems, whereby norms enable cooperation and inform actors about the "game" they are engaged in, as well as other players' behaviour.[19] Foreshadowing the ZIB-debate, however, was an increasing scepticism within the economic field about the accuracy of egoistic rationality in the face of increasing empirical evidence from cognitive psychology that cast doubt on the stable and transitive nature of actors' interests as well as the process of decision-making.[20] The insights of cognitive psychologists such as Daniel Kahneman and Amos Tversky found their way into behavioural economics, demonstrating that actual human behaviour deviates in significant ways from the economic rationality that was assumed until then.[21] The need for systematic empirical testing of the formation of interests, the updating of beliefs and actors' decision processes were then taken up

by social sciences, leading to the "behavioural revolution" in aiming to develop more accurate foundations for human behaviour.[22]

While the ZIB-debate in the 1990s illustrated the challenges posed by the behavioural revolution to the prevailing rational models, several decades of research today allow for a more precise delineation of the consequences that the research conducted by Kahneman, Tversky et al. entails for the study of international law and international relations.[23] First, in terms of interest formation, their research identified systematic deviations from the classic rational model, such as risk-taking and the evaluation of future costs and benefits, but most notably the presence of social components in actors' interests, which make cooperation more likely than rationalist theory had assumed. Second, it also found human behaviour vulnerable to "widespread and systematic misperceptions" in the interpretation and assimilation of available information to guide choices. The third revelation consists in individual and collective decision-making processes being affected by actors' inability to adequately calculate costs and benefits of possible courses of action, thereby inducing significant deviations from the ideal of utility-maximising choices. These insights found their way into political science,[24] and thereafter the study of international law, with researchers trying to "identify the varied causal mechanisms through which international law impacts behaviour".[25] Influenced by the field of international relations, the transposition of cognitive psychological revelations into international law has highlighted the cognitive bias affecting actors' decision-making in areas such as security policy and international economic law.[26]

In recent years, these developments in the theoretical and methodological foundations of social sciences have induced an "experimental turn" in the analysis of international law, with an increasing recourse to experimental methods as a way to gain empirical insights into how law shapes behaviour.[27] This shift is characterised by the questioning of a priori rationalist assumptions through the observation of concrete human behaviour based on cognitive psychology and the insights gained from behavioural economics. In order to refine theories about the causal pathways of international law's impact on behaviour in the international arena, the experimental method draws from psychological studies modelled along the randomised double-blind setting, with a sample and control group, only the former being exposed to the specific international legal information that is being assessed for its effect on outcomes.[28]

The issue with a shift from observational to experimental methods in the study of international law is that it might be difficult to accurately replicate situations involving decisions on questions such as the use of force in a controlled setting—the external validity problem—which may lead to results not reflecting decision-making in real-world situations.[29] This is compounded by the "level of analysis" problem, whereby studies may be conducted on individual participants, while actual decisions in international law and international relations generally involve a plurality of actors in an exercise of collective interaction and decision-making.[30] The divergences in the behaviour of actors depending on whether they operate in a controlled experimental setting or in the high-pressure environment of actual political and legal decisions link back to Kahneman's notion of "System 1 thinking" and "System 2 thinking". Condensed in his work on *Thinking, fast and slow*,[31] Kahneman uses cognitive psychology to posit that humans tend to privilege "fast" thinking in what they perceive as low-stakes situations, using cognitive frameworks based on mental shortcuts to reach a decision quickly without necessarily weighing all the consequences of their actions. On the other hand, when humans are confronted with high-stakes decisions, they shift to "slow" thinking, carefully reflecting on the available information and the potential consequences of their actions in a conscious, rational thought process aimed at identifying the optimal outcome among the possible options. The promise offered by the experimental method in identifying the impact of international law on behaviour is significant but, as highlighted by Dunoff and Pollack, experimenting with international law requires a careful evaluation of the limits in transposing the effect of an independent variable on an outcome variable in a controlled setting into actual decisions in international life.[32] In probing the role of norms in social action, it can be tempting to emphasise the causal impact of norms as an explanatory variable while overlooking the complex ways in which law and politics interact.[33]

At this time, observational-empirical studies remain the predominant method to analyse how actors interact with international law in real-world situations, and this study will follow an approach closely tracking concrete cases, while being attentive of the insights from cognitive psychology and behavioural economics on decision-making.[34] The observational method itself can be divided into quantitative and qualitative approaches, and international relations theory has seen an influx of quantitative approaches, whereby phenomena are analysed through statistical techniques on data sets and involving the systematic review of quantitative

evidence. This development has increasingly found its way into international law, in particular concerning compliance with human rights law[35] and international economic law.[36]

Quantitative approaches present the advantage of being able to process large amounts of data and analyse complex phenomena through representative samples and the law of probability. Statistics further have objectivity and allow testing competing explanations for outcomes, they are thus presumed to be particularly transparent.[37] There is, however, an important caveat to the use of quantitative approaches in the present context. Statistical analysis has difficulties to adequately perform objective measurements of concepts like power and interests. Some concepts like norms and ideas are malleable, transient, intangible, and therefore may not be measurable at all.[38] Another issue with quantitative approaches is their vulnerability to selection bias, a point that has been particularly highlighted in the analysis of compliance with human rights law. While early analyses in this area seemed to indicate, somewhat counter intuitively, that the adherence of states to international human rights law instruments does not further domestic compliance with human rights, later studies uncovered that these findings resulted from inadequate selection of data sets. By conflating the human rights records of all states where data was available, including those that could be presumed to fully comply and those situated at the bottom end of human rights records, the outcome of statistical analysis could not account for the most relevant cases, where adherence to international law instruments could tip the balance in favour of higher compliance with human rights.[39] Streamlining the data sets to include only those actors where international law can be presumed to make a difference then highlighted that adherence to international law instruments did indeed improve compliance with human rights.[40]

At the other end of the methodological divide are qualitative-empirical approaches, which analyse phenomena through observational studies.[41] While qualitative approaches may lack the ability of statistics to process and compare large data sets, they present the advantage of allowing for deeper insights into the complexity of international phenomena[42] or, in other words, deliver "richer" views of law and politics.[43] It is further possible to combine qualitative with quantitative approaches and utilise hybrid methodologies, such as quantitative processing of sets consisting of qualitative assessments.[44] Such studies probe the role of international law in guiding choices in furthering our understanding of the factors that

shape the creation of norms as well as the effect of norms on actors' behaviour in the international system.

For the purpose of the present enquiry, we shall test the argument following a qualitative-empirical approach, based on a set of observational studies. While this methodology may be more limited in the spectrum of international regulation that can be assessed, it is deemed to have a decisive advantage in the context of the argument made, in that it allows telling the "story" underlying the phenomena that shall be examined. It is also mindful of the call for caution by John Mearsheimer and Stephen Walt, not to "leave theory behind", in that a disproportionate emphasis on empirical hypothesis testing to the detriment of the attention given to theory risks leading to incomplete findings and an impoverished discipline—all evidence without theory does not necessarily make for better results.[45] The methodological approach presents the further benefit in allowing for the empirical analysis of phenomena such as the use of force or the institutional design of international jurisdictions through both the macro-level perspective of the events themselves and the micro-level implications in terms of the decisions of the actors involved.[46] For the latter, the approach based on actual events also avoids the risks of inference affected by cognitive bias along Kahneman's System 1 thinking.

In terms of the theoretical precepts, we have seen that both international relations and international law are characterised by the interest-norm divide. These two perspectives each focus on particular elements in explaining actors' behaviour in the international arena. Realist or institutionalist approaches are particularly well-suited to analyse phenomena such as power, incentives and material interests. Constructivist or norm-based approaches, on the other hand, place greater emphasis on interaction, argumentation, norms and the social construction of meanings.[47] Both strands increasingly consider that a rigid divide between these theoretical precepts is no longer productive in explaining complex phenomena in international life. In that sense, realism can be enriched with elements of norm-based approaches to better explain how interests come about, thus trading off parsimony in favour of greater heuristic power.[48] Constructivism, at the same time, is able to integrate elements of rational approaches to similarly enhance its explanatory power.[49]

In the course of the present enquiry, the central question is not so much now norms impact actors' behaviour in terms of the causal imputation that would link international law as an independent variable to an outcome variable, but rather how actors reason with norms. In tracing a

path for norms to shape, rather than determine, outcomes, it also aims to bridge the gap between rationalist and behavioural methods, aligning the logic of appropriateness with the logic of consequences and accounting for the role of power relations in the international system.

2 Different Conceptions of Law in the International System

2.1 International Law as Restraint

In the classic accounts of international relations theory, the operation of international law in external relations is primarily seen as regulating the relationships among actors in the international realm. In this view, the conduct of external relations is oriented towards the maintenance of international order, so that actors can pursue their interests, both domestically and internationally. The optimisation of interests, in turn, requires the presence of predictable norms to guide interaction and behaviour, as well as manage expectations. These norms are contained in international law, and the conduct of external relations among different actors involves legal agreements of various forms. An analysis of international law would accordingly amount to probing the role of norms in guiding choices. According to the principle of *pacta sunt servanda*,[50] actors rely on the premise that these agreements will be observed, independently of whether the obligations contained in the agreement can actually be enforced. An absence of international legal order would approximate a situation in which all actors were perpetually, if not at war, then at least in a latent state of conflict with one another, since there would be no stability and no reliance on mutual expectations of conduct.

International law, understood in this sense of facilitating cooperation and coordination among actors, largely reflects what theorists like Morgenthau have termed "non-political international law". It may not necessarily *direct* actors to take a particular course of action, thus the limitations of an analogy with domestic law, but it is nonetheless aimed at influencing actors' behaviour and may shape policies even in the absence of formal enforcement mechanisms. International relations, in this regard, rely on international law to ensure the smooth conduct of interactions and create predictable patterns of behaviour. International law constitutes the normative framework for the operation of foreign policy, and may

constrain behaviour even though, in the case of non-political international law, norms largely reflect actors' interests.[51]

At the other end of the spectrum resides international law that aims directly at controlling behaviour, and most notably the regulation of the use of force. This is what Morgenthau considered "political international law", which touches upon the core interests of actors. The realist tradition holds that when international law conflicts with essential security interests, it will not constrain actors' behaviour. In this sense, Morgenthau agreed with Carl Schmitt that international law is the result of, and must reflect, objective social forces. Such a view is thus sceptical of the ability of international law to influence conduct in the international system, and Morgenthau contends that the main issue here is the decentralised nature of international law, which lacks a centralised authority endowed with the power to enforce legal norms.

However, Morgenthau himself nuanced his assessment and concluded that, in effect, most of international law is complied without actual compulsion, thus doing away with the need for specific enforcement mechanisms in most cases. Louis Henkin later stated that: "*The question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behaviour, whether international behaviour reflects stability and order. It is through international law that states have accepted limitations on their sovereignty, they have observed norms and undertakings, and the result has been substantial order in international relations*".[52] The costs of non-compliance are mostly indirect, in the form of negative repercussions on actors' reputation which increase transaction costs in the future, or retorsion measures by other negatively affected actors. Responses against violations of international law in terms of formal enforcement action, at least to some extent, depend on the distribution of power and interests in the international system. Weaker actors are more likely to feel the effects of non-compliance, and powerful actors or large groups of them have a greater propensity to act in reaction to norm violations that contravene their own interests. Given the fundamentally different nature of international law as opposed to domestic law, it would be misguided to assume that the cure for international law's perceived ills, in terms of weaker enforcement mechanisms, rests in the creation of formal procedures and material constraints.[53]

In terms of H. L. A. Hart and others,[54] the binding nature of international law is separate from the question of its enforceability. Legal obligations exist regardless of sanctions, and therefore enforcement is

delinked from the actual validity of international law. Enforcement fulfils a dual function in aiming to discourage defection from a prescribed conduct and, if a violation occurs, to sanction non-compliance with the norm.[55] Due to the horizontal nature of the international system, and the lack of centralised authority endowed with the legitimate use of force, collective enforcement is the exception, rather than the rule. In practice, action to enforce the application of a norm may be unilateral or plurilateral in nature, however, the justification of the enforcement action takes place on the basis of collective disapprobation by the international community.[56]

The absence of centralised authority in international law need not necessarily affect its impact on international relations, as may be illustrated by Paul De Visscher's extensive conception of enforcement in his 1972 General course at the Hague Academy.[57] Apart from what he referred to as *techniques institutionnelles* (enforcement through international institutions), and *techniques d'autoprotection* (e.g. self-defence, reprisals, retorsion or embargoes), De Visscher developed the notion of *techniques spontanées* (voluntary compliance with international law),[58] suggesting that to the extent that international law reflects a state of social consciousness, so firmly established that even governments can neither ignore nor challenge it, international law requires, for its realisation, neither judge nor constable.[59]

Such a definition might in itself be problematic, however, in that it raises the issue of international law's added value in the conduct of foreign policy if law merely reflects underlying interests. In other words, it could be argued that if the norms of international law are but a mirror image of what actors would do even in the absence of it, compliance with international law is a rather shallow concept. The more interesting concept might thus be the effectiveness of international law, in the sense of whether it can affect the behaviour of actors in a way that their course of action is different from what it would have been in the absence of any applicable norms.[60]

According to Guy de Lacharrière, when analysing the constraining function of international law, a distinction has to be made between law *determining* decisions, and law *shaping* decisions: "*With regard to the function of determining governmental conduct, it is necessary to subdivide.*

(a) *Law may be the determining factor in conduct. The decision is then made on the basis of international law, even if other factors advise a different decision. International law thus has a binding effect on the governmental conduct under consideration.*
(b) *Law is an element in the decision-making process, but it is not automatically the decisive or dominant element. It is one of the parameters of the decision among others. It does not govern the decision but influences it. Ultimately, this influence can only be that which, between two otherwise equally satisfactory solutions, leads to the choice of the one that is more in line with the law*".[61]

The constraining force of international law itself depends on actors' normative consciousness within the international system. Constraint is not strictly linked to sanctions which, in any event, would only apply once a violation has actually occurred. Even if international law cannot materially prevent actors from engaging in a particular conduct, it can influence the process leading up to the decision on the course of action to take.[62] International law can serve both as a set of regulatory norms designed to constrain choices or to shape the social context within which agents pursue their interests. Such a view of international law is in line with the precepts of realists like Morgenthau who consider that international law in relation to issues like the use of force is not able to "control" the behaviour of actors.[63] While there may be merit to the claim that international law will not constrain action on core security issues, even realism acknowledges that in the majority of cases, the course of action traced by international law is actually followed. International law, in a wider, constructivist view, does not merely constrain action in the strict understanding of the term; it also helps constitute the identity and thus the interests of actors. In that sense, it provides "reasons for action".[64] Janina Dill relies on the notion of justiciability to highlight how international law can impact how actors perceive their "reasons for action" in a specific situation. The compulsory effect of international law, in this sense, is not primarily a matter of enforceable sanctions. Rather, a more immediate way in which international law can alter actors' perception of the motivational imperatives they face is by providing them and the audience by which they intend their behaviour to be perceived as legitimate with a ready measure to assess the outcome of an action. As a consequence, other things being equal, acting in accordance with international law becomes more of an immediately instrumental course of action than is acting in a socially appropriate fashion in the absence of legal norms.[65]

2.2 *International Law as Framework for Communicative Action*

2.2.1 International Law as Instrument for Justification

Actors operating in the international arena generally seek to back up their actions with some form of justification, as well as deny the legitimacy of the behaviour of opposing actors; this usually takes place on the basis of international law.[66] The realist tradition has argued that one of the primary roles of international law is to serve as justification for policies, and in particular to justify the policy of maintaining the status quo.[67] International life is always characterised by the presence of a plurality of possibilities, on the one hand, and the need to justify the particular choice that an actor makes in a specific situation, on the other hand. Just because there is no single right answer does, however, not imply the nihilistic conclusion that anything goes or that "any answer is as good as any other".[68] Some adherents of structural realism have nonetheless termed international law as "organised hypocrisy", in that it serves to legitimate the actions of the powerful, as well as the existence of the international system itself, as it has been shaped by the powerful.[69] The sceptical view of conceiving of international law as a justification for action would hold that it is merely a concern "with wrapping […] policies in the mantle of legal rectitude".[70] The legal analysis is seen here as an *ex post facto* concern to justify a course of action chosen essentially on political considerations. In this view, international law "does not have a valid life on its own; it is a mere instrument available to political leaders for their own ends, be they good or evil, peaceful or aggressive".[71] For Guy de Lacharrière, international law's function of justification serves to legitimate decisions, without it having shaped the decision in any meaningful way: "*In its justification function, law serves to legitimise a choice previously made on other grounds. In this case, law plays no role at the stage of the decision and only intervenes at the stage of the justification of the decision. It is purely a 'post-decision' instrument. The consideration given to law is only reflected in the fact that the actor finds it useful, after the fact, to legitimise with arguments drawn from international law a decision taken without particular regard to that law, on the basis of reasons that have no connection with it*".[72]

Following such an understanding of justification as a means for actors to externally legitimate decisions, the role of international law as a justification of political action is linked to the communicative function. The justification is presented as a reasoned reference to legal arguments; even if it is entirely established after the conduct in question has been decided,

it enters into the game of legal motivations; it is outwardly respectful of the law and suggests (if it does not even assert) that the correspondence between the conduct and the law is not a coincidence but a result produced by concern for legality. But if the reference to international law constitutes merely language, a way of expressing oneself without any real claim to argumentation, then the use of concepts drawn from international law plays only the role of a means of communicating the intentions to which governmental conduct claims to respond.[73]

The reduction of international law to a mere instrument of justification, however, falls short of revealing the fully array of legal rationalisations. In domestic settings, regarding both civil law and common law systems, judicial decisions, in practice, may be based not only on legal reasoning, but also reflect interests and particular public policies.[74] The court or tribunal, though, is required to issue a decision that is reasoned according to the legal norms and procedures applicable to the case that is presented for adjudication.[75] There can be no determinate answers in terms of absolute "right" or "wrong", but analysis by third parties can nevertheless distinguish a persuasive from a dubious rationale that is presented as justification. In this way, the requirement of justification according to applicable law provides a substantive scrutiny on the legality of action and, in turn, on the decision-making process.[76]

In the international sphere, international law confers normative value to actors' behaviour; the international legal order "specifies the steps necessary to insure the validity of official acts and assigns weight and priority to different claims".[77] In the UN Security Council, decisions may be taken for political motives, but the requirement to assert the action on a legal basis according to the formal norms in the UN Charter and the Council's provisional rules of procedure sets boundaries to what justifications can reasonably be advanced for the decision to be perceived as legitimate, in particular for enforcement action under Chapter VII. In this sense, international law provides "action guidance", and once an action has occurred, it also serves to make normative assessments about actors' behaviour based on authoritative standards of conduct. For instance, the denial of immunity to United States diplomatic personnel by Iran following the Islamic revolution in 1979 was perceived by the wider international audience as an action that could not be justified under international law as it constituted as violation of the Vienna Convention on Diplomatic Relations.[78]

The relative indeterminacy of many norms of international law leaves actors with a margin of discretion or appreciation in some cases; there is also the possibility of divergent interpretations of a norm by different actors or in different contexts. Interpretations can be stretched to fit particular interests or international law may be manipulated for political aims. Janina Dill conceives of international law as a continuum with immediate imperatives at one end and more abstract reasons for action at the other end. How far international law can be stretched to accommodate an actors' underlying interests then depends on its "contingent determinacy". International law, in this sense, aligns the outcome of an actors' causal intervention with a compromise between immediate situational imperatives (interests) and long-term systemic considerations (ideas and norms). The wider the range of results that can pass as legal, the easier it is for the actor to claim that its interest-based action is justified under international law.[79] Even where international may be indeterminate, however, there are limits to what actors can reasonably put forward as a valid argument. And overall, actors do consider whether their actions can be effectively and persuasively justified under international law before engaging in a particular conduct. It is of course the case that in some instances, actors, especially powerful actors, engage in actions of dubious legality under international law, notably when essential security interests are perceived to be involved.[80] While the actor may be materially capable of pursuing its action, the fact that it has acted in violation of international law remains. The repercussions may not be felt immediately, but even powerful actors will eventually be affected by a loss of reputation and increasing transaction costs.[81] In the case of the invasion of Ukraine by the Russian Federation in 2022, international law was not able to prevent the actions from taking place, but the swift imposition of wide-reaching restrictive measures, including trade restrictions and financial sanctions, coupled with the suspension of Russia from international forums, did lead to tangible consequences in reaction to a conduct that was not deemed in conformity with international law by the wider international community. The consequences may be less severe for powerful actors, but even here international law's "shadow of the future" is relevant, in that the short-term benefits from violating international law might be outweighed by the long-term costs,[82] as actors are aware that acquiring a reputation of unreliable compliance with international obligations would lead to diminishing influence over other actors.[83] The Russia-Ukraine crisis also illustrates the long-term effects of restrictive measures, which may

not immediately be fully apparent. What may initially appear as short-term consequences for an action may end up being of more systemic relevance, affecting the power position of the actor in the longer term. This calculation of whether the benefits a particular violation of international law outweigh the repercussions in terms of future costs depends on how the actors in question perceive their competing interests, how they value specific norms, and even the way in which norms feed back into the constitution of actors' identity and thus the construction of interests.

Further, if one accepts the premise that international law has entered the "post-ontological era", it can be considered to share the basic attributes of law such as consistency and fairness.[84] It follows from this perception that justification in terms of international law contributes to actors' self-restraint when resorting to international law as an instrument of justification. When an actor aims to justify a certain conduct under international law, there is a generalised expectation of reciprocity, that the actor will apply the norm in question to other actors in similar situations.[85] According to the International Court of Justice, it is a form of equity whereby the application of international law should display a certain degree of consistency and predictability.[86] For instance, in international trade law, the most-favoured nation principle (MFN) generally precludes actors from discriminating treatment towards other actors. Once a particular treatment is accorded to one trade partner, the actor cannot legally preclude other trade partners from the same treatment.[87]

2.2.2 Intersubjective Understandings in International Law

In order for international law to guide social interaction, it must link back to intersubjective understandings among actors, the term "intersubjective" here denoting the engagement of actors in a collectively meaningful activity.[88] Norms are not "things out there", but are created through the interaction of actors in the international arena,[89] thereby establishing new "logics of appropriateness".[90] The linguistic turn in social theory has evidenced how intersubjective understandings contribute to determining the meaning of an act, rather than just describing it, and this process is itself context-dependent.[91] The creation and reinterpretation of norms is the product of persuasive and argumentative processes, linked to social contexts.[92] This does not preclude that actors, especially powerful actors, may embrace norms out of self-interested motives, but over time the use of norms in turn feeds back into the constitution of actors' identities.[93] Once norms become internalised in this way, they form part of

how actors analyse social reality, and they become part of how actors routinely calculate the consequences of their actions. While the ideas and norms that form part of actors' understanding of social reality are not immutable, they are "sticky" or resistant to change.[94] The United States might have embraced the principle of self-determination following World War II simply because it provided a means to put an end to the era of European colonial rule and establish a new world order based on its own role as the preeminent actor, but several decades later, this principle has become such an inherent part of how actors conceive the international order that resorting to direct colonial rule is simply not an option in foreign policy, even though the United States would be materially capable of it.[95] For instance, following the fall of the Taliban in the wake of the multinational intervention in Afghanistan at the end of 2001, an international military presence was established in the country. While this would have allowed for a form of colonial rule, the country was transitioned back to formal self-administration, albeit with a strong international presence. Though the United States would have been capable of administering the country under direct rule, this was never considered as an option, although it was clear that the United States and its allies would not tolerate particular policies, notably the support to terrorist groups, and had certain expectations regarding good governance and the respect for fundamental freedoms. The swift collapse of the Afghan government following the international withdrawal in August 2021 points to the weakness of the national governance structures. It also highlighted the crucial role of the external presence in maintaining stability. Nonetheless, it was clear from the outset that the direct rule of foreign territories was no longer a sustainable policy.

This agent-centred account does, however, not fully address the social communication through which common meanings are built.[96] According to Jürgen Habermas, international law must refer back to common meanings, which provide the background understandings enabling interaction. Social learning theory has analysed the processes of how actors' understanding of social and material reality, including them, is constructed and perpetuated through continuous interactions and the fixing of meanings.[97] Central to these theories is the premise that actors generate and maintain collective meanings through social interaction.[98] This premise links back to the concept of language as an interactive practice based on Ludwig Wittgenstein's notion of "language games" in the *Philosophical Investigations*, which points at the rule-governed character of language.[99]

Paragraph 201 of the philosophical investigations is concerned with the difficulties of norms to provide guidance, since their application to specific situations always requires actors to engage in interpretation of what the norm requires. Wittgenstein thus identifies the "paradox" with norms providing guidance, in that "*no course of action could be determined by a rule, because every course of action can be made out to accord with the rule*".[100] Kratochwil considers that the puzzle of such radical norm scepticism can be resolved by considering the interactive nature of the exercise. Proceeding by analogy to paragraphs 151 and 185 in Wittgenstein's investigations, he uses the notion of language as an intersubjective practice to posit that norms do not merely provide actors with guidance in situations they may not have faced before, but the application of norms is also enveloped in certain conventions among the community of actors.[101] For Kratochwil, the paradox of norm scepticism then dissolves as there may well be disagreement on the interpretation of a norm, but the range of possible interpretations of the norm is circumscribed by the wider group of speakers that the actor is part of.[102] Wittgenstein himself points to the limiting effect of actors having to justify their reasons for acting to the audience of other actors in considering that providing reasons for an actor's behaviour equates to showing a way which leads to this action. "In some cases it means telling the way one has gone oneself; in others it means describing a way which leads there and is in accordance with certain accepted rules".[103]

Over time, the collective social experience tends to become stabilised in a more fixed shape.[104] The "fixing" of experience into particular norms, in turn, provides actors with common references in the continuous process of negotiating meanings, and helps facilitate further interactions.[105] In the classic example of Alexander Wendt on the North Korean nuclear weapons threat, actors' identities as enemies are just as intertwined with one another and shaped by common practice as those of friends.[106] Gerald Postema, in turn, illustrates, the notion of friendship as social practice whose complex meaning is constructed over time, creating a common history. When actors identify along these commonalities, "*[…] it is not like cows sharing a pasture, for the shared life of friends engenders common perception, a common perspective, and common discourse*".[107] Kratochwil adds another layer to this understanding and posits that the emergence of such a common system of expectations among actors depends, by reference to Niklas Luhmann's treatment of social systems, on the "suspension of the capacity to learn",[108] in that actors need to feel bound by common

perceptions, perspective and discourse even if their interactions might yield outcomes that do not conform to expectations.[109] Were actors to simply proceed in a purely rational fashion and update their expectation of conduct on the basis of each interaction with other actors, which may not comply with the perceived norm guidance, no stable social order could develop.

In John Searle's terms, actors need to construct their social reality in a way that enables interaction on the basis of common understandings.[110] Kratochwil compiled various examples to illustrate the implications of this concept for the analysis of international law and international relation.[111] The interaction found in a swarm of bees, for instance, is founded on intentionality in the sense that the actions of the bees are directed at a common purpose and coordinated by some form of communication.[112] The functioning of a pack of wolves, in turn, requires the wolves to coordinate their actions in a way that each is playing its part in the pursuit of the common aim. The hunting wolf pack involves more than the sum of the individual wolves' actions and requires strategic interaction. In a game of chess, the players' interaction involves both competition and the commitment to a common aim, with the conscious element that norms structure the interaction of the participants. The interaction is competitive in the sense of a contest between the players trying to win, but at the same time requires them to abide by the rules of chess. In this form of social contract, the rules of the chess game specify how and when the players can make their moves within the game that they are engaged in. The construction of social reality thus creates the conditions for a "shared life world" that allows for a system of expectations to emerge.

Pierre Bourdieu has linked the social construction of reality to the role of law, and considers that "*law is the form par excellence of the symbolic power of nomination that creates named things and in particular groups; it confers on these realities arising from these classification operations all the permanence, that of things, that a historical institution is capable of conferring on historical institutions. Law is the form par excellence of acting discourse, capable, by its own virtue, of producing effects. It is not too much to say that it makes the social world, but on condition that we do not forget that it is made by it*".[113] The creation of common meanings is also linked to the mutual constitution of agents and structure.[114] Intersubjective meanings are generated and maintained through social interaction.[115] The mutual constitution of agents and structure entails that actors generate and further intersubjective understandings through

processes of social learning,[116] and these understandings then mutate into "structures" in the sense that they shape actors' perceptions of themselves and the reality they operate in, the construction of their interests, as well as the arguments they present and their assessment of others' arguments.[117]

International law depends on intersubjective understandings among actors that make its norms intelligible within the context that it operates.[118] Intersubjective, transcendent understandings create the very possibility of normative activity in the international system, thus enabling communicative interaction among actors based on legal norms.[119] Simplifying a necessarily more complex picture in social life, institutional facts provide the common understandings that enable actors to connect certain consequences with their actions, thereby linking the "is" with the "ought". Through this pathway, they make it possible for actors to settle arguments that would otherwise be circular, allowing them to make sense of their actions, distinguish compliance from deviance, and submit claims based on rights or obligations.[120] For instance, when the parties to an international agreement are able to confront one another with a document that bears the word "treaty" accompanied with the names of their countries and signatures, they are entitled to conclude the existence of a legal relationship between these parties, endowing them with rights and obligations. Whether the other party will respect those rights or comply with its obligations is not the crucial element here, rather what matters is that through these institutional facts, actors have a mutually shared comprehension of the context in which they are operating, as well as the concepts that make their communication intelligible.

There have of course been challenges to the universal aspiration of international law, in that it is able to constitute a common framework for all actors in the international sphere, ranging from the early soviet doctrine of international law,[121] the Critical Legal Studies movement,[122] to the contemporary transcivilisational approach to international law.[123] The notion of an "international community" is often presupposed in international legal theory,[124] but there continues to be debate over the existence of, to use the term of the English School, an "international society".[125]

However, the "international community" does not necessarily have to equal the societal conception underlying the contemporary universalist claims of international law. There is a generalised recognition among

international actors for the role of international law in shaping international communication and interaction, or in the words of Martti Koskenniemi, "international law provides the shared surface […] on which political adversaries recognize each other as such and pursue their adversity in terms of something shared".[126] A community of diplomats may have a shared commitment to certain diplomatic practices despite fundamental political disagreements among the entities that they represent.[127] For example, although the members of the UN Security Council may not agree on substance in particular instance, they are "in an enduring relationship and share certain expectations about the enterprise in which they are engaged".[128] Another challenge to the universality of international law comes under the heading of legal pluralism, whereby the fragmentation and multiplication of legal regimes leads to the emergence of idiosyncratic concepts of international law.[129] Gunther Teubner argues that each differentiated cluster of international law thus becomes self-contained in the pursuit of its particular objectives in that "*[d]ifferent social particularistic rationalities have formed bridgeheads within the law from which they operate in the designing of mutually incompatible legal concepts, to represent alternative doctrinal arguments and methods, and to project norms which contradict each other*".[130] The practical consequences of this fragmentation can be seen, for instance, in the odyssey of the *Mox Plant* cases, where the issue at the centre of the litigation could be considered from the angles of the international law of the sea, international environmental law or European Union law.[131] This plurality of legal regimes applicable to the cases then translated into a fragmentation of jurisdictional forums, with different aspects of the cases being brought before the Permanent Court of Arbitration, the International Tribunal for the Law of the Sea and the Court of Justice of the European Union.[132]

Dirk Pulkowski, to the contrary, contends that rather than consisting of mutually incompatible concepts, international law allows translating the different social discourses into common terms.[133] By reference to Klaus Günther's notion of international law as a universal "code of legality",[134] Pulkowski considers that international law provides a "common grammar" that endows actors with the capacity to negotiate and express intersubjective understandings and norms of appropriate conduct across the boundaries of particular legal regimes.[135] In other words, no distinct part of international law "can be read in clinical isolation from [general] international law".[136] Despite the progressive development of specialised fields of international law, "international lawyers are accustomed to thinking of

international law as a unified, all-encompassing discipline", whose unity results "from psychological elements of shared beliefs, emotions and aspirations [as well as] the historical bonds that tie it to the social and physical environment".[137] Pulkowski concludes that through the institutional facts[138] embodied in international law, the latter enables the negotiation of transcendent, intersubjective understandings among actors in the international system.[139]

2.2.3 International Law and Communicative Action

International Law and Communicative Action Theory

In an international system characterised by competing interests, peaceful coexistence requires actors to engage in coordination and accommodate conflicting interests of other parties. Actors consequently interact with each other in order to maximise their interests under various conditions and restraints. While conflict, and especially armed conflict, would appear to deny any meaningful role for international law, even here international humanitarian law provides some normative guidance for behaviour and standardised procedures for exchanging information.[140] International law provides a common language and framework for the exchange of claims in the argumentative process among actors.[141] In combination with its constraining properties, this communicative aspect of international law provides a form of normative guidance inducing actors to mediate between competing claims and accordingly contributes to shaping outcomes.[142]

Realism and the Critical Legal Studies movement do emphasise that international law can be manipulated by political powers and induces the parties towards outcomes that favour the powerful actors.[143] The problem here is that the absence of centralised authority in the international system makes it difficult to decide which norms are applicable and relevant in specific cases or, according to Krasner: "International rules can be contradictory […] and there is no authority structure to adjudicate such controversies".[144] Thus, powerful actors will have a greater range of options to choose a legal basis in support of their consequentially determined action, either by reinterpreting existing law or setting new norms, be it through formal procedures or by asserting customary international law—the latter being a source which privileges the actions and arguments of the powerful actors.[145] However, while it is important to recognise the seriousness of the question and to avoid a stylised or idealised view of international law, it is one thing to admit that it leaves

room for manipulation, but "quite another to argue that anything goes", that because there might be no single right solution, any option is as valid as any other and *"powerful [actors] can simply pick and choose the rules that suit their purposes*".[146] In most cases, while interpretations may remain disputed, there are limits to what can reasonably be argued by actors[147] and manifestly abusive or frivolous claims will meet with resistance in the international arena.[148] In particular, powerful actors may be able to manipulate international law to some extent, but the determinacy of legal norms sets boundaries to the range of permissible interpretations.[149]

This does not do away with the role of politics as a medium of communication or mediation among various international actors. Politics does not require substantive agreement, the parties can "agree to disagree" if there is no scope for compromise. In this sense, diplomacy can serve to keep channels of communication open and maintain relationships among actors even if there is fundamental disagreement on substance.[150] For instance, in the period preceding the conclusion of the Joint Comprehensive Plan of Action (JCPOA), as well as the ongoing efforts to revive the agreement, the United States and Iran are able to engage in diplomatic talks despite the absence of formal relations between the two countries. They are also able to deliberate on issues relating to the nuclear programme despite fundamental disagreements on other issues, such as the ballistic missiles issue. There is also a distinction between juridical disputes and political questions in both theory and practice. In the United States, the Supreme Court has established the "political questions doctrine", according to which certain matters are exempted from juridical review as they pertain to the privilege of the executive branch in the conduct of foreign policy.[151] Andrew Hurrell notes, however, the often imprecise and approximate relation between political language and the realities it seeks to describe. This reliance on "unstable metaphors" complicates the facilitation of communication and collective action through a shared language.[152]

International law, on the other hand, provides actors with a set of commonly accepted norms. These are endowed both with a certain stability and permanence, as well as clarity and determinacy regarding standards of behaviour in the international arena, that cannot be replicated by politics. Dirk Pulkowski considers that communicating through the medium of international law "limit[s] the range of permissible arguments by compelling participants to formalise their arguments in predictable terms, playing with a limited reservoir of legal concepts".[153]

Further, international law does provide a language for diplomatic interaction in that, on the most basic level, actors presuppose the propriety of communicating on the basis of international legal norms.[154] International actors generally assert their position in terms of *legal* rights or obligations. The justification of action in the international arena based solely on factors outside the realm of law constitutes the rare exception. In instances of resort to armed force, actors will aim to present their justification in terms of international law, rather than political necessity,[155] mostly as self-defence against a prior or imminent use of force, which then serves to justify the actor's conduct. In turn, disapproval of other actors' behaviour will usually be framed in terms of non-compliance with *legal* obligations.[156] The Russian invasion of Ukraine in 2022 was not condemned in vague terms of rejecting assertions of a Russian "space" or sphere of influence beyond the borders of the Russian Federation, even though this may have been part of the political considerations, but on precise legal arguments, namely as an act of aggression in violation of the prohibition to use force in Article 2 (4) UN Charter.[157]

International law accordingly provides actors in the international arena with a common language for the communication of their claims and counter-claims. Even in times of conflict, actors can rely on the norms of international law as a framework for communication and mediation since, while interests may diverge and claims may be disputed, the medium transmitting their arguments is accepted by other actors. This holds true independently of any questioning relating to the enforceability of international law.[158] And while form *and* substance do matter in international agreements,[159] formalism is less of an issue here than the fact that international law is recognised by actors as a medium providing intersubjective meanings for communicative action. In the following section, we shall now investigate how this framework provided by international law operates in practice.

The Logic of International Legal Argumentation

Before delving further into the argument, it is worth recalling that interactions in the international system are characterised by both cooperative and conflictual elements as well as interdependent decisions, or in the words of an early analyst of decision-making in external relations: "Without common interest there is nothing to negotiate for, without conflict there is nothing to negotiate about".[160] Although interactive processes have become commonly associated with communicative action theory, the

early treatment of the issue was essentially based on rationalist premises and can be traced to two pioneering works. In 1960, Thomas Schelling's *The Strategy of Conflict*, inspired by game theory as applied to social phenomena by economists, combined with psychological insights, analysed commitments as "the power to bind oneself", through which the parties eliminate some of the options available to them.[161] To be effective, Schelling argues, a commitment must not only be communicated and made intelligible to the other party, but has to be made credible as well—thus actors use different "strategic moves", designed to constrain other actors' behaviour by affecting their expectations of others' behaviour.[162] Further, it is assumed that the parties operate along a continuum ranging from their maximum objective to the minimum acceptable outcome or what has been termed "resistance point".[163] When actors interact with each other, the question is then to identify a space where these continuums overlap, that is, where the parties prefer an agreement to not having an agreement or acting unilaterally. This space has been called "contract zone" or "bargaining range".[164]

In 1984, Robert Axelrod's treatment of the prisoners' dilemma game in *The Evolution of Cooperation* took the analysis one step further, as he showed the importance of iteration: repetition of the game led to cooperation.[165] According to Axelrod's famous notion of the "shadow of the future", continued interaction makes cooperation more likely, as the short-run gains of non-cooperation are outweighed by the long-run repercussions of non-cooperation. Moreover, continued interaction induces actors to develop a pattern of behavioural norms of its own, therefore the importance of institutions in "lengthening the shadow of the future".[166] In other words, whenever actors interact with each other, they inevitably create structured patterns of norms considered appropriate to regulate a given set of interactions. Rational choice theories posit that these interactions are characterised by rational, utility-maximising actors.[167] It follows that within constraints imposed by institutions, limited resources and incomplete information, actors will aim to develop optimal strategies with which to pursue their interests. In this context, norms can exert a moderating role and contribute to a level-playing field by mitigating differences in power or material resources among actors, given that normative systems, in most cases, are either agnostic about power asymmetries or else posit the principle of formal equality among the parties.[168] Of course, seemingly power-neutral norms may well reflect underlying distributions of power, and this issue shall be addressed at a

later stage; rather, it is important to note here that normative processes are never devoid of power.

These insights were formalised under the label of "regime theory" by Stephen Krasner's *International Regimes*,[169] though large parts of them can be transposed into the analysis of international law. Krasner builds on a form of modified structural realism to posit a model whereby international law can have a decisive impact on behaviour, but only under restrictive conditions,[170] a figure which was to influence political science for years to come.

According to regime theory, for most situations there is a direct link between basic causal variables and related behaviour; but under circumstances that are not purely conflictual, and where non-cooperation may lead to outcomes below Pareto-efficiency, legal norms may be significant.[171] International law was accordingly denied any constraining influence in areas pertaining to vital interests such as essential security, and was deemed relevant only in areas that could be conceptualised as coordination games. This view, however, was deemed to be overly simplistic; as it did not take into account Axelrod's insight that continued interaction modifies the nature of the game. Behaviour that conforms to a specific pattern inevitably generates convergent expectations.[172] This leads to behaviour being regulated by "conventions", where actors are expecting some form of collective disapproval for deviations from established practices. Conventionalised behaviour generates norms; and patterns of behaviour that persist over time are infused with normative significance.[173] The international system cannot be sustained by calculations of self-interests alone, rather, it must be embedded in a social environment that creates the conditions for its functioning. Even the balance of power, considered by structural realists as a conflictual situation, can be treated as a form of organisation or, in the words of Hedley Bull, as an anarchical *society*.[174] This leads to a new causal pathway in which conventionalised behaviour reflecting calculations of interest tends to lead to the creation of norms, and norms in turn contribute to reinforce these patterns of behaviour, though without affecting the basic causal variables.

The analysis was then taken another step further to include the possibility of feedback from norms to basic causal variables.[175] Once "principles, rules, norms and decision-making procedures" (or, put simply, international law) are internalised by actors, they may alter the interests and power configurations that led to their creation in the first place.[176]

This then posits a new set of causal relationships, since norms do not only intervene in between causal variables and outcomes, but also "feed back" into the basic causal variables, with the potential to alter actors' interests and identities in making decisions in the international arena. The mechanisms of feedback from norms to basic causal variables can take many forms, such as altering actors' calculations in pursuing their interests, altering actors' ideas, or in norms themselves becoming an instrument of power that actors may deploy to further their aims.[177]

This broadly represented the state of the art until the so-called ZIB-debate came to the fore in the 1990s and called into question the primacy of rationalism,[178] and subsequent treatments tended to be dominated by sociological-psychological approaches. These approaches had as their starting point the claim that the classic distinction of March and Olsen between a logic of consequences, as associated with rationalism, and a logic of appropriateness, as linked to constructivism, had to be complemented by a logic of argumentation, which related to processes of argumentation that constitute a distinct mode of social interaction. Actors may well be endowed with interests, but that does not reveal the entire picture, since rationality, in the utility-maximising sense, is not the only logic of action relevant to actors' behaviour.[179] Drawing from insights gained in cognitive psychology, further research has revealed individuals' instinctual capacities for language that include the ability to reason about norms in complex ways.[180] This supports the notion that normative reasoning, based on analogies that link norms to situations, is at least as innate to individuals as utilitarian calculations.[181] Since the capacity to engage in normative deliberation, including legal argumentation and assessment, is considered to be an innate part of thinking,[182] actors simultaneously engage in instrumental logics (interest-maximising reasoning) and in logics of obligation and justification (normative reasoning).[183] Jürgen Habermas distinguishes between strategic action and communicative action and, as argued by Dirk Pulkowski, a complete account of actors' behaviour in international relations needs to consider both these alternatives.[184] Strategic action implies that actors consciously arbitrate between different alternatives to realise their ends, whereas communicative action relates to interactions among several actors seeking an intersubjective understanding (*Verständigung)* of the meaning of the situation (*Handlungssituation*) in order to coordinate their actions.[185] Here, language becomes a mechanism for coordinating actions (*handlungskoordinierender Mechanismus*), enabling actors to contest or recognise the

validity claims of the other parties.[186] From this initial claim, Thomas Risse derived a new model, comprising three different modes of social action and interaction, each characterised by different rationalities as far as the goals of action are concerned (*Handlungsrationalität*).[187]

The first mode corresponds to the already known logic of consequences, which relates to rationalism, considering actors' interests as mostly fixed during the process of the interaction.[188] Rational choice theories focus on strategic interactions in which agents aim to realise their aims through instrumental rationality: "Rational choice is instrumental: it is guided by the outcome of action. Actions are valued and chosen not for themselves, but as more or less efficient means to further an end".[189] Norms or institutions, in this view, serve to overcome collective action problems or to optimise the realisation of the interests of rational actors under conditions of uncertainty or incomplete information.[190] The second mode, in turn, corresponds to the realm of the logic of appropriateness, as emphasised by March and Olsen whereby "actors are imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations".[191] It follows that the difference between norm-guided behaviour and instrumentally rational behaviour resides in the fact that in the former, actors are induced to conform to normative standards whereas the latter is characterised by actors aiming to optimise outcomes according to their interests.[192] In this sense, normative action implies that social norms are endowed with constitutive effects, since these they do not only aim to impact behaviour, but also define social identities.[193] Constructivism emphasises the constitutive role of ideas on actors. The role of norms is thus not limited to a behavioural impact, rather they simultaneously help to "construct" the identity of actors and determine the rules of the interactive "game" that actors are engaged in. There may still be instances of non-compliance and norms are not immutable, but they play a crucial role in defining the basic concepts around which actors operate in the international system.[194]

Since actors' interests and identity are socially constructed, they are plastic and transient, therefore may be redefined. International law, accordingly, is both a reflection of the identities and interests of the powerful actors, *and* at the same time feeds back into, thus reinforcing, actors' identities, interests, and even power.[195] The international legal order, in that sense, can be understood as a social construct that reflects

and shapes behaviour.[196] In the extreme view, international law *is* international relations because international law constitutes actors through a communicative process guided by intersubjective norms and ideas.[197] Ontology eclipses epistemology: law is about defining, not regulating: "the international legal order exists simply by virtue of its role in defining the game of international relations".[198] In this sense, the importance of power in the material sense is exclusively dependent on the social context that actors operate in.[199] Such a view was, however, short-lived and contemporary constructivist approaches also accept the effect of objective material forces in international relations.[200]

March and Olsen, however, do not only refer to norm internalisation, but also conceive of normative guidance, whereby actors engage in a conscious process of understanding the situation and seeking the applicable norm prior to acting.[201] The more the norms are contested, the more difficult it becomes for actors to make sense of the situation and act according to the appropriate norm, respectively to determine which norm among conflicting ones to apply.[202] This creates the opening for Risse to propose a third mode of interaction, which then corresponds to a "logic of argumentation", by means of which actors aim to determine what, in effect, is the appropriate conduct. In this logic of argumentation, actors engage in a communicative process to either test the validity of their ideas about the situation and the cause and effect relationships framing their actions; or, to determine whether the behaviour can be normatively justified, and which norms do apply.[203] The argumentative rationality that underpins this logic implies that actors are open to contest the validity of causal or normative statements and engage in a communicative process to align their understanding of the situation in which they act, as well as the justifications provided by the norms that serve to guide their actions—what Jürgen Habermas calls "communicative action".[204] While argumentative behaviour is as just as premised on actors seeking to realise their aims as strategic interaction, the difference here is that actors' interests and perceptions of the social context are not fixed and can be contested through communicative interaction.[205]

Communicative behaviour in international relations can take several forms.[206] The first form equates to the logic of consequences, whereby actors interact on the basis of predetermined interests. Drawing from Jon Elster, communicative action here is characterised by a logic of the market: actors aim to realise their ends based on positive or negative incentives to the other parties with the aim to maximise, optimise or

satisfy their interests.[207] The second form corresponds to communication as a form of *justification*, whereby actors deploy arguments in a strategic mode in support of their identities and interests. Arguments are used to underline the desire for a particular course of action, or to justify interests, in order to persuade other actors to change their position, respectively to induce a shift in interests, identities or contextual understanding. The crucial element here is that actors aim to induce change in the other parties, but are not themselves ready to alter their own interests or to be persuaded—interests and identities remain fixed.[208] Jürgen Habermas' theory of communicative action then introduced a third form of communication, conceived as behaviour oriented towards reaching a common understanding (*verständigungsorientiertes Handeln*), which he defined as "*the actors involved are not coordinating their plans of action through egocentric success calculations but through acts of understanding. In communicative action, the participants are not primarily oriented towards their own success; they pursue their individual goals under the condition that they can coordinate their plans of action on the basis of common definitions of the situation. In this respect, the negotiation of situation definitions is an essential component of the interpretive performance required for communicative action*".[209]

The aim of this form of communicative action is to reach a reasoned consensus—for Habermas *Verständigung* as opposed to *Verstehen*. While actors still put forward arguments with the aim to persuade other parties to alter their interests or normative beliefs, the difference here is that actors are themselves ready to be persuaded by others. The benchmark for successful negotiation is not primarily the realisation of actors' own aims, but rather the coordination of different courses of action though reasoned consensus.[210] In this mode of arguing, if successful, material power matters less than having the "better argument". Habermas posits that communicative action depends on actors' assumption that argumentative interaction is available to them in order to effectively contest the competing claims of other parties. This type of communicative process, oriented towards reasoned consensus, requires that actors presuppose the existence of an "ideal speech situation", unfettered by social or historical contingencies, whereby the parties aim to persuade others of the validity of their respective claims while being themselves disposed to accept the arguments of other actors. In this sense, Habermas considers that "*communicative action refers to an argumentation in which the participants justify their claims to validity before an ideally expanded auditorium.*

Participants in argumentation start from an idealised assumption of a community of communication that is delimited in social space and historical time and must presuppose the possibility of an ideal community 'within' their real social situation".[211]

The important element here is that because actors are ready to be persuaded by others, interests and identities are no longer fixed, but can be subject to contestation and alteration. Contrary to negotiation and justification, the aim of discursive interaction is not to impose a predetermined position, but to reach an argumentative consensus with the other party. The parties of course still aim to realise their interests, but given that the scope of the discourse extends to the perception of validity with regard to actors' interests and identities, the interaction feeds back into the respective positions. Therefore, the argumentative consensus may have constitutive effects; the interaction can construct and reconstruct social reality. This relates to the mutual constitution of social structure and agents.[212] Drawing from John Searle, Habermas' theory of communicative action does not simply conceive of agents as "puppets of social structure", rather the participants are endowed with agency to actively contest competing claims to meaning.[213] They are also "social agents", in the sense that through engaging in communicative interaction, actors create and reproduce the intersubjective understandings (structures of meaning) that underpin their communicative practices.[214] Habermas' argumentative rationality does, however, depend on the presence of several preconditions for its practical operation.

First, actors need to share a common frame of reference (*gemeinsame Lebenswelt*), which Habermas envisages as a set of collective interpretations of social reality and ideas of their identity. This "common lifeworld" is formed by a system of norms shared by actors, linked to their social identity.[215] It provides actors with a "répertoire" of intersubjective understandings that serve as common reference points to define the permissible range of legitimate arguments. Second, Habermas posits that argumentative interaction should be devoid of power asymmetries, force and coercion.[216] The idea is that actors would seek an argumentative consensus under conditions of equality, both in terms of mutual recognition and their access to the interaction.[217] In practical terms, this implies that, as a matter of principle, all parties may participate in communicative action, and there is no differentiation among actors with regard to the right to present or contest claims to meaning.

In short, Habermas' theory is based on agents that are oriented towards the creation of common meanings and accordingly endowed with an innate readiness to accept the arguments of other parties (*Verständigungsbereitschaft*), given the premise that actors aim for reasoned consensus and exclude the strategic use of arguments to realise specific aims. This process has been dubbed *authentic persuasion*.[218] Argumentation thus depends on the existence of norms that can serve as a universally accepted common frame of reference for new arguments. In international relations, however, the practice of diplomacy and the norms of international law only offer a rather thin layer of common lifeworld as compared to domestic settings, which would seem to indicate reluctance on the part of international actors to engage in communicative action.[219] There have been inquiries into the possibility of increasing the level of lifeworld certainties, charting "islands of persuasion" so as to induce Habermasian-style communicative action in the international arena, notably by endowing actors with the capacity to manipulate the discursive setting in which interactions take place.[220] The more favourable the conditions that can be established, the more likely it becomes that actors engage in Habermasian-style communicative action, provided that the alteration of argumentative environment relaxes distrust among the participants and reduces the impact of material incentives and coercion. Actors will then be induced to switch from a consequentialist or output-oriented mode of interaction (*erfolgsorientierte Interaktionseinstellung*) to a mode of interaction aimed at argumentative consensus (*verständigungsorientierte Interaktionseinstellung*).[221]

A central challenge for models of communicative action is to account for the issue of incomplete information. Studies on persuasion have identified uncertainty as an important factor in expanding the explanatory power of communicative action. Rationalist approaches looking at Habermas' theory of communicative action have been credited with uncovering subtle shifts in the initial approach and enabled to conceptualise alternative notions of communicative interaction.[222] Christian Grobe highlighted that, by contrast to Habermas' initial theory of communicative action, revised models accord greater emphasis to the insights of social psychology and therefore are able to accommodate the role of uncertainty into the model from the outset. According to Jeffrey Checkel, rather than focusing on an interactional orientation of the agents aimed at argumentative consensus, persuasion can be defined as "a process of interaction that involves changing attitudes about cause and

effect in the absence of overt coercion. It is thus a mechanism through which [changes in interests] may occur".[223] This process, which has been dubbed *sincere persuasion*, somewhat relaxes the demanding precepts of Habermas' theory of communicative action, given that in an international environment in constant flux and characterised by situations with high uncertainty, it may be necessary for actors to adjust their initial positions to changing social realities.[224] Although drawing from constructivism, Checkel's approach is close to classical rationalist premises.[225] Despite its a priori promise, though, Checkel's sincere persuasion model is nonetheless subject to conceptual difficulties. His approach holds that communicative interaction may result in an alteration of how actors perceive causal relationships, which in turn leads to an adjustment of the actors' interests. A change in the perception of the situation is thus conceived as a precursor to a change in actors' interests, whereas purely rationalist accounts consider it as an alternative to a change in interests.[226] This conceptual difficulty is further exacerbated when changes in the situational perception are explicitly cited as evidence for the functioning of a model of sincere persuasion,[227] despite the possibility of a rationalist explanation for the phenomenon. Andrew Moravcsik contends that overlooking viable or even obvious rational explanations for changes in actor's interests renders constructivist theory susceptible to the temptation of using the mere presence of a variation in actor's interests to validate their approach, with the risk of generating fallacious results.[228]

While such scepticism may be legitimate, rationalism itself, despite an extensive practice in analysing the role of incomplete information in decision-making processes, has difficulties in developing an alternative model able to fully capture the persuasive effects of argumentative interaction in the international sphere.[229] At the outset, the problem is that rationalist accounts are grounded in a theory of decision-making under conditions of incomplete information, which allows that the argumentative interaction may reveal actors new options to pursue their aims.[230] While actors might anticipate the emergence of a persuasion situation, they will always be confronted with an element of uncertainty concerning the nature of the arguments and how those arguments relate to the structure of the "game" that the actors are engaged in.[231] Once new causal information emerges during the course of the interaction, actors might adapt their strategies and behaviour to this situation, without this actually having induced a change in their interests. This proposition then

leads Grobe to devise a revised causal model of how norms may influence outcomes, whereby the emergence of new causal information alters the dynamics of the interaction.[232] The actors will deviate from the initial rational game and instead engage in an exercise of persuasion where one party claims to possess new information relevant to the situation and aims to induce other actors into endorsing it.[233] In case other actors do accept the new piece of information and adapt their beliefs accordingly, the parameters of the initial game alter. The parties then revert back to the rational game, but with new causal information, and therefore engage in a revised game. In this form of argumentative interaction, which has been named *functional persuasion* theory, the result will be a change in actors' strategies to realise their aims according to new causal information, but importantly with their interests remaining unchanged.[234] This is the main dividing line between functional persuasion and constructivism, since in the latter, the "feedback effect" of norms through the social constitution of agents will necessarily alter their interests. According to functional persuasion theory, persuasion will only be successful if it provides actors with new causal information relevant to the particular issue or the range of options available to them in the pursuit of their aims.[235] When such new information appears, actors may then modify their understanding of the situation and adapt their behaviour according to the new causal information available to them, notably when new information increases the range of available options or the potential for interest-maximisation. On the other hand, new causal information that results in a restriction of available courses of action, will be met with reluctance by rational actors, given that this new information might be used to further the interests of other competing actors.[236]

This returns us to the issue of how international law enters the decision-making calculations of international actors. We have seen that neither rationalism, nor the constructivist-based theories of communicative action can offer an entirely satisfactory account of the pathways by which international law enters the processes of how foreign policy decisions are shaped. The most complete explanatory account can be drawn from a form of constructivist theory, which integrates elements of rationalist approaches in order to increase constructivism's heuristic dimension. They differ from purely rationalist accounts in that norms or institutions do not merely serve as tools for interest-maximisation in order to lower transaction costs, and rely on constructivism in that norms "feed back" into actors' calculations of behaviour, without, however, necessarily

inducing a modification of interests. At this point, it seems useful to reiterate the insights of organisational sociology by March and Olsen that decisions are grounded in two different "logics".[237] According to the logic of consequences, relying on a rationalist-utilitarian perspective, decisions are purely instrumental: "How do I get what I want, and what will happen if I will behave in a certain way?" The logic of appropriateness—and argumentation—in turn focuses on social norms and prompts the question of "What should I do in this situation?"[238] For March and Olsen, the logic of appropriateness entails "duties" and "obligations" to act; translated to the realm of international law, the logic of appropriateness can therefore develop into a sense of *legal* obligation.[239] These logics are, however, not mutually exclusive, rather, March and Olsen, as well as other authors, argue that the decisions of actors can be motivated by both consequentialist concerns *and* normative considerations.[240]

How actors calculate consequences is therefore not easily separable from their understanding of international law, especially as thought processes can become internalised over time, leading to a continuous interplay of the logics of appropriateness and of consequences. For Andrew Hurrell, "it may indeed be helpful to think of actors making choices between consequentialist calculations of interest and normative evaluations of appropriateness. But over time the obviousness of certain sorts of norms […] becomes such an accepted and natural feature of the international political and legal landscape that it becomes part of how actors routinely calculate consequences, and the costs and benefits of alternative policy choices".[241] It shall be noted that rationality in the framework of communicative action theory is not limited to an instrumental understanding whereby actors optimise strategies to realise their interests, but extends to common meanings attached to social reality, that is, the type of interests to be pursued legitimately and the kinds of norms applicable. Rationality in this sense refers to the ability to justify a course of action by reference to a foil of intersubjective understandings.[242] According to Jürgen Habermas, communicative action is the process by which the justification of competing claims under international law is discursively managed. In sketching the basic features of a discursive theory of law, Habermas raises the question "whether the ideal requirements for the postulated theory cannot be translated into ideal requirements for a legal discourse that takes equal account of the regulative ideal of the only correct decision and the fallibility of the actual decision-making practice. Although this problem is not solved, it

is at least taken seriously by a discourse theory of law that makes the rational acceptability of judgements dependent not only on the quality of the arguments, but on the structure of the argumentation process. It is based on a strong notion of procedural rationality, according to which the properties constitutive of the validity of a judgement are sought not only in the logical-semantic dimension of the structure of arguments and propositional linkage, but also in the pragmatic dimension of the reasoning process itself. The correctness of normative judgements cannot be explained in terms of a correspondence theory of truth anyway; for rights are a social construction that must not be hypostatised into facts. 'Rightness' means rational acceptability supported by good reasons. The validity of a judgement is certainly defined by the fact that its conditions of validity are fulfilled. Whether they are fulfilled, however, cannot be clarified by direct recourse to empirical evidence or to facts that are given in ideal conception, but only discursively - precisely by way of a justification carried out argumentatively; it cannot be ruled out that new information and better reasons will be brought forward. In fact, under favourable conditions, we only end an argumentation when the reasons in the horizon of hitherto unproblematic background assumptions condense into a coherent whole to such an extent that an unconstrained agreement is reached on the acceptability of the disputed claim to validity".[243]

Even if one would suspect that appeals to political ideas, to legal norms, and moral purposes are no more than rationalisations of self-interest, they may still affect the behaviour of actors due to the need to legitimate social or political action and thus cannot be merely rationalisations *ex post facto* that have no connection to the observed behaviour. Quentin Skinner argued that any agent would claim that their undesirable behaviour was in fact guided by commonly accepted norms. This observation holds independently of whether the agent is actually motivated by the norm. The agent will therefore find herself obliged to act in such a way that her behaviour appears consonant with the assertion that her actions were indeed guided by norms. The implication that follows from this is that "*the courses of action open to any rational agent in this type of situation must in part be determined by the range of principles that [she can defend] with plausibility*".[244]

In the international arena, actors may well be guided by a rational interest-maximising logic, but still feel a sense of legal obligation to the norms of international law in deciding which course of action to take. As a consequence of this analysis, the argument is that while actors will aim

to pursue their material interests according to the logic of consequences, they do simultaneously engage in normative considerations, according to a logic of appropriateness, in deciding how to behave in order to obtain what they want. This then leads us to a new model of the causal effect of norms on international behaviour, which may be termed as *concentric circles*.[245]

The model comprises two overlapping circles, with the larger circle encompassing all the alternative outcomes that actors could aim to realise being guided exclusively by rational calculations of self-interest, relying on their material resources and power relations in the international system. According to realist and institutionalist approaches, any random alternative among these outcomes is open for actors to pursue, and no further limitation is placed upon them than the means they have at their disposal to achieve their ends. The smaller circle corresponds to those alternatives that are in some way justifiable under international law. Choosing one of these alternatives thus includes a normative element, as they not only follow a logic of consequentialism, but also a need to be perceived as the "right" thing to do, in other words, they are considered to not only further the actors' aims, but also as appropriate means to do so. If one were, for a moment, to consider international law as absent from international relations, then all options within the wider circle would reasonably be considered by actors when deciding upon the adequate course of action. International actors do, however, not operate in a vacuum, they are embedded in and socialised into a normative framework, namely international law which, despite the occasional instances of non-compliance, determines for the international system as a whole what can be deemed as reasonable conduct. Thus, by being engaged in the interactive process of international law, actors are made to opt for those alternatives that are at least *prima facie* reconcilable with international law. This takes us back to Guy de Lachrrière's argument that acting on and through international law constitutes an inherent part of foreign policy. In this view, law is an element in the decision-making process, which does not govern the decision but influences it. Ultimately, this influence is that which, between two otherwise equally satisfactory solutions, induces actors to choose the one that is most in conformity with international law.[246]

Such an argument does not exclude that behaviour may primarily be motivated by interest-based calculations, or that compliance with international law might be due to the increased long-term costs of non-compliance. It is nonetheless the case that international law does "matter"

to international actors, in that, on the international stage, they have to argue and justify their decisions with reference to international law. While the indeterminacy of some norms of international law might leave room for interpretation and make it difficult to determine which norms apply to a specific conduct, instances of actions in open violation of international law nonetheless remain the rare exception to the rule.

While normative considerations seem all pervasive in international relations, this does, however, not do away with the problem of what Georges Scelle has termed *dédoublement fonctionnel*, the idea that actors are both subject to and sovereign in international law. Actors are endowed with a dual role in international law, as both subjects of and the creators of international law,[247] which makes it difficult to accommodate the international legal order with domestic conceptions of law predicated upon hierarchical projections of authority.[248] Since actors generate the norms of international law to which they subject themselves, international law is an autonomous entity aiming to regulate behaviour, but at the same time it is itself both instrumental to, and shaped by, power. This implies that it seems premature at this point to completely discard the most prominent alternative explanation for actors' behaviour, namely the realist explanation or power distribution argument. Following this premise, variation in behaviour is explained by differences in the variation of power in the international system, as the powerful can simply coerce less powerful actors into changing their position and reinterpret norms in a way that suits their purposes. We shall accordingly delve in more detail into the interplay between international law and power.

3 Anarchy and Power Asymmetry in International Law

The preceding sections have aimed to uncover the dynamics of international legal argumentation using communicative action theory. We have seen that while communicative approaches have distinctive merits, their effective operation also requires the realisation of certain conditions: namely the presence of a "common lifeworld" and the absence of overt coercion among international actors. Given these preconditions, it could be argued that due to the anarchical structure of the international system and power asymmetries contained therein, the communicative approach, rather than furthering the understanding of international relations, actually reveals with clarity the "limits of international law". In light of this

caveat, the following sections will more concretely examine the issues of anarchy and asymmetrical power in international law.

3.1 Communicative Action and the Logics of Anarchy

3.1.1 The "Anarchy Problématique" and the "Common Lifeworld"

The international system is generally described as anarchic, defined as the absence of centralised authority. This *anarchy problématique* underpins the controversy in international relations theory about the extent to which the anarchical structure of the international system is an inherent source of conflict inhibiting the creation of any stable form of normative order that could constitute the "common lifeworld" in communicative action theory. Dirk Pulkowski refers to the argument that due to ideological distortions and asymmetrical power in international relations, one could conclude that the international system is "structurally doomed" to strategic action given that in a state of anarchy characterised by latent threats to actors' security, international relations is not a social environment conducive to rational argument among participants, which are discouraged to pursue their aims through communicating with one another.[249] Jürgen Habermas' theory, however, posits the common lifeworld as the setting enabling communicative action; it presents actors with a shared system of norms and ideas to which they can interrelate in their interactions.[250] Communicative action theory presupposes that actors share some common frame of reference, in turn implying that there is a sufficient degree of overlap in their intersubjective understandings.[251] According to Habermas, law enables and stabilises discourses by reducing the potential for exploitation by strategically oriented actors and ensuring the access of all participants, as well as enabling reasonable compromise.[252] This brings back the scepticism of realist approaches concerning an overly optimistic view of the role of international law in political decisions, particularly in the international arena,[253] even though some universally recognised norms of international law such as *pacta sunt sevanda* could be considered as elements of the basic structure of a common lifeworld.[254] Habermas' theory does not specify the density of common lifeworld what would be required for communicative behaviour to occur[255]; what matters is that the social environment that actors operate in enables cooperative interpretative processes (*kooperative Deutungsprozesse*) and meaningful communicative exchanges with a view to reaching consensus (*verständigungsorientiertes Handeln*).[256]

Pulkowski points out that the existence of a communication community (*Kommunikationsgemeinschaft*) in Habermas' theory of communicative action is merely an analytical concept, rather than an actual state of international affairs.[257] In other words, the presence of a communication community is a deliberately counterfactual element in Habermas' theory, which provides a foil against which societal complexity is illustrated ("*um eine Folie zu gewinnen, auf der das Substrat unvermeidlicher gesellschaftlicher Komplexität sichtbar wird*").[258] The "common lifeworld" accordingly does not strictly imply a set of realisable conditions, but "is rather used to highlight the imperfections of actual communication".[259]

In the most basic sense, the presence of anarchy in the international system could in itself be considered as a form of common lifeworld in the sense that it represents the intersubjective understanding among actors of the social context in which they operate in international relations. Anarchy, even if it implies a state of permanent latent conflict, does not necessarily need to equate to the "state of nature", but can be seen as a collective social interpretation of the international system. Conceiving of social reality as a mere "survival of the fittest" environment is, however, a rather thin basis for meaningful communicative interaction. For this to occur, actors' social interpretation of the environment they are operating in would need to go beyond an understanding that they are competing with each other for relative gains towards an understanding that their interactions can be characterised by cooperation as much as conflict.[260] It could be said that there is no single right concept of a "common lifeworld" in international relations; rather communicative action relies on social integration that is not dependent on a predetermined idea, enabling the possibility of a multitude of different lifeworlds.[261] While realism has long considered the international system to be inherently conflictual, this relatively flat and uniform view was challenged with the publication of Alexander Wendt's *Social Theory of International Politics*,[262] which raised the question whether anarchy is compatible with more than one kind of structure and therefore "logic".

3.1.2 Three Logics of Social Interaction

At the outset of his argument, Wendt introduces a distinction between micro- and macro-level structures, by reference to Kenneth Waltz's differentiation of the respective domains of "foreign policy" and "international politics".[263] Micro-level anarchic structures may vary from peaceful to

conflictual. If we take the two principal players of the past decades, it appears that the United States and China today interact just as much in an environment characterised by anarchy, as did the United States and the Soviet Union; it is clear, however, that their structure of interaction differs. For Wendt, the real question is whether the presence of anarchy creates a tendency for all such interactions to realise a single logic at the macro-level.[264] According to realism, this is indeed the case: anarchies are systems that inherently tend towards competition, balancing of power and conflict.[265] Against this view, Wendt argues that anarchy can have at least three kinds of structure at the macro-level, based on what kind of roles—enemy, rival and friend—dominate the system. Adapting terms from the English School, his theory defines these structures as respectively Hobbesian, Lockean and Kantian.[266] Further, against the view that international relations focus on either structure or agents, that anarchic structure either has one logic or no logic at all, Wendt defends a third possibility: that anarchic structures do indeed constitute their elements, but that these structures are not immutable at the macro-level, opening up the possibility of multiple logics.[267] Anarchy as such is an empty vessel and has no intrinsic logic; anarchies only acquire logics as a function of the meaning that actors infuse them with. This argument is based on conceptualising the international structure in social rather than material terms—thus Wendt's *social* theory of international politics, as opposed to realism's materialist definition of structure as a distribution of capacities. This process is based on actor's ideas about the roles of Self and Other, and as such social structures are "distributions of ideas" or "stocks of knowledge".[268] Intersubjective understandings within the international system provide meaning to power and content to interests. This does, however, not necessarily equate to social structures "constructing" actors.

Ian Hurd's theory of political legitimacy elaborates three reasons why actors comply with norms: coercion, self-interest and normative legitimacy.[269] These pathways correspond roughly to realist, institutionalist and constructivist theories of "the difference that norms make" in international life.[270] In the present context, they reflect different degrees to which a norm can be internalised by actors, thereby generating three different options through which structure can be created—*force*, *price* and *legitimacy*. It is an empirical question which pathway occurs in a given case.[271] While the first two degrees remain on a rather superficial level and are characterised by external constraints, it is with the third degree of internalisation that actors are really "constructed" by norms. Prior to

this point, norms are merely affecting actors' behaviour or ideas about the environment they operate in, not their identity and interests.

Both international relations and social theory distinguish between social order understood as an empirical occurrence and conceived as a normative phenomenon.[272] Social order as an empirical occurrence denotes a stable and regular behavioural structure, as opposed to random, disorder and volatility. Social order as a normative phenomenon relates to the presence of purposive patterns that have been infused with meaning by actors, thereby setting objectives, and leading to particular outcomes.[273] Hedley Bull defines order as a "pattern [in the relations of individual actors or groups] that leads to a particular result, an arrangement of social life such that it promotes certain goals or values".[274]

Jon Elster distinguishes two problems of order in social life. The first consists in getting actors to coordinate their actions towards the realisation of positive-sum outcomes such as reducing conflict or increasing trade, which is why it has been dubbed, by reference to Robert Axelrod, the "cooperation problem",[275] central to political theory and international relations due to the challenges of cooperation under conditions of anarchy. The second is the "sociological problem", namely the puzzle of actually establishing stable patterns of behaviour, whether cooperative *or* conflictual.[276] Social patterns are determined primarily by intersubjective understandings that enable actors to reasonably predict each other's behaviour. Realist approaches in international relations premised their creation on the presence of centralised authority. The absence of such centralised authority in anarchy thus forces actors to engage in worst-case scenario assumptions, presuming that others might violate norms whenever it suits their interests, and prudence requires even non-belligerent actors to focus on power relations.[277] Hedley Bull has criticised the domestic analogy underlying some of realism's assumptions, whereby centralised authority constitutes the basis for norms both at the domestic and at the international levels.[278] The consequence would be that, due to its anarchic structure, the international sphere could at most be a "system" (parts interacting as a whole), not a "society" (common interests and norms).[279] Bull questioned the applicability of this analogy to the international level, arguing that at least limited forms of cooperation based on intersubjective understandings among actors are possible, thereby opening up the possibility of an "anarchical society".[280] This,

in turn, would enable variations in the structure of anarchy, ensuing in different logics.

Wendt follows that change within the structure depends on how deeply norms are internalised.[281] The more norms "matter" to actors, the "stickier" the structure will become, independently of how conflictual the system is. The social relations in whom they are embedded determine the meaning of the material factors.[282] Intersubjective understandings provide meaning to material conditions; it is not about how many guns an actor has, but its intention of whether and how to use them.[283] Wendt posits the central importance of *role structure* here: the configuration of subject positions in terms of representations of Self and Other as particular agents related in particular ways.[284] Given that role asymmetry is unlikely to be a durable feature of anarchical systems,[285] each type of anarchy is limited to a single subject position: in Hobbesian systems it is "enemy", in Lockean "rival", and in Kantian "friend". These subject positions entail a distinct posture or orientation of the Self towards the Other at the macro-level, which may, however, be realised in different fashions at the micro-level.[286] The posture of enemies corresponds to threatening adversaries without restraint in the use of force among each other; that of rivals is one of competitors with some degree of self-restraint, but nonetheless willing to use force to advance their interests; and that of friends one of actors refraining from resorting to force as means of dispute settlement within the group and using collective security against external threats. The proposition that structures can be analysed in terms of roles draws heavily from sociology's approach to structure, in that roles are structural positions, not actor beliefs.[287] These positions constitute social structures, in the sense that they are based on representations of the Other defining the posture of the Self.[288] The structure and tendencies of anarchic systems are determined by which of Wendt's three roles—enemy, rival or friend—becomes prevalent in a given system, with actors under corresponding pressure to internalise that role in their identities and interests.

3.1.3 Hobbes and the State of Permanent Conflict

In Wendt's definition, deriving from Carl Schmitt,[289] enemies are constituted by representations of the Other as an actor who does not recognise the right of the Self to exist as an autonomous entity, and therefore will not willingly restrain the resort to force towards the Self.[290] Enemies will contest the right of the Self to exist on equal terms, and accordingly seek to "revise" the latter's existence (what has therefore been

dubbed "deep" revisionism).[291] While enemy and rival may both impute belligerent intent to the Other, the difference here is that the enemy's intentions are unlimited in nature, whereas violence among rivals is self-limiting.[292] The former corresponds largely to Hobbes' "state of nature". The latter is characteristic of "civilisation", the essence of which Norbert Elias argues is self-restraint, in that resort to force is moderated by the recognition of actors' right to exist.[293]

In Wendt's theory, representing the Other as enemy tends to have four implications for actors' posture and behaviour at the micro-level, causing a particular logic of interaction at the macro-level.[294] First, actors interact with Others by acting like deep revisionists themselves, creating latent instability. Actors may well be interested in maintaining the status quo, but the latent threat of the enmity environment forces them to display deep revisionist behaviour. Second, decision-making will privilege worst-case scenarios in the immediate to the detriment of long-term perspectives, suppressing the shadow of the future.[295] Third, actors will focus on relative power, on being stronger than other actors, as they presuppose the Other's revisionist intentions. The behaviour of other actors is predicted on the basis of material capabilities, with any superiority of the Other constituting an existential threat.[296] Power is necessary to ensure actors' existence, and as such even actors aiming for the status quo will engage in military competition on the principle of "if you want peace, prepare for war".[297] Fourth, when conflict breaks out and in the absence of self-restraint, hostilities will be conducted on the perceived terms of the Other. This entails that self-limitation would equate to a competitive disadvantage, thus the laws of armed conflict will have little to no bearing on actors' behaviour.

In cases where conflict seems imminent, pre-emptive action is necessary to prevent the enemy from acquiring a fatal disadvantage by striking first. The role of enemy, as understood here, is particular in that it is symmetric, with all actors in the same position simultaneously. Depicting the Other as an enemy forces the Self to mirror back the representations it has attributed to the Other. Self then mirrors Other, becomes *its* enemy. As a result, this role representation will automatically confirm any hostile intentions the Other had attributed to the Self. The Other will then engage in a posture of enmity, reinforcing the Self's perception of the Other, and thus triggering a downward spiral in mutual expectations of behaviour.[298] The logic of enmity, in other words, is a self-fulfilling prophecy: its beliefs generate actions that confirm those

beliefs.[299] The reality of whether or not actors are existential threats to each other becomes of secondary importance to their beliefs, since once a logic of enmity is engaged, actors will determine their actions based on their perceptions and thus translate the latter into actual existential threats.

In social psychology, this phenomenon has also been analysed as "fundamental attribution error", whereby actors emphasise dispositional over situational explanations of behaviour.[300] When interpreting the Other's behaviour, actors characterise the actions as a manifestation of "who she is" rather than arising out of the particular circumstances of the situation that the Other finds itself in. In other words, the Self will perceive the Other's behaviour as a reflection of fundamental dispositional traits ("character"), that would yield a particular action independently of the situational imperatives the Other finds itself in.[301] As a consequence, actual behaviour and intentions of the Other get devalued since actors focus on a representation of the Other attributed to perceived intentions rather than genuine reasons for action.

The collective representation of the Other as enemy, over time, acquires a logic distinct from actor's concrete perceptions of behaviour.[302] The self-reinforcing dynamic generates a negative spiral whereby, as more and more actors within the system represent each other as enemies, these representations take over the logic of the system.[303] It is here that actors start to consider that enmity constitutes a property of the system itself rather than an attribute of individual actors. The Other becomes represented as an enemy not because of its behaviour, but for being part of the system.[304] As actors make attributions about Self and Other in terms of positions within the structure, rather than based on actions, the logic of interaction shifts to now relating to actors' perception of their roles, as opposed to the Others' actual behaviour. This leads actors believing that they can accurately predict each other's behaviour without knowing each other's "minds".[305] Through this phenomenon of the Self extrapolating behavioural assumptions from role structure as opposed to other's intentions, *"the particular Other becomes [George Herbert] Mead's 'generalised Other', a structure of collective beliefs and expectations that persist through time even as individual actors come and go, and into the logic of which new actors are socialised*".[306]

In turn, since enmity is seen as a property of the system as a whole, the logic becomes reflected in behavioural patterns at the macro-level. The "logic" of the Hobbesian anarchy corresponds to the "war of all against

all" in which actors operate on the principle of unrestrained violence. Actors' existence is dependent on material power; as a consequence, any increase in the power of one actor necessarily reduces the relative power of other actors. Security becomes a zero-sum game where actors perceive threats not based on material factors (how many guns), but rather the intentions they attribute to other actors.[307]

The structure of enmity, in Wendt's understanding, generates four patterns at the macro-level[308] that will get realised unless they are blocked by countervailing forces[309]: First, the presence of endemic and unbridled conflict.[310] This leads, second, to the elimination of weaker actors and "functional isomorphism" of the stronger actors in terms of their adaptation to the conflictual environment.[311] As a consequence, the stronger units within the system tend towards a balance of power.[312] And, fourth, all actors are absorbed into belligerence, leaving little space for neutrality.[313] Realism in international law and international relations, to a large extent, is based on these characteristics of the Hobbesian logic, which, according to John Mearsheimer, has defined significant parts of the history of international politics. In an inherently dangerous international environment characterised by uncertainty, the realist approach considers that actors need to base decisions on consequentialist prudence given the perils of misguided idealism.[314]

Robert Jervis has highlighted the risks of *Perception and Misperception in International Politics*,[315] relying on social psychological insights into attribution bias to explain that escalatory spirals mainly result from actors attributing hostile intentions to the Other based on dispositional traits. This makes it difficult to prevent or reverse conflict spirals. If the Other's hostile intent is a reflection of "who she is", then it becomes difficult to resolve conflict save to eliminate the Other.[316] In the same vein, preventive use of force is legitimised, as the Other's behaviour is not amenable to situational incentives for de-escalation.

Wendt concludes that in a Hobbesian logic, actors share three basic features: First, interaction with other actors that mirror their own characteristics; second, that other actors are their enemies and constitute a threat to their existence and; third, how to operate in an environment where conflict is pervasive.[317] The characteristics of the state of nature become the norm for an environment where power politics and self-help are not merely a regular occurrence in actors' behaviour, but an intersubjective *understanding* about the social world that actors operate in.[318] It is clear that such an understanding provides little to no foundation

for a common lifeworld enabling some form of intelligible communicative action. Actors may share a common structure, but the fact that they conceive of each other as permanent threats to their security and existence inhibits even the most basic notion of trust in order to engage in social communication based on collectively shared norms. This is the reason why, on issues of essential security, realism considers international law as epiphenomenal at best and dangerous at worst. Actors can never be sure of each other's intentions; thus, realists argue it unwise to rely on normative understandings without there being some form of authority capable to enforce them, as any mistake in the intentions of the Other could be fatal to the Self's very existence.

3.1.4 Locke and the Logic of Rivalry

While much of international history may have been characterised by the prevalence of some degree of a Hobbesian logic, this is clearly not the case today. The current form of the international system may not be peaceful in absolute terms, but neither can it be equated to a "state of nature". It is here that Bull's notion of an "anarchical society" comes into play. The "logic" of the Lockean model differs from the Hobbesian one due to the difference in role structure: rivalry replaces enmity. Although rivals' identities are constituted by representations about Self and Other relating to the use of force, the difference here is that there is a mutual expectation of the Other recognising the existence of the Self as a *right*, and accordingly no latent tendency for conquest or domination among actors. Rivalry is based on sovereignty, which becomes a "right" only through the recognition of other actors.[319] And given that sovereignty comprises an element of territoriality, this then implies the recognition of a right to the respect of borders and a sphere of domestic jurisdiction.[320]

The recognition of a certain restraint among rivals does, however, not extend to a right to the peaceful settlement of disputes in all circumstances. A "right", in this sense, is a social attribute that is conferred on an actor by the Other's "permission" to do certain things; this permission contains a discretionary element.[321] On the other hand, powerful actors may of course have the material capability to impose their rights against any competitor, but then again weaker actors may still enjoy their rights provided that other actors do recognise them. The constitutive feature of enjoying rights is therefore *self-limitation* by the Other, in terms of the acceptance that the Self is endowed with certain prerogatives—implicit in what international relations theory terms as actors being

reciprocally "status quo".[322] The status quo may be enforced in the last instance by coercion, but Ian Hurd's legitimacy theory has demonstrated that social systems based solely on coercion are inherently unstable and require disproportionate amounts of resources to sustain; pure coercion is therefore insufficient to ensure long-term stability.[323] Actors thus need to exercise self-restraint, either out of self-interest or due to the perceived legitimacy of norms. When actors generally recognise each other's rights, these then move beyond an attribute of individual actors, and become an *institution* shared among the members of the international system.

In contemporary international relations, international law formalises the recognition of reciprocal rights. International law can thus be seen as an integral part of the "deep structure" of the international system, rather than merely an epiphenomenon to material forces.[324] Rivalry among actors is constrained by the rights recognised in international law and reflected in Article 2 of the UN Charter, and to that extent can be said to rely on the rule of law. Within those constraints, however, rivalry remains compatible with the use of force to settle disputes. The determining factor here is the frequency and intensity of coercive action that actors expect of each other. Rivals integrate the possibility that Others may occasionally resort to force to settle disputes, but the use of force is not unbridled and conditioned by the mutual recognition of certain rights.[325]

The implications of rivalry for the Self are less clear than they are of enmity due to the lack of symmetry: the Other's perceived restraint endows actors with options. The latent possibility of a descent into generalised conflict underpins the "worst-caseism" of realist theories, but the fact is that large-scale conflict is rare in contemporary international relations since actors' mutual recognition of rights allows them the necessary political space to choose another option—to reciprocate by also recognising Others' rights and thus exercise self-restraint. When this occurs, actors enter the logic of rivalry.[326] The 2022 Russian invasion of Ukraine provides an illustration of the various tendencies in a logic of rivalry. The aggression of Russia against Ukraine denotes the residual possibility of resort to force and the dependency of actors on competitors respecting their sovereignty and territorial borders. At the same time, the exceptional nature of this event points to the wider status quo tendency in the international arena and a generalised exercise of self-restraint of actors vis-à-vis others. And though other actors pushed back against Russia's revisionist behaviour through providing material support to Ukraine, there has not been a downward spiral towards generalised revisionism. It could be said

that other actors, despite the threat posed by Russia to the status quo, exercised self-restraint in their response, thereby preventing the system to slide back into a logic of enmity.

According to Wendt, rivalry has at least four implications for foreign policy.[327] First, irrespective of the level of conflict among actors, their behaviour will adopt a status quo posture towards each other's right to sovereignty. Second, threats to essential security are less acute in rivalry, which thus allows for a larger "shadow of the future" as opposed to immediate worst-case hypotheses. Rational behaviour becomes oriented towards positive-sum outcomes rather than the avoidance of relative losses in power. Third, while relative material capabilities remain important due to the residual possibility among rivals that Others might resort to force for the settlement of disputes, the meaning of military power is different than it is among enemies because the mutual recognition of rights precludes the automatic presumption of armed conflict. Fourth, Wendt posits that if disputes entail the use of force, actors will limit the means employed. In international law, these limitations are historically found in the *jus ad bellum* and *jus in bello*, and in more contemporary terms reflected in the codification of international humanitarian law that specifies actors' conduct in armed conflict. While Wendt cites earlier research on global prohibition regimes as evidence that international law and international humanitarian law cause states to restrain themselves in armed conflict, more recent research into the effectiveness of international humanitarian law found a more nuanced state of play, in that actors do indeed take international law into account when taking decisions on the battlefield, but the presence of law did not necessarily reduce the overall amount of violence nor conflict as such.[328]

Rivalry at the macro-level is again a collective representation that comprises similar pathways from individual interaction to generalised internalisation. At this point, actors will accordingly make attributions about each other's "minds" based more on their ideas about the structure than about each other, and the system will acquire a logic of its own. This structure, Hedley Bull's "anarchical society", generates four tendencies at the macro-level.[329] First, armed conflict is simultaneously accepted and constrained. While the use of force remains accepted as a legitimate option for the settlement of disputes,[330] the resort to force tends to be limited in the sense that the aim is to resolve disputes, not to conquer or to revise the existence of other actors. Aggression is the exception and when it occurs, other actors tend to act collectively to

restore the status quo.[331] Second, the international system favours relative stability.[332] Consequently, actors' existence is being assured out of social rather than material reasons, since other competing actors exercise self-restraint, as opposed to the survival of the fittest. Third, the mutual recognition of rights enables the balance of power, given that variation in relative power is no threat to actors' existence, and thus the pressure to maximise power subsides.[333] Fourth, the status of neutrality becomes sustainable. Actors are able to resolve their differences without force and exercise self-restraint; as a consequence, in absence of a threat of revisionism, the necessity for them to compete militarily is less acute.[334] Wendt follows from these tendencies that the anarchy portrayed by Waltz's *Theory of International Politics* is a Lockean more than a Hobbesian system. The analogy to markets in Waltz's version of structural realism, which presupposes institutions ensuring that actors do respect others' existence, the emphasis on the balance of power, and the assumption that actors are security—rather than power—seeking are elements reflected in the relatively self-restrained logic of rivalry, rather than the state of nature.

The Lockean logic of interaction bears close resemblance to Hedley Bull's analysis of order in international relations, which emphasised the common framework of norms and institutions that have developed within the "anarchical society".[335] It is *anarchical* given the absence of centralised authority to enforce international law or to ensure cooperation, but it is a *society* insofar as actors' identities are constituted of norms and ideas, that they engage in cooperation within institutions, and are endowed with interests to pursue positive-sum outcomes within the framework of these norms and institutions.[336] It is, however, a necessarily thin and fragile international society in which the fundamental ends of social order remain circumscribed to the preservation of the society itself, the recognition of actors' reciprocal rights, and the exercise of restraint in recourse to armed force. Although limited and even slightly pessimistic, Andrew Hurrell underscores the importance of distinguishing this logic from the view that international relations remain a condition of immutable struggle and conflict in which there is no element of society.[337]

In this logic, there is room for the view that there is indeed a possibility for a—limited—common lifeworld enabling some form of communicative action. Since a constitutive element of the international structure is self-restraint, inherent in the right to territorial sovereignty in international law, actors can generally expect each other to respect their territorial

boundaries, and thus their right to existence. While states can never be sure that Others will not resort to violence, they can expect them to do so within certain limits. This, in turn, opens up space for the creation of mutual trust, which is fundamental to the establishment of a common system of norms that actors can refer to in their interactions.

3.1.5 Kant and the Logic of Friendship

The logic of rivalry has arguably characterised large parts of the history of international relations. Despite occasional episodes of enmity, actors have consistently maintained some degree of self-restraint. In more recent times, however, the behaviour of a significant number of actors appears to encompass more than merely a Lockean logic of rivalry.[338] In the latter, actors are presumed to account for the use of force to settle disputes, yet for instance no such occurrence has taken place in Western Europe and North America since the end of World War II. While actors could be expected not to entrust third parties with security concerns, the concept of collective security has come to the fore in the period after 1945. The cause for these departures from Lockean norms during the Cold War era may have been structural in the realist sense, in terms of a bipolar distribution of material capabilities that temporarily suppressed rivalries within the respective blocs. If that were indeed the case, these rivalries should subsequently have reappeared following the collapse of the Soviet Union.[339] This is clearly not what happened, though, at least for the Western alliance, and Wendt thus posits another structural cause of these patterns, namely the emergence of a new international logic of interaction within which actors refrain from armed conflict and resort to collective action as a norm, thereby overriding a return to rivalry. This logic has been dubbed "Kantian" by reference to Immanuel Kant's *Perpetual Peace*,[340] but Wendt's concept of a Kantian "logic" is agnostic about the precise modalities of realising it.

The Kantian model of interaction is based on a "logic of friendship". The concept of "friend" has been subject to scarce analysis in social theory as compared to antagonists, due to the fact that violent conflict represents a much greater problem for international relations than peaceful coexistence.[341] This is why realism considers the search for friendship in anarchy as utopian at best and dangerous at worst, given that actors can at most be expected to act on the basis of "interests" (rivalry), rather than "passions" (enmity).[342] In contemporary international relations practice, there are indications to the contrary, though, notably the routine references to

other actors as "friends", not merely among long-time allies, but also among erstwhile adversaries such as France and Germany. Here, cooperation trumps individualism, and the behaviour of the member states of the European Union seems easier to explain by the logic of friendship than by enmity or rivalry. In spite of significant divergences among the member states on core financial, economic and security interests, cooperation in the EU remains the norm and disputes are as matter of principle are resolved peacefully. In political theory, Carl Schmitt considered friendship and enmity as equal parts making up the deep structure of "the political",[343] which reflects the roles of enmity *and* amity in international relations.[344] Wendt conceives of friendship as a role structure within which actors expect Others to observe two basic rules: first, that disputes will be settled without the threat or use of force and, second, that actors will collectively engage in mutual aid in case the security of any member is threatened by a third party.[345]

These two rules of friendship generate the macro-level logics associated with collective security. Actors' assurance for their security here comes not from superior individual capabilities or a centralised authority endowed with the power to enforce peace, but from actors' intersubjective understanding of their reciprocal peaceful intentions and behaviour. Wendt acknowledges that armed conflict does remain a logical possibility because of actors' inherent capacity to resort to force, but crucially in a pluralistic security community, the unilateral use of force is no longer considered a legitimate way of settling disputes.[346] The intersubjective understanding that constitutes a security community results in altering the social meaning of power as compared to enmity or rivalry. In disputes among rivals, relative military capabilities matter to outcomes because the parties still have to assume that these capabilities might be brought to bear. In disputes among "friends" (in the sense of the member states of the European Union, for instance), this assumption becomes less acute, and power is infused with different meaning, such as balance of trade.[347] Collective security based on mutual assistance can be contrasted with the balance of power, which relies on the principle of self-help, although balancing of power can occur between competing collective security systems, as was arguably the case with NATO and the Warsaw Pact during the Cold War.[348] In collective security, actors have internalised "generalised" reciprocity (helping others) as a norm, in that actors come to each other's assistance without the expectation of a direct or immediate return, contrary to "specific" reciprocity.[349] Self-help may induce actors to form

alliances, but these are contingent on material interests, whereas collective security is neither threat- nor time-specific.[350] There is thus a qualitative difference between contingent alliances and collective security.[351] Members in a collective security system guarantee mutual aid because they consider themselves as parts of a single unit for security purposes a priori, independently of the origin and the nature of any future threat, as exemplified by NATO's successive adjustments of its security strategy following the end of the Cold War in order to adapt to the given state of international relations.[352] Their military capabilities therefore have a different meaning for each other than they do in an alliance, as in the former they are not only combining strength, but complementing their respective capabilities, each providing elements of the overall dissuasive force.[353]

The Kantian logic of friendship challenges some assumptions of the *anarchy problématique*.[354] Realism has traditionally defined anarchy as the absence of hierarchy.[355] However, a distinctive feature of the Kantian anarchy conceived in the present sense is an at least formal role for international law, which sets limits on actors' legitimate range of options to advance their interests, even under anarchy. In the international system, of course, there is no centralised authority to enforce these limits, but while this may reduce the certainty and swiftness of a response to norm violations, the essential feature is that once a majority of actors have internalised norms of behaviour, these will act as legitimate constraint on the available courses of actions.[356] Given that the legitimacy of power is the basis for "authority", the possibility of *de*centralised authority arises within the logic of friendship. In John Ruggie's terms, there is an "internationalisation of political authority".[357] Such a decentralised authority structure is not anarchy in the literal sense of "without rule", nor does it equate to *centralised* authority.[358] The Kantian logic posits that two dimensions pertain to the notion of anarchy: namely, the degree of centralisation of power *and* the level of authority that the system's norms are endowed with.[359]

It then becomes clear that such an understanding of anarchy has very different implications for communicative action than the traditional uniform concept of an anarchical international structure. In the Kantian logic, since non-violence is the norm, Other's military capabilities represent less a threat to one's own security than a common asset in a system of collective security. This, in turn, makes it relatively easy for actors to build up trust in each other's intentions, since the use of force has been

de-legitimised as a matter of international policy and even if they were to be attacked, actors could rely on the help of others within a system of collective security. Further, the existence of an at least formal rule of law at the international level works as a constraint on the exercise of power, and limits the means that actors can legitimately deploy in order to further their interests. This is a role of international law and the internalisation of its norms by international actors provides actors with a common framework of normative understandings to refer to in their interactions. One might, of course, object to this optimistic picture of a Kantian logic as utopian and it indeed remains questionable to what extent the current international system as a whole reflects this logic. Nonetheless, we have seen that for most of recent international history, the structure of the international system has evolved from a Hobbesian to a Lockean logic, and there are no indications of a regression below the limited minimum conditions of the common lifeworld in a logic of rivalry. Wendt himself further points out that role conceptions and actor identities can alter through continued and structured cooperation. Actors thus engage in a "virtuous circle", whereby over time, they establish a modified notion of identity that integrates an enhanced willingness to commit to collective security.[360]

3.1.6 The Common Lifeworld and Logics of Interaction

Wendt's argument stresses that there is no such thing as a "logic of anarchy" per se, since the term "anarchy" refers to an absence, not a presence; it indicates what there is not, rather than what there is.[361] In other words, it is merely an empty vessel, without intrinsic meaning. What gives an anarchy its meaning are the actors that it encompasses and the structure of their relationships.[362] This has crucial implications for the possibilities of a "common lifeworld" and Wendt follows that the most important structures that actors are embedded in consist of ideas, not material factors. Constructivism has broadened the perspective offered by realism in positing that power is a social concept that acquires meaning through ideas, just as actors' interests are constituted through norms and ideas. According to this proposition, anarchic systems are not deprived of structure or logic, but rather the logic of the system depends on *social* structures, not anarchy—*anarchy is a nothing, and nothings cannot be structures.*[363] Social structures consist of ideas, and some of these ideas then become intersubjective understandings among actors. There is no fixed and uniform degree to which a common lifeworld may exist in

international relations.[364] The anarchical international system comes in different shapes, based on which actors can develop a common logic of interaction: Hobbesian, Lockean and Kantian. The role relationships among actors at the micro-level become instantiated in actors' representations of Self and Other and behavioural patterns; and once translated at the macro-level, in terms of the "generalised Other", they acquire logics that persist through time, independently of individual actors.[365] Wendt thus considers that these logics of anarchy are "self-fulfilling prophecies" that once established, replicate themselves. Defining the structure of the international system in terms of distributions of ideas implies that the "logic of anarchy" is not immutable, but the possibility of change depends on intersubjective understandings among actors.[366] Ideas are "sticky" and resistant to change the deeper they are internalised by actors.

The degree of internalisation of the respective logics by actors, in turn, is linked to the three pathways in Ian Hurd's theory of political legitimacy: coercion, self-interest and legitimacy.[367] How deeply a logic of interaction is internalised by actors bears no impact on the potential for conflict. Wendt's theory is analytically neutral between conflict and cooperation.[368] Actors may deeply internalise a logic of conflict just like a shallow internalisation of a logic of cooperation, and vice-versa. While there is no assurance for progress in international relations,[369] thus realism's caution against undue idealism, this does not necessarily equate to regression being easy or natural in the absence of an exogenous shock. Once actors have internalised a "higher" logic, regression is the exception rather than the norm—one notable exception could be seen the dissolution of the Warsaw Pact following the end of the Cold War with an initial period seen as part of the "end of history" then followed by Russia's subsequent behaviour towards some of its erstwhile collective security partners since 2008, showcasing elements ranging from rivalry towards the eastern European EU members, to outright revisionism concerning Ukraine. At the same time, one could argue to which extent the collective security arrangements in the eastern bloc during the Cold War constituted a genuine consensual proposition for all members.

Drawing a rationalist analogy from domestic politics, it could be held that once certain rights have been internalised, actors will resist them being taken away, the cost of regression thus exceeding the benefits of maintaining the status quo.[370] Further, actors become locked into path dependency, whereby the deeper they internalise a certain logic, the more it shapes future behaviour and constrains options to deviate from the

traced course of action. The benefits that actors derive from collective security are likely to outweigh short-term incentives. Here again, NATO may have been criticised or even contested as "brain-dead",[371] but there is no viable alternative proposition. Since conflict is unlikely, and if it occurs, other actors will come to their assistance, the need for material resources spent on defence is reduced, opening up more policy options that actors will loathe to give up[372]—hence the reluctance of some NATO members to increase their national defence spending. For instance, in the case of both the European Union and NATO, some members individually may not be able to repel aggression by third parties, thus in a Hobbesian setting would be doomed, but collectively their security is assured through the pledge of mutual aid and the pooled resources of the other members within their collective security system.

According to Andrew Hurrell, however, this analysis is somewhat incomplete as regards the treatment of power in the international system, in that the trilogy of the Hobbesian logic of unfettered power competition, the Lockean strand of controlled rivalry in the international system, and the Kantian emphasis on the notion of an international community still rely on the idea of power as separate from other elements in the international arena, thereby ignoring the complex relationship between norms and power. Whereas "*there are times and situations where the starkness of power appears all-dominant, such a move fails to appreciate the social aspects of power and the crucial links between power on the one hand and norms, rules, and institutions on the other*". In the classic dialectic view, "*power is all too often understood in simple contradistinction to law. Political power cannot be understood only in terms of material forces and factors. It is an inherently social concept*". The social interaction involved in the exercise of power then also links to issues of justification and legitimacy.[373] While it can thus be argued that the international system is unlikely to regress below the "thin" common lifeworld of shared norms and ideas achieved under the logic of rivalry, there still remains the objection that the international system is nonetheless marked by stark differentials of power, and that legal norms are both shaped by, and instrumental to, the powerful actors.

3.2 *International Law and Power Asymmetries*

3.2.1 Ideal Speech Situations and Power Asymmetries

While the conditions for communicative action are challenged by the anarchical structure of the international system, their realisation appears further complicated by power differentials. Habermas' theory of communicative action posits that ideal speech situations based on the "better argument" are unfettered by power relationships. This point has however, been met with considerable criticism and labelled as both "idealistic" and "utopian".[374] In actual political life, power conceived as the ability to get an actor to do what it would not otherwise do might affect communicative action in several ways. Power relations might determine which actors actually have access to the discourse—for instance, in the UN Security Council, the voices of the permanent members are endowed with more weight than those of elected members.[375] Power relations might also affect the persuasiveness of an argument—again, members of the Security Council with an array of options outside that institution can expect to see their influence magnified compared to weaker actors.[376] Moreover, asymmetrical power might impact the setting of the agenda, of what is and is not decided[377]—in the Security Council, the permanent members exercise disproportionate influence on the adoption of the programme of work, the inclusion of items on the agenda, as well as the format and the timing of deliberations.

It has been argued that obstacles to the realisation of "ideal speech situations" resulting from power differentials are inherent to communicative action, rather than exogenous, and accordingly bear on actors engaged in social interaction. Foucault posits that power understood as social structure resides in the communicative action itself where norms determine which arguments actors can legitimately put forward.[378] However, as Jon Elster cautioned, it is virtually impossible in social interaction to make purely self-serving claims or to reasonably justify claims on grounds that are manifestly self-interested.[379] Even arguments that are merely used as empty shells to help further actors' interests can only gain traction when they bear some connection to norms or intersubjective understandings shared by the participants.[380] The social context of the interaction thus establishes boundaries to what can reasonably be argued. For instance, actors engaged in arms control negotiations may not agree with commitments on disarmament concerning certain types of weapons or on the international regulation of the trade in arms. Despite the presence of

fundamental disagreement about even the basic purpose of the negotiations, however, the participants could not openly state such a position without at the same time undermining any and all of their arguments. Accordingly, actors are required to at least acquiesce the existence and validity of the underlying normative structure in order to engage in the negotiations. Social-psychological research on persuasion has also suggested that actors are capable of differentiating between arguments put forward for merely strategic reasons and arguments based on genuine engagement. Actors that operate on self-interested grounds are thus far less persuasive than actors whose position is perceived by others to be neutral or driven by intersubjective ideas.[381] Therefore, the criticism of communicative interaction as subjected to power structures nonetheless presupposes the presence of argumentative rationality since the objection itself is, and can only make sense within, a reasoned exchange of arguments.[382] Moreover, the three forms of social action in Risse's model of three logics of interaction—strategic behaviour, norm-guided behaviour and argumentative behaviour—each represent an ideal for the purpose of theoretical illustration that, in pure form, do not occur in actual political life. In practice, the different types often overlap and actors may operate based on self-interest while still displaying traits of communicative interaction. Interactions always imply the interplay of different rationalities, in that actors may resort to rational arguments to convince other actors to accede to their demands, but by doing so are themselves constrained through the norms that enable interaction in the first place.[383] Accordingly, it is less the specific mode of interaction that matters, rather the key empirical question is which mode more adequately captures the determination of an actor's course of action in a given situation.[384]

Addressing the objections against the realisation of Habermas "ideal speech situation" only partially solves the issue, though, as the theoretical counter-arguments cannot do away with the fact that in practice there simply is no "equal access" among participants to communicative action in international relations.[385] On the other hand, it appears equally clear that those actors who are engaging in communicative action do argue over norms and accordingly display traits of norm-guided behaviour. Rather than focusing on equal access, a more useful indicator might thus be found in the presence of an environment amenable to communicative action under the condition of formal equality among actors, in the sense of non-hierarchy. In the UN Security Council, the distinction between permanent and non-permanent members is a given, and

the former have privileged access to making their arguments heard. The key point, however, is not just the ability to present the argument, but how to determine what arguments are considered as valid. And it is clear that even the P5 cannot simply present any random argument, no matter how farfetched, and expect it to convince their audience.[386] The practical issue, then, is not the presence of power relations in communicative action—that much is implicit in international realities—but to determine the extent to which power can explain outcomes.

While norm-guided behaviour is possible in international relations, this still leaves us with the issue that the norms themselves might be a mere reflection of the interests of, and be instrumentalised by, the powerful.

3.2.2 External Legal Policy and Power Relations

International law and international relations theory have been subject to debates whether international law is epiphenomenal to power and a mere expression of the interests of the powerful actors.[387] It is certainly the case that powerful actors will be disproportionately influential in shaping the content of international law, which confers them the ability to protect and advance their interests, and in turn allows them to rely on international law in instantiating and perpetuating their power.[388] The extreme view would hold that the norms of international law are merely "paper tigers" in confronting powerful actors, since these can afford to disregard the norms that do not suit their interests without suffering the cost.[389] From this perspective, the concept of sovereign equality among actors appears as mere pretence.[390] The idea that actors must consent to international law appears similarly fictitious: power overrides equality and consent, and we have seen for the case of customary international law that powerful actors have disproportionate influence in shaping its norms. Some actors will thus feel bound because they freely consented to be, while others will feel bound because they cannot want to be, because the norm is imposed upon them; as a result, the customary international norm is the one which is considered to be such by the will of those actors which are able to impose their point of view.[391] Rather than a set of neutral norms, international law is seen here as representing the dominant ideology within the international system, taken up by all, even though it may be wanted by some and endured by others.[392]

A further problem consists in the indeterminacy of many norms of international law and the possibility for powerful actors to assimilate into existing international law claims that they effectively asserted as resulting

from a legal right. Other actors might challenge the claim at the time of its assertion; it might even go against the prevailing interpretation of international law, but it nonetheless endures as a precedent available to vindicate similar claims in the future.[393] Powerful actors can rely on the *principe d'effectivité* in generating legal norms.[394] An effectively asserted claim develops law-generating properties and acquires a legal validity that transcends the specific circumstances of the case. This dynamic further highlights the interdependent relationship between power and international law. Within certain limits of plausibility, powerful actors are endowed with law-creating capacity, which enables them to generate new norms that, once established, command universal adherence.[395]

It has been suggested in international relations theory that constructivist approaches are agnostic about power asymmetries, and therefore implicitly tend to favour the status quo[396]; this is, however, not an inherent feature of constructivist thought. The primary insight that constructivism brings to bear in this regard is to reveal that all power, even material power, is a social attribute that cannot be understood outside its social context.[397] Further, political science has long moved beyond a flat and uniform conception of power as a mere ability to coerce, to an understanding that power can take multiple forms or "faces".[398] A purely materialist conception of power thus only represents part of a larger picture: "raw" power matters, but it can only make sense within the relationships that define and shape power.[399] The understanding that power relationships are socially constructed does not render them any less crucial: interaction may produce oppression just as it can further cooperation. The critique that constructivism is unduly optimistic about the realities of the international system and political action tends to overlook that any analysis of power relationships is not inherently positive; rather, it is neutral just like an analysis of material resources. It adds, however, to the latter in allowing us to broaden the lens of enquiry to the social realities underlying power distribution, in order to identify how social reality empowers some actors to influence international law, as well as the limitations that international law places on this ability.[400]

At first sight, international law and power, especially in the case of dominant actors, are considered antagonistic: Powerful actors appear to consider international law as overly constraining on the various means they can draw upon to achieve their ends. They seem reluctant to abide by the norms of international law and turn to politics instead.[401] International law also seems to distance itself from power relations: based on the

principle of sovereign equality among its main subjects (states), it is disinclined to grant formal recognition to structures of superiority and leaves them to the political realm.[402] Hans Morgenthau held that international law is epiphenomenal to power: "When there is neither community of interests nor balance of power, there is no international law".[403] Realism, however, did not merely argue that international law is epiphenomenal to the interests and preferences of the powerful, but also examined how international law itself is instrumental to, and shaped by, power.[404]

At the outset, if international law is to be an instrument of power, then actors must not only have a particular foreign policy that they aim to realise in the international arena, but also an external legal policy, what Guy de Lacharrière termed "*politique juridique extérieure*".[405] According to the positivist or legalist position, there can be no such thing as an external legal policy since law is distinct from and immune to political manipulation. The role of law, "*magnified beyond measure, would be recognised as being of a sacred nature that vows it to the respect of governments and places it above political manipulation. Viewed in terms of such devotion, it could not be the object of government policy. It should only be a matter of governments serving it and submitting to it. The validity of the concept of foreign legal policy would be denied, because such a policy would be immoral and sacrilegious*".[406] The other extreme is represented by the realist approach, according to which an external legal policy "*would be pointless and not worth the effort",* thus realism *"excessively reduces the role of law and professes the most radical contempt for it: legal considerations play no role in actors' conduct, either in determining it or in justifying it*".[407] However, it is only if these approaches were applied in their most extreme form that they would lead to conclude that there is no external legal policy, as such a policy would be immoral in the first case, useless in the second case. In the real world, "*no state manifests this totally devout respect for international law, nor this radical nihilism*",[408] and as Stanley Hoffmann has highlighted, while political activity might not necessarily involve law as such, it nonetheless often entails legal consequences and political decisions may involve the creation, amending or abrogation of legal norms. Legal activity, therefore, is just as infused with political significance as vice-versa. "Hence the ideal of a continuum: legal decision-making is *a* form of policy".[409] Consequently, every actor, and specifically the powerful, will aim to apply what Hoffman has termed "legal strategy", in terms of the means and techniques employed to promote particular norms. Analysing the *substance* of positive law might enlighten us about

the scope of cooperation and competition among actors at a given time, thus the degree that the system has evolved from a Hobbesian logic of enmity. At the same time, however, since all actors aim to translate their interests, power position and ideas into international law, an analysis of actors' legal strategies, namely the *process* of shaping norms, might be just as useful as a survey of diplomatic, economic of military strategies.[410]

The concept of external legal policy, in turn, has been defined as "*the willingness of the governments concerned to determine their conduct according to their own objectives, i.e. their national interests as they see them*".[411] Thus, actors do not merely observe or disregard rules of international law, but in a premeditated fashion try to shape international law in a way that is most compatible with their respective interests. "*Once it is accepted that the government adopts a policy towards the legal element in its international relations, this policy is, like the others, modelled on the specific interests of the government in question. Like any other policy, legal policy reinforces, in its own field, the link between conduct and interests because, by necessity of method, it tends to substitute a set of premeditated actions for behaviour that would otherwise proceed from spontaneity, reflex and instinct*".[412]

It is, however, overly simplistic to either reduce international law to an expression of power, or to regard international law as a mere justification to legitimate the exercise of power. It can never merely be an apology *or* utopia. In order to have meaning, international law needs to maintain some distinction to power or political action, it is both an instrument of power and a condition to its exercise; it is always apology *and* utopia. Nico Krisch has analysed how unequal power is shaping international law and notes that this double nature creates complex interactions of powerful actors with international law, which in turn generates different patterns of how actors aim to shape international law. From a rationalist interest-based perspective, three different elements can be drawn upon to explain the utility of international law for powerful actors: First, by avoiding the need for repeated negotiations with other actors to set the norms governing their interaction, international law can reduce transaction costs.[413] Second, negotiating international norms in multilateral forums provides weaker actors with the perception of greater influence over the norm-generating process, which creates incentives for them to comply with international law despite the norms being shaped by the powerful, and thereby lowers the cost of enforcement. Joseph Nye has put forward this function of pacification in explaining "the paradox of

American power" and the lack of balancing against the United States after the end of the Cold War.[414] Third, international norms are "sticky" and resistant to change, thereby allowing for preserving a social order that reflects the interests of the powerful at the zenith of their dominance. International institutions are likewise more immune to subsequent shifts in the power distribution than diplomatic relations; they will remain relatively stable even if the constellation of power in the international system shifts. The UN Security Council institutionalises the power structure of the post-World War II era and enshrines the privileges of the permanent members in a legal form for the foreseeable future, irrespective of subsequent changes in the power structure of the international arena. The same could be said for the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[415] which essentially safeguards the existing rights of the nuclear powers at the time of the entry into force of the NPT in 1970 while committing the parties to preventing the spread of nuclear weapons. For the nuclear power signatories to the treaty, the NPT therefore contributes to preventing, or at least delaying, the emergence of new rival nuclear actors. Likewise, the START treaties reflect the commitments of the United States and the Soviet Union at the height of the Cold War,[416] and preserved the interests of the actors beyond the end of the bipolar era, even as the United States entered its unipolar moment and the later emergence of Russia's revisionist tendencies coupled with the rise of China as a strategic power.

As John Ikenberry has argued in *After Victory*,[417] the activism of the United States in multilateral institution-building following World War II can at least partially be explained by a sense that its predominance was ephemeral and that it would need to rely on more than its material power alone to maintain its privileged position.[418] Emerging powers that expect to rise further, by contrast, will often have a more revisionist attitude and are less likely to value stabilisation through institutions. International law, in this sense, can be seen as an instrument of stabilisation for dominant actors, as it allows them to solidify norms that suit their interests and contribute to perpetuate their vision of social order. Once political preferences are translated into international law, they become reference points for the behaviour of other actors.[419]

We have seen that exclusively rationalist approaches fall short of fully uncovering the distinctive value that international law entails for powerful actors. Such approaches are based on the premise that actors' behaviour conforms to an instrumental rationality. Here, actors' identities are not

subject to change and they accordingly determine their actions following calculations of costs and benefits based on identities and interests that remain fixed. Following this theoretical precept, the sustenance of any social order in international relations can only be based on coercion or self-interest; weaker actors conform to the interest of powerful actors either because they feel coerced into doing so or because they expect to derive net benefits from cooperating with powerful actors.[420] As Ian Hurd's theory of political legitimacy has demonstrated, however, both of these variants require the expenditure of significant resources and may entail prohibitively high enforcement costs.[421] Accordingly, sustainable social order requires more than just coercion and self-interest: stability is based on legitimate authority—actors conform to norms because they perceive them as legitimate.[422]

For dominant actors, this role of legitimacy and authority has two central implications. First, their interests and identities are not immutable or predetermined, but socially constructed.[423] The formulation of actors' policies will therefore not simply result out of instrumental calculations, but rather is embedded in the web of normative expectations that prevails in the international system at any given time.[424] Second, conceptions of legitimacy also shape how other actors assess their behaviour in a situation of hegemony. The legitimacy of international law endows hegemonic actors with far lower costs for the enforcement of their interests, and the exercise of power through international law confers greater authority upon it.[425] The construction of legitimate authority can also help to stabilise political dominance in the future. For instance, the western liberal international order has largely resisted shifts in the international structure, even as the rise of China challenges the legal framework with its formal emphasis on sovereignty and non-intervention, coupled with the implicit assertion of a sphere of influence around the South China Sea and the Taiwan Strait.[426] The creation of new norms of international law can alter the perception of legitimacy in the international system and thus complicate or constitute a barrier to the aims of emerging powers to change the institutional structure in their favour: in this sense international law can be seen as an ideology within international society and actors have been socialised into following the paths of the hegemon.[427]

The stable character of international law, in terms of the "stickiness" of its norms, however, also entails inherent limitations for powerful actors. International law fixes the organisation of the international system at a given time, and generates resistance to the attempts of emerging powerful

actors to reshape international law to better suit their interests.[428] Here again, the attempts by China at redrawing maritime boundaries in the South China Sea along the nine-dash line to reflect its interests have met the resistance of current international law as applied by international courts and tribunals. Relying on international law for the pacification and stabilisation of international order therefore requires dominant actors to simultaneously accept constraints; and these limitations increase parallel to the progressive development of international law, as the reach of the international legal order covers ever more subject areas with precise norms of conduct. Further, the egalitarian nature of international law, which does not recognise formal inequality among actors, confronts powerful actors with another challenge.[429] The passage from a Hobbesian logic of enmity to a Lockean logic of rivalry in the international system was due in large parts to the recognition of reciprocal rights among actors.[430] While sovereignty only relates to the notion of formal equality, the jurisdictional rule of *par in parem non habet imperium* prevents the direct governance of other actors by means of international law. This consequence represents a significant obstacle for powerful actors, which is further compounded by the fact that the formally equal position of all actors in the creation of international law renders it difficult for dominant actors to translate their political aims into international law.[431] Moreover, given that the creators and subjects in international law are identical, Georges Scelle's *dédoublement fonctionnel*, this generally precludes the option of creating law only binding on others.[432]

There is of course the possibility to insert certain privileges in international law, but the presence of such provisions is considered an anomaly only acceptable under the condition of a particular justification, such as the privileges accorded to the permanent members of the UN Security Council as the major powers whose consent was essential for the viability of the future organisation. The insertion of "common but differentiated responsibilities" into international environmental law provides emerging economies that count among the major emitters of greenhouse gases with a preferential position, as they do not have to commit to emissions reduction pledges at the same level as the major industrialised economies.[433] This has been justified with the historic responsibility of the industrial economies for generating the conditions leading to climate change, thereby endowing them with a greater share of responsibilities among the early movers to act in limiting anthropogenic atmospheric temperature rise.[434] It is generally considered that international law requires a

certain level of internal coherence, which stands against the establishment of particular legal regimes without a justification acceptable to the larger international community. The mere fact that it suits the political interests of a hegemon is not enough for arguments to gain traction here. All of these limitations of course entail the caveat that they only relate to the formal criteria of law-creation, and may not be sustained in actual international practice, where unequal treatment is not uncommon. Even if there is no absolute correlation between formality and the ensuing substance, the exigencies of temporal stability, formal equality, and internal coherence pose significant obstacles to translating political dominance into norms of international law.[435]

Contrary to the notion that international law is essentially epiphenomenal to power; resorting to international law places powerful actors in a delicate position. On the one hand, international law indeed presents them with an instrument for international regulation that, in line with rationalist precepts, they can utilise to smoothen their paths and sustain their privileged position, all the more so due to the high degree of legitimacy that action through legal norms and procedures commands. On the other hand, however, reaping these benefits requires actors to submit themselves to certain constraints in that they need to honour existing norms for them to remain effective. The creation of new norms takes place in a setting of formal equality, in which exceptionalist claims are misplaced. Even powerful actors therefore find themselves confronted with certain limitations to their freedom of action.[436] In response to these challenges, powerful actors will develop an external legal policy, whose content is dependent on different strategies with regard to the international legal order. First, at one end, powerful actors can aim to instrumentalise international law to further the stabilisation of their dominance; second, at the other end, they have the option of simply withdrawing from international law that does not meet their ends; third, in cases where existing norms of international law does not suit their interests, they may aim to reshape them in order to better reflect and accommodate their interests; finally, they might aim to create international law by other means, such as extraterritorial application of their own domestic law.[437]

3.2.3 International Law as Instrument of Power

Most predominant actors on the international stage have at some point in history been active forces behind the development of international law,

and the story of the different periods in the development of international law bears testimony to how various actors have made extensive use of the international legal order to help stabilise their reign and improve their power position in the concert of nations.[438] From the colonial conquest era to the Vienna Congress and the gilded age, various periods in history have seen developments in international law driven by the predominant actor of the time. For the contemporary period in the history of international law, John Ikenberry's analysis on *After Victory* illustrates the role of the United States as driving force behind the development of international law in terms of international agreements and multilateral institutions after the end of World War II, such as the United Nations system, the Bretton Woods agreement establishing the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD, subsequently the World Bank Group),[439] or the General Agreement on Tariffs and Trade (GATT) leading to the creation of the World Trade Organisation.[440]

This dynamic might be explained in part by a desire of the United States as *primus inter pares* among the victors of World War II to stabilise and help perpetuate an international order favourable to its interests against further developments in international relations and the possibility of a decline in its relative power, as well as the exigencies of strengthening the resilience and coherence within the Western bloc in the face of an emerging bipolar system.[441] With the rise of the United States and the absence of competitor after the end of the Cold War, its posture towards international law in the face of the emerging multipolar moment in the international arena has subsequently shifted from reliance on, and the instrumentalisation of, international law to a variation of different strategies that may diverge according to the specific interests involved in the given subject matter.[442] While there is currently no other actor on the international stage in a position to significantly rival the dominant position of the United States, it can be held that the above dynamic would be replicated if another hegemon came to emerge in the international system and for instance, China were to replace the United States as the preeminent actor. The Secretary of State in 2021 contrasted the commitment of the United States to a "rules-based international order" with the alternative, namely "a world in which might makes right" that would lack restraints on the use of force and therefore stability.[443] That these remarks were made at meeting with senior Chinese officials does not, however,

equate to the Chinese side being any less interested in norms that structure interactions on the international stage. The notion of a binary choice between the presence and the absence of norms is misleading in the sense that any international order requires rules that organise the interaction between actors. Great power competition is notably about actors' ability to shape the "rules-based order"; it is "a competition of norms, narratives, and legitimacy".[444]

In the case of China, the implication from its rise to power is that it is increasingly in a position to induce actors into complying with the norms that it prefers. The creation of the Asian Infrastructure and Investment Bank (AIIB)[445] in 2016 can be seen as a rival proposition to pre-existing equivalents such as the Bretton Woods institutions and, at least within China's geographical sphere, also serves to establish an alternative legal framework more amenable to the interests of the dominant actor. The existing multilateral system is largely modelled after the preferences of the United States after World War II and magnifies the influence of norms centred on fundamental freedoms, the rule of law and market economy, despite imperfections and inconsistencies in their application. The international order favoured by China is no less rules-based, but privileges norms such as sovereignty and non-intervention to the detriment of a more liberal view of international relations.[446] Each conception is valid insofar as it is based on elements of the UN Charter and amenable to structured cooperation. The difference is that the former is more mindful of the rights of individuals whereas the latter places more emphasis on the rights of states. This would not necessarily entail consequences on issues such as the global fight against climate change, as cooperative behaviour is still possible. But an international order reflecting on the preferences of China would impede interference in the domestic governance of states even in the face of systematic and widespread violations of human rights and fundamental freedoms. The resilience of the western liberal international order at the end of the unipolar moment illustrates the importance of international law in instantiating and perpetuating power. At the same time, should China's rise towards the dominant economic power in the twenty-first century continue, it will find itself in a position with increased influence over the international legal order, while other actors are limited in their ability to deviate from the norms set by China, and thus having to adapt their behaviour to conform to the preferences of the new dominant power.[447]

3.2.4 Withdrawal from International Law

Withdrawing from the obligations of international law sits at the opposite end of instrumentalisation. Predominant actors have always had a latent tendency to try and evade the constraints of international law, or to limit the reach of legal obligations in such a way that constraint is minimised for them. Evading international law does not necessarily need to come in the form of open violations of international norms. Rather than simply ignoring international law, which could weaken the norms that they might wish to invoke again in the future, powerful actors prefer to draw on mechanisms that result in exempting themselves from the obligations that others incur; or, alternatively, to remove certain aspects from the sphere of international law; respectively to push back the scope and stringency of international legal obligations where powerful actors benefit from greater flexibility.[448] When in 2017, a new administration took office in the United States, the tendency for withdrawal from international law that is considered inconvenient took on a new twist, becoming both more pronounced and acted out more explicitly. Whereas it was commonly held that hegemonic actors intended to at least be seen as playing by the same rules as others, the policy of "America First" made clear that the interests of one particular actor were to prevail over conflicting interests of others, even if they were cast in norms shared by the larger international community. While dominant actors can evade the normative structure of international law to some extent by relying on force and economic strength, whether they can extricate themselves sustainably from international law is another question.[449]

The most radical withdrawal from international law likely consists in simply removing subject areas from international law's jurisdiction, in their transfer from the international to the domestic sphere, as results from the establishment of formal empire.[450] This, however, also entails prohibitively high administrative costs and increasingly severe issues of legitimacy; practically, it is simply not an option in foreign policy any more.[451] We have previously seen that resorting to colonial rule is excluded even for actors that would be materially capable of it and the resilience of the norms of territorial sovereignty and non-intervention has contributed to an international environment where it is simply not acceptable to consume territories in the name of self-proclaimed interests.

Kal Raustiala's survey on *The Evolution of Territoriality in American Law* links the underlying tendency for legal flexibility in allowing for a wider range of permissible actions for powerful actors, to a more subtle

form of evading international law.[452] His analysis, based on the territoriality of law, illustrates how a small stretch of land in Cuba came to exemplify the external legal policy deployed by the United States to gain more options for acting outside the bounds of international law. In arguing that the naval base at Guantánamo Bay is set outside the reach of ordinary law, the United States ingeniously used an underlying controversy about the legal regime governing the leased territory to circumvent its legal obligations. Though under control of the United States, the issue whether domestic, foreign or international law applies in this case dates back virtually as far as the lease on the territory from Cuba has been in place. The United States could therefore claim with at least some plausible justification that its position was backed by valid legal arguments.[453]

In retracing Guantánamo's history, Raustiala highlights two factors that underscore its specific legal status. First, the absence of a status of forces agreement (SOFA) applicable to the naval base, outlining the rights and responsibilities of the United States and allocating jurisdiction over the territory.[454] Second, the unusual drafting of the lease agreement with Cuba accords the United States "complete jurisdiction and control" over Guantánamo, while simultaneously leaving "ultimate sovereignty" over the territory to Cuba.[455] These factors provide the United States with a rather unique combination of flexibility and control. In effect, the United States is able to exercise unrestricted de facto governance over the naval base without the corollary of *de jure* sovereignty.[456] Disagreements concerning the legal status of Guantánamo date back to the dawn of the twentieth century and up to this day relate to an underlying question drawn from the *Insular Cases* that the Supreme Court had to contend with during the period of United States overseas colonies, namely whether such territories are foreign or domestic under the Constitution. The enigmatic response by the Supreme Court was that both characteristics applied simultaneously; thus, the possessions were "foreign in a domestic sense".[457] The Department of Justice further elaborated in a memorandum of 1929 on Guantánamo that the naval base constitutes "a mere governmental outpost beyond our borders", a place "subject to the use, occupation, and control" of the United States without formally being part of it.[458]

The United States did not simply ignore international law, but engaged in a more insidious form of withdrawal in order to circumvent the constraints on the range of available options, through a deliberate exercise of reinterpreting the territorial applicability of international agreements to

which it is a party so as to better meet its ends.[459] In this sense, Guantánamo represented the most legally remote place to be found. Despite being subject to the complete and indefinite control of the United States, the fact that the terms of the lease agreement specified that a foreign actor exercises sovereignty was considered an adequate safeguard to circumvent the restrictions arising out of the United States' obligations under international law.[460] The displacement of certain activities to Guantánamo thus came to exemplify a conscious effort to draw distinctions between different geographic zones under the control of the United States in order to maximise its freedom of action.

More elaborate forms of withdrawing from international law consist in actors' efforts at reshaping particular treaty regimes and thus selectively limiting the reach of international law to better suit their interests. The United States has become increasingly reluctant to enter into multilateral treaties,[461] a tendency that can be attributed in part to domestic political constraints relating to the ratification procedure, but it is also linked to efforts at extracting itself from legal obligations it deems overly constraining to its interests. A subtle form to minimise legal obligations consists in the practice of lodging reservations or declarations to international instruments, with the aim of reinterpreting or even interpreting away obligations contained therein,[462] which can go as far as to render certain provisions ineffective with regard to the other parties. Where a treaty does exclude reservations, the United States has often signed, but not ratified it, thereby not becoming a party. A consequence of this practice has been an increasing reluctance on the part of other actors in accepting what they consider an exceptionalist position aimed at bringing actions within the framework of international law through redefining and reinterpreting the relevant norms.[463] In particular, this approach is at odds with the principle that norms of international law apply equally to all actors. The selective carve outs by the United States, on the other hand, were circumscribed to the benefit of one particular actor, with no intention for this interpretation to be equally applicable to other actors' behaviour vis-à-vis itself.[464] Not only do other actors waive reservations, they also refuse to accede to requests by the United States to grant it specific exemptions.[465] In the face of mounting resistance by other actors, the United States is then forced to either withdraw completely from an agreement, or resort to bilateral agreements to remedy the outcome. In the latter case, it can bring to bear incentives and pressures that allow it to play out its privileged position with regard to weaker actors in a way

that it could not in a multilateral setting,[466] notably against parties that are dependent on assistance from the United States in other fields and accordingly vulnerable to conditionality requirements.

When the Trump administration came into office in 2017, the President announced his intent for the United States to withdraw from the Paris Agreement on Climate Change,[467] an agreement that he deemed not reflecting the interests of the United States despite it having been concluded only shortly before between practically all members of the United Nations, including the United States. Extricating oneself from international law might not be as simple as some actors imagine, however, and the withdrawal procedure is governed by the terms of the agreement. In the case of the Paris Agreement, a notice of withdrawal could not be submitted to the depositary until three years after the entry into force of the agreement, and it would then take another year for the withdrawal to take effect.[468] In practice, the formal withdrawal of the United States from the Paris Agreement could only be effective at the very end of the Trump administration's term of office (the United States rejoined the agreement as soon as the Biden administration took office). In the intermediate period, the United States found itself with vastly reduced leverage towards the other 190 parties to the agreement; incapable, despite its vast material power, to both extricate itself from its legal commitments and to renegotiate "suitable terms for reengagement".[469]

This pattern repeated itself with the Joint Comprehensive Plan of Action (JCPOA), the agreement concluded in 2015 to place limits on Iran's nuclear programme.[470] In 2018, the United States President announced his intention to withdraw from this agreement, which was deemed not consistent with the interests of the United States. The complex institutional architecture of the JCPOA, however, is at odds with a simple withdrawal, as the agreement foresees mutual actions and commitments by Iran, the E3+ 3 countries,[471] and the International Atomic Energy Agency (IAEA). The United States could decide to reimpose unilateral sanctions against Iran, but in doing so was prejudging the approach of the other parties to an agreement they considered adequate and effective. When the other contracting parties responded by announcing that they would not default on their obligations from the JCPOA and the IAEA continued to certify Iran's compliance under the terms of the agreement, the United States again found itself with a diminished array of options rather than increased leverage to achieve its ends. As has been highlighted by Harold Koh, the Trump administration's

approach to international law was characterised by an underestimation of the interconnectivity of international legal commitments as by undermining the JCPOA, the United States also likely foreclosed the only option to resolve the North Korean nuclear issue, namely an agreement in the format of the Six-Party Talks modelled after the agreement with Iran.[472]

The story of withdrawal from international obligations continues with the pattern of resistance against international jurisdiction. For dominant actors, this caution can be traced back to the jurisprudence of the International Court of Justice (ICJ) in its 1986 judgement in the *Nicaragua* case.[473] While the United States had been a long-standing supporter of the ICJ and decisively relied on it during the Tehran hostage case,[474] only a few years prior to the Nicaragua case, the Court's critical assessment of the means employed by the United States in the events underlying the Nicaragua case openly conflicted with the interests of the United States and eventually led it to terminate its acceptance of the Court's compulsory jurisdiction under the optional clause declaration.[475] This episode was followed by clashes of the United States with the ICJ on the issue of provisional measures under the Vienna Convention on Consular Relations[476] again leading the United States to eventually withdraw from the compulsory jurisdiction of the ICJ under said convention.[477] Although the United States is not a party to the Inter-American Convention on Human Rights and therefore not subject to the jurisdiction of the Inter-American Court of Human Rights, it is a member of the Organisation of American States (OAS) and in this capacity forms part of the petition system under the Inter-American Commission on Human Rights (IACHR). During the Trump administration, the United States ceased to defend its conduct in petitions where violation of human rights were alleged to have been committed by a member state of the OAS, thus including the United States.[478] Realising that not appearing before the IAHCR does neither contribute to improving its standing in the OAS, nor further its interests, the United States thereafter resumed the practice of defending its conduct with the Biden administration.

Another instance of a powerful actor conflicting with international adjudicatory bodies can be found in the case of China's claims relating to the maritime boundaries and territorial delimitation in the South China Sea. The issue of "the legal basis of maritime rights and entitlements in the South China Sea" was eventually brought before the Permanent Court of Arbitration (PCA) by the Philippines.[479] From the outset, China

contested the jurisdiction of the arbitral tribunal; it also did not participate in the proceedings. While the case was brought under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), China argued that it had only accepted Section 2 of Part XV on compulsory dispute settlement under UNCLOS to the exclusion of disputes over territorial sovereignty, which it considered an integral part of the maritime entitlement claims.[480] This line of argument was, however, rejected by the arbitral tribunal, in conformity with the principle already stated by the ICJ in the *Nicaragua* case that just because a dispute may involve elements that are politically sensitive or non-justiciable does not equate to a court having to decline to hear a case with regard to the elements that actually do fall within its jurisdiction.[481] The arbitral tribunal rendered its award in 2016, finding that there is "no legal basis for China to claim historic rights to resources within the sea areas falling within the 'nine-dash line'". It further held that China had not complied with the duty to act in good faith in Article 300 of UNCLOS.[482] The arbitral award issued by the PCA led to vigorous criticism of the Court by China, which rejected the arbitral proceedings in a fashion reminiscent of the United States reaction following the ICJ's Nicaragua judgement three decades earlier.[483] Beyond the substantive findings of the arbitral tribunal, the reaction of China also draws from the PCA not taking up the argument that "China and the Philippines have agreed through bilateral instruments […] to settle their relevant disputes through negotiations".[484] In other words, by asserting its jurisdiction over the case, the PCA had deprived China of an alternative forum more amenable to its interests where it could deploy its posture as the dominant actor.

A similar pattern of disengaging from the multilateral avenue can be seen in the regulation of international trade, where the United States has displayed a fading interest in multilateral forums such as the World Trade Organisation, in which it has encountered increasing difficulties to promote its interests. Eyal Benvenisti and George Downs have analysed how powerful actors use the fragmentation of international law to carve out specific regimes and create international economic law that reflects their interests and that only they have the capacity to alter, thus helping to maintain their political dominance.[485] In this case, the decisions of the United States in the field of international trade can be seen as abandoning a forum that is perceived as being overly responsive to the interests of other, less powerful, actors, and thus shifting to another, more favourable, forum. Under the Trump administration, the United States

Trade Representative (USTR) put forward serious concerns with regard to the functioning of the WTO dispute settlement system, refusing to appoint new arbitrators to the Appellate Body and bringing the dispute settlement process to a stalemate. The report by the USTR made explicit the United States criticism that the Appellate Body "has consistently acted to increase its own authority while decreasing the authority of the United States and other WTO Members", thereby impeding the United States in its ability to assert its trade interests, and argued that there is "no legitimacy under our democratic, constitutional system for the nation to submit to a rule imposed by three individuals sitting in Geneva".[486] Acting unilaterally, the administration then moved to impose a series of trade measures on other countries, notably tariffs on imports of steel and aluminium under the justification of national security. The United States further decided its withdrawal from the Trans-Pacific Partnership (TPP), a plurilateral trade agreement with eleven countries from the Asia-Pacific region. It also announced its intention to renegotiate the North American Free Trade Agreement (NAFTA) with Canada and Mexico, threatening to otherwise withdraw from the agreement. Doing away with international law, however, is not necessarily a straightforward process.[487] Rather than let the TPP collapse, the existing parties to the partnership decided to continue without the United States under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[488] an agreement renegotiated under terms less favourable to the United States and requiring unanimity for admitting new members. Likewise, there was little incentive for Canada and Mexico to concede to exorbitant demands from an actor that in any case maintained the option to act outside of NAFTA. In addition, the attempts by dominant actors to extricate themselves from the norms applicable to others have given rise to the perception that "in global trade, power increasingly trumps rules", with China and the United States operating outside the multilateral system and, in the absence of norms applicable to all, acting as they see fit.[489]

At the same time, the difficulties of even the most dominant actors to extricate themselves from international law that does not further their ends again illustrates that norms are "sticky" and, the longer they shape behaviour in the international arena, create path dependencies for actors. They often find it more costly to deviate from international law than proceed within the existing norms, processes and dispute resolution mechanisms. In international trade, the temporary restrictions enacted

during the COVID-19 pandemic should not overshadow the deep interconnectedness of the global economy, and the actions of even the most powerful hegemonic actor will not bring trade to a halt. Rather, as the United States had to realise when withdrawing from international economic law during the Trump administration, "[t]he world just moves on without us".[490] In the law of the sea, a similar fate may yet await China despite refusing to consent to the jurisdiction of the PCA in the arbitration proceedings brought against it. As the quarrels in the South China Sea over the control of islets, and thereby the maritime delimitation, continue, its unyielding approach might not serve China well in the long term. Asserting its position by force alone is a costly endeavour, and acting within international law is a more sustainable form of exerting influence on other actors than withdrawing from it. International adjudication may take more time and not suit the interests of the dominant actor entirely, but resorting to force and bilateral pressures bears its own risks of miscalculation and escalatory spillover effects. In the end, "going to court is always cheaper than going to war".[491]

3.2.5 Reshaping International Law

When powerful actors find themselves impeded from instrumentalising international law, they do not necessarily withdraw from it. Another option consists in creating alternative forms of international law that are more favourable to them. Through this process, actors seek to reshape the international legal order in order for it to accommodate more elements that are amenable to the presence of unequal power.[492] In contemporary international relations, the rejection of international adjudication appears in stark contrast to the efforts of actors like the United States in the UN Security Council to establish case-specific tribunals such as the ICTY[493] or ad-hoc mixed tribunals, which cannot turn against them due to their circumscribed mandate.[494] Likewise, powerful actors are often unimpeded in consenting to the inclusion of stringent investor-state dispute settlement provisions in free trade agreements and investment treaties. Although recent findings in behavioural law and economics attribute the consent to such provisions at least in part to a systematic underestimating on the part of actors of the probability of being subject to litigation,[495] in practice a majority of cases concern private operators from the economically stronger party contesting their treatment in the weaker contracting party. Dominant actors are also more susceptible to accepting WTO dispute settlement.[496] Here, actors in an economically powerful

position as key players in global trade have much less to fear from strong adjudicatory mechanisms, as they benefit from open markets and can rely on international institutions to counter efforts at protectionism by weaker actors. The sceptical position of the United States since the Trump administration with regard to WTO dispute settlement should not obscure the fact that it has, in fact, prevailed in almost all of the cases involving the United States as a complainant that have been brought before dispute settlement panels for adjudication.[497]

The phenomenon of dominant actors aiming to reshape the international legal system in their favour is also evidenced in the case of China, with the Communist Party in January 2021 publishing a new five-year plan comprising the development of a "socialist rule of law with Chinese characteristics".[498] This extends to the international legal order, where the Communist Party is seeking to safeguard and advance China's interests through reshaping norms related to, for instance, intellectual property, maritime delimitation and sanctions. In the framework of the Belt and Road Initiative, the settlement of disputes between Chinese and foreign entities has seen the creation of a special international commercial court to strengthen China's capacity to adjudicate such matters.[499]

The mistrust of multilateral mechanisms in international law is reflected in a shift to alternative forms of norm-setting and attempts at flexibilising legal change by powerful actors, in order to be better able to reshape international law in their fashion.[500] Powerful actors are reluctant to delegate prerogatives and, according to Kenneth Abbott and Duncan Snidal, prefer forms of international law that are less constraining to them, while similarly effective with respect to other, less powerful, actors.[501] The role of regulatory networks dominated by powerful actors can be seen in fight against money laundering and combating terrorist financing (AML/CT). The Financial Action Task Force (FATF), an intergovernmental body whose membership is mostly limited to developed countries from the western hemisphere, evaluates the implementation of the anti-money laundering and countering terrorist financing framework (the "FATF Recommendations" or standards) by all states, not merely its members, and a finding of low compliance or non-compliance of its international standards by the FATF Plenary entails consequences that may be of equivalent effect to sanctions, notably in severely complicating integral access to the international financial system.[502] In financial regulation, informal law-making for third parties also takes place in other informal "regulation networks", such as the Bank for International Settlements

(BIS) in Basel for the field of monetary and financial stability, trough the global standards produced by its standard-setting committees. Here again, the mechanisms of the Basel Process privilege the expertise and superior resources of developed economies.[503] The Basel Committee on Banking Supervision (BCBS), representing 28 jurisdictions, is the primary forum for international standard setting with regard to the prudential regulation of banks. The "Basel Framework" relates to the comprehensive set of standards developed by the BCBS aimed at strengthening the regulation, supervision and risk management of banks.[504] These include the Basel III set of measures adopted following the 2008 financial crisis, such as capital requirements, minimum coverage ratio and core principles for effective banking supervision.[505] The standards represent minimum requirements that apply to all internationally active banks, with the members of the BCBS held to implement and apply the measures within their jurisdictions. The implementation and assessment of the Basel Framework is conducted through the Regulatory Consistency Assessment Programme (RCAP), which monitors and evaluates the standards in the regulatory environment for internationally active banks.[506] While the implementation requirement of the Basel Framework is limited to the membership of the BCBS, it is difficult to conceive for any internationally active financial operator to ignore these standards, as they apply to all major jurisdictions in financial markets.

A similar picture appears in international standard setting for taxation matters. Following a formal request by the G20 intergovernmental forum of the world's major economies, the OECD in 2014 developed a common reporting standard (CRS) for the automatic exchange of financial account information.[507] The jurisdictions adopting CRS are required to obtain tax information from their reporting institutions and proceed to automatic exchange with other jurisdictions. CRS also sets out the types of accounts and taxpayers covered, as well as common due diligence procedures that financial institutions are required to comply with. In addition, the OECD designed an international legal framework with mandatory disclosure rules (MDR) for avoidance arrangements and opaque offshore structures that will also be subject to automatic exchange among jurisdictions.[508] The Global Forum on Transparency and Exchange of Information for Tax Purposes, in turn, is tasked with monitoring and reviewing the implementation of international standards on automatic exchange of information.[509] This review process yields ratings for monitored jurisdictions similar to the FATF process. The participation in the Global Forum

far exceeds the OECD membership, thus again illustrating how norms shaped by a small group of actors are taken up by others and gain virtually global reach. Informality allows the strictures of sovereign equality to be circumvented in the process of creating international law, and accordingly privileges the position of the powerful, which is at the outset of Martti Koskenniemi's critique of the shift to informal policy networks: "*[T]he image of law in the United States has been—and continues to be—conceived from the perspective of a powerful nation, indeed a world power, whose leaders have 'options' and routinely choose among alternative 'strategies' in an ultimately hostile world. From that perspective, any conception of law as 'fixed rules' seems irrelevant to the extent that it is not backed up by sanction and counterproductive inasmuch as it limits the choices available to those who have the means to enforce them. The language of 'governance' (in contrast to government), the management of 'regimes', of ensuring 'compliance', is the language of a powerful and a confident actor with an enviable amount of resources to back up its policies*".[510]

Beyond the relative informality of regulatory networks, reshaping of international norms can also occur through the more formal processes of treaties and international agreements. In the field of international economic law, the European Union, under Article 207 TFEU, is endowed with exclusive competence for the common commercial policy on behalf of the Union's member states, thus representing the largest economy in the world.[511] This confers the European Union with a disproportionate role in the legal dimension of global governance,[512] in particular concerning trade and, to the extent that it is covered by the competence of the Union, investment policy. While the Union negotiates trade and investment agreements with third countries, it does so backed with the weight of the world's largest single market to shape the norms governing international exchanges and ensure these rules are respected. The "Brussels effect" relates to the idea that norms developed by the European Union swiftly become global standards because of the sheer scale of the single market. In this way, the rules and standards contained in EU trade and investment agreements bear upon the development of international economic law and thereby help the European Union to shape globalisation in its favour.[513] The communication on the 2021 EU trade policy review mentions among the core objectives of the Union's trade policy the shaping of global rules and increasing the capacity to assertively pursue its interests, including by acting autonomously to advance its own

agenda.[514] These objectives entail further strengthening the EU's regulatory impact and reinforcing the implementation and enforcement of trade agreements.

This phenomenon is potentially compounded when dominant actors in the global economy act in concert. In June 2021, the European Union and the United States agreed to set up a joint Trade and Technology Council (TTC), in order to coordinate approaches to global trade, economic and technology issues, and to cooperate on the development of compatible and international standards, as well as to facilitate cooperation on regulatory policy and enforcement.[515] Given the scale of their economies, the norms generated through this process are likely to shape the standards adopted by all other actors. Taken together, the economies of both entities amount to almost half of global GDP and trade in goods and services.[516] The working groups operating under the TTC are tasked with operationalising political decisions into legal deliverables and prepare the ground for the alignment of standardisation. In this fashion, dominant actors in the global economy create norms that reflect their interests and priorities, but which are effectively shaping international economic law itself, as other, less powerful actors, come to adopt the same standards.

Reshaping international law can also be realised by enhancing the flexibility and reducing the formalism required for altering existing norms. The major constraint for powerful actors resulting from international law arguably concerns the limitations imposed on the use of force. Together with economic resources, it is here that power is most acute, since restrictions placed on military action disproportionately affect powerful actors compared to weaker actors that lack the material resources to compete in this domain. Therefore, while any relaxing of the conditions for the legitimate use of force would, in principle, be applicable to all actors, it is only the powerful actors that may effectively draw significant practical benefits in terms of an expanded range of action.[517] Since the end of a bipolar system based on distinct spheres of influence during the Cold War era, where the use of force among the major powers was essentially excluded, efforts have been undertaken to reshape international law in order to adapt it to the new realities in the international system and thus better reflect the interests of the dominant actors. This tendency has been particularly reflected in developments pertaining to the use of force, notably through a flowering of new justifications to intervene, driven mainly by actors with the power and material resources to back

up these assertions with coercive action. In order to fit with legal arguments, actors portrayed their actions as enforcements of collective aims of the international community, for instance grounded in resolutions of the UN Security Council, even if those resolutions did not explicitly authorise the use of force.[518] The vagueness of the legal framework regulating interventions for collective purposes can be considered in and of itself as privileging the powerful who are best placed to define its content in later situations according to their interests.[519] In the words of Martti Koskenniemi: "*[W]hat counts as law, or humanitarianism, or morality, is decided with conclusive authority by the sensibilities of the Western prince*".[520]

A further option to reshape international law comes under the form of formal hierarchy and "legalised hegemony", which entails establishing derogatory norms for the powerful.[521] The creation of the United Nations in 1945 to some extent formalised the existence of a form of hierarchy in international law, in that some members of the international community are more equal than others, through the privileges accorded to the permanent members of the Security Council under the UN Charter, most notably the right to veto any measure they deem incompatible with their interests.[522] The multipolar moment from the 1990s was characterised by renewed efforts to establish greater hierarchy in international law, as evident in the revitalisation of the Security Council both in terms of an expansion of its enforcement powers in authorising coercive measures[523] and increasingly also in terms of a law-creating capacity by enacting binding norms for the international community as a whole in matters the Security Council deems necessary for the maintenance of peace and security. The design of United Nations sanctions, for instance, has gained in scope and sophistication, with resolutions including measures such as financial restrictions that impact member states' private operators, travel restrictions that affect national immigration and visa policies, or vigilance requirements and export interdictions bearing upon national customs authorities.[524] These norms are binding on all actors even though only the permanent members of the Security Council consistently participate in their elaboration.[525] The P5 thus exert a much greater degree of control over the setting of norms than would be the case in traditional processes of creating international law. It is, however, not only the formal voting privileges that privilege the powerful; the Security Council also allows its members to generate binding international law merely for others, without being bound themselves, as measures

can be targeted to any single actor or group of actors at the Council's discretion.

This phenomenon extends beyond the realm of the Security Council,[526] as Harold Koh has highlighted in his analysis of "American exceptionalism".[527] While, according to Koh, exceptionalism can come in many "faces", the most problematic aspect of it consists in the United States using its power to promote a *double standard*; "that a different rule should apply to itself than applies to the rest of the world".[528] We have seen that the United States is itself rather reluctant to ratify multilateral agreements; yet at the same time it is often a major actor in the negotiating process, a phenomenon that extends to other powerful actors in the international arena. The United States, Russia and China thus played a central role during the preparatory committee phase and the conference convened in 2012–2013 under the auspices of the United Nations to negotiate the Arms Trade Treaty (ATT) regulating the international trade in conventional arms.[529] These actors, by virtue of their power position in the international system as well as their role as major producers and exporters of conventional weapons, were able to weigh heavily on the drafting of the treaty provisions during the negotiations, yet ultimately did not accede to the treaty once it was adopted by the UN General Assembly in 2013. While the United States did sign, but not ratify, the ATT in 2013, Russia and China have so far refrained from signing the treaty in the first place.[530] These instances lead to an international order in which powerful actors heavily influence the content of new international law, but maintain the option of remaining outside of the legal framework while weaker actors have no choice but to be bound. This phenomenon is further accentuated by the use of reservations and resorting to bilateral agreements instead of the less flexible, but more inclusive multilateral approach. In the end, where the international legal process fails to formally reflect an exceptional status for dominant actors, the latter withdraw and thereby create a bifurcated international order: international law binding on other actors, not on themselves.[531] The result is not much different from the composition of the Security Council, in that the powerful actors in some regard cease to be subjects of international law and take a position above it.[532]

3.2.6 Extraterritorial Application of Domestic Law

While the introduction of formal hierarchy into international law can be complicated or obstructed by international law's insistence on equality,

which stands in opposition to translating dominance into legal norms, the alternative of withdrawal from international law does not necessarily need to equate an abdication of law altogether. In contrast to the distinction between international law and politics, the withdrawal from international law is not tantamount to a collapse of law into politics, but may rather signify the rise of another form of law to the international stage, namely *domestic* law.[533] The obstacles to radiating internal law into the international sphere have been articulated by arbiter Max Huber in the *Island of Palmas* case: "*Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations*".[534] In order for domestic law to become an instrument of *international* governance, it therefore needs to circumvent the jurisdictional limits imposed by international law from the *Lotus* case that jurisdiction is linked to territory.[535] Consequently, much of the authority of domestic law in the international system has to rely on factual rather than formal subjection. *De jure*, foreign legal persons and individuals are traditionally not required to submit to the prescriptions of the domestic law issued by another state, except within its territory.[536] In practice, however, the domestic law of dominant actors "governs" because other actors de facto have no choice but accede to its prescriptions, be it out of political pressure or economic dependence, or even the authority commanded by the dominant actor within the international community—Ian Hurd's three pathways to norm obedience: *force, price and legitimacy*. The scope of application and actual effectiveness of dominant actors' domestic law distinguish it from an internal instrument of social regulation among equals and transform it into an instrument of *international* governance.[537]

The projection of domestic law into the international arena essentially comes in form of the application of extraterritorial jurisdiction.[538] The conception of the international legal order as an arena where actors' jurisdictional reach is exclusively linked to their own territory is put under strain both by the factual power of economic dependence, such in the *Hartford Fire Insurance* case,[539] and the historical development of

competing claims to jurisdiction. The development of international criminal law over the past decades has been accompanied by an increasing assertion of universal jurisdiction, based on the reasoning that the most serious crimes of concern to the international community as a whole entail a right or obligation to prosecute alleged perpetrators independently of whether they are covered by the passive nationality principle. Furthermore, international tax law has seen an increasing tendency for powerful actors to rely on the active nationality principle in directly subjecting their nationals abroad to domestic tax legislation by asserting the extraterritorial reach of these laws.[540]

In 2010, the United States adopted the Foreign Account Tax Compliance Act (FATCA)[541] which, *inter alia*, requires that foreign financial institutions and certain other non-financial entities report to the Internal Revenue Service (IRS) on the assets held by their United States account holders. The aim of FATCA is to combat tax evasion by United States natural or legal persons holding accounts and other financial assets offshore. FATCA further requires certain foreign financial institutions to report directly to the IRS information about financial accounts held by foreign entities in which United States taxpayers hold a substantial ownership interest.[542] The reporting institutions subject to this requirement include not only banks, but also other financial institutions, such as investment entities and insurance companies. While FATCA is part of United States domestic law, its obligations explicitly apply to operators located outside of the United States. The provisions of FATCA notably require foreign financial institutions to enter into agreements with the IRS in order to allow the latter to search through their records for the purpose of identifying United States persons and to disclose account holder names (this was later changed to intergovernmental agreements concluded between the United States executive branch and foreign governments, providing that all financial institutions of the latter shall comply with FATCA).[543] The consequences of non-compliance with FATCA range from the imposition of regulatory costs and penalties by the United States on foreign financial institutions to the latter potentially losing their access to the United States market, even though the actions by foreign financial operators may be perfectly compliant with their own domestic law.[544]

For the United States, extraterritorial jurisdiction has also become an instrument of international governance in a broader sense. Particularly in competition law, starting with the *ALCOA* and *Timberlane Lumber*

cases, the United States took an early lead in applying its own law to situations involving foreign legal persons acting abroad with little connection to itself other than a widely defined "intended and actual effect" or a "substantial or foreseeable" effect on the domestic market.[545] The methodology that has become known as the "effects test" in United States antitrust law succeeded in reshaping the jurisdictional norms in the area of international competition law.[546] It also marked the beginning of a broader tendency of extraterritorial application of United States domestic law.[547] In the *Saint Gobain* case, the Court of Appeals for the District of Columbia Circuit held that domestic law must be given effect even if the exercise to assert jurisdiction to prescribe by the national legislator exceeded the limitations contained in international law.[548] The European Union swiftly followed suit to the extraterritorial reach of the United States legislation, and the European Commission retaliated by likewise asserting extraterritorial jurisdiction in EU competition law based on the "effects doctrine" (also termed "implementation doctrine" to distinguish it from the similar United States approach), which was endorsed by the Court of Justice of the European Union in the *Wood Pulp* cases.[549] The court observed that "*Where producers established outside the [Union] sell directly to purchasers established in the [Union] and engage in price competition in order to win orders from those customers, that constitutes competition within the common market […] The [Union]'s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law. Under the rules against agreements, decisions or concerted practices, the decisive factor is where the agreement, decision or concerted practice is implemented rather than where it is formed. It is immaterial whether or not the producers had recourse to subsidiaries, agents, sub-agents, or branches within the [Union] in order to make their contacts with purchasers within the [Union]*". In other words, it is sufficient for foreign legal persons to engage into practices that have an effect on the single market for the Union to assert extraterritorial jurisdiction of European Union law to conduct formed outside its territory.

Perhaps, the most ambitious case of legislation with extraterritorial effects can be found in the European Union's rules to protect personal data. The General Data Protection Regulation (GDPR),[550] applicable since 2018, sets out norms relating to the treatment of personal data in the single market. These norms include an international dimension, namely that whenever data is transferred outside the European Union

and European Economic Area, the GDPR protections travel with the data. According to articles 44–50 GDPR, the transfer to or processing of personal data in a third country or international organisation outside the EU/EEA requires the destination jurisdiction to ensure that cross-border data flows have a level of privacy rights protection "essentially equivalent" to the GDPR. The equivalence of protection can be certified by an adequacy decision of the European Commission or alternatively ensured through standard contractual clauses (SCC's) approved by the Commission for cross-border data transfers, respectively binding corporate rules (BCR) for data transfers outside the EU/EEA within multinational companies. Third countries therefore need to ensure either an "adequate level of protection" according to the GDPR standard for the Commission to issue an adequacy decision pursuant to Article 45 of the regulation, or the controllers and processors of personal data in the third country need to ensure "appropriate safeguards" through SCC's or BCR according to Article 46 of the regulation. In both cases, operators in third countries are bound to comply with personal data protection rules set by the European Union to maintain their continued exchanges with the largest single market in the world. The compliance requirements of GDPR even affect international organisations such as the United Nations, since the European Union itself is not a party to the UN Charter or the 1946 Convention on the Privileges and Immunities of the United Nations.[551]

The Court of Justice of the European Union has been stringent in upholding the requirements of this "EU law exceptionalism", most notably by invalidating the adequacy decision of the Commission with regard to the United States in the *Schrems II* case for providing inadequate safeguards according to GDPR and thus forcing renegotiation of the Trans-Atlantic Data Privacy Framework.[552] Following its decision to withdraw from the European Union, the United Kingdom likewise had to contend with the requirements of GDPR with regard to third countries after the end of the transition period in the Withdrawal Agreement. The EU-UK Trade and Cooperation Agreement, which entered into force in January 2021, contained a six-month "bridging clause" to ensure the continued cross-border flow of data by essentially maintaining the EU data protection regime in place while an adequacy decision was being negotiated with the Commission.[553] In essence, the United Kingdom was therefore required to continue applying EU data protection rules even after withdrawing from the Union, and thereafter maintain personal data provisions that are "essentially equivalent" to GDPR standards.

Another instance of extraterritoriality relates to the imposition of unilateral restrictive measures against foreign states or individuals by the United States. The Office of Foreign Assets Control (OFAC)[554] of the United States Department of the Treasury enforces economic and trade sanctions based on the foreign policy and security aims of the United States directed against foreign states or individuals, in response to activities related to the proliferation of weapons of mass destruction and other threats to the security, foreign policy or economy of the United States. These sanctions may notably include controls on transactions and asset freezes. While the measures apply in principle to the jurisdiction of the United States only, the practical effects often extend to foreign operators as well. In the case of restrictive measures against the Islamic Republic of Iran, the Democratic People's Republic of Korea, or in the context of the Russian Federation's aggression against Ukraine, for instance, while foreign individuals and entities *de jure* would not be required to comply with the sanctions administered by OFAC, the exigencies of access to the United States market leave actors with no choice, but to implement the measures. In the field of multilateral sanctions, a reverse image of the extraterritorial reach of law can be seen in the judgements of the Court of Justice of the European Union relating to the implementation of restrictive measures decided by the UN Security Council, upholding European Union law over the requirements of individual member states to comply with international law in implementing the resolutions adopted by the Council. In the *Kadi I* case, the court held that the EU treaties created "*an autonomous legal system which is not to be prejudiced by an international agreement*" and "*which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions*". Given that "*an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the [EU] legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it*", the Court is empowered to review the validity of any measure, even one implementing UN Security Council resolutions, in light of fundamental rights enshrined in European Union law.[555] By virtue of this judicial review of implementing acts for restrictive measures adopted under international law, the court exerted a form of indirect extraterritorial application of European Union law, compelling the UN sanctions committee to amend its listing and de-listing procedures to comply with these requirements.

The five-year plan published in 2021 by the Communist Party in China for the development of a "socialist rule of law with Chinese characteristics" includes encouraging the increased use of Chinese law abroad, as well as to safeguard and advance Chinese interests through promoting its own conception of the rule of law. This notably entails to promote the extraterritorial application of Chinese intellectual property law, thereby claiming jurisdictional authority beyond its territorial borders, coupled with an increased assertiveness of Chinese courts to hear international commercial cases.[556] Due to the size of the Chinese domestic market and the importance of China in global manufacturing and supply chains, foreign operators, when faced *de jure* with a choice of applicable law or jurisdictional forum, will de facto have limited options but to submit to Chinese jurisdictional authority according to its domestic law. While private international law might provide some remedies in the form conflict rules like *forum non-conveniens* or mechanisms such as anti-suit injunctions, the factual normative force of the more powerful actor might yet prove irresistible.[557] The *Sabena* case illustrates that in the face of competing exercises of jurisdiction in pursuance of actors' interests, adjudication sometimes cannot disentangle the legal claims.[558] The ensuing stalemate is more advantageous for the powerful actor endowed with a larger array of options. In global trade, China typically has leverage over foreign actors who operate on the Chinese market or depend on its supply chains, and have little choice but to acquiesce to the application of Chinese intellectual property law.

3.2.7 Power Politics and the Paradox of Hegemony

International law cannot be reduced to just an epiphenomenon of power nor is it completely independent from power relations; international law and dominant actors entertain an uneasy relationship. We have seen the various forms taken by the interplay between international law and powerful actors: they are always tempted to instrumentalise or reshape international law to suit their ends, or alternatively to escape its constraints by limiting the reach of legal obligations, or impose the extraterritorial application of their own law.[559] As hegemonic actors view themselves in a position of exceptionalism, international law comes under pressure as the principle of formal equality gives way to a system of some being more equal than others, whereby one or more actors cease to be effectively subjected to the same legal obligations as all others. At the same time, norms are "sticky" and the international legal order does not give in easily

to the pressure of power; it thus constitutes an obstacle at attempts to undermine the egalitarian, coherent and stable character of law. Powerful actors accordingly tend to turn to alternative forms of governance, with the aim to adjust the international legal order into a more limited role, which imposes fewer constraints on their freedom of action.[560] This interplay between international law and power reflects the ambivalent position of law in regulating the operation of politics in the international arena. In this view, international law is invested with a dual role in international relations: its role as an instrument for the exercise of power is counterbalanced by its role as an element of resistance to power. These roles are necessarily interdependent for international law to be effective. On the one hand, without its resistance to the expression of politics, international law could not provide powerful actors with the very benefits that they derive from relying on legal norms in the stabilisation of their dominance. On the other hand, if international law would not to some extent reflect the factual inequality among actors in international relations and the power relations existing at a given time, dominant actors might simply turn away from international law and thus deprive it of at least some of its effectiveness. The role of international law in international relations therefore depends on a delicate balance between these antagonist positions.[561]

Significant parts of dominant actors' power is exercised not through the application of coercion, but rather more subtly through influencing the legal framework and intersubjective understandings prevailing in the international system at any given time. Dominant actors can exert disproportionate influence on the content and the interpretation of the norms relating to the use of force or the regulation of trade in international law. They may weigh upon the creation and the design of new norms and institutions while simultaneously remaining outside these legal frameworks.[562] Dominant actors are further in a privileged position to bear upon the shape of international governance to better suit their ends, such as the reliance upon informal regulatory networks where their expertise and economic power carry more weight than other actors.[563] The focus on the power position of the United States and other dominant actors in the international system is overtly narrow and tends to obscure important parts of a larger picture in explaining how power is exercised in international relations, not merely in the certainly spectacular, but also sporadic, instances of recourse to armed force, but much more significantly in the routine operation of the international system.[564]

We have seen that the stabilisation and legitimation of power relies on international law and institutions. The realist tradition considers international law as largely epiphenomenal to the interests of dominant actors and thus reflecting the existing power relations in the international system at a given point in time. Accordingly, the consequence of this approach entails that any evolution in international law would mirror the shifts in power among the dominant actors as well as their respective interests[565]: "Law [in this understanding] does not "matter": it has no autonomy or compliance pull on its own, either by affecting the incentives or calculations of actors or by influencing the way in which interests are understood or preferences constructed".[566] One should not discard the central role of power as the most obvious explanation for behavioural outcomes, notably due to the fact that power confers actors with a larger array of options. Power comes in various "faces" and is not limited to material constraint in getting other actors to do what they would not otherwise do. Rather, power endows actors with the possibility to make choices. These options may vary between: (1) complying with international law that suits their interests and the ability to walk away unscathed from norms that become too constraining in the pursuit of their aims, or (2) to opt between formal international law and regulatory or economic approaches, as well as (3) to use coercion and incentives to alter the positions of weaker parties and thus shape negotiations in their favour. International law should not be linked to a narrow view of serving to solve coordination problems in the international system or to facilitate intersubjective understandings; it is itself also an instrument of power which stabilises existing hierarchical structures and furthers the aims of the powerful.[567]

An overly narrow view of the international legal order fails to adequately reflect the role of international law in the stabilisation of power and the legitimation of authority. International law is not merely a neutral order of equals, but can foster power asymmetries or enable hegemonic power. Alexander Wendt defined power as a social attribute.[568] Ian Hurd, in turn, highlighted the importance of social concepts like authority and legitimacy in understanding the role of power in international relations.[569] To a significant extent, the competition for political power is actually characterised by actors' aim for legitimate and authoritative control that precisely seeks to avoid reliance on force and coercion as being costly and perilous in the long term. Focusing primarily on material factors tends to systematically undervalue the importance of international law in alleviating the material and political costs for actors in furthering

their interests and, even more, to endow them with the authority and legitimacy of power that raw force could not command on its own.[570] Dominant actors are faced with the challenge of translating their capacity for material or economic coercion into a form of authority grounded in the legitimation of power. Martin Wight identified the issue of politics in the justification of power "Power is not self-justifying; it must be justified by reference to some source outside or beyond itself, and thus be transformed into 'authority'".[571] This illustrates that it is hardly possible to conceive of a neat separation between international law and the power relations prevailing in the international system.[572]

It is *The Paradox of Hegemony* that hegemons are endowed with the material capabilities to act outside of international law, yet they cannot remain hegemons if they do so at the expense of the system they aim to lead.[573] We have seen that for actors to rely on raw material power alone entails excessively high costs, and thus usually proves to be unsustainable in the long term.[574] As a corollary, hegemony that would be based exclusively on power relations among dominant actors would be inherently unstable and therefore not likely to last long.[575] Bruce Cronin, by contrast, defines hegemony as a social property that is dependent on legitimating norms and ideas. In this view, it is less an attribute of particularly powerful actors, but rather a type of relationship that exists among actors in the international system.[576] Inis Claude has argued that legitimacy is an essential characteristic of any cohesive and stable political system.[577] For collective legitimation to occur, Cronin posits that hegemons convert their material power position into authority, that their capabilities equate to jurisdiction, and their ownership be validated as property.[578] The construction of international social order requires the legitimation of norms and the material distribution of power.[579] When these conditions are present, there is no balancing against the hegemon given that authority is not linked to material power which, depending on the social context, other actors could perceive as a threat to their own security within a balance of power system—but from the hegemon's role within the international system. The behaviour of the hegemon is judged by other actors according to the extent that it conforms to the boundaries established by its specific role.[580] Oran Young defined hegemony as an institution in the international system that consists of roles recognised by other actors, patterns of behaviour and procedural norms.[581] These norms determine agents' identities and preferences and in turn specify patterns of appropriate conduct.[582] Moreover, the expectation of

role-conforming behaviour is reciprocal. Thus, actors operating within a particular role do not merely have internalised expectations of their own behaviour, but also develop a set of assumptions about how other actors are expected to act in relation to them,[583] by analogy to Wendt's description of social roles with actors making assumptions about expectations of conduct based on a form of George Herbert Mead's "generalised other". Within the context of the international system, hegemony generates specific expectations of behaviour among agents. In a social context characterised by the role of hegemony, the ambition of the hegemon to lead is dependent on its authority which in turn is conditioned on the hegemon being recognised as such by other actors in the international system. Hegemony is therefore a social *role*, and other actors accordingly expect the hegemon to observe certain limits on its behaviour.[584]

Hedley Bull posited that the behaviour of dominant actors in the international system is curtailed by the norms of international law, notably in formal legal equality; that dominant actors tend to refrain from violations of international law in order not to appear to be undermining the order and erode the legitimacy of their position; and that their range of action is limited by their "responsibility" towards the system.[585] Cronin goes further in arguing that there is an expectation for hegemons to abide by certain procedural norms when acing within their role as a hegemon—their authority *within* the international system is thus accompanied by increased obligation *towards* the system.[586] While the superiority in both military and economic terms of a hegemonic actor endows it with a wider range of options to act in pursuance of its foreign policy aims than less powerful actors, the role as hegemon simultaneously entails significant constraints. It is this antagonism of both more latitude for action and greater constraints that Cronin defines as the *paradox of hegemony*.[587] The use of the system entails responsibility towards that same system. There is thus a permanent contradiction between the propensity for powerful actors to take unilateral action in order to pursue their self-defined interest and their desire to maintain long-term systemic stability, albeit with themselves at the centre.[588] This tension results in an inherent "role strain" in which hegemons are torn between their conflicting roles as great powers and systemic leaders, between short-term gains and long-term interests.[589] Thus, powerful actors, in determining whether or not to comply with international law, usually take into account their interest in the international legal order as such, quite aside from whether, in any particular instance, particular norms serve their interests by validating a

desired outcome.[590] In other words, it is important not to overlook the interest of actors—even hegemonic powers—in strengthening the rule of law in international relations by voluntarily subjugating themselves to international law, through compliance with it, even to the detriment of more immediate short-term interests. Conformity with norms even in instances when they do not meet powerful actors' ends helps to deter others from disregarding the norms that establish the legitimacy of hegemony. Conversely, powerful actors violating a norm when it suits their interests lends legitimacy to others' non-compliance with international legal obligations.[591]

The perception of a "double standard" in the international system, whereby the hegemon applies different, in the sense of more relaxed, norms to itself than those by which it holds other actors accountable, carries the significant risk of ultimately undermining the hegemon's ambition to lead through legitimate authority.[592] Power, when completely unbalanced, entails a tendency for dominant actors to distort in their favour, and thus ultimately weaken, the norms on which stable and sustained cooperation rests.[593] Dominance solely asserted on material power and resources lacks the ability to act through persuasion, to "make others want the outcomes that you want", a central element of Joseph Nye's notion of "soft power".[594] Rational hegemons will thus engage to some extent in voluntary constraint though international law in order to avoid their dominance being perceived as a threat by other actors. Further, outright opposition to international law by actors undermines the legitimacy of the norms themselves. This risks foreclosing the option of shaping international law to suit the interests of the powerful and prevents them from relying on those same norms in the future when they intend to invoke them in support of their aims.[595] International law, to a certain extent, is inevitably a reflection of the prevailing power relations at a given time, but at the same time it inherently resists the unfettered expression of power—it is never just an apology, but also an enduring utopia. By maintaining this delicate balance, international law occupies a sometimes precarious, but ultimately stable place in the international system. International law will always have to accommodate the interests of the powerful actors and to some extent adjust its norms to their preferences in order to ensure its viability. Simultaneously, it is only by taming the raw expression of power that international law is able to fulfil its role in the stabilisation of the international order. International law that is merely an epiphenomenon to power is unable to legitimate the actions of

the dominant actors, and Harold Koh notes that no actor in the international legal order, not even the most powerful ones, can simply discard the rules that have been followed for some time.[596] It is therefore by shaping political action that international law operates in the international system.[597]

Notes

1. See e.g. Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992); Peter Niesen and Benjamin Herborth (Eds.), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (2007).
2. Niklas Luhmann, *Ecological Communication* (1989), 17.
3. John Mingers, *Self-Producing Systems: Implications and Applications of Autopoiesis* (1995), 157.
4. *See e.g.* Thomas Risse, "Let's Argue!": Communicative Action in World Politics, 54 *International Organization* (2000), 1–40.
5. Walter Carlsnaes, Foreign Policy, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 340.
6. Henrik Larsen, British and Danish European Policies in the 1990's: A Discourse Approach, 5 *European Journal of International Relations* (1999), 453.
7. See Emmanuel Adler, Constructivism and International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 98.
8. Ludwig Wittgenstein, *Philosophical Investigations* (2010), paragraph 85.
9. See e.g. Otto Keck, Rationales Kommnikatives Handeln in den Internationalen Beziehungen: Ist eine Verbindung von Rational Choice Theorie und Habermas' Theorie des Kommunikativen Handelns möglich? 2 *ZIB* (1995), 5–48; Harald Müller, Internationale Beziehungen als Kommunikatives Handeln, 1 *ZIB* (1994), 15–44; Thomas Risse, Reden ist nicht Billig: Zur Debatte um Kommunikation und Rationalität, 2 *ZIB* (1995), 171–189; Bernhard Zangl and Michael Zürn, Argumentatives Handeln bei Internationalen Verhandlungen: Moderate Anmerkungen zur post-realistischen Debatte, 3 *ZIB* (1996), 31–36.
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12. Thomas Risse (2000), supra.

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14. Nicole Deitelhoff, The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case, 63 *International Organization* (2009), 33–65.
15. Wayne Sandholtz and Alec Stone Sweet, Law, Politics, and International Governance, *in* Reus-Smit (Ed.), *The Politics of International Law* (2004), 242.
16. Michael Byers, International Law, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008), 623.
17. Brigitte Stern, La coutume au coeur du droit international, *in* Stern (Ed.), *Mélanges offerts à Paul Reuter: Le droit international, unité et diversité* (1981), 479–499 (498–499) (my translation).
18. Guy de Lacharrière, *Politique juridique extérieure*, 200 (my translation).
19. Emilie Hafner-Burton, Stephan Haggard, Dvaid Lake and David Victor, The Behavioral Revolution and International Relations, 71 *International Organization* (2017), 6; see also Joel Trachtman, *The Economic Structure of International Law* (2008).
20. Daniel Kahneman and Amos Tversky, Prospect Theory: An Analysis of Decision under Risk, 47 *Econometrica* (1979), 263.
21. See Friedrich Kratochwil, *Praxis*, 60; Christine Jolls, Cass Sunstein and Richard Thaler, A Behavioral Approach to Law and Economics, 50 *Stanford Law Review* (1998), 1471.
22. Richard Thaler, *Misbehaving: The Making of Behavioral Economics* (2015).
23. For a concise overview of these implications in the field of international relations, see Hafner-Burton et al., The Behavioural Revolution and International Relations, supra, 9–11.
24. James Goldgeier and Philip Tetlock, Psychological Approaches, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008), 462.
25. Jeffrey Dunoff and Mark Pollack, Experimenting with International Law, 28 *EJIL* (2017), 1317.
26. Adam Chilton, The Laws of War: An Experimental Study, 171 *Journal of Institutional and Theoretical Economics* (2015), 181; Lauge Poulsen, *Bounded Rationality and Economic Diplomacy* (2015).
27. Adam Chilton and Dustin Tingley, Why the Study of International Law Needs Experiments, 52 *Columbia Journal of Transnational Law* (2013), 173–238.
28. On randomisation, see Dunoff/Pollack, Experimenting with International Law, supra, 1321.

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30. Dunoff/Pollack, supra, 1323.
31. Daniel Kahneman, *Thinking, Fast and Slow* (2015).
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34. See Emilie Hafner-Burton, Alex Hughes and David Victor, The Cognitive Revolution and the Political Psychology of Elite Decision Making, 11 *Perspectives on Politics* (2013), 368–386.
35. Oona Hathaway, Do Human Rights Treaties Make a Difference? 111 *Yale Law Journal* (2002), 135.
36. Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, The Data-Driven Future of International Economic Law, 20 *Journal of International Economic Law* (2017), 217–231.
37. See Edward Mansfield and Jon Pevehouse, Quantitative Approaches, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008), 482.
38. Ibid., 483.
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40. Beth Simmons, Treaty Compliance and Violation, 13 *Annual Review of Political Science* (2010), 289–290; Beth Simmons and Daniel Hopkins, The Constraining Power of International Treaties: Theory and Methods, 99 *American Political Science Review* (2005), 623.
41. See Andrew Benett and Colin Elman, Case Study Methods, *in* Reus-Smit/Snidal (Eds.), *The Oxford Handbook of International Relations* (2008), 499.
42. Andrew Bennett and Colin Elman, Complex Causal Relations and Case Study Methods: The Example of Path Dependence, 14 *Political Analysis* (2006), 250–267.
43. Martha Finnemore and Kathryn Sikkink, Alternatives to "Legalization": Richer Views of Law and Politics, 55 *International Organization* (2001), 743.
44. Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (2014).
45. John Mearsheimer and Stephen Walt, Leaving Theory Behind: Why Simplistic Hypothesis Testing Is Bad for International Relations, 19 *European Journal of International Relations* (2013), 427.
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47. Elisabeth Stubbins Bates, Sophisticated Constructivism in Human Rights Compliance Theory, 25 *EJIL* (2014), 1170.
48. Steinberg, *Wanted—Dead or Alive: Realism in International Law* (2013), 155.
49. Bates, supra, 1172.
50. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 311, Article 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".
51. Louis Henkin, *How Nations Behave* (1968), 23.
52. Ibid., 26.
53. See Chayes and Chayes, *The New Sovereignty*, 2–3.
54. H. L. A. Hart, *The Concept of Law* (1961); Prosper Weil, Le droit international en quête de son identité, 237 *Recueil des Cours* (1992), 53.
55. Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), 112.
56. Ibid.
57. Paul de Visscher, Cours général de droit international public, 136 *Recueil des Cours* (1972), 1–202.
58. Ibid., 137–153.
59. Ibid., 139 (my translation).
60. Janina Dill (2015), 41–42, 44.
61. Guy de Lacharrière, *Politique juridique extérieure*, 204–205 (my translation).
62. Ibid.
63. See e.g. Stephen Krasner, Structural Causes and Regimes Consequences: Regimes as Intervening Variables, 36 *International Organization* (1982), 185; Stephen Krasner, Global Communications and National Power: Life on the Pareto Frontier, 43 *World Politics* (1991), 336.
64. Andrew Hurrell, *On Global Order*, 18.
65. Janina Dill (2015), 53–54.
66. Onuma, supra, 136.
67. Morgenthau, *Politics Among Nations*, 87–88.
68. Friedrich Kratochwil, *Praxis*, 160.
69. Stephen Krasner, *Sovereignty: Organized Hypocrisy* (1999).
70. International Law and the Cuban Missile Crisis, *in* Lawrence Scheinman/David Wilkinson (Eds.), *International Law and Political Crisis* (1968), 175–176.
71. Ibid., 209.
72. Guy de Lacharrière, *Politique juridique extérieure*, 205 (my translation).
73. Ibid.
74. Abram Chayes, *The Cuban Missile Crisis*, 41.

75. Ibid., 42.
76. Chayes and Chayes highlight the ability of international law to set clear boundaries for discourse of justification. Within this legal discourse, "good" legal arguments can be distinguished from "bad" ones. See Janina Dill (2015), 35; Chayes, supra, 42.
77. Kratochwil, *Rules, Norms and Decisions*, 251.
78. International Court of Justice, *Case concerning United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), Judgment of 24 May 1980, *ICJ Reports* 1980, 3.
79. Janina Dill (2015), 57.
80. Henkin, *How Nations Behave*, 43.
81. Onuma, supra, 135.
82. See Bruce Cronin, The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations, 7 *European Journal of International Relations* (2001), 103–130.
83. Henkin, supra, 60–61.
84. See Franck, *Fairness in International Law and Institutions* (1995).
85. Andrew Hurrell makes a similar argument based on the principle of consent in international law: "[B]eing in a political system, [actors] will seek to interpret their obligations to their own advantage. But being in a legal system that is built on the consent of other parties, they will be constrained by the necessity of justifying their actions in legal terms". See International Society and the Study of Regimes, *in* Rittberger (Ed.), *Regime Theory and International Relations* (1993), 61.
86. See e.g. ICJ, *Libya and Malta Continental Shelf Case*, 1985 ICJ Reports 39: "[T]he justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability."
87. World Trade Organisation, *Principles of the trading system*, Most-favoured nation: Under the WTO agreements, countries cannot normally discriminate between their trading partners. Granting one country a special favour entails an obligation to do the same for all other WTO members, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.
88. Charles Taylor distinguishes between "intersubjective meaning" and "common meaning", whereby the former "gives people a common language to talk about social reality and a common understanding of certain norms" and the latter constitutes the "objects in the world that everybody shares". See Charles Taylor, *Philosophical Papers, Vol. 2, Philosophy and the Human Sciences* (1985), 39. In the context of the present enquiry, however, analog to Dirk Pulkowski's analysis based on Habermas' theory of communicative action, we shall use these terms

interchangeably. See Pulkowski, *The Law and Politics of International Regime Conflict* (2014), 265.
89. Arend, *Legal Rules and International Society*, 137.
90. Martha Finnemore and Kathryn Sikkink, International Norm Dynamics and Political Change, 52 *International Organization* (1998), 896, 897–898.
91. Friedrich Kratochwil, *Praxis*, 38.
92. Alastair Iain Johnston, Treating International Institutions as Social Environments, 45 *International Studies Quarterly* (2001), 494–506.
93. Ryan Goodman and Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 *Duke Law Journal* (2004), 642–643.
94. Finnemore and Sikkink, supra, 895.
95. Hurd, Legitimacy and Authority in International Politics, supra (1999), 397.
96. Brunnée and Toope, supra, 62.
97. Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (1998); Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (2005).
98. Wenger, supra, 55–56.
99. Anat Biletzki and Matar Anat, Ludwig Wittgenstein, *in* Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2021 Edition): https://plato.stanford.edu/archives/win2021/entries/wittgenstein/.
100. Ludwig Wittgenstein, *Philosophical Investigations* (2010), paragraph 201.
101. Ibid., paragraphs 151, 185.
102. Friedrich Kratochwil, *Praxis*, 166.
103. *Quoted in* Hanna Fenichel Pitkin, *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (1972), 186.
104. Wenger, supra, 58–59.
105. Ibid, 61.
106. Alexander Wendt, Anarchy Is What States Make of It: The Social Construction of Power Politics, 46 *International Organization* (1992), 391.
107. Gerald Postema, "Protestant" Interpretation and Social Practice, 6 *Law and Philosophy* (1987), 309–310.
108. Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1987).
109. Kratochwil, *Praxis*, 27.
110. John Searle, *Intentionality: An Essay in the Philosophy of Mind* (1983).
111. Kratochwil, *Praxis*, 25, 29.
112. John Searle, *The Construction of Social Reality*, 7.
113. Bourdieu, supra, 13 (my translation).

114. Wenger, supra, 281.
115. Brunnée and Toope, supra, 64.
116. Alexander Wendt, *Social Theory of International Politics*, 326–335.
117. Michael Barnett and Raymond Duvall, *Power in Global Governance* (2005), 295–296.
118. Brunnée and Toope, supra, 71.
119. Dirk Pulkowski, *The Law and Politics of International Regime Conflict*, 270–271.
120. Kratochwil, *Praxis*, 176.
121. Grigorii I. Tunkin, *Theory of International Law* (1974); Kazimierz Grzybowski, *Soviet Public International Law* (1970), 6–9.
122. See Critical Legal Studies (CLS), supra, Chapter I.
123. See e.g. Yasuaki Onuma, *A Transcivilizational Perspective on International L*aw (2010).
124. See Andreas Paulus, *Die Internationale Gemeinschaft im Völkerrecht* (2001).
125. Hedley Bull, *The Anarchical Society*, 13; Christian Reus-Smit, Society, Power and Ethics, *in* Reus-Smit (Ed.), *The Politics of International Law*, 274–279; Dino Kritsiotis, Imagining the International Community, 13 *EJIL* (2002), 268.
126. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 110.
127. Adler, supra, 15.
128. Ian Johnstone, Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit, 102 *AJIL* (2008), 300–301.
129. Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (2014), 240.
130. Gunther Teubner, *Altera Pars Audiatur*: Law in the Collision of Discourses, *in* Rawlings (Ed.), *Law, Society and Economy* (1997), 157.
131. Nikolaos Lavranos, The MOX Plant and Ijzeren Rijn Disputes: Which Court Is the Supreme Arbiter? 19 *Leiden Journal of International Law* (2006), 223–246.
132. Permanent Court of Arbitration, Case N° 2002-01, *MOX Plant Case (Ireland v. United Kingdom)*, Award of 16 June 2008: https://pca-cpa.org/en/cases/100/; International Tribunal for the Law of the Sea, *MOX Plant Case, Ireland v United Kingdom*, Order, Request for Provisional Measures, ITLOS Case No. 10, ICGJ 343 (ITLOS 2001), 3 December 2001; CJEU, Judgment of the Court (Grand Chamber) of 30 May 2006, *Commission of the European Communities v Ireland*, C-459/03, EU:C:2006:345.
133. Pulkowski, supra, 239.
134. Klaus Günther, Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory, Paper for the Colloquium

in Legal, Political and Social Philosophy, *New York University School of Law*, 25 September 2003.

135. Pulkowski, ibid.
136. WTO Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS/2/AB/R, 20 May 1996, DSR 1996: I, 17.
137. Thomas Skouteris, Bridging the Gap? The 1999 Annual Meeting of the American Society of International Law, 12 *Leiden International Law Journal* (1999), 506; Julius Stone, *Legal Systems and Lawyers' Reasoning* (1965), 26.
138. Institutional facts in international law consist, for example, in the fact that the recognition of an actor as "diplomat" depends on the accreditation pursuant to the Vienna Convention on Diplomatic Relations, or that the notion of "contracting state" is determined with reference to the Vienna Convention on the Law of Treaties. According to Kratochwil, institutional facts enable social interaction in providing "an intersubjectively understood context" for communication among actors. See Kratochwil, *Rules, Norms and Decisions*, 24. Pulkowski argues that actors do not merely encounter one another under anarchy, where only material power capabilities are brought to bear, but that interaction is set against a backdrop of norms that define the "game" of international relations. By reference to Wendt, he states that these institutional facts "are just as objective, just as constraining, just as real as power and interest". See Pulkowski, supra, 267.
139. Pulkowski, supra, 271.
140. See International Committee of the Red Cross, The Geneva Conventions of 1949 and Their Additional Protocols: https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols.
141. Kratochwil, *Rules, Norms and Decisions*, 35, 181.
142. Onuma, supra, 131.
143. Koskenniemi, The Politics of International Law, 1 *EJIL* (1990), 4.
144. Stephen Krasner, *Sovereignty: Organized Hypocrisy* (1999), 6.
145. See Byers, *Custom, Power, and the Power of Rules* (1999).
146. Hurrell, *in* Carlsnaes/Risse/Simmons, 143. According to Kratochwil, *Rules, Norms and Decisions*, 70: "[R]ules and norms link autonomy to sociality by providing guidance and acting as a problem-solving device. On the one hand they leave each actor free to decide for himself/herself which goals to pursue – even to break the rules – while on the other hand they safeguard the conditions of social coexistence. Three distinct ordering functions can be discerned within the universe of norms. First, by 'ruling out' certain methods of individual goal-seeking through the stipulation of forbearances, norms define the area within which conflict can be bounded. Second, within the restricted set of permissible goals

and strategies, rules which take the actors' goals as a given can create schemes or schedules for individual or joint enjoyment of the scarce objects. Third, norms enable the parties whose goals and/or strategies conflict to sustain a 'discourse' on their grievances, to negotiate a solution, or to ask a third party for a decision on the basis of commonly accepted rules, norms, and principles".

147. Kratochwil contends that "radical rule scepticism dissolves as soon as we leave the atomistic world of the single speaker and take more seriously the notion that language is an intersubjective enterprise. As a practice, a rule not only tells me how to proceed in a situation that I might never have faced before, it is also governed by certain conventions of the community of which I am part […] Thus, while there are likely to be disagreements about the proper use of a term or the interpretation of a rule, purely idiosyncratic uses are excluded even if the use of the concepts remain contestable and contested". See How Do Norms Matter, *in* Byers (Ed.), supra, 52.
148. Richard Falk, *The Status of Law in International Society* (1970), 15–16.
149. The notion of clarity and determinacy as important functions of law has long been highlighted for the domestic context, see e.g. Robert Axelrod, An Evolutionary Approach to Norms, 80 *American Political Science Review* (1986), 1106–1107: "The law tends to define obligations much more clearly than does an informal norm. A social norm might say that a landlord should provide safe housing for tenants, but a housing code is more likely to define safety in terms of fire escapes"; Carol M. Rose, Crystals and Mud in Property Law, 40 *Stanford Law Review* (1988), 608, observing that clear rules "enhance sociability and facilitate ongoing social interactions".
150. See e.g. George Kennan, *American Diplomacy* (1951). According to Hurrell, supra, "Diplomacy is essential to the international system because it underpins the minimal conditions and prerequisites of any cooperative social order: the capacity to communicate, the necessity of shared conventions for communication (linguistic and procedural), and the provision of an institutional framework to allow political negotiations to take place in strained and often very difficult circumstances".
151. The United States Supreme Court holds that cases dealing directly with issues that the Constitution attributes to the sole responsibility of other branches of government are precluded from hearing in federal courts. Thus, the Supreme Court decided that the conduct of foreign policy falls under the exclusive competence of the executive branch and accordingly cases challenging the way this prerogative is exercised are not justiciable: *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).
152. Hurrell, *On Global Order*, 36–37; Friedrich Nietzsche, On Truth and Lies in a Nonmoral Sense (1873), *in* Keith Ansell-Pearson and Duncan

Large (Eds.), *The Nietzsche Reader*, Vol. 10 (2006), 117: "What then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms—in short, a sum of human relations which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins".

153. Pulkowski (2014), 243.
154. Arend. *Legal Rules and International Society*, 139.
155. See e.g. Robert J. Beck, *The Grenada Invasion; Politics, Law, and Foreign Policy Decisionmaking* (1993).
156. Arend, supra, 140.
157. UN General Assembly, Eleventh emergency special session, Aggression against Ukraine, 2 March 2022, UN Doc. ES-11/1, operative paragraph 2: "Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter".
158. Onuma, supra, 134.
159. Kal Raustiala, Form and Substance in International Agreements, 99 *AJIL* (2005), 581–614.
160. Fred Charles Iklé, *How Nations Negotiate* (1964), 2. Iklé defined negotiations as a sequence of actions in which two or more parties address demands, arguments and proposals to each other for the ostensible purpose of reaching an agreement. Notably, this definition does not require a win-win situation for actors.
161. Thomas Schelling, *The Strategy of Conflict* (1960).
162. Ibid.
163. Christer Jönsson, Diplomacy, Bargaining and Negotiation, *in* Carlsnaes/Risse/Simmons (Eds.), 224.
164. Ibid.
165. Robert Axelrod, *The Evolution of Cooperation* (1984).
166. Jönsson, supra, 223.
167. Sandholtz and Stone Sweet, Law, Politics, and International Governance, *in* Reus/Smit (Ed.), *The Politics of International Law*, 243.
168. Ibid.
169. Stephen D. Krasner (Ed.), *International Regimes* (1983).
170. Stephen Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, 36 *International Orgnaization* (1982), 185–186.
171. Ibid.
172. Oran Young, Regime Dynamics: The Rise and Fall of International Regimes, *in* Krasner (Ed.), supra (1983), 94.
173. Krasner, supra (1982), 193.

174. See Bull, *The Anarchical Society*, Chap. 5.
175. Stephen Krasner, Regimes and the Limits of Realism: Regimes as Autonomous Variables, 36 *International Organization* (1982), 500.
176. Ibid., 503.
177. Ibid.
178. See supra, Section A.
179. See e.g. Robert Sudgen, Spontaneous Order, 3 *Journal of Economic Perspectives* (1989), 85–97.
180. Steven Pinker, *The Language Instinct* (1994).
181. Sandholtz and Stone Sweet, supra, 244.
182. Sudgen, supra, 89.
183. See Mark Keane, *Analogical Problem Solving* (1988), 103; James Murray, The Role of Analogy in Legal Reasoning, 29 *UCLA Law Review* (1982), 833–871. According to the latter, normative deliberation, including legal argumentation and judging, can be regarded as a species of analogical reasoning: actors reason from existing institutions (the equivalents of source analogs), to characterise the interplay of new fact contexts and interests raised by a dispute (the target analog), and to find an appropriate solution to it.
184. Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (2014), 91.
185. Jürgen Habermas, *Theorie des kommunikativen Handelns*, Vol. 1, 127: "Der zentrale Begriff ist die auf die Realisierung eines Zwecks gerichtete, von Maximen geleitete und auf eine Situationsdeutung gestützte Entscheidung zwischen Handlungsalternativen".
186. Ibid., 148: "Verständigung funktioniert als handlungskoordinierender Mechanismus nur in der Weise, dass sich die Interaktionsteilnehmer über die beanspruchte Gültigkeit ihrer Äußerungen einigen, d.h. Geltungsansprüche, die sie reziprok erheben, intersubjektiv anerkennen".
187. The famous "triangle model" of social action, see Risse (2000), 4.
188. Ibid., 3.
189. Jon Elster, *Nuts and Bolts for the Social Sciences* (1989), 22.
190. Goldstein and Keohane (Eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (1993).
191. March and Olsen, supra (1998), 951.
192. Risse (2000), 4.
193. Ibid.
194. Risse (2000), 5.
195. Steinberg and Zasloff, Power and International Law, 100 *AJIL* (2006), 82.
196. Sinclair (2010), 19, 22.
197. Steinberg and Zasloff, ibid.
198. Kratochwil, *Rules, Norms and Decisions*, 251.

199. Steinberg and Zasloff, supra, 83; see also Wendt (1999), 92.
200. Wendt, The Agent-Structure Problem in International Relations, 41 *International Organization* (1987), 335.
201. March and Olsen, *Rediscovering Institutions* (1989).
202. Risse (2000), 6.
203. Ibid., 7.
204. Habermas, *Theorie des kommunikativen Handelns* (1981), Vol. I, 141–151.
205. Risse (2000), 7.
206. Ibid., 8.
207. Jon Elster, The Market and the Forum: Three Varieties of Political Theory, *in* Elster/Hylland (Eds.), *Foundations of Social Choice Theory* (1986), 103–132.
208. Risse (2000), 8–9.
209. Habermas, *Theorie des kommunikativen Handelns* (1981), Vol. I, 385 (my translation).
210. Risse (2000), 9.
211. Habermas, *Faktizität und Geltung* (1992), 391 (my translation).
212. John Searle, *The Construction of Social Reality* (1995).
213. Dirk Pulkowski highlights that Habermas has more in common with rationalism than constructivist approaches, in the sense that he emphasises individual consciousness, not actors' collective consciousness, as the site for the construction of social reality. See Pulkowski, supra, 92. For John Searle, the construction of social reality represents a collective social process whereby different actors join in a singular intentionality to act as part of a common "we"; see Searle, *The Construction of Social Reality* (1995), 24–25.
214. Lars G. Lose, *Communicative Action and the World of Diplomacy* (1998), 183.
215. Habermas, *Theorie des kommunikativen Handelns* (1981), Vol. II, 209; Lose (1998), 9.
216. Risse (2000), 11.
217. Lose, supra, (1998), 188.
218. Nicole Deitelhoff and Harald Müller, Theoretical Paradise—Empirically Lost? Arguing with Habermas, 31 *Review of International Studies* (2005), 167–179.
219. Christian Grobe, The Power of Words: Argumentative Persuasion in International Negotiations (2010) *European Journal of International Relations* (2010), 7.
220. Nicole Deitelhoff, *Überzeugungen in der Politik: Grundzüge einer Diskurstheorie internationalen Regierens* (2006).
221. Grobe (2010), 8.
222. Ibid.

223. Jeffrey Checkel, Why Comply? Constructivism, Social Norms and the Study of International Institutions, 55 *International Organization* (2001), 562.
224. Grobe (2010), 9.
225. See e.g. Andrew Moravcsik, Bringing Constructivist Theories of the EU Out of the Clouds: Have they Landed Yet? 2 *European Union Politics* (2001), 226–240.
226. Grobe, ibid.
227. Checkel (2001), 575.
228. Moravcsik, supra (2001), 227.
229. Grobe (2010), 10.
230. Goldstein and Keohane, supra, (1993).
231. On the role of incomplete information, see Eric Rasmussen, *Games and Information* (1994); David Lax and James Sebenius, Thinking Coalitionally: Party Arithmetic, Process Opportunism and Strategic Sequencing, *in* Young (Ed.), *Negotiation Analysis* (1991).
232. Grobe (2010), 12.
233. Jacob Glazer and Ariel Rubinstein, On Optimal Rules of Persuasion, 72 *Econometrica* (2004), 1715–1736.
234. Grobe (2010), 12.
235. Ibid.
236. Ibid.
237. James G. March and Johan P. Olsen, The Institutional Dynamics of International Political Orders, 52 *International Organization* (1998), 943.
238. March and Olsen, *Rediscovering Institutions* (1989).
239. March and Olsen (1989), 23, 59.
240. March and Olsen (1998), 952.
241. Andrew Hurrell, *On Global Order*, 19.
242. Deitelhoff (2009), 35.
243. Habermas' account of a discourse theory of law is more specifically phrased with regard to judicial decisions, though—it can be argued—the underlying argument can be translated to the legal decision-making process in more general terms, see Habermas, *Faktizität und Geltung* (1992), 277–278 (my translation).
244. Quentin Skinner, Some Problems in the Analysis of Political Thought and Action, *in* Tully (Ed.), *Meanings and Context: Quentin Skinner and His Critics*, 116–117.
245. I am indebted to Richard Steinberg for the suggestion of the two circles.
246. Lacharrière, *Politique juridique extérieure*, 205.
247. Janina Dill (2015), 3.

248. Georges Scelle, Le phénomène juridique du dédoublement fonctionnel, *in* Schätzel (Ed.), *Rechtsfragen der internationalen Organisation* (1956), 324–342: "Les ordres juridiques décentralisés sont conditionnés par les lois ordinaires de l'ordre juridique étatique de superposition, tant en ce qui concerne leur étendue d'action qu'en ce qui concerne les compétences institutionnelles ou organiques destinées à les mettre en œuvre […] c'est ici que nous rencontrons sous un premier aspect, le plus courant, - le phénomène juridique du dédoublement fonctionnel. Ce phénomène pourra se définir ainsi: les agents dotés d'une compétence institutionnelle ou investis par un ordre juridique utilisent leur capacité « fonctionnelle» telle qu'elle est organisée dans l'ordre juridique qui les a institués, mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaires à cette réalisation, ou n'en possédant que d'insuffisants […] C'est précisément dans le domaine international que le phénomène du dédoublement fonctionnel revêt toute son ampleur […] C'est que les ordres juridiques internationaux, malgré leur caractère de superposition et, notamment, l'ordre juridique œcuménique, ont échoué dans leur aspiration vers la hiérarchie, par suite de la résistance des ordres étatiques sous-jacents considérés, malgré l'absurdité de la conception, comme égaux et souverains. Cette fiction de la souveraineté repose sur une contradiction fondamentale puisque les gouvernants étatiques se donnent a la fois comme sujets de Droit international et comme seuls créateurs de ce Droit" (331–334).
249. See Pulkowski, supra, 257.
250. Risse (2000), 14.
251. Cornelia Ulbert and Thomas Risse, Deliberatively Changing the Discourse: What Does Make Arguing Effective? 40 *Acta Politica* (2005), 352.
252. Habermas, *Faktizität und Geltung*, 187–207.
253. Deitelhoff, ibid.
254. See Alistair Ian Johnston, Treating International Institutions as Social Environments, 45 *International Studies Quarterly* (2001), 487–515; Deitelhoff, supra, 44.
255. In his original argument, Habermas sharply distinguished the "common lifeworld" ("*Lebenswelt*") from the "system world" ("*System*"), which is functionally differentiated through complex divisions of labour and where instrumental rationality prevails. Modern political systems (i.e. international relations) were originally conceptualised as part of the latter. In his later work, however, Habermas no longer maintains this strict separation and theorised about deliberative politics as institutionalised in the practices of modern democracies. Compare Habermas, *Theorie des kommunikativen Handelns* (1981), Vol. II, 173–269 with Habermas, *Faktizität und Geltung* (1992).

256. Pulkowski, supra, 257; by reference to Habermas, *Theorie des kommunikativen Handelns*, Vol. II, 189.
257. See Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns* (1995), 553.
258. Habermas, *Faktizität und Geltung*, 392.
259. Pulkowski, ibid.
260. Risse (2000), 15.
261. Lars Lose has argued that social integration resulting out of communicative action does not depend on "pregiven common values, but is embedded in the dialectical relationships between agents and the structures of the lifeworld as mediated by the communicative interaction. What is interesting about this concept of social integration is that it conceptualises social integration in a modern, pluralistic world where a multitude of different lifeworlds exist". See Communicative Action and the World of Diplomacy, *in* Fierke/Joergensen (Eds.), *Constructing International Relations: The Next Generation* (2001), 186–187.
262. Alexander Wendt, *Social Theory of International Politics* (1999).
263. See Wendt, supra, 145–157.
264. Ibid., 247.
265. See e.g. Kenneth Waltz, *Theory of International Politics* (1979).
266. Martin Wight, The Three Traditions in International Theory, *in* Wight/Porter (Eds.), *International Theory: The Three Traditions* (1991), 7–24.
267. Wendt (1999), 249.
268. Wendt, ibid.
269. Ian Hurd, Legitimacy and Authority in International Politics, supra (1999); see also Henkin, *How Nations Behave* (1979), 49–50.
270. See Andreas Hasenclever, Peter Mayer and Volker Rittberger, *Theories of International Regimes* (1997).
271. Wendt (1999), 250.
272. See Hedley Bull, *The Anarchical Society*, 3–21; Jon Elster, *The Cement of Society: A Study of Social Order*, 1–16.
273. Andrew Hurrell, *On Global Order*, 2.
274. Bull, supra, 3–4.
275. Robert Axelrod, *The Evolution of Cooperation* (1984).
276. Wendt (1999), 251.
277. Kenneth Waltz, *Man, the State, and War* (1959), 232.
278. Hedley Bull, *The Anarchical Society* (1977), 46–51.
279. Wendt (1999), 255.
280. Dirk Pulkowski argues that Bull's "anarchical society" might itself constitute a substitute for Habermas' common lifeworld. While the international system remains anarchic in terms of the absence of centralised authority, it could nonetheless form a "society", deriving *inter alia* from

international law: "[an international society] exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions", *in* Bull, *The Anarchical Society* (1977). See Pulkowski, supra, 260–261.

281. Ibid.
282. Daniel Deudney, Geopolitics as Theory: Historical Security as Materialism, 6 *European Journal of International Relations* (2000), 77–107.
283. Wendt (1999), 256.
284. Ibid., 257; George McCall and Jerry Simmons, *Identities and Interactions* (1978).
285. Waltz (1979), 95–97.
286. Wendt (1999), 258.
287. Kal Holsti, National Role Conceptions in the Study of Foreign Policy, 4 *International Studies Quarterly* (1970), 233–309 (243).
288. Wendt (1999), 258.
289. Schmitt (1932), supra.
290. Ibid., 260.
291. Wendt (1999), 261.
292. Richard Herrmann and Michael Fischerkeller, Beyond the Enemy Image and Spiral Model: Cognitive-Strategic Research After the Cold War, 49 *International Organization* (1995), 415–450 (426).
293. Norbert Elias, *The Civilizing Process* (1982).
294. Wendt (1999), 262.
295. See Stephen Brooks, Dueling Realisms, 51 *International Organization* (1997), 455–477.
296. Joseph Grieco, Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42 *International Organization* (1988), 485–508.
297. Wendt, ibid.
298. Wendt, supra, 263.
299. Wendt (1992), supra.
300. Lee Ross, The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, 10 *Advances in Experimental Social Psychology* (1977), 173–220.
301. Stephen Walt, The Geopolitics of Empathy, *Foreign Policy*, 27 June 2021: https://foreignpolicy.com/2021/06/27/the-geopolitics-of-empathy/.
302. See Wendt (1999), 264.
303. Thomas Schelling, *Micromotives and Macrobehavior* (1978), 99–102.
304. George Herbert Mead, *Mind, Self, and Society* (1934), 154–156.
305. Wendt (1999), 264.
306. Ibid.

307. John Herz, Idealist Internationalism and the Security Dilemma, 2 *World Politics* (1950), 157–180.
308. Piet-Hein van Eeghen, Towards a Methodology of Tendencies, 3 *Journal of Economic Methodology* (1996), 261–284.
309. Wendt (1999), 265.
310. Waltz (1959), 232.
311. Waltz (1979); Stuart Kaufman, The Fragmentation and Consolidation of International Systems, 51 *International Organization* (1997), 117–123.
312. Waltz, ibid.
313. Arnold Wolfers, *Discord and Collaboration* (1962), 26–27.
314. John Mearsheimer, The False Promise of International Institutions, supra (1994–1995), 42.
315. Robert Jervis, *Perception and Misperception in International Politics* (1976).
316. Walt, The Geopolitics of Empathy, supra.
317. Wendt (1999), 268.
318. Richard Ashley, The Geopolitics of Geopolitical Space: Toward a Critical Social Theory of International Politics, 12 *Alternatives* (1987), 403–434; Bull (1977), 184–199.
319. On sovereignty as "right", see Christian Reus-Smit, The Constitutional Structure of International Society and the Nature of Fundamental Institutions, 51 *International Organization* (1997), 555–589.
320. Wendt (1999), 279.
321. Haskell Fain, *Normative Politics and the Community of Nations* (1987), 134–160.
322. Wendt (1999), 280.
323. See supra, Chapter II.
324. Stephen Kocs, Explaining the Strategic Behavior of States: International Law as System Structure, 38 *International Studies Quarterly* (1994), 535–556.
325. Wendt, supra, 281.
326. Ibid., 282.
327. Ibid.
328. Ethan Nadelmann, Global Prohibition Regimes: The Evolution of Norms in International Society, 44 *International Organization* (1990), 479–526; Janina Dill (2015), 307–310.
329. Wendt (1999), 283.
330. Chris af Jochnick and Roger Normand, The Legitimization of Violence, 35 *Harvard ILJ* (1994), 49–95.
331. John Ruggie, Territoriality and Beyond: Problematizing Modernity in International Relations, 47 *International Organization* (1993), 162–163.

332. A survey of the evolution in the international system since 1415 revealed that those states recognised as sovereign by European states had a much higher rate of survival than those that were not. See David Strang, Anomaly and Commonplace in European Political Expansion: Realist and Institutionalist Accounts, 45 *International Organization* (1991), 143–162.
333. Wendt (1999), 285.
334. Ibid.
335. See Kai Alderson and Andrew Hurrell, *Hedley Bull on International Society* (2000).
336. Andrew Hurrell, *On Global Order*, 3.
337. Ibid., 4.
338. Wendt (1999), 297.
339. Mearsheimer, Back to the Future: Instability in Europe After the Cold War, 15 *International Security* (1990), 5–56.
340. Immanuel Kant, *Perpetual Peace* (transl. of ZUM EWIGEN FRIEDEN, reprint 2004) (1897).
341. Wendt, supra, 298.
342. Michael Williams, Identity and the Politics of Security in Europe, 4 *European Journal of International Relations* (1998), 204–225.
343. Schmitt (1932), supra.
344. Wendt (1999), 299.
345. Ibid.
346. Ibid., 300.
347. Janice Bially Mattern, The Power Politics of Identity, 7 *European Journal of International Relations* (2001), 349.
348. George Downs and Keisuke Iida, Assessing the Theoretical Case Against Collective Security, *in* Downs (Ed.), *Collective Security Beyond the Cold War* (1994), 17–39.
349. Michael Taylor, *Community, Anarchy, and Liberty* (1982), 29.
350. See e.g. Article 42(7) of the Treaty on European Union (TEU): "*If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States*".
351. Wendt (1999), 301.
352. Thomas Risse, Collective Identity in a Democratic Community: The Case of NATO, *in* Katzenstein (Ed.), *The Culture of National Security* (1996), 357–399.
353. Wendt, ibid. See e.g. Article 3 of the North Atlantic Treaty establishing NATO: "*In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective*

self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack".

354. Wendt (1999), 307.
355. See e.g. Waltz (1979).
356. Wendt, ibid.
357. John Ruggie, International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order, *in* Krasner (Ed.), *International Regimes* (1983), 195–232.
358. Wendt (1999), 308.
359. Nicholas Onuf and Frank Klink, Anarchy, Authority, Rule, 33 *International Studies Quarterly* (1989), 149–174.
360. Alexander Wendt, Collective Identity Formation and the International State, 88 *American Political Science Review* (1994), 384–396.
361. Wendt (1999), 309.
362. This is true even for structural realism, which derives its conclusions about anarchy by assuming that the actors are states and therefore armed, that they are necessarily self-interested but not in a bad, inherently aggressive way, and that their interactions are structured mainly by material forces. See Robert Powell, Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate, 48 *International Organization* (1994), 315: "[W]hat have often been taken to be the implications of anarchy do not really follow from the assumption of anarchy. Rather, these implications result from other implicit and unarticulated assumptions about the states' strategic environment".
363. Wendt, ibid.
364. Risse (2000), 16.
365. Wendt (1999), 309.
366. Ibid.
367. See Hurd, Legitimacy and Authority, supra (1999).
368. Wendt (1999), 310.
369. On the question of the inevitability of progress see Emanuel Adler and Beverly Crawford (Eds.), *Progress in Postwar International Relations* (1991).
370. See Robert Goodin, *Motivating Political Morality* (1992), 95–96.
371. Emmanuel Macron Warns Europe: NATO Is Becoming Brain-Dead, *The Economist*, 7 November 2019: https://www.economist.com/europe/2019/11/07/emmanuel-macron-warns-europe-nato-is-becoming-brain-dead.
372. Wendt, supra, 312.
373. Andrew Hurrell, *On Global Order*, 13.
374. Risse (2000), 16.
375. Ibid.

376. Erik Voeten, Outside Options and the Logic of Security Council Action, 95 *American Political Science Review* (2001), 845.
377. Ibid.
378. Michel Foucault, Politics and the Study of Discourse, *in* Burchell/Gordon/Miller (Eds.), *The Foucault Effect: Studies in Governmentability* (1991), 53–72.
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591. Thomas Franck and Edward Weisband, *World Politics: Verbal Strategy Among the Superpowers* (1971), 120–148.
592. Koh, On American Exceptionalism, supra, 1487.
593. Hurrell, *On Global Order*, 280.
594. Nye, *Soft Power*, supra.
595. Koh, On American Exceptionalism, supra, 1487.
596. Koh, *The Trump Administration and International Law*, 7.
597. Krisch (2005), 408.

CHAPTER 4

International Law and the Use of Force

The case of the use of force in international relations probably represents the hardest case to argue for any significant role of international law in regulating behaviour. Issues of war, force, self-defence and the like relate to essential security interests and it is for this reason that realism denies any significant role for international law in these areas since, in an anarchic international environment characterised by uncertainty, actors will always value actions that could ensure their own survival higher than compliance with international norms.[1] While international law has long been concerned with both resort to force and the conduct of hostilities, many foreign policy decision-makers, up to the present day, at least to a certain degree concur with the statement made at the height of the Cuban Missile Crisis in 1962 that "the law simply does not deal with such questions of ultimate power – power that comes close to the source of sovereignty."[2] War and violent conflict indeed often appear to be bereft of all norms—*inter arma silent leges*. On the other hand war, as a particular form of social conflict, its relationships to other forms of coercion, and its connection to the practices of "normal" politics, is impossible to understand outside a complex set of historically evolving norms and moral principles.[3] At least in the forms that we know it, war is an inherently normative phenomenon.[4] To presume the existence and importance of a framework of legal and social norms does not imply that power, coercion and conflict do not play a major, often dominant role in international

A. Germeaux, *The International Legal Order in Global Governance*,
https://doi.org/10.1007/978-3-031-16057-8_4

relations, but it can be argued that the way international law operates within the political realm is equally crucial to understanding the political processes than material factors or power relations.[5]

The first part of this chapter aims at retracing the evolution from the early "just war doctrine" to the prohibition of the use of force enshrined in the UN Charter, thereby illustrating the gradual shift of international law from regulating behaviour in this area to placing increasing restraints on the recourse to force. The second part then proceeds to analysing the exceptions to this prohibition, in order to illustrate how actors' interests and power politics are framed by reference to norms, in that the use of international law has become one of the central features relating to the use of force. When actors resort to force, they also rely on international law to "define and defend, argue and counter-argue, explain and rationalise their actions" in a form of "intellectualised diplomacy."[6] International law, in this perspective, is part of the effort to persuade an international audience, a form of communicative exercise and, in the words of Michael Walzer, "justifications and judgements" permeate the realm of politics on issues relating to coercive action and intervention.[7] This view of international law also demonstrates the limits of a static notion of international law as a system of norms applied to fact-situations, since it aims not only at regulating behaviour, it is also a justification for action.[8] Whereas at first glance, given international law's explicit and specific indication of behaviour in the prohibition of the use of force, the constraining role on political action appears to be preeminent, a closer look at the exceptions to the norm could reveal a different picture, of a prohibition that seems to exist on paper only, since once actors decide on the recourse to force all that is needed is a justification to cover the action in a cloak of legality.[9] Indeed, prohibition of the use of force is not an absolute norm of international law, against which every counterfactual can be judged.[10] Rather, it is a general norm, open to exceptions, which appears in the form of legal justifications for action. It is at this point that conceiving of international law as purely a set of prescriptive norms comes under strain, since the justifications occur either as expansions of existing *rights* for action (such as self-defence), or as generating new norms (such as the *responsibility* to protect).[11] International law, in this context, represents a communicative exercise, in which actors can express, scrutinise and respond to justifications, and it is through this interactive process that the "self-knowledge"[12] of international law takes shape, in terms of acceptable behaviour concerning the use of force.

1 Bringing Force Under International Law

While modern international law on the use of force essentially emerged in the seventeenth century,[13] it was heavily influenced by the "just war" tradition of Western philosophy, rooted in ancient Roman practice requiring a "just cause" for war.[14] The Roman tradition, based on objective assessments of fact, was altered significantly during the early Christian era when Augustine refined the concept of just war by focusing upon moral obligations.[15] The starting point of Augustine's teaching was the principle that only those wars were permissible which were undertaken for a just cause (*iusta causa*): "*A just war is usually described as one that atones for a wrong, such as when a nation or polity has to be punished for refusing to punish wrongs inflicted by its subjects, or to restore what has been seized unjustly.*"[16]

War was only justified by a wrong which had been committed by an adversary. It was only a means of preserving or restoring peace (*bellum geritur, ut pax acquiratur*). Peace was to be understood according to Augustine's comprehensive understanding as a state of tranquillity based upon a just order (*pax omnium rerum tranquilitas ordinis*). This conception thus contained the concept of righteous intention (*intentio recta*), without which war could not be allowed.[17] Augustine's teaching was based on the conviction that even the protagonist of a just cause could not avoid using a certain degree of force, but it also showed profound scepticism towards the necessity of war, and was concerned to direct it towards the restoration of peace.[18] Since the just war was directed as a punishment against wrongful actors, Augustine's school of thought implied a tendency to refuse the same legal position to both belligerents, as the Romans had conceded in their laws of war. He attributed a right to reparation, tribute, transfer of territory and, under certain circumstances, even complete subjugation of the vanquished to the victor of a just war.[19]

The binding formulation of Augustine's teachings was established by Thomas Aquinas. Although he did not add much in terms of substance, he acquired lasting influence through his systematic clarity and his logical terminology.[20] Aquinas summarised the basic ideas, as already conceived by Augustine, identifying three prerequisites for commencing a just war: (1) *auctoritas principis*, the authority of a sovereign who had no superior judge and was therefore compelled to identify his rights himself; (2) *iusta causa*, the just cause, which consisted in avenging and punishing wrongs (with more emphasis placed on subjective culpability than had been the

case in Augustine's doctrine); and (3) *recta intentio*, the sincere intention of advancing good or preventing evil. This last point suggests that *why* one wages war matters to the justness of the cause.[21] Aside from his focus upon intention, Aquinas argued further that it was not injury alone that gave rise to a right to war; it was injury suffered through the fault of the perpetrator. War became a form of punishment for subjective guilt—a move from war as a policy tool designed to protect interests and restore order (or Augustine's "peace"), to war as a means to punish aggressors.[22] Yet even with this move, Aquinas was not concerned primarily with justice or the theoretical value of law. He continued to be interested primarily in order: aggression breaches social order, giving rise to guilt, which must be punished through just war.[23]

Among the scholars in the Italian sphere, Niccolò Machiavelli, in his advice to the sovereign of the Florentine republic, insisted on a moral neutralisation of the exercise of power.[24] Machiavelli conceived of public authority as a means to create order within the state and to defend that order against external threats, using violence whenever necessary. He was therefore sceptical of the just war doctrine and the limits on resorting to war, arguing instead "that war is just which is necessary" and every sovereign nation may decide on the occasion for war.[25] In his latest work tracing the philosophical foundations of legal and political thought of the time, Jürgen Habermas observes an increasing differentiation between the sacral and the political around this period, of which Machiavelli is only the most extreme exemplar. The increasing secularisation of public authority entails the progressive weakening of a transcendental source for the legitimation of power. There is thus a need for a new justification for the right to resort to war, linked to the question of which new authority should replace the sacral authority that until this period served as the source of legitimacy.[26] For Habermas, guidance for social action requires cognitive, evaluative or normative elements as part of a positive legal system that is able to justify the acquisition, exercise and change of public authority. In the absence of a transcendental source, there is an increasing abstraction of political authority.[27] Deriving from Foucault's analysis of the French *ancien régime*, Habermas posits that political authority is a transient concept that changes with the gradual transformation of the personalised power of sovereigns into a legally constituted form of power. In this way, power abstracts itself from its personification in the form of a sacral ruler to a legitimation through positive law, which represents the change from

the sacral to a positive law-based legitimation of power.[28] This, in turn, constitutes the conceptual foundation of modern international law.

The late Spanish scholastics concurred with a need for reasoned decisions and were mindful of the need for restraints to just war, but did not yet fully draw the consequences of the transition from natural law to a secular positive law.[29] Francisco de Vitoria became the leading figure of the late scholastics and was increasingly concerned with the legitimacy of Spanish colonial rule. Uneasy about the violent conquest and subjugation of foreign territories in the interest of exploiting natural resources, he considered that the use of armed force and coercion should be subject to limitations, though he was hesitant to draw concrete conclusions.[30] Vitoria found in law itself the ultimate arbiter of human action, and was the first to turn towards law to ask whether a war—by contrast to Augustine's teachings—could be "just" on both sides,[31] (*bellum iustum ex utraque parte*) and to answer this question in the affirmative, even if he did indicate certain reservations about this position. Vitoria added a new element of relativity to the question when, in analysing the *iusta causa* of wars, he separated objective wrong from subjective guilt. He asserted that it was possible for one of the belligerents objectively to commit a wrong without subjectively being charged as guilty. This could occur if the belligerent was in "invincible ignorance" (*ignorantia invincibilis*), he would fight *iusto per accidens*, even if he did not actually have a just cause.[32] This belligerent would be like someone who, following his opinion as based on probability, initiated an erroneous legal procedure.[33] A war conducted against such an adversary could not be a punitive war because nobody was subjectively guilty. It could only aim at restoring legality. However, in Vitoria's opinion such a war also had a *iusta causa* and was consequently a just war.[34] The idea that war was comparable to a lawsuit, where both belligerents appeared in the position of equal parties and aimed to sustain a claim that they considered justified, leads us to the view of the classical period of the law of nations. According to these views, both belligerent parties were in an equal position; this was the "non-discriminating concept of war".[35] The problem with such an approach is that it does away with objective constraints on war, given that one belligerent's subjective belief in the justness of the cause for resorting to war is sufficient, notwithstanding whether her cause was objectively just.[36] Franciso Suárez, one of Vitoria's successors among the late scholastics, realised the problem with considering all parties to a conflict as acting upon a permissible just cause based on each actor's subjective belief about

the justness of her own cause, but found no solution to adjudicating the competing claims of sovereigns convinced of the necessity to resort to war.[37]

The late scholastics views were further developed by Alberico Gentili who, in conformity with the traditional doctrine, started from the assumption that defensive wars were always lawful per se and that the problem of the just war was restricted to an offensive aggressive war.[38] Like Vitoria, however, he assumed that an aggressive war could be subjectively just on both sides—namely in those cases in respect of which Vitoria had spoken of an "*ignorantia invincibilis et manifesta*",[39] Gentili also could not solve the problem of competing subjective claims. If it was doubtful which of the parties was right, neither party could be charged with being wrong. Gentili did go even further in his conclusions, in that he declared that it was possible that a war could objectively be just on both sides.[40] By contrast to mediaeval authors, he not only recognised the existence of just wars aimed at atoning a wrong, but also just wars aimed at the enforcement of a disputed legal claim. Wars of the first kind could be compared with a criminal procedure, whereas wars of the second kind were similar to a civil one. The rights of belligerency had to be conceded to both disputants, just as procedural law had to be applied equally and impartially to both the parties in litigation.[41]

Hugo Grotius, understanding the weaknesses in Vitoria and Gentili's arguments, moved the framework into a form that continues to shape debates today.[42] Grotius defined the *iusta cause* of a war in the same way as his predecessors had defined it: the just causes of war were, in his view, defence, recuperation of property and punishment.[43] However, Grotius did not consider that the three causes for a just war carried equal weight. He focused his attention on crime as a cause of war, and punishment as justification. The question of whether war could be just on both sides was answered by Grotius in conformity with the traditional doctrine: objectively the just cause could reside only on one side.[44] However, he also conceded that each party could believe, in good faith, in the justice of the cause for which they were fighting. Nor did he stop there: he further affirmed that a war could be "just" on both sides, as long as this expression was understood in terms of its legal effects ("*quod effectus quosdam iuris*").[45] In distinction to Gentili, however, Grotius argued that the cause for war must be objectively just, not merely subjectively in the mind of the actor deciding to use force.[46] Grotius equalled the just cause in war to the lawful cause necessary to launch a civil lawsuit, thereby

establishing clearly that a belligerent actor had to meet a burden of proof on the balance of probability that its cause was just, thereby endowing the just war doctrine with credible constraints. This standard was meant to be demanding; Grotius said that the just cause had to be "perfectly evident".[47] Factors to be evaluated included whether the belligerent was acting in defence against an injury, actual or immediately threatened, not merely anticipated, or whether the war was for the recovery of what was legally due. For Grotius, the punishment of a wrong was a just cause for war, so he reintegrated the interest-based and moral accounts of the earlier just war tradition.[48]

The Grotian version of just war is thus not a presumption against war per se, but rather a "presumption against an injustice focused on the need for responsible use of force in response to wrongdoing."[49] Grotius further articulated precautionary elements: if the justness of a cause was in doubt, war should not be pursued, and if success could not reasonably be anticipated, war could not be just, as the harms would outweigh the benefits.[50] The Grotian argument, in its emphasis on reasoned decisions regarding the legal requirement to resort to war, can be said to have heralded a change in the expectations of actors since the enforcement of a legal right needs to be distinguished from violence as the result of a divine revelation of what the law requires. This established the foundations of the process leading to the Westphalian system, ushering in a secularised legal order with the first attempt at international organisation.[51] The Peace of Westphalia did, however, already contain elements for a new challenge on the legal restraints to use force, as the establishment of equal, sovereign states implies that these actors are each endowed with interests, which may be conflicting and thereby create renewed incentives for war.[52]

In his work on *Just and Unjust Wars*, Michael Walzer connects the just war tradition to what he calls a "legalist paradigm", most clearly set forth in the UN Charter.[53] It is assumed that there exists an international society, governed by a set of laws establishing the rights of its members, especially the rights of territorial integrity and political independence. Any use of force by one actor against the territorial integrity and political independence of another is *prima facie* aggression, a criminal act.[54] Only specific exceptions to the prohibition on the use of force are allowed.

1.1 The Rise and Fall of the League of Nations

Up to the early twentieth century, however, force was largely unregulated in the international arena, and actors scarcely held strictly to the just war doctrine.[55] It took until the Second Hague Peace Conference in 1907 to reach agreement on the first multilateral treaty outlawing the use of force for a particular class of disputes, collection of contract debts.[56] And it was only after the end of the First World War that the modern antecedents of the current prohibition on the use of force were elaborated, the first one, following the Versailles Conference, being the 1919 Covenant of the League of Nations.[57] Article 12 of the Covenant provided for a general restriction on the automatic right to resort to war:

> The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.

While this seemed to indicate a clear limitation on the right to wage war, the Covenant complemented Article 12 with other provisions, especially Article 16, providing for the use of military force in response to unlawful resort to war, and Article 10, the commitment "to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League."[58] Certain delegations to the Versailles Conference, and notably the United States, perceived this provision as an unqualified acquiescence to use force on behalf of the League, independently of whether the coercive action coincided with their interests.[59] Since the United States Senate would refuse to ratify an agreement that implied a standing consent to use armed force, the United States was unable to become a member of the League.[60] The United States were quite amenable to the general aim of the League though, and following the Senate's refusal to ratify the treaty establishing the League of Nations, it explored other avenues to bear upon the legal developments taking place.[61] Then United States Secretary of State, Frank Kellogg, joined with his French counterpart, Aristide Briand, to promote a general prohibition on the use of force—something even beyond the Covenant of the League, which only called for delay and attempts at peaceful settlement. Parties to the 1928 treaty (Kellogg-Briand Pact) renounced war as an instrument of national policy and committed themselves to seeking the peaceful

settlement for disputes.[62] The Pact did not, however, eliminate the right to using force in self-defence, nor was it clear whether it prohibited the use of force for the enforcement of legal rights.[63] Many actors therefore considered that the right to use force in self-defence or to enforce legal rights remained intact, especially with regard to armed reprisals. In the *Naulilaa* arbitration, a case that arose before the adoption of the Pact, but was decided in 1928, in the light of the new developments prohibiting war, it was held that armed reprisals to enforce legal rights continued to be a lawful form of enforcement, when strict procedures were followed: "They are limited by the experiences of humanity and the rules of good faith applicable in relations between state and state. They would be illegal if a preliminary act contrary to the law of nations had not furnished a reason for them."[64] Nevertheless, as Ian Brownlie has pointed out, after the adoption of the Kellogg-Briand Pact in the same year as the *Naulilaa* arbitration, the use of armed reprisals practically ended.[65]

Taken together, the Covenant of the League of Nations and the Kellogg-Briand Pact have been said to herald a moment of "high moral absolutism in international relations."[66] Despite this achievement, however, the substantive contribution and fundamental relevance of those treaties came under increasing scepticism,[67] as events unfolded in Europe and further afield—E. H. Carr's "Twenty Years' Crisis"—towards the end of the inter-war period, international law increasingly came to be regarded as "something of an epiphenomenon, dependent on power and therefore subject to short-term change at the will of power-applying states."[68] This view corresponds to the realist theories that flourished after World War II and which defined the relationship between law and politics as one where the former is epiphenomenal to the latter in issues relating to the use of armed force.[69] The interpretation, however, is underpinned by a generalised assumption concerning the application of power as a "force of nature" that cannot be tamed through international law.[70] Part of this assumption draws from the perceived failure of international law to present itself as a countervailing—let alone prevailing—force to restrain power and political action. According to this view, the behavioural norms contained in the Covenant and the Pact were practically irrelevant to actors' decisions on their course of action since there were no sanctions in place to deter them.[71] In short: the Covenant and the Pact are not relevant because they do not provide for compulsory sanctions. This assumption, however, sits uneasy with international law even when it comes to the use of force.[72] We have already seen that the law equals

sanctions approach is short sighted, but even if one were to adopt this view, then these treaties do still share the same characteristics as all international law; it can be reasonably contended that the ontological question of whether international law is "law" has been settled in the affirmative.[73] It is thus necessary to expand one's view on the issue beyond the question of sanctions to account for what ultimately came to be seen as the failure of the Covenant and the Pact, or in the words of Thomas Franck, to consider the "non-coercive factors in understanding the phenomenon of global obligation and rule conformity."[74]

1.2 Restraining Force Under the UN Charter

We should recall here that the extent of participation in the League of Nations remained limited and its Covenant was affected by inadequacies and incoherencies of formulation. Article 10 of the Covenant, for example, qualified the right to resort to armed force, but was criticised for being "an abstract provision, which lent itself to more than one interpretation."[75] Although the Kellogg-Briand Pact enjoyed a higher degree of support than the Covenant, its formulations—which condemned recourse to "war" for the "solution of international controversies" and declared the renunciation of war "as an instrument of national policy"—likewise meant that it was only a matter of time before the Pact became the subject of competing and often irreconcilable interpretations.[76] Even read alongside other provisions of the Covenant, the Pact still contained legal loopholes for actors to exploit in asserting the right to use force.[77] The term "war" carries a range of meanings for a range of different purposes,[78] but it was its technical definition whereby wars could only begin and end through the formal process of declarations and peace treaties that took hold in interpretative practices, which in turn would undermine the objective of the treaty.[79] As early as 1931, following the Japanese invasion of the Chinese province of Manchuria,[80] neither actor admitted the existence of a state of war. Both relied on a strict interpretation of the term "war" in the technical sense.[81] Since neither issued a declaration of war, no state of war in the legal sense existed between Japan and China, and accordingly the situation remained beyond the scope of the Pact. The endorsement of this narrow concept of war may indicate that international law in practice is subjected to political aims and processes.[82] Legal processes, however, can shape politics itself. Taking the rationales given for the respective positions in the Manchuria case, the political considerations motivating

the interpretations were themselves drawn from legal considerations. In rationalist terms, in the case of Japan the reputation among the members of the League of Nations, and in the case of China, an interest in avoiding the effects of neutrality laws on third parties that could disrupt trade flows.[83] This, in turn, raises the question of whether "legitimising or criticising state behaviour is not a matter of applying formally neutral rules" to specific situations, but "depends"—or should depend—"on what one regards as politically right, or just."[84]

This consequentialist argument would entail that any political statement could constitute a valid act of interpretation, that anything can be claimed and said, therefore international law were "singularly useless as a means for justifying or criticising international behaviour".[85] The Kellogg-Briand Pact, however, suffered not only from the ambiguous interpretation of the term "war" in international law, but perhaps even more from the ambivalent nature of the political commitment to renounce to war at that time.[86] Fifty years later, by contrast, the *Nicaragua* case brought before the ICJ in 1984 yielded a very different outcome. In 1946, the United States had submitted to the Court its Declaration pursuant to the Optional Clause recognising the compulsory jurisdiction of the ICJ,[87] to which the United States appended a reservation excluding from the Court's jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[88] In legal terms, this reservation provided the United States with a powerful argument to plead for inadmissibility of the case in the jurisdiction stage of the proceedings without even having to enter the merits phase of the litigation. The legal argumentation of the United States before the Court, however, was not framed in terms of the reservation, and all other defences left the key jurisdictional questions up to the Court, which rejected them,[89] and the United States went on to lose both on jurisdiction and eventually also on the merits.[90] While this outcome might appear surprising at first, it is worth recalling Thomas Franck's question: "What lawyer would want to stand before the fifteen judges of the Court and argue that the US bombing of Nicaraguan harbours was a domestic matter?"[91] The fact that no lawyer was prepared to put the reservation to the test in this case has been described as evidence that the determinacy of law sets limits to what can legitimately be argued in the international arena. Franck links the determinacy of legal norms to their narrowness in accommodating arguments purported to be based on

them. Norms that circumscribe the range of what can be perceived as reasonable legal arguments are said to have determinacy, which in turn confers legitimacy and induces towards compliance. There is an expectation in the international realm that legitimate expectations are complied with, in line with *pacta sunt servanda*, and acting to the contrary is seen as unfairness. In general, actors are therefore reluctant to incur the discredit that unfair conduct would entail.[92]

This brings us to the contemporary prohibition of the use of force contained in the UN Charter.[93] Preparations to replace the League of Nations began as early as 1939, and what finally emerged at the San Francisco Conference in 1945 was in many ways based on the Covenant and the Pact, but with important differences. In order to avoid the shortcomings of the Kellogg-Briand Pact, the Charter places a comprehensive interdiction on the use of force in Article 2 (4):

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2 (4) thereby goes further than either the Covenant or the Pact in that it more categorically excludes the right to use armed force even to enforce most legal rights.[94] Under the Charter, resort to armed force is only lawful according to the exceptions explicitly provided for in the text: self-defence in response to an unlawful armed attack (Article 51) and as part of a collective force under the authority of the UN Security Council (Chapter VII of the Charter). The formulation of Article 2 (4) has been deemed to be open to various interpretative opportunities,[95] but despite these openings the only restriction to the meaning of the provision that has become accepted is the limitation of the meaning of "force" to "armed force".[96] The core of the provision has also held up against developments such as cyber operations that could not have been anticipated at the time the UN Charter was drafted. The fact that Article 2 (4) covers only "armed" force does not restrict the prohibition to acts involving kinetic force, and the ICJ had recognised in the *Nicaragua* case that more indirect actions, such as the training or arming of insurgents, could amount to a use of force.[97] The Court had also stated in its advisory opinion on *Nuclear Weapons* that the prohibition on the use of force applies "regardless of the weapons involved".[98] Whether a

cyber operation amounts to a use of force, then, depends on the effects of the action, not the means with which it is conducted. Evaluating the effects of a cyber operation is not too difficult in the presence of physical damage or casualties, but becomes more complicated in the case of "invisible" consequences, such as degradation of networks and communications infrastructure. These difficulties did not impede the progressive development of international law, though. Rule 69 of the Tallinn Manual 2.0 uses the scale and effect of cyber attacks as criteria for the use of force, and posits the "severity, immediacy, directness, measurability, military character, state involvement, and presumptive legality of international conduct" as additional elements in case of non-physical damage.[99]

This signals a major change of circumstances, in terms of both the formulation of the norm itself and the international political realm, which has impacted upon the norm's application and interpretation. Attempts to deconstruct the norm by its various elements, an endeavour aimed at impeding the behavioural impact of the norm, have not been met with success.[100] In 1949, the United Kingdom argued before the ICJ in the *Corfu Channel Case* that its actions in Albanian territorial waters had "threatened neither the territorial integrity nor the political independence of Albania", but the Court rejected this restrictive interpretation.[101] In 1999, Belgium argued before the ICJ that the aerial campaign by NATO against Serbia in the Kosovo intervention was "an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State",[102] but this argument was again not taken up by the Court or other parties in the case.

Since the adoption of the UN Charter, there have been analyses of the state of international relations concluding that, effectively, there are no norms restricting the use of armed force. In 1970, twenty-five years after the adoption of the UN Charter, Thomas Franck concluded that the Charter's core provision—the prohibition on the use of armed force in Article 2 (4)—was "dead".[103] His analysis was contingent upon the political realities during the period of détente among the United States and the former USSR, and he would not go as far as to argue that the world had reverted to a condition in which there was no prohibition on the use of force. Rather, Frank described the world emerging from the "ashes of Article 2 (4)" as a "world of peacefully co-existing, super-Power-dominated regional spheres […] a world in which the threat or use of violence by super-Powers within their own spheres will largely

displace the threat or use of violence among super-Powers."[104] This view was, however, quickly contested. Replying to Franck, Louis Henkin did not dispute that instances of recourse to armed force in violation of the UN Charter had occurred. However, while these uses of force constituted indeed violations of international law, this did not do away with the norm-prohibiting force. In the words of Henkin: "The occasions and the causes for war remain. What has become obsolete is the notion that nations are as free to indulge in it as ever and the death of that notion is accepted in the Charter."[105] Henkin rejected Frank's advocacy of a different normative order and his view was vindicated by the ICJ in 1986 when the Court found that the United States had violated international law in using force against Nicaragua in the absence of an armed attack by Nicaragua. Legal norms have counterfactual validity, not merely serving to guide action but also to judge behaviour and the Court held that despite other instances of unlawful use of force following the adoption of the UN Charter, the prohibition on force was still valid international law.[106] Article 2 (4) had moved beyond treaty law to customary law, and the Court held that it now constitutes a *jus cogens* norm.[107] The Court further explained that a norm remains viable in spite of occasional violations depending on whether the international community still manifested acceptance of the norm, and here it is significant that for the most part actors have not simply disregarded the norm, but have instead chosen to qualify their actions in terms of exceptions available under international law.

> If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to the exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[108]

While the argument that the Charter provisions have lost their relevance due to a form of *clausula rebus sic stantibus*[109] is revived periodically, the most prominent occasion being the Iraq invasion of in 2003,[110] the adherents of such an approach fail to consider the argument of Henkin and others, who contend that it is not merely actors' actions that matter, but also the justifications actually presented by the actors using force to defend their behaviour.[111] In the vast majority of cases, actors resorting to the use of force in apparent violation of Article 2 (4) UN Charter have not

contested the existence of the rule, nor have they advanced the creation of new rights or a permission to act outside international law, rather they made efforts to validate their behaviour by asserting legal justifications of exceptions such as self-defence or intervention by invitation to claim their actions in compliance with international law.[112]

2 Self-Defence

The most important exception in the UN Charter's prohibition on the resort to force for actors acting unilaterally is self-defence. Article 51 provides that:

> 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 the measures necessary to maintain international peace and security.

2.1 Self-Defence in International Law

In the same vein as war, the term self-defence in contemporary international law has taken on a specific definition. The reference to self-defence in Article 51 refers to the right of the victim to use significant offensive military force on the territory of another actor legally responsible for the attack for the purpose of defence.[113] The victim may do more than merely stop an ongoing attack as long as its actions are necessary and proportional to the attack. In order to assure its future security, it may use force to degrade the attacker's offensive military capability and infringe upon its territory. The events allowing for self-defence therefore need to fulfil a significant threshold, since the response in self-defence may permissibly involve consequential armed force.[114] The large prerogatives of the defending actor are one of the reasons for the temptation to justify use of force as an act of self-defence. When resorting to self-defence, actors do however still operate in situations where "the possibilities for manipulation are limited" because "whether or not people speak in good faith, they cannot just say anything they please".[115] Martti Koskenniemi has argued that international law is a rigorously formal language, since "*it is not possible to say just anything that comes to one's mind and pretend that one is making a legal argument*".[116] This formalism is observable in the

practical application of Article 2 (4) of the Charter, where the development of legal justifications for the use of force has not led to a plethora of systematic violations in the name of justifications that are manifestly factitious or unsupported by realities. Conquest and occupation today are the rarity; it seems hardly conceivable even for powerful actors to invade other territories under the pretence of self-defence.[117] Actors need to justify their behaviour before the international community and cannot act "[as] judges in their own cause", given the presence of authoritative instances "who can pronounce on the validity of claims advanced."[118]

The UN Charter deliberately affords some latitude and discretion as to whether to activate the right to self-defence. That actors form their own interpretations and make legal claims before other actors and international organisations is not, in and of itself, a new feature of international relations—nor is it an innovative development pertaining to the use of force.[119] This practice has been witnessed on many occasions, such as self-defence as justification for armed intervention to rescue nationals abroad,[120] the argument that attacks by non-state actors trigger the right to self-defence,[121] up to the claims for the existence of a right to pre-emptive self-defence in resorting to the use of force.[122] Actors notably raise arguments and counterarguments as the result of situations that could not have been predicted at the time Article 51 was drafted. While clear rules guidance is desirable, the evolving nature of international life requires norms to be necessarily general and therefore open to continuing interpretation and subject to fresh perceptions according to the facts of the time.[123]

The legal consideration surrounding the use of unmanned aerial vehicles ("drones") is one instance of the existing rules being adapted to fit new situations. Since drone strikes involve, by definition, the use of force, their justification, outside of an armed conflict, necessarily entails the exceptions to the recourse to force under the UN Charter. The only exception that could be applicable for drone strikes outside of an existing conflict would be the narrow case of self-defence in response to an "armed attack". According to the ICJ, such an attack must be of certain gravity, and the response (in form of the drone strike) both necessary and proportional to the initial attack.[124] Actors having recourse to drone strikes have therefore made sure to envelop their actions into arguments about legitimate self-defence against attacks of sufficient gravity and attributable to the party they are claiming to target in a necessary and proportional fashion.

Things get even more complicated if one considers the deliberations concerning scenarios that may only fully arise in the future, such as the use of space for military purposes. The current legal framework is essentially concerned with the use of space for peaceful purposes, as evidenced most prominently with the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.[125] The only provision of the 1967 space treaty explicitly referring to military space activities is its Article IV, which states the principle of the use of space for peaceful purposes and notably prohibits the "establishment of military bases, installations and fortifications, the testing of any kind of weapons and the conduct of military manoeuvres on celestial bodies". This does not amount to a blanket prohibition of military activities in space, though, and actors such as NATO consider that outer space should be treated similar to the high seas regime in the UN Convention on the Law of the Sea.[126] While Article 88 of that convention also reserves the high seas for peaceful purposes,[127] this has generally been understood as permitting actors to operate for legitimate military proposes, including exercising their right to self-defence under the UN Charter.[128] According to such an interpretation, military space activities could therefore amount to an "armed attack" to, from or in space, within the meaning of Article 51, and consequently entitle the actor that is the victim of the attack to assert its right to individual or collective self-defence in response.[129] With international law governing this domain still in flux, initiatives such as the Woomera Manual on the International Law of Military Space Operations aim at clarifying and articulating more objectively the international law applying to such operations.[130]

While this adaptive approach may be seen as reflecting a vision of international law as epiphenomenal to the powerful actors, it is by no means assured that other actors will favourably receive the claims made by individual actors in defence of their actions, and there are limits on what can be reasonably used as legal justification. The clearest restriction on the lawful use of force in self-defence is Article 51's requirement that an armed attack occur before resort to force. It creates a requirement open to objective testing, so it has become particularly difficult to argue that it need not be complied with. Nevertheless, arguments have been made to find ways to circumvent the restrictive wording of Article 51.[131]

2.2 *Pre-emptive Self-Defence?*

The apparently clear text of Article 51 appears more complex once one begins to consider whether or not the right to fend off an attack can be extended to a right to prevent an armed attack—in other words, is there a norm of anticipatory or even pre-emptive self-defence? Advocates of anticipatory action usually rely on customary law resulting from the 1842 correspondence between the United States and the United Kingdom over the scuttling of the ship *Caroline* in 1837 by British forces over Niagara Falls.[132] They cite the incident for the proposition that an actor facing an imminent threat may use force, even before an armed attack has occurred, as long as the actions are proportional to the threat:

> Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation."[133]

The challenge is to agree on when such an imminent threat actually constitutes an armed attack in the sense of Article 51. Some instances may be uncontroversial, such as anticipatory self-defence against missiles that have been launched, but have not yet struck.[134] Moving along the scale from anticipatory to pre-emptive action, things become incrementally more difficult. The mere placement of offensive military capabilities in a context of high political tension, such as during the Cuban missile crisis and more recently along the border between Belarus, Russia and Ukraine or, hypothetically, during heightened tensions in the strait of Taiwan, is a rather ambiguous case.[135] It is even more so for the mere development of capacities, as in the case of the Iranian nuclear programme.[136] The further one moves from an actual attack to a threat that has not yet materialised, the less likely it is that the norm can be used as justification for action.[137]

The practice of drone strikes has generated a further complication with regard to the imminence requirement. The United States, for instance, has justified a large number of such acts as self-defence against either an ongoing armed attack from non-state actors or, such as in the January 2020 drone strike targeting the commander of Iran's Quds Force, against future armed attacks that were imminent.[138] The problem with the pre-emptive self-defence argument in cases where future attacks may be

plausible, though not clearly foreseeable, is that the imminence requirement is stretched to its utmost limits and it becomes near impossible to adequately assess the necessity and proportionality requirements. Drone strikes carried out under the vague public justification (which according to the ICJ is the only relevant justification) that the targeted person "*was plotting imminent and sinister attacks […] but we caught him in the act and terminated him*" are of rather dubious compatibility with international law.[139] The peril with such attempts at legal justification is that they open a path to escalation by undermining the rules framing the use of force. In the above-mentioned 2020 episode, Iran could well have justified its own response to the drone strike as acting against any future such acts that it considered unlawful and imminent. While Iran and the United States framed their justification in terms of international law, actors reinterpreting norms according to their circumstantial interests incur the risk of undermining the authority of those same norms they might want to rely on in the future.[140] The United States, mindful of this risk, therefore undertook efforts to formalise the legal and policy frameworks it applies to its use of military force and security operations, with the aim of establishing their continued compatibility with current international law.[141]

2.3 The Determination of the 'Armed Attack' Requirement

Another issue concerning the scope of self-defence relates to debates over the intensity of an attack that is required for the measures to be in conformity with international law.[142] The ICJ held in the 2003 *Oil Platforms* case that, in order to exercise the right to individual self-defence, it is necessary to establish that the attacks "were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force".[143] Whereas the ICRC in its commentary to Common Article 2 of the Geneva Conventions states that "there is no requirement that the use of armed force between the Parties reach a certain level of intensity before it can be said that an armed conflict exists",[144] the ICJ maintains that for the purpose of self-defence it is "necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms".[145] One legal implication of this approach is that the victim of an illegal use of force that does not rise to the level of an armed attack is limited to responding by non-coercive

countermeasures. This limitation, which follows from the general understanding that armed reprisals are no longer permitted in international law, has been criticised as the intensity requirement would appear to create a loophole in the law of self-defence, depriving actors of a valid justification for legitimate responses to attacks below the gravity threshold.[146] The determination of this gravity threshold is likely to become even more complicated in the future with the increasing prevalence of hybrid or cyber attacks. The nature of cyber warfare entails the absence of clearly detectable kinetic force generates a realm of uncertainty as to when events amounting to an armed attack might have occurred and what would constitute a necessary and proportionate response to such actions. The difficulties in determining the armed attack requirement are particularly acute in the cyber realm since the effects of the act might not be immediately visible. While efforts to clarify international law applicable in cyberspace are ongoing, such as Rule 71 of the Tallinn Manual, the incremental nature of this process entails that a certain degree of indeterminacy is likely to subsist for some time in the future.[147]

The law governing activities in space presents an analogous situation. As with cyber warfare, there are currently no authoritative criteria when an operation to, from or in outer space would amount to the gravity of an armed attack against which self-defence is lawfully available.[148] Future scenarios could even combine space and cyber aspects, since a cyber attack incapacitating one or a constellation of satellites could potentially result in the same effects as the physical destruction of those space objects through kinetic force.

Although, reactions to completed, small-scale attacks are often difficult to interpret as anything but retaliatory, actors have nonetheless preferred to justify military responses as self-defence.[149] One argument is that a series of small attacks, even if none reaches the gravity of an armed attack individually, can be assessed cumulatively as constituting an armed attack that justifies forcible self-defence measures.[150] This "accumulation of events" doctrine has been used on several occasions by the United States and Israel, notably to justify limited armed responses to repeated border incursions,[151] it is also increasingly being examined in the context of cyber operations. The jurisprudence of the ICJ offers support for the claim that several smaller attacks are in fact an ongoing armed attack, against which self-defence is available.[152] The question of aggregation of the effects caused by multiple acts not individually amounting to an armed attack risks becoming most acute with the phenomenon of cyber

operations, whether conducted by states or non-state actors. These attacks might not only target military objectives, but might as well be directed against economic sectors or civilian infrastructure, potentially with devastating effects. The accumulation of such attacks could therefore constitute a violation of the international legal rights of the target state, notably its sovereignty, and amount to the gravity threshold that gives rise to the right to self-defence.[153] Some actors have therefore started to articulate their position on the cumulative effects of cyber operations. At the 2021 NATO Summit, the Allies stated that "the impact of significant malicious cumulative cyber activities might, in certain circumstances, be considered as amounting to an armed attack."[154] The Tallinn Manual 2.0 on the international law applicable to cyber operations took a similar view in "treating [cumulative] incidents as a composite armed attack", as did France in considering that cyber attacks "which do not reach the threshold of an armed attack when taken in isolation could be categorised as such if the accumulation of their effects reaches a sufficient threshold of gravity".[155] A similar situation might, again, develop regarding space operations. Here as well, it is conceivable that an individual act to incapacitate, for instance, a satellite would not amount to the gravity threshold of an armed attack, but the iteration of such acts could well generate aggregate effects susceptible to trigger the right to necessary and proportionate self-defence to put an end to the armed attack.

A more difficult issue is whether an attack by non-state actors such as terrorists can constitute an armed attack, thus allowing for lawful reactions in self-defence. At the time of the San Francisco conference, the Charter framework was drafted upon the assumption of direct action by states[156] and the UN Charter superseded customary international law relating to self-defence. Given that the language of the Charter does not refer to "state" action specifically, and since the right to self-defence is "inherent", others have, however, contended that the pre-dating customary law under the Caroline doctrine remains valid.[157] In the *Caroline* case, non-state actors perpetrated the initial attack; it became therefore plausible to argue that the Charter, read together with pre-existing custom, would allow for the initial attack, justifying self-defence, to be carried out by non-state actors.[158] In its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall In the Occupied Palestinian Territory*, the ICJ notes that Article 51 recognises an "inherent right of self-defence in case of armed attack by one State against another State", but notes that "Israel does not claim that the attacks against it are imputable to a foreign State"

and finds Article 51 to be of "no relevance" in the case.[159] However, the Court seems to have based its finding in this particular instance on the fact that "Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory", and consequently Israel could not invoke claims relating to self-defence.[160] The past two decades appear to have engaged a shifting perception about the relevance of non-state actor attacks for the right to self-defence. In that period, the Security Council has adopted numerous resolutions qualifying terrorist acts by non-state actors as a threat to international peace and security and enabling significant measures under Chapter VII, such as in the case of Al-Qaida, ISIS and terrorist groups in northern Africa.[161] In parallel, actors have increasingly invoked and become more likely to accept assertions of a right to self-defence against non-state actors, although the conformity of that practice with international law has not been finally established.[162] Instances notably include actions taken in response to non-state actors Syria, Iraq, Libya and Yemen. For instance, when requesting international efforts to combat ISIS' presence in Syria, the government of Iraq invoked the right to collective self-defence in its letter to the Security Council in 2014. UN members involved in coalition attacks against ISIS targets in Syria have subsequently written to the Security Council informing it of impending attacks and likewise cited Article 51 in of the Charter in asserting "necessary and proportionate" collective self-defence. This increasing tendency indicates a recognition that armed attacks against states may be carried out by non-state actors, thus triggering the right to use force in self-defence against individuals or entities not affiliated with a particular state.

The attribution of attacks carried out by non-state actors remains, however, a more problematic issue. While the above examples are indeed devoid of a link to a particular state actor, situations in the realm of cyber attacks might not be so clear. Discussions about the existence of a "due diligence" obligation under international law for states to prevent, to the extent feasible, cyber operations from or through their territory have so far been inconclusive.[163] Were such a due diligence obligation to be established, states would have to ensure that no actor or group conduct from their territory hostile cyber operations entailing adverse consequences for the legal rights of third states, whether or not such actors were acting under the instructions or acquiescence of the territorial state. Agreement in the United Nations' Group of Governmental Experts (GGE) on Cyber

has thus far been elusive on this point, though a due diligence requirement can increasingly be considered to form part of voluntary norms for the responsible behaviour in cyberspace. In case a cyberattack was linked to an armed conflict or amounts to the gravity of an armed attack, it could then trigger the right to self-defence against the perpetrators, respectively, the state harbouring them without fulfilling its due diligence obligations.[164]

2.4 Self-Defence Beyond the Charter Paradigm?

The question then is whether the developments in international law and the practice of international actors concerning the exception of self-defence to the prohibition on the use of force have affected the norms' effectiveness. International relations theory generally considers that security constitutes one of actors' most essential interests, overriding other conflicting considerations. In realist terms, when actors are faced with an acute and imminent threat, international law will not constrain action.[165] These types of arguments have surfaced in the context of pre-emptive self-defence to provide a moral justification for the alleged preventative use of force.[166] Bowett has argued in justifying the actions of the United Kingdom in the 1956 Suez crisis that "[n]o state can be expected to await an initial attack, which in the present state of armaments, may well destroy the state's capability for further resistance and so jeopardise its very existence".[167] It would follow from this view that self-defence is to accommodate anticipatory actions, but over-stretching the exception in turn risks undermining the underlying norm.[168] Customary international law recognised this risk, and while extending the margin of appreciation surrounding the right to self-defence, it nonetheless excluded entirely self-serving justifications. Anticipatory self-defence according to the *Caroline* doctrine is limited by the "instant necessity" requirement and "leaving no choice of means and no moment for deliberation". The implied conditions of necessity and proportionality are contextual and thus adaptable to the changing state of international relations. Even when faced with new threats such as international terrorism or the proliferation of nuclear weapons and their means of delivery, the requirement that actors are left with "no choice of means and no moment for deliberation" in the face of an imminent attack remains as adequate to delimit unilateral military responses to security threats as it was when the phrase was drafted in 1837.[169] This norm is applicable to all actors, together with the

requirements of imminence, necessity and proportionality. By contrast, attempts at extending its scope to a generalised right to "pre-emptive self-defence" is predicated upon what Grotius already cautioned: unilateral assessments as to when pre-emption is justified to protect essential security interests.[170]

That broadly conceived provision, subject to entirely unilateral assessment of what constitutes a "sufficient threat", becomes a self-constructed permission to act. Actors would effectively end up asserting the international legality of their own behaviour. Thomas Frank already highlighted the inherent limitation of this exceptionalist claim.[171] Admitting the applicability of an all-encompassing norm on the pre-emption of vague "threats" would undermine the international legal framework on the use of force, and consequently preclude even the powerful actors from using the norm when it suits their interest.[172] Michael Walzer suggests that the characterisation of another actor as a "threat" is essentially a moral claim.[173] If this possibility were generally applicable in the international system, the normative framework would collapse as actors could indiscriminately attack one another by simply claiming that the "Other" constituted a threat—it would signal a return to a generalised "logic of enmity".[174] By contrast to the circumscribed notion of anticipatory self-defence, then, the doctrine of "pre-emptive self-defence" against threats cannot guide behaviour.[175] As Abram Chayes already highlighted in the context of the Cuban Missile Crisis of 1962, the result would result in trivialising the effort at legal justification for action, given that the criteria were so indeterminate as to impede any normative guidance or ability to adequately assess the merits of an action.[176]

International law in itself cannot prevent the use of force when actors deem it to be necessary or in their essential interest to resort to coercive action.[177] Rather, these actions are assessed against the norms of international law in the process of justification. And in order for justifications to constrain actors' resort to the use of force, it is best to require that they be provided in advance, since after the event, they will usually be shaped into a form that coincides with the action as it took place.[178] Further, legal justification is distinct from political justification. The requirement of adherence to legal norms ensures that social norms, which may be contingent to the given context, must be assessed against more stringent criteria. In political decision-making, the justification for an action may often be distinct from the reasons the action was undertaken.[179] For the purposes of assessing the fit of an action

within a normative framework, however, one must focus upon justifications actually offered rather than suspected motivations.[180] Arguments of pre-emptive self-defence cannot clearly distinguish between permissible defensive measures and illegal attacks. It is for this reason that a hegemonic actor like the United States has not previously accepted the idea that any actor could unilaterally attack another in the name of pre-emptive self-defence, recognising that such reasoning could just as well serve as justification for China to assert a more aggressive posture in the South China Sea, for North Korea to attack South Korea, or for many countries in the Middle East and the Caucasus to resume hostilities.[181] It would appear that actors clearly distinguish between political statements and legal justifications, refraining from claims of pre-emption in the latter, as a perilously infinite concept.[182] What Louis Henkin already wrote in 1987 remains compelling even today, when he cautioned against the temptation of diluting and reconstructing the UN Charter in an international sphere devoid of centralised authority. Widening the scope of the exceptions to the prohibition to resort to force and thus heightening the potential for military action is a risky undertaking, and even dominant actors ultimately have no interest in undermining the very international order based on the UN Charter, implicating war and peace in the nuclear age, and which, for the United States at least, is largely of its own creation following the end of World War II and upon which it has established its very dominance.[183]

2.5 Necessity, Proportionality and the Burden of Justification

It its Nuclear Weapons advisory opinion, the ICJ held that, as a rule of customary international law, self-defence allows only for measures "which are proportional to the armed attack and necessary to respond to it".[184] In the *Oil Platforms* case, the Court then specified that the armed attack must be attributable to the actor against whom self-defence is directed, and that the counter-actions in must be necessary to respond the this attack.[185] In the case of drone strikes against certain individuals carried out under the justification of pre-emptive self-defence, it can, however, be difficult if not impossible to adequately assess the necessity requirement to prevent alleged future attacks for which there may exist reasonable indications, but that have not yet occurred. Even when actors accept, or at least tacitly acquiesce to, the self-defence argument, they may still be at odds with whether the actions taken are proportionate to the alleged attack. In responding to Israel's incursions into Lebanon in 2006 and Gaza in 2009

and 2014,[186] many of those that had accepted the self-defence argument in principle condemned Israel's action as disproportionate.[187]

Proportionality was also central to the conflict between Georgia and Russia in 2008. Initially the Georgian military deployed forces into South Ossetia in order to "neutralise" rebel forces, thereby incursing into territory under Russian control. Russia then responded with an armed intervention, which it justified with the aim of repelling the Georgian incursion and attacks against its peacekeepers, as well as protecting the ethnic Russian population in the territory.[188] A fact finding-finding mission into the events of summer 2008 mandated by the Council of Europe found that it were essentially Georgia having to be credited with starting the hostilities.[189] At an emergency meeting of the Security Council, the international response to the initially limited Russian intervention was rather muted.[190] It was only when Russian military forces quickly expanded their operation beyond South Ossetia that the reaction of the international community began to shift. At a subsequent meeting of the Security Council, most members declared this disproportionate to any threat posed by Georgia.[191] NATO Ambassadors then convened at a meeting of the North Atlantic Council, which "deplored Russia's disproportionate use of force"[192] whereas a statement of the G7 foreign ministers condemned Russia's actions and "deplore[d] Russia's excessive use of military force in Georgia".[193] In a similar vein, following the takeover of government buildings and airports in Crimea by armed militias in February 2014, Russia defended its sending of troops by pointing to a formal request for assistance of the local government and the necessity to protect the majority Russian population on the peninsula. While these arguments failed to gain traction with the international community, the initial diplomatic reaction recognised that Russia had legitimate interests in the region and merely called for Russia to take steps to decrease tensions while respecting Ukraine's territorial integrity and sovereignty.[194] Despite the assurances contained in the Budapest Memorandum of 1994,[195] it was only when it became clear that the situation was moving towards a de facto annexation of Crimea by Russia and further destabilisation of the eastern regions of Ukraine that stringent calls for Russia to halt its actions or face serious consequences such as economic sanctions, travel bans and an expulsion from the G8 were voiced.[196] The Security Council was subsequently presented with a

draft resolution (vetoed by Russia) reaffirming the sovereignty, independence, unity and territorial integrity of Ukraine and urging for a peaceful resolution of the dispute through political dialogue.[197]

The conceptual problem here is not with isolated conduct that fails to conform to norms; international law can withstand some degree of non-compliance, as is true in any legal system. The problem arises when behaviour has become so disconnected from the norm, non-compliance so widespread and unchallenged, so as to undermine the validity of the norm.[198] As the above examples have illustrated, international responses to violations can be as important as the violations themselves. Over time, and especially since the 11 September 2001 attacks, attempts have been made to stretch the self-defence exception in ways that seem not to coincide with the latitude offered by the wider international community in deviating from established norms. Although international practice may indicate some extension of the self-defence framework, such as to the lawful justification of attacks on states actively supporting terrorist activity and, to some extent, an accommodation of the "accumulation of events" doctrine, there has been no major normative shift, which seems to demonstrate the "stickiness" of the existing legal framework.[199]

The contextual analysis of the right to self-defence helps reveal the interplay of international law and politics. In terms of international law, we have seen that the actors involved, independently of their relative power or material interests, drew up detailed lines of argument elaborating their right to self-defence—rather than to a right of armed reprisal action. This appears to indicate an expression of legal conviction, or *opinio juris*, on the understanding of the scope of the right to self-defence in international law, thereby shaping the expression of politics.[200] Through the sensiblilisation of actors to changing security challenges, politics does in turn feed back into the development of international law. The dynamic of interpretations and counter-claims is an essential and necessary part of the role of international law in the contemporary international system, and the right of self-defence constitutes a means by which actors frame and communicate the merits of their cause for action.[201] When actors resort to using force and issue claims on the basis of self-defence under Article 51, they are not only doing so pursuant to a particular provision of the Charter, but as part of the system intended by the Charter, which according to Thomas Franck has "far outstripped the Kellogg Treaty in shaping state conduct after World War II, precisely because it is not a static system of norms but provides a living, growing and above all discursive system for applying [its] rules on a reasoned, principled, case-by-case basis."[202]

3 From Humanitarian Intervention to the Responsibility to Protect

Thus far, the focus of this chapter has been on an established or existing *right* to use force and on questions relating to the scope and interpretation of the right to self-defence under international law. However, the issue becomes more complicated when we turn to the issue of law-*creation* and the attempt to introduce new justifications for the use of force under international law.[203] The most prominent example of this phenomenon in recent times relates to the case of humanitarian intervention, a right not explicitly mentioned in the UN Charter, but which has been asserted in different legal justifications since the Cold War period. Upon preliminary reading, the concept of humanitarian intervention does not appear to offer much space for the relevance of international law in shaping the intervening actors' political decision-making: the absence of a formal basis in international law or of an authorisation from the Security Council under Chapter VII of the Charter did not prevent actors from intervening in number of instances which could be considered violations of the Charter's prohibition on the use of force.[204] It could be argued that these events constitute mere embodiments of the "hegemonial approach to international relations", an approach which "involves maximising the occasions when the powerful actor will obtain 'legal approval' for its actions and minimising the occasions when such an approach may be conspicuously withheld."[205] The notion of humanitarian intervention has therefore been criticised as "a practice only available to strong states or other states acting alongside the powerful."[206] These perceptions are not without merits, but one needs to distinguish between instances of actors simply casting aside international law and instances of actors deliberately attempting to introduce normative change to the system. These latter cases have been termed constructive non-compliance, "where apparent violations of international law are legitimated by the collective will of the dominant states and thus form the basis for a change in the law, rather than a violation of the law".[207]

In a decentralised system, there is no single authoritative source for normative change, and to take into account actors' respective power in shaping international law must necessarily lead to inequalities of treatment in some form or the other.[208] What matters here are the responses to acts of legal innovation, or according to the ICJ: "*Reliance by a state on a novel right or an unprecedented exception to the principle might, if*

shared in principle by other states, tend towards a modification of customary international law."[209] As part of this process, the Court emphasised that a condition for normative change was that practice would need to be accompanied by statements of legal conviction, not merely "statements of international policy".[210] It is indeed the case that actors engage in different lines of argument at one and the same time, a political track in which the practical *reasons* for an intervention are exposed and a legal track, where *justifications* for an action are articulated, and these lines of argument may or may not coincide.[211] There is an interplay of legal and political action, which, in turn, feeds back into actors' interests when deciding on the relevant course of action. Even if one would operate on the assumption that humanitarian intervention is now accommodated under international law, such a development would not equate that political considerations have been removed from the spectrum of international behaviour and that "international law *is* international relations" in indicating a clear course of action in all instances of human catastrophe.[212] The degree of latitude afforded to political action depends on the international legal norm under consideration. In the classical conception under international law, humanitarian intervention was understood as a "right", thereby comprising an element of selectivity, rather than an "obligation" requiring actors to comply by taking action. The notion of selectivity in the application of the right to humanitarian intervention is in line "*with the right-holder's sovereign discretion to decide whether or not to exercise the right in question and commit its armed forces to foreign territories and explains why it is the right of – rather than the right to – humanitarian intervention that has taken hold in practice as well as legal scholarship.*"[213] Conceiving humanitarian intervention as a right implies a certain flexibility within the decision-making process, in that it endows actors with a degree of latitude in deciding whether or not to exercise this "right" to intervention.[214]

3.1 Turning Rights into Responsibilities

At the present time, there is little evidence that a right to unilateral humanitarian intervention would have been recognised by the wider international community, nor has any new authority in this regard been created.[215] Humanitarian intervention was largely conceived of as an exceptional measure undertaken in situations of emergency and extreme

human suffering, brought somewhat uneasily under the existing international framework. When international action in response to humanitarian crises expanded in the 1990s, with a concomitant expansion in the scope and complexity of operations, it became clear that the existing political and legal concepts could not fully address the ensuing questions about legitimacy and authority. The position that an intervention for humanitarian objectives could not be in compliance with international law in the absence of an explicit authorisation by the UN Security Council might be textually pure, but is vulnerable to criticism for being overly reliant on a formalistic reading of Articles 2 (4) and 2 (7) UN Charter. In particular, the protection of territorial sovereignty at the expense of other considerations such as the protection of human populations at risk is at odds with the object and purpose of the Charter, which does include both non-intervention and the respect for human rights.[216] In addition, strict reliance on explicit Security Council authorisation would effectively shield the permanent members of the Council and their allies from any accountability for crimes committed against their own citizens. The use of force by NATO without Security Council authorisation in the 1999 Kosovo intervention did, however, lead to intense discussions.[217] The Kosovo episode exposed the fault lines that divided the international community on the issue of humanitarian intervention. The Swedish government therefore commissioned an independent commission to look into NATO's use of force. The report of that commission, chaired by the former South African judge Richard Goldstone, found that the use of force against Yugoslavia had been unlawful, but was nevertheless still "legitimate".[218] The 1994 genocide in Rwanda, where no one intervened, and the situation in Kosovo, where the legality of the intervention was contested in the international community, highlighted the problem that even when it appears morally clear that someone ought to intervene, how was one to determine who that someone should be and through which process intervention should be authorised?[219] Michael Walzer conceived the issue as a form of "imperfect duty", whereby the responsibility to act is assigned to no specific agent. It would therefore be necessary to find a solution to what Walzer termed "agency problem", of "finding a better, more reliable form of agency".[220] And even if asserting a general duty to protect on behalf of the international community could replace the imperfect duty with a clearer guidance for action, the question then is who has the responsibility or the authority to assign it?[221]

Soon after the release of the Goldstone report, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) to devise ways to improve the international community's performance in protecting populations in case of large-scale loss of life or ethnic cleansing.[222] The ICISS Report led to the concept of responsibility to protect ("R2P"), which sought to transcend the tensions between sovereignty and humanitarian intervention. In its effort to reframe the debate from a question of right to one of obligation, the commission posited a responsibility to protect particularly threatened populations.[223] The ICISS report rests on the premise that:

> Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt it, the principle of non-intervention yields to the international responsibility to protect.[224]

Accordingly, the use of force could be authorised not only to defend actors' territorial integrity and political independence, or to defuse threats to international peace and security through collective action, but also in defence of a moral claim that sovereignty is characterised—also—by a responsibility towards the welfare of people.[225] The report argued that the responsibility to protect "resides first and foremost with the state whose people are directly affected",[226] but that the latter's failure in discharging this responsibility towards its population required the international community to take preventative action through measures ranging from various forms of assistance to non-military forms of coercion. R2P was cast mainly as a responsibility to prevent, while military intervention for human protection was conceived as a last resort for extreme and exceptional cases.[227] The advent of R2P can be seen to reflect a normative change in the international system, "part of a broader shift in international legal understandings of sovereignty: away from an emphasis on the rights of states and towards a greater stress on both duties and common interests."[228] Following the unilateral military intervention against Iraq in 2003, and the ensuing divisive exchanges, the issue of R2P became absorbed by a broader debate concerning the evolution of the UN system and the role of the Security Council. In the wake of these events, the "lack of agreement amongst Member States on the proper role of the United Nations in providing collective security" induced the UN Secretary General to mandate a High-Level Panel on Threats, Challenges and

Change, to conduct, inter alia, a comprehensive review on all legal provisions concerning the use of force.[229] The High-Level Panel's report was published in 2004 and drew extensively on ICISS's recommendations.[230] The panel specifically endorsed "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising military intervention as a last resort."[231] Building on the ICISS report, the panel outlined "five basic criteria of legitimacy" (which evoke the "just war" doctrine)[232] for the Council to consider in making decisions on the use of military force, whether to deal with external threats to states' security or to address grave humanitarian crises within states: seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences.[233]

In his response to the report of the High-Level Panel, the Secretary General highlighted the question whether there is a right, or even obligation, to use force to rescue citizens from genocide or other crimes against humanity.[234] The emphasis on international crimes, rather than grave human rights violations, indicated a shift in the duty for action.[235] While the concept of R2P survived the difficult negotiations leading to the adoption of the 2005 United Nations World Summit Outcome Document, the responsibility to protect was now described as primarily a responsibility of individual states to protect their own populations; in addition, the link to international crime was made more explicit.[236] The UN membership did not take up the consistent recommendations of the ICISS, the High-Level Panel and the Secretary General, to develop criteria for intervention.[237] These adjustments seem to indicate a desire to track as closely as possible the existing legal framework shaped by the continuing power of the norms on sovereignty, non-intervention as well as the predominant role of the Security Council. By asserting that decisions on the use of force be made on a case-by-case basis without generally applicable criteria, the Outcome Document effectively does not alter the delicate political consensus around the role of the Security Council concerning the use of force.[238] The overall balance in the Outcome Document is that the legal criteria are relevant for determining if force may be used to protect populations at risk, but the considerations that affect concrete decisions whether to intervene or not are left to the political realm. This reflects Michael Walzer's argument that "the decision to intervene, whether it is local or global, whether it is made individually or collectively, is always a political decision".[239]

3.2 Implementing the Responsibility to Protect

In January 2009, the UN Secretary General released a report on *Implementing the Responsibility to Protect*, which highlighted a conceptualisation of sovereignty as responsibility and a further effort to distance the responsibility to protect from the more controversial notion of a "right" to humanitarian intervention.[240] The report underscores that "the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter", coercive military action being reserved for "extreme cases."[241] In July 2009, the General Assembly held a plenary debate, which reaffirmed the 2005 commitment contained in paragraphs 138 and 139 of the Outcome Document.[242] The General Assembly subsequently adopted a consensus resolution in September 2009 on the responsibility to protect, "taking note" of the Secretary General's report.[243] Since then, annual reports of the Secretary General have been delivered to the General Assembly, which holds a yearly informal interactive dialogue on the subject. The Security Council has made reference to the responsibility to protect in more than 40 resolutions since 2006, both thematic and country-specific. The concept of R2P is also regularly mentioned by a number of member states at the open debates held by the Security Council on protection of civilians.[244] The concept could potentially alter the structural imperatives that have long shaped international law and politics[245] and lead to a conceptual shift in actors' understanding of their role and powers.[246] The full implementation of R2P would not merely entail that states would be under the obligation to protect their population; it also implies an accountability to the wider international community if they fail to discharge this obligation. The accountability is not simply at the level of the responsibility of states concerned; it can activate a "residual" or "fall-back" responsibility of third parties to intervene, including ultimately military intervention.[247] This also implies an obligation *erga omnes*[248] on the part of other actors to act in the face of large-scale human rights abuses which amount to international crimes.[249]

The advent of R2P, however, has not been without criticism. In 2011, the Security Council invoked the responsibility to protect when it adopted resolution 1973 concerning the situation in Libya. The resolution was placed under Chapter VII and in operative paragraph 4 "authorises member states to take all necessary means" to protect civilians and civilian populated areas.[250] This language accorded significant latitude to member

states for operations aimed at preventing attacks against populations at risk. While initially the provision in the resolution allowing for the setting up of a no-fly zone over Libya was the most controversial, the discussion soon began to shift and questions started to arise as to how far the resolution permitted to use force. Once a coalition of NATO member states began enforcing the no-fly zone and using force to act against Col. Gaddafi, criticisms were voiced with increasing insistence that the actions taken under resolution 1973 outstepped the mandate that the Security Council intended to confer. Some Security Council members argued that the resolution was misused as pretence for regime change, and that the intervening actors were relying on the doctrine of R2P as an instrument to further their political aims, rather than act impartially to protect civilians.[251] This, it was claimed, demonstrated that the responsibility to protect was inherently prone to manipulation and thereby be subject to the same degree of caution than other justifications for intervention in the name of humanitarian motives. Since 2011, no further action has been authorised by the Security Council in the name of responsibility to protect, the concept having largely been confined to thematic resolutions.

This seems to demonstrate that, when there are no established norms of international law to shape decisions on intervention, political calculations will prevail, which coincides with the interest of numerous actors. Precise guidance would not eliminate political considerations or provide easy solutions, but would increase accountability in the decision-making process.[252] Given the potentially fundamental importance of the challenge to sovereignty contained in the R2P, even the incomplete implementation of the concept in the Outcome Document is nonetheless notable, as further exemplified by efforts to modify and limit the concept through its various iterations. These efforts also reflected different approaches to international law among actors. The dominant actors centred on their power position and were adamant to avoid constraints on the use of force,[253] while other actors became increasingly concerned with the R2P undermining the principle of non-intervention. Non-western approaches to international law, in particular, place greater emphasis on norms like sovereignty and the principle of non-intervention in domestic affairs. Shortly after the events in Libya, Brazil introduced a new concept called the "responsibility while preventing" into debates concerning the protection of civilians in the Security Council.[254] Specifically, the proposal contained a set of principles to serve as guidance to the international community when exercising the responsibility to protect,

notably through "enhanced Security Council procedures" to monitor and assess how resolutions are interpreted and implemented. The principles also contained strict limits on the use of force to protect civilians and aim to render accountable those using force,[255] again reflecting an emphasis on the respect of national sovereignty in the classical sense as opposed to the reinterpretation in the R2P context, as well as non-intervention. While these proposals can be seen as part of a broader discussion on the legal limits to international action to protect civilians, the concept of "responsibility while preventing" also alludes to a disagreement about the proper ends of authority in the Security Council. The proposal of a "responsibility while preventing" was put forward and examined in the General Assembly parallel to mounting criticism surrounding the correct interpretation and implementation of resolution 1973. While it can be argued that the broad heading of "all necessary measures" indeed conferred a significant latitude to the intervening actors in their actions to address the threats to civilians in Libya, other Council members insisted that the measures taken went far beyond what they conceived as an implicit understanding of the scope of the Security Council authorisation in the Libyan case.[256] The permanent members that abstained on the vote of resolution 1973, but also a number of elected members, including Brazil, became increasingly concerned that the concept of R2P was turning out to be an easy vehicle for interventionism. As they considered that the use of force by the intervening actors went significantly beyond the narrow aim of protecting civilians and opened up the path to regime change in Libya, calls for accountability for those intervening in the name of R2P grew louder without, however, translating into concrete actions.

At the tenth anniversary of the World Summit Outcome Document, the General Assembly held an informal interactive dialogue following the Secretary General's report assessing the progression of the responsibility to protect over these ten years and identifying core challenges and opportunities for implementation.[257] The Secretary General commended the increasing consensus on R2P and notably called for Security Council members to accord the political space necessary to prevent and respond to atrocity crimes, in order to put the principle into practice. A large majority of participants spoke out in favour of R2P and urged the General Assembly to reaffirm its commitment to the concept. Several actors further noted the convergence of R2P with related thematic areas and advocated for the mainstreaming of the concept within the UN system. A small number of participants, however, expressed their continued concern

with the implementation of R2P and in particular were apprehensive that the concept could be misused for wrongful military intervention.[258] This critique links back to the views mentioned at the beginning of this section that saw the advent of a responsibility to protect as manifestations of the hegemonial approach to international relations. International law, seen through this lens, would merely represent a form of language to justify interventions by the powerful actors on the territory of others. The concern also relates to the wider consequences of establishing respect for human rights as the supreme consideration that overrides traditional notions of sovereignty and territorial inviolability. Whereas the proponents of R2P advocate for action to protect civilian populations, this new approach might not necessarily contribute to reducing conflict, atrocity crimes and instability. The long arc of history points towards international law restricting the recourse to force and the promotion of international stability as more favourable to human welfare than liberal interventionism.[259]

While there is growing consensus about the notion of sovereignty as responsibility, in the thematic debates of the Security Council on the protection of civilians, R2P has in recent years been increasingly eclipsed by the notion of accountability. The moderate success of R2P partly results from the fact that "it could be used by different bodies to promote different goals", notably due to the indeterminate nature of the Outcome Document. The intervention in Libya in 2011, which ended up leaving civilian populations in the country worse off than before the Security Council decided to act, and that same Council's inability to act against a constantly deteriorating situation in the Syrian conflict have cast shadows over the R2P concept, while the flawed withdrawal from Afghanistan in the summer of 2021 has highlighted the lack of attention given to the "rebuild" aspect after an intervention.[260] Insofar as it has been received by the international community, R2P has, however, contributed to pushing actors to substantiate the claim that they are upholding certain norms and standards of governance towards their population when invoking sovereignty as a defence against external interference. Some aspects of the R2P, and in particular the "right" or "responsibility" for forceful intervention in extreme cases, continue to elude international consensus. This, however, reflects the fact that from a normative point of view, the concept is having effects on behaviour while being exposed to attempts at limiting the scope of its potential consequences.[261]

3.3 Responsibility to Protect or Duty to Prevent?

Parallel to efforts at limiting the reach of R2P, intellectual attempts were made to reshape the concept in favour of a more interventionist agenda. We have previously seen that the international framework on the use of force was depicted as inadequate to address the increasing threat posed by non-state actors.[262] Given the advent of R2P, attempts were made to link together the justification underlying R2P and rationales for action against emerging threats to dovetail the creation of new international legal rules to fit the purposes of the powerful. The limitations on the use of force contained in contemporary international law were seen as overly restrictive and accordingly, it was argued, rethinking of the international legal framework was necessary in the light of the new international security situation.[263]

The argument consisted in drawing an analogy between the large loss of life engendered by internal conflicts, as in the case of R2P, and the casualties resulting from non-state actor attacks or the use of biological, chemical or nuclear weapons.[264] This concept of a duty to act aimed at effectively transposing R2P into contexts for which the concept was not originally intended.[265] Contrary to the ICISS document, the exercise of this duty is not framed through a set of conditions.[266] The concept therefore circumvents the imminent threat requirement applicable to self-defence, an approach that, as we have seen, is rather problematic with regard to pre-emptive use of force. Further, the purported concept was not linked to concrete actions, but merely to actors' abstract profile.[267] Because such proposals contain an inherent element of arbitrariness (who is to judge whether a given actor constitutes a threat?), they are inherently vulnerable to misuse and manipulation. The danger is exemplified in the claim of some authors who "doubt whether the Charter use-of-force rules remain legally binding,"[268] and who argue "the justifications for a preventive war […] have a deep resemblance to the justifications now commonly given, and accepted, for preventive 'humanitarian' interventions."[269] They therefore risk undermining the legal restraints attached to the use of force and provide greater latitude for action to the most powerful actors. Ultimately the peril consists in a collapse of legally distinct concepts such as self-defence, protection of human rights and threats to international peace and security into one overarching concept of "threat prevention", using notions with a circumscribed meaning simply as examples of an open-ended list of dangers that can be invoked to justify action as either

defensive or protective.[270] It is with good reason that interventions are to be justified on grounds that relate to the actual problems one is seeking to alleviate.[271] International actors have invested considerable efforts to maintain the distinction between the legal frameworks on self-defence and collective security, so as to maintain the resilience of the provisions in the Charter against attempts to reshape the norms in order to fit the purposes of a select set of privileged actors by creating new interventionist rights.[272]

The unease created by such legal projects becomes more evident when projecting our perspective beyond the previously mentioned criticisms of some actors against an essentially western-led interventionism. In 2011, Russia and its allies considered the aftermath of Resolution 1973 as a misguided regime change in Libya resulting in a protracted civil war. It only took Russia a few years, however, to put its own twist on the concept of protecting populations as articulated in its vision for reframing European security.[273] The annexation of Crimea in 2014, the support of insurgents in the Donbas region from the same year and the invasion of Ukraine in 2022 have all, to some extent, been conducted under the mantle of public justifications by Russia that take inspiration from the protection of populations and human rights playbook, albeit bending them to fit new goals. The New European Security Architecture advocated by Russia is strategically framed to promote Russian interests.[274] Relying on a responsibility to protect the rights of Russian citizens abroad, this approach then illustrates the "dark side of human rights"[275] by providing a legitimation for Russia to intervene in other countries whenever the rights of ethnic Russians are allegedly infringed upon.

Further, while material inequality is a given in the international system, asserting a general provision of threat prevention undermines the principle of equality before the law. Given the absence of centralised authority in international relations, it will likely be up to the most powerful actors to invoke the legal principles used to justify the use of force, to define "good" from "bad", "dangerous" from "reputable" member of the international community, according to Thucydides' tale of the Athenians at Melos that the strong do what they can while the weak suffer as the must. The result is a selective application of international law, where decisions to act essentially remain in the political realm, unfettered by legal norms. It has been highlighted in the context of the R2P that justifying authority in terms of the capacity to protect raises new questions of legitimacy: "*Who decides what protection will mean in a particular time or*

place, how it can be realised, and which claimant to authority is able to provide it? […] To argue that the capacity to protect grounds legitimate authority is itself a normative claim. De facto authority, the capacity to protect in fact, is perceived as giving legitimacy to power only where protection itself is invested with a normative value. Differences in the nature of that underlying normative claim give rise to important differences in the project of creating institutions that can realise protection […] Which authority, representing which normative commitments and acting on behalf of which people, will have the jurisdiction to state what protection means and which claimant to authority is capable of delivering it?"[276]

In the context of Security Council practice, it has been argued that decisions are essentially political rather than legal ones.[277] This does nonetheless not equate to allowing for such decisions to be taken entirely outside the current framework of international law, for it would create significant political tensions and risk generating further resort to violence.[278] Legal norms are applied in an interactive social context where agents refer to their interpretation of the objectives and expectations of other actors with whom they interact and to past practices that circumscribe plausible interpretations, there is therefore an interdependence of expectations and aims.[279] Accordingly, legal norms depend on the interaction of a set of actors to be applied and interpreted, but in turn the range of legal arguments that can be deployed is not infinite since there is only a limited set of arguments that can acceptably be invoked to justify a solution.[280] It is not enough that an argument can be made; the argument must be capable of generating an intersubjective understanding among the actors collectively engaged in an exercise of legal interpretation.[281] In other words, while the relative indeterminacy of the current normative framework is designed to accommodate some degree of discretion, that latitude does not operate entirely outside legal scrutiny. Actors are entitled to make *prima facie* claims on the basis of an alleged legal *right* or *responsibility*, but on the flipside they then carry the evidential burden to assert and justify why it is that the exercise of that prerogative should be regarded as lawful or permissible in a given case.[282] While the development of international law may still be in flux here, the reliance on humanitarian motives as justification for action does, at the very least, preclude actors from invoking human rights concerns without simultaneously having to accept their own actions to be assessed on the basis of international humanitarian law and human rights law.[283] The key point is the evidential burden that actors carry, so as to not end up as arbiter

of their own cause, as evidenced by a former President of the ICJ that "[w|hether a claim invoking any given norm is made in good faith or abusively will always require contextual analysis by appropriate decision-makers – by the Security Council, by the International Court of Justice, by various international bodies."[284]

4 A System of Collective Security

As we have seen, part of the concern underpinning criticisms of humanitarian intervention relates to the selective nature of its application[285]—hence the call to regulate such actions within the framework of the UN Charter and its system of collective security. That system has its foundation in Chapter VII of the Charter, which awards the Security Council considerable enforcement powers. From the start, this organisation of power at the international level and in an institutionalised form constituted a core element in the design of a global system of collective security.[286] By contrast to "pluralistic security communities", which have been defined as a system in which "there is real assurance that the members of that community will not fight each other physically, but will settle their disputes in some other way",[287] collective security is based on the principle of mutual aid.[288] Alexander Wendt refers to the difference between a pluralistic security community and a system of collective security in that the former concerns disputes within a group, while the latter concerns disputes between a group and outsiders—whether non-members or members who have renounced the group's norms.[289] Collective security thus implies that when the security of any one member of the system is threatened by aggression, all members are supposed to come to its defence even if their own individual security is not at stake, as exemplified in Article 5 of the Treaty establishing the North Atlantic Treaty Organisation[290] ("*an armed attack against one or more of [the Parties] shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them […] will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security*").[291] The norm here is one of generalised reciprocity, in which actors help each other even when there is no direct or immediate return, as there is in specific reciprocity.[292] Wendt follows that when such a norm is functioning properly, as in the

case of NATO, the dominant behavioural tendency will be one of multilateralism with respect to security, as opposed to the alternative principle of self-help.[293]

4.1 Law and Politics in the UN Security Council

To read Chapter VII of the UN Charter in the sense that law would henceforth replace power in decisions on collective security, obscures the fact that the Charter was drafted in response to what was considered a misguided idealism in the inter-war years leading up to World War II. It accordingly cannot adequately reflect how the Security Council was intended to function. The Council is the main political organ of the United Nations, and its decisions therefore necessarily reflect the specific sets of circumstances that prevail at any given point in time.[294] From the start of the negotiations leading to the adoption of the UN Charter, it was clear that the new structure, in order to avoid the fate of the League of Nations, had to take into account the distribution of power in the international system and the idea of a preeminent role for the major allies, United Kingdom, China, the Soviet Union, the United States and later France became a permanent feature of the plan. The right of veto accorded to the permanent members of the Council was a necessary precondition of the establishment of the United Nations, ensuring the participation of the great powers of the time in the newly created body. It was understood that the agreement of the major powers was paramount in particular with regard to enforcement measures, as it appeared likely that their militaries would be engaged in such situations. Negotiations centred on the scope of the veto, notably whether that right should extend to questions relating to the peaceful settlement of disputes. In the end, however, the P5 made it clear at the San Francisco conference that their participation in any new mechanism was contingent on them being accorded the veto in all but procedural matters.[295]

The voting rule in Article 27 (3) of the UN Charter thereby sets the legal framework for Security Council decisions in that it cannot take important decisions without the support of at least nine members, including the concurring votes of the permanent members. This provision is based on the assumption that in matters of international peace and security, it is not viable for the Council to act against the interest of the most powerful actors and in turn the Council's own power is enhanced

to the extent that the P5 accept its decisions as legitimate.[296] The permanent members would accordingly have greater responsibilities, but also greater rights. The conclusion drawn by United States President Franklin D. Roosevelt from the weaknesses of the defunct League of Nations in enforcement operations was that it would be imperative for the major powers to continue exercising a preeminent role in the maintenance of security for any global organisation to be viable.[297] The veto therefore ensures that the new organisation would not take decisions related to international peace and security without the collective support, or at least tacit acquiescence, of the permanent members of the Security Council.[298]

Article 24 (1) of the UN Charter provides that:

> In order to ensure prompt and efficient action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 25 then states that UN members "*agree to accept and carry out the decisions of the Security Council in accordance with the present Charter*". Chapter XVI, Article 103 provides "*In the event of a conflict between the obligations of the Members of the United Nations under the Present Charter and their obligations under any other international agreement, their obligations under the Present Charter shall prevail.*" Finally, the parameters of Security Council actions are set out in Chapter VII, Article 39: the Security Council may make recommendations or take measures (through Articles 41 and 42) to maintain or restore international peace and security if there is a threat to the peace, breach of the peace or act of aggression. The Security Council's authority to use force is broader than that of individual UN members. It has the right to respond both to threats to international peace and security and to actual breaches of the peace and acts of aggression. The time and context of the drafting explains that the authors of the Charter used language clearly intended to evoke images of inter-state conflict. While in 1945 the term breach of the peace may have been limited to hostilities plainly engaged in between the military forces of two states, today it is understood that Chapter VII confers a broad discretion on the Security Council—"a magnificent latitude in which political considerations can and do make their presence felt".[299] The willingness of the Council to expand upon the textual reading of

Article 39 was first made explicit in the Note by the President of the Security Council adopted at the 1992 Summit meeting whereby the Security Council declared that "absence of war and military conflicts amongst States does not in itself ensure international peace and security" and that "*non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security*".[300] This provided the opening for the Council to increasingly become engaged with both situations internal to states, such as internal conflict, mass atrocities and humanitarian crises, as well as global threats such as the impact of climate change on the maintenance of international peace and security.[301]

The COVID-19 pandemic, coupled with the increasing prevalence of cyber operations, have exacerbated this development.[302] In 2021, the UN's Group of Governmental Experts (GGE) on Cyber and the Open-Ended Working Group (OEWG) examined issues related to responsible behaviour in cyberspace, including threats to international peace and security through acts targeting information and communication technologies (ICT) and the application of international to such situations.[303] The OEWG noted that "*[t]he current global health crisis has underscored the fundamental benefits of ICT's and our reliance upon them*", which in turn magnifies the threat posed by malicious activities targeting these technologies, notably in the health sector.[304] In the wake of the COVID-19 outbreak, the report of the GGE affirms that malicious cyber activities against the healthcare sector constitute a threat to international peace and security.[305] While the report does not bind the Security Council, it nonetheless represents an authoritative state of play regarding the views of the participating actors, including permanent members of the Council.[306] The United States, for instance, explicitly mentioned vaccines and life-saving medical devices in its contribution, stating that cyber operations attempting to interfere coercively with a state's ability to protect the health of its populations during a pandemic could constitute a violation of the non-intervention rule.[307]

It is understood that it is at the discretion of the Council to determine the existence of a threat to the peace, and that in doing so the Council is making a political, rather than a legal judgement.[308] This latitude results from the Charter, but it is no less apparent from the drafting history of the relevant provisions as well, whereby the P5 insisted on a strong executive organ for the maintenance of international peace and security.[309] These provisions reveal that the Security Council was not designed to use force to enforce general international law or even the most important norms of

international law; its original purpose is to enforce peace in the international realm.[310] According to these terms, "*the political logic behind the Council's enforcement power strongly suggests that it cannot be contained within the bounds of existing law – in empowering the Council to create new legal obligations on states in response to threats to international security, the Charter implies that the Council is not limited by currently existing international law*". The vast legal authority conferred by the Charter on the Security Council sees its only bounds in the requirement that the Council's action takes place within that framework, in other words that the Council's action is circumscribed to questions that it deems to be related to "international peace and security".[311]

Over time though, the meaning of "breach of the peace" has been broadened, and Article 39 of the Charter has come to be interpreted as conferring a large degree of discretion upon the Security Council for the determination of when a situation constitutes a threat to international peace and security.[312] According to the ICJ, the only mention concerning the limitations to the Security Council's action in the Charter are the principles and purposes contained in Chapter I.[313] Article 1 (1) does refer to international law, stating that a purpose of the UN is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes." It is, however, understood that this reference is only to the basis of any peaceful settlement, not how the Security Council operates.[314] This understanding is vindicated by the *travaux préparatoires* of the Charter. At the San Francisco conference, a proposal was made by Mexico to link the maintenance of international peace and security to international law. This proposal was rejected, however, as it was considered that it might unduly hinder the work of the Security Council if it found itself limited by currently existing international law in responding to a breach of the peace. In the end, the drafters preferred the arrangement by which the Council has a self-consciously political rather than legal role, the determination of the existence of a threat to the peace, breach of the peace or act of aggression according to Article 39 being a political determination by the Council[315] (which does not equate to the Council being ungoverned by the international legal framework in which it is set).[316]

While the nature of the Council's discretion is not in doubt, the way in which this discretion is exercised, or not exercised, bears upon the coherence and acceptability of the system as a whole.[317] The problem here is not when the Security Council conforms to expectations—rather

the issue arises when it performs below expectations or does not act,[318] as was the case during most of the Cold War period or more recently with regard to situations such as Syria, Myanmar, Yemen and most prominently the Russian invasion of Ukraine.[319] While these decisions were all taken pursuant to a discretion provided for in the Charter, they inherently contain political elements and the challenging puzzle with regard to international law is whether the enforcement powers of the Council were used or withheld according to rationales that can be reasonably defended by reference to legal norms.[320] Where the Council was considered as not living up to its responsibilities, that challenge manifests itself in an acute form because other actors respond to what they perceive as decisions of the Security Council not taken on a reasonable basis in international law with actions of their own, which then puts into perspective the deficiencies within the existing international system.[321] This phenomenon surfaced in the jurisprudence of the ICJ as early as in the 1949 decision in the *Corfu Channel Case*, where the Court determined that it could

> [o]nly regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law.[322]

The essence of this statement is that, irrespective of the deficiencies in the current international system—and the reasons for those deficiencies—actors cannot simply adopt their own initiatives or policies that precipitate coercive methods of dispute resolution.[323] While the Court's position closely tracks the letter and spirit of the Charter, international practice has evolved rather differently, in particular once it became clear that efforts to put into practice the armed forces made available to the Security Council by standing arrangement pursuant to Article 43 of the Charter had failed. In his dissent in the 1986 *Nicaragua* case, judge Sir Robert Jennings therefore presented the alternative view, arguing that the system of collective security has "never come into effect", and continuing that

> [t]herefore, an essential element in the Charter design is totally missing. In this situation, it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.[324]

While these words were crafted at the onset of the Cold War era, it can be suggested that the logic of this argument based on a form of *clausula rebus sic stantibus* doctrine carries forth to contemporary situations where the political dynamics within the Council produce similar effects. The difference is that the entrenched binary ideological opposition of that period has been superseded in the contemporary period by multipolar political dissensions based on economic interests or policy strategies. In economic theory, the UN Charter can be conceived as the solution to a collective action problem in providing a public good in the form of international security. The large number of actors in an anarchic international arena requires a single powerful actor to overcome the variety of competing interests, but such a hegemonic actor will only fulfil this role if its benefits equal or exceed the costs of maintaining the system. In the absence of the Security Council providing for international security as envisaged in the Charter, powerful actors should therefore be empowered on intervene in order to provide the public good instead.[325]

4.2 The United Nations and the Collective Legitimation of the Use of Force

The Council's primary task being the maintenance of international peace and security, it was specifically designed to operate at the intersection of law and politics.[326] Notwithstanding widespread dissatisfaction with its performance over the years, the Security Council is seen as invested with the paramount and enduring ability to confer legal cover to international action, including the use of force.[327] Ian Hurd considers that, in practical terms, the power of the Security Council is the result of the dynamic between the Council's authority under international law and its membership at a given time. Since the effects of the Council's legal authority and political composition cannot supersede each other, relying on the perspective of either international law or political science in isolation is unable to yield an adequate picture of the Security Council's role in the international realm. The legal and the political need to be seen as mutually implicating, "*decisions of the Council draw on the legal framing provided by the Charter, but they enter into the wider discussion of international politics and law and can have effects that go beyond the Charter – they can also reconstitute international law, including the Charter, and so change the terms for Council power in the future*."[328]

The interplay between these two elements is complex. While Security Council authorisation can be seen as an important indicator of legitimacy, it is not necessarily sufficient.[329] The considerations that underpin decisions whether or not to resort to force must also be justifiable to the larger audience of international actors and fit within the context of existing international law. The core feature of collective security, requiring that recourse to armed force, except for self-defence measures, must be authorised by the Security Council, is still seen as prevailing in the international system.[330] The Security Council's ability to confer legitimacy to international action derives from the manner in which collective deliberative process and substantive assessment blend together in the work of the Council.[331] As a matter of process, rather than permitting unilateral assessments of the existence of a threat to international peace and security, the Charter moulds the decision-making process into a structured form. It is necessary for all the permanent members and at least half of the elected members to be convinced of the reality of the threat and the utility of forceful intervention.[332] In other words, multilateral checks are imposed on purely self-serving arguments.[333] As a matter of substance, any proposed action needs conforming to a combination of legal, prudential and political assessments.[334] While the basic structure of the system of collective security seems fundamentally sound, it is, however, a separate issue whether the range of actors to be convinced and the precise processes of decision-making within the Council remain appropriate. Ever since the Cold War period, the United Nations system has been alleged to defer to power politics, especially when the Security Council was deadlocked in the face of conflict.[335]

Over the years, debates have intensified as to how the Council can adapt to a changing international environment. For the most part, pressures for change have been managed through rather informal mechanisms, such as changes to the Council's working methods or by reinterpreting existing provisions in innovative ways to suit new needs.[336] To some extent these debates have focused on the use of the instruments in the Charter, and we have seen that while the collective security mechanism initially foreseen by Article 43 was not realised, the scope of Article 39 has been significantly broadened by subsequent practice. Discussions have also centred on systemic reform, working methods and Security Council membership, the latter element requiring amending the Charter, an exceedingly difficult enterprise given that, by virtue of Article 108 UN Charter, any changes require the support of both two-thirds of

the general membership as well as of the five permanent members of the Council.

Security Council membership is a delicate issue and one of the most controversial themes in the discussions around the wider UN reform. The Council's composition, and in particular the permanent members, enshrines the power political structure of 1945, which is part of the reason for both the resistance to reform of its membership and the continuing calls for updating it in the light of the political realities of today. The contestation of established power hierarchies can be seen as forming part of the ontological debate about international law, in that to remain relevant, international law needs to reflect the interests of all actors, not merely the privileged few from an essentially western perspective. The liberal internationalist view in international law is thus subject to criticism from the angle that a formalistic understanding of equality can also be understood as perpetuating the existing international order, no matter how unsatisfactory, and instantiate the status and privileges of the powerful. At the same time, however, powerful actors use precisely these debates to dilute and defuse the proposed remedies and thereby protect their privileged position in the international system. Over time, different groups have formed, all with the perceived aim of rendering the Security Council more representative, though their approaches for doing so differ. The G4 group composed of Germany, Japan, Brazil and India aims at an increase in both categories by conferring permanent membership with veto rights to these four actors and adding a number of seats for non-permanent members in the different regional groups. The Uniting for Consensus (UfC) group, by contrast, is weary of conferring permanent membership with full privileges to a select group of four countries with no apparent benefit for other member states with similar ambitions. The UfC therefore opposes the G4's approach and instead argues in favour of creating a new category of non-permanent seats on the Council, allowing for some members to serve longer terms with the possibility of immediate re-election. Finally, the L.69 group is pushing for a greater share of seats for developing countries on the Council through an increase in both categories of membership.[337] While all these groups share the desire of seeing the membership structure of the Security Council reformed, there is no common denominator among them except the dissatisfaction with the status quo.[338] As their efforts to some extent cancel each other out, no significant progress has been accomplished during the various rounds of the intergovernmental negotiations (IGN). The momentum

for meaningful reform is further undermined by the absence of significant change in Council dynamics during the presence of the proponents of wider membership representation as elected members on the Council. For instance, the period of 2011–2012 saw Brazil, India and South Africa simultaneously sit on the Council, without their presence translating into a notable change in Council action.

The stalemate is further exemplified by the General Assembly debates on the topic, which essentially replicate the IGN deliberations. Reform of the Security Council will, in any case, be a highly complex process and may prove elusive. To achieve meaningful reform, significant political capital would need to be expended by a range of actors, most notably by the permanent members, which have no incentive of changing the status quo that has enshrined their privileges in the Charter and subsequent practice.[339] In addition, some voices have cautioned against the lower degree of cohesion and the increasing difficulty to achieve consensus in an enlarged Council.[340]

As elusive as institutional reform may prove to be, in the end there is no reasonable alternative to the collective legitimisation of the use of force through the Security Council, either within or outside of the UN.[341] The veto right ensures that no enforcement action can be authorised by the Council in the face of opposition by any of the permanent members, which can convey the image of a frustrating paralysis when the Council is unable to act due to disagreement between the P5, such as with regard to the situations in Kosovo in 1999, in Syria from 2011 or later Ukraine from 2014. This eventuality has, however, been included in the Charter scheme by design, as the alternative might lead the most powerful members to actively oppose or even abandon the organisation.[342] In the context of the Korean War in 1950, the General Assembly did attempt to overcome, to some extent, the problem of the veto when there was need for action to maintain international peace and security.[343] The resulting *Uniting for Peace* Resolution, however, merely aims to complement, rather than change, the institutional balance in the UN Charter scheme.[344] The General Assembly may only recommend military action when such action would be legitimate even absent a Security Council resolution, for instance collective self-defence in response to an armed attack on a UN member. For other breaches of threats to the peace, it may not recommend the use of armed force for enforcement purposes.[345]

In the absence of formal changes to the institutional setup of the United Nations system, some limited progress has been achieved through

incremental changes in the Council's working methods and informal arrangements. Following the mention in the 2004 High-Level Panel Report that the permanent members consider, in their individual capacity, to from using the veto in the case of genocide and large-scale human rights violations, a group of five small states, the S5 group[346] advocated for a series of reforms to the Council's working methods which included the P5 refraining "from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity."[347] While the S5 group dissolved in 2012 without a concrete outcome, its agenda was taken up from 2013 by the Accountability, Coherence and Transparency (ACT) group, which drafted a code of conduct for UN member states relating to Security Council action in the face of atrocity crimes. The code is aimed at encouraging more decisive action by the Council, which includes the permanent members voluntarily agreeing to refrain from using the veto in situations involving mass atrocities. About two thirds of the UN membership has to-date signed up to the code of conduct, but only two permanent Council members, France and the United Kingdom. Likewise, an initiative launched by France in 2014 for voluntary restraint in the recourse to the veto has only received the support of the United Kingdom among the other permanent members.[348]

The notion of "coalitions of the willing" that may form in specific situations bears the problem that these are most often not endowed with impartial interests, and therefore lack legitimacy, again in particular in the light of the critique directed against the selectivity of interests represented by the liberal internationalist world order.[349] Suggestions that a more permanent coalition of "responsible actors"[350] could complement the Security Council as decision-making authority in authorising the use of force if the Council is paralysed would be unacceptable to many actors for being reminiscent of the international system in the nineteenth century, when the group of "civilised" states could intervene at will in the "non-civilised parts" of the world.[351] Developing actors have long fought the notion that there is a core group of "civilised states" that provides the sole model for those that seek international credibility, arguing that it is precisely such rationales underlying a western-centric conception of international to the detriment of the interests of the developing world. The idea also undermines the pluralist aspirations of international law, and the diversity of its sources.[352]

To return to the collective security norm *per se*, Chapter VII of the Charter requires that the Security Council determine the existence of any threat to the peace, breach of the peace or act of aggression.[353] This determination is a prerequisite for the Council to decide what measures should be taken to maintain or restore international peace and security.[354] In other words, within the UN Charter framework, military force can be employed only on the basis of a decision of the Council, which in contemporary terms imply that the Council may mandate the use of force through UN member states or regional organisations, the provision of Article 43 envisaging that the Council alone could take action through standing forces supplied by member states never having taken effect.[355] All of the concepts contained in Article 39 are infused with political considerations, which does, however, not imply that legal considerations do not matter here.[356] A closer look reveals that the issue resides not in the system itself, but results from the way generalised reciprocity is reflected in international practice.[357] On many occasions, the Security Council has refrained from determining the existence of threats to or breaches of international security, let alone aggression, even when the circumstances would have justified such a determination.[358] The presence of an element of selectivity, or even arbitrariness, was always inherent in the Charter scheme, which accorded the veto right to the permanent members, and this state of play was accepted by the wider membership to a large extent as a precondition for the long-term viability of the UN system. An element that is not reflected in official records is the "hidden veto", where draft resolution are not even formally tabled due to the threat of veto by one or more of the permanent members.[359] This can be seen as reflecting one of the "faces" of power wielded by the P5, namely the power of agenda setting, in terms of arbitrating, whether explicitly or implicitly, what is and what is not decided. In the view of the elected members, as well as the wider membership, the uneven practice can undermine the effectiveness of the Council.[360] The failure of the Security Council to authorise intervention may be perilous for the system of collective security. For example, when a state is faced with a serious, but not imminent threat to its security, so that no right of self-defence arises, a failure of the Security Council to authorise appropriate response measures may place the state in a situation that will ultimately push it towards recourse to self-help.[361]

4.3 The Unilateral Approach to Using Force

According to one perspective, the 2003 invasion of Iraq would represent a situation where the Security Council did not perform to expectations, and thus other actors had to take over the responsibility to face up to the threat—with or without Security Council authorisation.[362] Following an economic analysis of international law, when the Security Council was unable to deliver the public good of international security, it was legitimate for another hegemon to act in order to resolve the collective action problem. This interpretation of events is highly disputed, however,[363] and an analysis of the stalemate preceding the intervention reveals the interplay of law and politics within and surrounding the Security Council.

The antecedents of the Iraq episode can be traced back to the first Gulf crisis in 1990–1991 and the invasion of Kuwait by Iraq. After a significant diplomatic effort by the United States, the Security Council adopted a resolution authorising member states to "use all necessary means" to restore international peace and security in the area.[364] The ensuing military operation by an international coalition to liberate Kuwait can therefore be said to represent a classic case of action authorised by the Security Council in the maintenance of international peace and security. In 2002, the United States brought the issue of using force against Iraq back into the Security Council framework under the heading of non-proliferation and succeeded in the Council adopting a resolution that "afford[ed] Iraq […] a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council"[365] and "warned Iraq that it will face serious consequences as a result of its continued violations of its obligations."[366] This constituted another diplomatic success by the United States, and over the following months, a United Nations inspection mission was sent to Iraq to collect disarmament facts in a period of tension reminiscent of the Cuban Missile Crisis.[367] This tension resulted from the United States wanting to preserve its latitude in asserting the authority to use force, and accordingly not being inclined to subject its freedom of action to a further decision by the UN Security Council.

While the inspection mission worked under enormous pressure to establish the facts that could form the basis of the Security Council's further consideration of the matter, international law compelled the United States into pursuing its efforts in the Council for an explicit authorisation to use force if necessary, despite its preference for maintaining

the option of acting without an explicit further Security Council decision.[368] Whereas the United States initially engaged in negotiations for a second resolution, it later pronounced its intention to intervene militarily, independently of whether the UN backed that course of action and before the inspection mission could present authoritative findings.[369] This created a zero-sum situation, in which other permanent members on the Council considered the only action deemed relevant by the United States, the adoption of a resolution enabling immediate intervention, unacceptable.[370] The United States thus framed the issue in a manner that did not resonate with the accepted interpretation of international law, thus precluding agreement on a text that could gain the support of the remaining P5 and secure sufficient votes from the non-permanent members to be adopted.[371] The resulting failure to have its draft resolution adopted on a question considered of key importance to its essential security interests represents one of the most severe diplomatic failures of the United States in the Security Council in over half a century.[372]

This outcome can be attributed to the United States' decision to frame the issue in bipolar terms—either intervene, or accept a situation in which Iraq threatens other actors with biological, chemical or nuclear weapons. The United States thus deliberately limited its options by depriving itself of a further option, namely addressing the situation with the existing UN monitoring and verification mechanism under more stringent requirements—diplomacy backed by threat of force.[373] Security Council authorised coercion short of use of force would have certainly been much more likely to gain the approval of other Council members, and could potentially have led to a peaceful resolution of the crisis.

The legal justification of the 2003 Iraq war has been the object of considerable controversy. It was suggested that pre-emptive self-defence could constitute a possible legal basis for the use of force,[374] along a doctrine advocating acting in self-defence against emerging threats before they are fully formed. The problem with this rationale of pre-emptive action or a duty to act is that in the *Nicaragua* case, the ICJ stated that "*under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'*".[375] And as Thomas Franck highlighted, even if one were to assume that subsequent practice had established a right to self-defence against an armed attack that has not yet occurred, the facts of the situation that existed in the Iraq episode are difficult to fit within any plausible

theory of pre-emptive self-defence.[376] Looking at the justification actually put forward by the United States in its letter to the President of the Security Council, the argument relies on the much narrower claim that Iraq was in material breach of pre-existing Security Council Resolutions.[377]

The picture looks similar for other actors involved in the invasion. The official version of the United Kingdom's legal argumentation did likewise not rely on arguments about pre-emptive self-defence or humanitarian intervention, but rather on two narrow resolution-based arguments.[378] First, the argument that the Security Council's explicit authorisation of force from the first Gulf war, which was suspended by the cease-fire of April 1991, "revived" upon Iraq's failures to meet its disarmament obligations. Second, that the subsequent resolution adopted in 2002 was effectively self-executing, with individual UN members entitled to determine whether or not to use force against Iraq as part of the "serious consequences" it should face for non-compliance.[379] The formal advice of the UK Attorney General to the Prime Minister on the use of force against Iraq did, however, contain the much more nuanced overall conclusion that "the safest legal course would be to secure the adoption of a further resolution to authorise the use of force".[380]

The assessment that a "reasonable case" could be made that the United States-drafted resolution of 2002 was "capable of reviving" the 1991 authorisation to use force, "although of course a second resolution would be preferable", was not deemed to offer a clear enough indication on the lawfulness of eventual military action. This was compounded by the realisation that there was no chance of securing the adoption of a second resolution in the Security Council. Requested again to indicate whether military action would be lawful—rather than unlawful without explicit renewal of Security Council authorisation, the UK Attorney General then concluded in favour of the revival argument, although there is no evidence to demonstrate on what basis this conclusion could have been reached.[381]

The majority view in legal doctrine is that the invasion was not in conformity with international law.[382] Likewise, Hans Blix, the head of the United Nations inspections force in Iraq (UNMOVIC), "share[s] the dominant view among international lawyers that the war was in breach of the UN Charter. It was not launched by the US and UK in self-defence against Iraqi aggression, and was not authorised by the Security Council […] Three permanent members of the Security Council – China, France and Russia – explicitly opposed the action."[383] The Netherlands committee of inquiry on the war in Iraq issued its report in 2010 and

found that "the only conclusion possible is that there was no adequate international law mandate for the unilateral military force used against Iraq by the US and the UK."[384]

In general terms, the legal justifications for the use of force put forward by the intervening parties attempted to argue that the 2003 Iraq invasion formed part of the same collective security action than the first Gulf War in 1991, which was endorsed by the Security Council. It asserted that resolution 678 authorised the use of force for a material breach of its provisions, which defined the terms of cease-fire, and resolution 1441, which gave Iraq a "final opportunity" to comply, and therefore the 1990 authorisation to use force was deemed to have been still valid in 2003 and subject to re-activation. The problem with this interpretation is that, already from a reading of the plain text of resolution 678 the mention of "resolution 660 (1990) and all subsequent relevant resolutions" would refer to those resolutions cited in paragraph 1 of the preamble, and which are not related to an alleged later threat emanating from Iraq.[385] In addition, resolution 678 made reference to states "co-operating with the Government of Kuwait" using all necessary means. That was the case for Operation Desert Storm, but in 2003 the Permanent Representative of Kuwait to the United Nations explicitly stated at the Security Council that "the State of Kuwait reaffirms that it has not participated and will not participate in any military operation against Iraq".[386] Further, conceiving of the resolution as comprising an authorisation to use force that is, in fact, indefinite, seems at odds with a teleological interpretation of the text in the light of the intentions of the drafters at the time of its adoption. The aim in 1991 was to expel Iraqi forces from Kuwait and restore peace and security in the area. That objective was achieved. It would therefore seem logical to conclude that the authorisation to use force ended with that operation and was then superseded again by the general norm of the prohibition on the use of force in inter-state relations contained in Article 2 (4) UN Charter.[387]

While resorting to an ambiguous interpretation of UN Security Council resolutions indicates the importance that was attached to the legal justifications for the course of action, the legal arguments sit uncomfortably within the UN Charter framework and past practice.[388] In particular, the argument of reviving a prior authorisation to use force essentially relied on resolutions passed by earlier Security Council configurations, which were then invoked at a time when the United States demonstrably could not obtain the nine votes necessary for its second

draft resolution in the current Security Council. Such an argument to justify force is reminiscent of the hegemonial approach to international relations in casting aside the position of the current Security Council membership.[389] Further, the only resolution explicitly authorising the use of force against Iraq was Resolution 678, passed in November 1990, and the only military action it explicitly authorised was such force as was necessary to restore peace and security in the area.[390] Similarly, Resolution 1441 gave Iraq a "final opportunity to comply with its disarmament obligations" and warned Iraq of "serious consequences", but refrained from authorising member states to use "all necessary means"—the term of art used to authorise the use of force.[391] It seems highly unlikely that the Security Council members who voted unanimously for Resolution 1441 can be presumed to have intended the authorisation of a future use of force without further explicit UN action.[392] This is backed up by the records of the explanations of vote following the adoption of resolution 1441 and simply assuming the contrary would amount to denying any relevance to the votes and positions of other Security Council members.[393]

The Iraq invasion cast a long shadow over the use of force in international law. It has been taken to exemplify the dysfunction of the Security Council and the shortcomings of the United Nation's system of collective security. At the same time, even in a moment of intense political tension, the world's hegemonic actor did not explicitly question the norms that underpin the collective security system,[394] working with the existing legal framework, rather than casting it aside. The comment also points to the question of what to do when, as Michael Walzer termed, the law "runs out"? Walzer argued that in such cases it is necessary to refer to "*our common morality, which doesn't run out, and which still needs to be explicated after the lawyers have finished […] I don't think that there is any moral reason to adopt that posture of passivity that might called waiting for the UN*".[395]

The argument underlying unilateral actions were that if the United Nations failed to live up to its responsibilities, there was nothing wrong with others taking its place as executive agents of the international community, particularly if they could do so more effectively. It appears that the the unilateral alternative would always be considered by the hegemon in the face of Security Council inaction, which paints a far darker picture for the relevance of the United Nations collective security system in shaping the foreign policy decisions of powerful actors.

This links to a form of *clausila rebus sic stantibus* whereby strict adherence to the terms of the UN Charter is seen as utopian thinking that fails to properly engage with the real world.[396] Michael Walzer reiterates the argument that the system of collective security envisioned by the UN Charter has never come into effect and holds that therefore the decrees of the United Nations do not command intellectual or moral authority for lack of impact on the real world. "*The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.*"[397]

The UN Secretary General, however, highlighted shortly after the beginning of the invasion, while "all of us must regret that our intense efforts to achieve a peaceful solution, through this Council, did not succeed, […] at the same time, many people around the world are seriously questioning whether it was legitimate for some Member States to proceed to such a fateful action now — an action that has far-reaching consequences well beyond the immediate military dimensions — without first reaching a collective decision of this Council".[398] The aftermath of the Iraq episode revealed the increasing discrepancy between the material power of the United States military power and its fading capacity to shape norms and ideas. At the same time as it was using its material superiority, it could not diplomatically secure the votes even of some of its closest allies on a matter considered of highest national importance.[399] Thus, in this instance, the Council's refusal to adopt a resolution authorising the use of force can also be seen as a demonstration of the Council members' adherence to international law, even in the face of extreme pressure from some of its most powerful members.[400] The Security Council had already determined that there had been breach of international peace and security by Iraq,[401] and the Council was therefore within its prerogatives to take action. Within the framework of Chapter VII, however, use of force is to be applied as a last resort to the peaceful settlement of disputes and other, less coercive, forms of enforcement measures.[402] We have seen that the United States did not seriously consider any of the other alternatives to military intervention available under Chapter VII. In authorising the use of force, the Council is however, subject to the requirements of necessity and proportionality, just as UN members are in their invocation of their right to self-defence, and the Council was not presented with evidence that would convincingly demonstrate that these requirements were indeed fulfilled.[403] The exercise of the political function of the Security Council

is shaped by international law. In that sense, the decision not to authorise a use of force was consistent with the role of the Security Council as authoritative arbiter on issues of international peace and security through the collective decisions of its members. It can therefore be argued that in the case of Iraq the Council actually functioned exactly as the Charter intended when, on the available evidence, it declined to authorise the use of force.[404] Although the Security Council is a political organ of the United Nations, it is nonetheless mired in the obligations of international law as embodied in the Charter.[405]

In 2009, an inquiry was launched into the decisions of the United Kingdom leading to the Iraq war.[406] The report was published in 2016 and represents the most comprehensive assessment of the decision-making process leading up to the invasion. The statement summarising its findings outlines that in this instance "*for the first time since the Second World War, the United Kingdom took part in an invasion and full-scale occupation of a sovereign state. That was a decision of the utmost gravity. […] The UK chose to join the invasion of Iraq before the peaceful options for disarmament had been exhausted. Military action at that time was not a last resort. […] Without evidence of major new Iraqi violations or reports from the inspectors that Iraq was failing to co-operate and they could not carry out their tasks, most members of the Security Council could not be convinced that peaceful options to disarm Iraq had been exhausted and that military action was therefore justified. […] In the absence of a majority in support of military action, we consider that the UK was, in fact, undermining the Security Council's authority. […] The circumstances in which it was decided that there was a legal basis for UK military action were far from satisfactory. […] Military action might have been necessary at some point. But in March 2003: There was no imminent threat from Saddam Hussein. The strategy of containment could have been adapted and continued for some time. The majority of the Security Council supported continuing UN inspections and monitoring*".[407] The inquiry committee adds that these conclusions could already have been made in the light of the information available at the time of the events: "*We do not agree that hindsight is required*."

To some observers, the findings of the inquiry seemed to confirm that in some instances international law is regarded simply as an impediment that can be done away with when the need for military action arises. This echoes the inquiry's conclusion that the invasion without Security Council authorisation undermined the authority of the UN.[408] However, despite the insistence of the United States and United Kingdom to proceed with

the invasion, the broader membership of the Security Council maintained its support for the UN inspectors and helped prevent the Council from endorsing a course of action in contravention of international law. The aftermath of the invasion also put in stark contrast the perils of intervening with armed force without proper UN authorisation.[409] A more optimistic long-term view for the international legal system might therefore just as well be arguable. International law may not have been able to prevent the invasion from occurring. The Iraq episode can nonetheless be seen as a confirmation of the international rule of law, rather than its demise. The United Nations and its collective security mechanism resisted enormous pressure to cover in a cloak of lawfulness military action that could not be accommodated by accepted justifications for the unilateral use of force.[410]

While the presence of legal argument in the discourse surrounding the intervention in Iraq does not in itself indicate that the conformity of any given course of action with international law was an overriding concern, the Iraq inquiry provided evidence for how the engagement with international law impacted on the thinking of the actors involved. The question is rather how precisely international law mattered to the relevant actors.[411] It could be argued that while international law mattered in the process of policy formation it did not necessarily shape the key decisions.[412] On the other hand, the testimony of the then Prime Minister at the Iraq inquiry indicates that the United Kingdom would have refrained from participating in the invasion if the verdict of its legal advice had considered doing so contrary to international law: "*let me make it absolutely clear, if [the Attorney General] in the end had said, "This cannot be justified lawfully", we would have been unable to take action.*"[413]

The United Kingdom further regarded it as essential to obtain a Security Council resolution stating that Iraq was in material breach in order to galvanise the UN to take action to disarm Iraq. The legal position taken by all the relevant UK legal advisers was that the use of force would only be lawful in the presence of an authorisation by the Security Council and that prior authorisations would not justify military action unless the Council had at the very least determined that Iraq was in material breach.[414] Intervention in the absence of even a spurious legal justification was deemed inconceivable; in this international law was instrumental in shaping the expression of power.[415] International law thus mattered in that it shaped the way in which the policy decision on Iraq were crafted, in terms of reasonable justification.

The consequences of the Iraq episode continue to loom over international relations. The Security Council was confronted again with a similar set of questions during the conflict in Syria, when the issue of chemical weapons took centre stage. From the beginning of the conflict in 2011–2013 the Council found itself mostly stalemated on events relating to Syria, given that meaningful international action was dependent on a convergence of views between the P5 that had proven elusive until then. In the summer of 2013, when indications surfaced that Syrian government forces had used chemical weapons against civilian populations, the pressure grew for the international community to intervene in the conflict. The United Nations sent a team of inspectors into the country to probe the use of chemical weapons during a number of previous incidents. Before the inspectors could report back to the United Nations with their findings, however, the United States and United Kingdom and France concluded that the use of chemical weapons by Syrian government forces was highly likely.[416] In the face of continuing stalemate in the Security Council, these actors were openly considering unilateral military action against the alleged Syrian chemical weapons programme. In a parallel to the build up to the Iraq invasion, the Council found itself on the verge of being sidelined as it was still awaiting the conclusions of the inspections team from the Organisation for the Prohibition of Chemical Weapons (OPCW).[417]

The political dynamics seemed set on a course leading to military intervention whether there was a Security Council resolution or not, and legal justifications were already being put forward in defence of a potential resort to force. Contrary to the Iraq episode, however, these events did not herald an irreversible course of action. The Syria chemical weapons case rather goes to demonstrate how, in of Harold Koh's terms, "international law may help to push unfolding events into the right direction" according to the premise of "do no harm".[418]

Following an intense debate, the UK House of Commons voted against supporting military action in Syria.[419] And subsequently, the United States deferred the decision on action against Syria, in order to fully exhaust the diplomatic path in the Security Council. These events opened the path for the option of diplomatic intervention backed by the—lawful—threat of military intervention The decisive element to bring the issue back into the Council was the proposal by Russia to put the Syrian chemical weapons under international control, followed by a framework agreement for the elimination of the chemical weapons

programme.[420] This enabled an approach that was already advocated in the context of Iraq ten years earlier: dismantling the chemical weapons programme without attack and relying Security Council authorised coercion short of use of force, through a multilateral strategy of disarmament plus enhanced monitoring.

The Security Council adopted resolution 2118 which endorsed an OPCW timeline to eliminate Syria's chemical weapons and means of production.[421] The resolution also imposed measures under Chapter VII in case Syria does not comply with its obligations, or uses or authorises the transfer of any chemical agents. Council members supportive of a resolution were keen to ensure it would not be interpreted as a *carte blanche* for the use of force and underscored the need for Council authorisation of any potential military action for non-compliance with the resolution. The removal of the chemical weapons was to be monitored by a joint UN-OPCW mission. In June 2014, the last shipment of chemical weapons was removed from Syria and all its production facilities were put out of use.[422]

The UN-OPCW plan did not resolve the Syrian conflict altogether, but then neither did the Iraq invasion bring lasting peace and security to the region. The Council may have ended up being circumvented in the Iraq episode, but the lessons were still present years later and while "those who are in power will sometimes seek to take advantage of it without much regard for such ephemera as respect for neutral and reciprocal principles",[423] this has not become an entrenched feature of the international system. Thomas Franck's premonition that, following the Iraq invasion, Article 2 (4) was "dead" for good seems, again, to have been premature. Rather than being sidelined in the face of possible military action, the Council was placed back at the centre of debates on accountability in the Syrian conflict. And whereas the P5 dynamic continued to determine the wider course of action, several subsequent resolutions provided the Council with a legal and political basis to play a more substantive role. The following years were characterised by inconsistent action of the Security Council with regard to the situation in Syria. Efforts at ensuring accountability for violations of international law suffered from the divisions among the permanent members, and on two occasion, in 2017 and 2018, the United States, United Kingdom and France carried out airstrikes against Syrian facilities reportedly involved in chemical weapons attacks. These unilateral actions again caused a divided reaction within the Council, with Russia and China characterising them as a violation of

sovereignty and an illegal use of force, whereas other Council members put forward justifications of the airstrikes as a humanitarian intervention and a preventative recourse to force to interdict the commission of future acts illegal under international law, namely the use of chemical weapons.[424]

The inconsistent approach of the Security Council in the Syrian conflict, and its inability on repeated occasions to resolve the crisis or establish accountability again demonstrates the difficulties of the UN Charter system for collective security when one or several of the permanent members are involved in the conflict. While this apparent failure of the Council to resolve a collective action problem in providing a global public good always bears the underlying possibility of powerful actors taking it upon themselves to act unilaterally on questionable legal grounds, at the same time stalemate in the Security Council creates a void that no other actor can fill in ending conflict.[425] Even in the face of the sometimes frustrating reality of a Council that may be unable to muster an effective response to international crises, it remains the case that collective security measures with Security Council authorisation are endowed with a more sound legal basis and political legitimacy, and therefore generate greater adherence by other actors.[426] Despite its apparent shortcomings, the institutional design of the United Nations has been vindicated in that successful collective enforcement measures require the at least tacit support of the permanent members of the Security Council. The consequences for acting unilaterally may sometimes only appear long after the fact, but are no less real. In the face of the 2022 invasion of Ukraine by Russia, the United States qualified the Russian military operation as an aggression against another sovereign state, but in making these arguments had to defend itself against parallels being drawn with the invasion of Iraq nineteen years earlier. Every effort by powerful actors at reshaping the legal framework to suit their purposes in a given situation entails the risk of weakening the very norms that these same actors might in the future rely on to instantiate their own privileged position.

5 Legal Argumentation and the Use of Force

Returning to the statement at the beginning of this chapter that law has no place in decisions pertaining to essential security issues, a closer look reveals that international law, in fact, is present throughout the process. Further, in each of the cases surveyed, the relevant actors did not simply

ignore legal considerations. On the contrary, as even the example of the Iraq invasion illustrates, considerable efforts were undertaken to integrate legal considerations into the political decision-making process. At the same time, the Iraq episode illustrates how powerful actors deploy efforts in "fixing [social] meaning"[427] within the process of legitimising their actions. While it can be held that continued containment, coupled with a reinforced inspections mission, constituted an adequate response to an actor weakened by a decade of economic sanctions imposed against it, the United States aimed to reshape the debate surrounding the intervention by contending that the "imminence" requirement needed to be interpreted in the light of new international realities and that faced with threats of chemical weapons one could not wait until forces gathered at the border, ready to attack.

The debate about the legality of the doctrine of pre-emption in the context of increasing threats by non-state actors and the risk of proliferation of weapons of mass destruction is held within the framework of existing legal interpretations about the law of self-defence. While the proper meaning and application of international law remains open to competing interpretations, none of the actors involved chose to simply ignore Article 51 UN Charter and associated elements like "imminence". Rather than discarding international law, the claims and counter-claims issued in the face of new threat situations such as non-state actors, cyber operations and the military use of outer space further contribute to define and shape the limits of "anticipatory" or pre-emptive self-defence, thereby clarifying what is permissible and what is not under international law on the use of force.[428]

Whenever actors resort to the use force, they engage in legal argumentation and justification. Moreover, action that can be justified in legal terms is more likely to be perceived as legitimate, thus reducing the need for expenditure of political capital and strengthening the international legal order on which hegemonic actors rely on to sustain their very dominance.[429] When the United States defends its invasion of Iraq based on Security Council resolutions or drone strikes as self-defence against an ongoing threat, it reaffirmed the importance of UN Charter provisions on the use of force. The United States believed, or perhaps believed that its audience believed, in the legality and legitimacy of these norms and their relevance to the situation at hand. Its use of these norms reflected their relevance.[430] Thomas Franck's glooming assessment was that "once obligatory efforts made […] to make a serious effort to stretch law to

legitimate state action have given way to a drive to repeal law altogether, replacing it with a principle derived from the Athenians at Melos: *the strong do what they can and the weak suffer what they must*".[431] However, the interpretation of Article 51 UN Charter that considers the multinational intervention in Afghanistan as in conformity with, and Iraq invasion as in contravention of, international law reaffirms international law on the use of force by adapting it to new circumstances without emptying the norms of their meaning.

Legal change can occur through communicative interaction, but even the most powerful actors cannot simply unilaterally reinterpret international law to suit their particularised interests. In other words, it can be said that despite the significant pressures generated by the episode of non-compliance, the principle that war is not acceptable in foreign policy, in the end, was strengthened rather than weakened.[432] The doctrine of generalised threat prevention based on subjective assessments was considered as undermining international law rather than contributing to it, and thus was quickly abandoned by the United States, since weakening the international legal order would have threatened the hegemonic position of the United States as one of the architects of that same order upon which it rests the perpetuation of its power position. The interactive process of legal argumentation can generate the creation of new norms or change existing norms.[433] The controversies surrounding the concept of the "responsibility to protect" (R2P) illustrate the issue of law-creation and the attempt to bring new justifications under international law. The actors involved in the R2P debate would not pursue their efforts if they were not convinced that the concept would potentially affect their latitude in the future decision-making. For some, the aim is to modify the concept in order to avoid constraints on the use of force or reshape it to better fit their own interventionist agenda under the guise of protecting populations abroad. Others are pushing for a non-coercive conception of R2P out of a concern of the concept being manipulated for wrongful armed intervention. In all cases, the actors concerned deemed the concept to be relevant as an emerging norm of international law.

In the situations surveyed in this chapter, international law and organisations played a part in shaping the possibilities faced by the relevant actors and the available courses of action. At this point, it seems worth revisiting Abram Chayes' conclusion of his analysis of the Cuban Missile Crisis that legal norms are not abstract entities entailing a binary choice

between the permissible and the impermissible. Due to the relative indeterminacy of legal analysis, this entails that law will impact the choice of available options in terms of shaping outcomes, not determining decisions as the legal considerations are but one of the factors in sorting out available courses of action in a given situation.[434]

This entails letting go of legal analysis' oracular aspirations, as international law cannot prescribe single right or wrong answers. Rather, it can help defining the "horizon" of options available to international actors. The interrelation between international law and political action depends on the particular circumstances of the case.[435] The use of force highlights international law's role in constraining the horizon of possible courses of action and as a vital communicative medium. The prohibition on the use of force exemplifies international law's role in shaping action but, in the words of Abram Chayes, one should remain modest and realistic in admitting, "it is no more possible to demonstrate 'proximate causation' [of law on the decision taken] than in any other human process",[436] as international law, like any law, can be ignored if only one is willing to pay the price. The exceptions to the use of force in turn shed light on the role of international law as an interactive exercise, through which actors frame the justifications in defence of their behaviour in the international arena.[437]

Notes

1. Janina Dill (2015), 3–4.
2. Dean Acheson, Remarks Before the American Society of International Law, 57 *Proceedings of the American Society of International Law* (1963), 13–14.
3. Andrew Hurrell, *On Global Order*, 37–38.
4. War is a social practice and our critical judgements about war are informed by our understanding of the world we have made. Those understandings are simultaneously the historical product of and the necessary condition for the critical judgements we make.
5. Hurrell, *On Global Order*, 38.
6. Dino Kritsiotis, When States Use Armed Force, *in* Reus-Smit (Ed.), *The Politics of International Law*, 48.
7. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, xix.
8. Kritsiotis, supra, 48.
9. Ibid.

10. Anne-Marie Slaughter and William Burke-White, An International Constitutional Moment, 43 *Harvard ILJ* (2002), 1.
11. Kritsiotis, supra, 49.
12. Fred Halliday, *Rethinking International Relations*, 7.
13. While the Peace of Westphalia of 1648 is often quoted as the "prelude to modern international law", it should be noted though that this view is based on a rather narrow understanding of the history of the law of nations which is grounded on an understanding that could only perceive of modern sovereign states as subjects of its law. There is, however, no compelling reason to infer the idea of an international legal order from one of its time limited manifestations. According to Grewe, in terms of its structural characteristics an international legal order can be assumed to exist if there is a plurality of relatively independent (although not necessarily equal-ranking) bodies politic which are linked to each other in political, economic and cultural relationships and which are not subject to a superimposed authority having comprehensive law-making jurisdiction and executive competence. In their mutual relationships, these bodies politic must observe norm which are deemed to be binding on the basis of a legal consciousness rooted in religious, cultural and other common values. It is only a question of terminological agreement as to the degree of mutual interdependence which is required to be able to speak of an international legal order, and vice versa, as to the degree of power exercised by a superimposed central authority which is sufficient to deny a legal characteristic to such an order. The limits of such a concept are necessarily fluid, See Wilhelm Grewe, *The Epochs of International Law* (2000), 7.
14. G.I.A.D. Draper, Grotius' Place in the Development of Legal Ideas About War, *in* Bull/Kingsbury/Roberts (Eds.), *Hugo Grotius and International Relations* (1992), 178.
15. James T. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (1981).
16. *Augustine, Pentat. VI, 10, in* J.-P. Migne (Ed.), *Patrologia Latina*, Vol. 34, 781.
17. Grewe, supra, 107.
18. Frederick H. Russell, *The Just War in the Middle Ages* (1977), 16–19.
19. Grewe, supra, 107.
20. Ibid., 109.
21. Brunnée and Toope, *Legitimacy and Legality in International Law*, 285. This point is problematic, since it is notoriously difficult to correctly interpret the true motivations of a state, and for the purposes of assessing the fit of an action within a normative framework, one must focus upon justifications actually offered rather than suspected motivations, see e.g. Dino Kritsiotis, Arguments of Mass Confusion, 15 *EJIL* (2004), 233.

22. St. Thomas Aquinas, *Summa Theologica*, Fathers of the English Dominican Province (transl.), Part II (1982), Question 40; Sydney D. Bailey, *Prohibitions and Restraints in War* (1972), 10.
23. Brunnée and Toope, supra, 286.
24. Jürgen Habermas, *Auch eine Geschichte der Philosophie*, Band I (2019), 889.
25. Mary Ellen O'Connell, Peace and War, *in* Fassbender/Peters (Eds.), *The Oxford Handbook of the History of International Law* (2012), 275.
26. Habermas, supra, 862–864.
27. Ibid., 876.
28. Ibid., 881–882.
29. Ibid., 910.
30. Ibid., 912.
31. Arthur Nussbaum, *A Concise History of the Law of Nations* (1954), 79–91.
32. Grewe, supra, 204.
33. Ibid., 206.
34. Francisco de Vitoria, *De Indis et De Iure Belli Relectiones* (1532).
35. Grewe, supra, 207.
36. Mary Ellen O'Connell, Peace and War, supra, 276.
37. Ibid.
38. Joachim von Elbe, The Evolution of the Concept of the Just War in International Law, 33 *AJIL* (1939), 676.
39. Grewe, supra, 211.
40. Alberico Gentili, *De Jure Belli libri tres* (1588–1589).
41. Grewe, ibid.
42. See Brian Orend, *Michael Walzer on War and Justice* (2000), 87.
43. Hugo Grotius, *The Rights of War and Peace* (transl. of DE JURE BELLI AC PACIS, 1625) (2005), Book II, Chapter 1.
44. Grewe, supra, 216.
45. Grotius, supra, Book II, Chapter 23.
46. O'Connell, Peace and War, supra, 276.
47. Thomas L. Pangle and Peter J. Ahrensdorf, *Justice Among Nations* (1999), 173.
48. Grotius, s*upra*, Book II, Chapter 20.
49. James T. Johnson, *Morality and Contemporary Warfare* (1999), 35.
50. Brunnée and Toope, supra, 286.
51. Arthur Nussbaum, *A Concise History of the Law of Nations* (1954), 117.
52. O'Connell, Peace and War, supra, 277.
53. Walzer, *Just and Unjust Wars* (2000).
54. Ibid., 62–63.
55. Arthur Nussbaum, *A Concise History of the Law of Nations* (1954), 232.

56. Convention of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 18 October 1907, 3 *Martens Nouveau Recueil* (ser. 3), 404.
57. Covenant of the League of Nations, 28 June 1919, 11 *Martens Nouveau Recueil* (ser. 3), 323.
58. Article 10 provided: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled".
59. Philip C. Jessup, *Elihu Root*, Vol. 2: 1905–1937 (1938), 380.
60. Mary Ellen O'Connell, *The Power and Promise of International Law*, 159.
61. Ibid., 160.
62. Treaty for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 94 L.N.T.S. 57.
63. Ian Brownlie, *International Law and the Use of Force by States* (1963), 89.
64. *Naulilaa Case* (Portugal v. Germany), 1928, 2 UN R.I.A.A. 1001 (1949).
65. Brownlie, supra, 222.
66. David Thomson, *Europe Since Napoleon* (1966), 678.
67. The low point of international law being (mis-)used for political aims came with the 1939 German-Soviet pact of non-aggression. The Ribbentrop-Molotov Pact essentially in effect carved up eastern Europe into spheres of influence between Germany and the Soviet Union. Rather than preventing aggression, it has been described as a "licence for war" as it freed each of the signatories to attack within its sphere of influence without hindrance from the other party. See Norman Davies, *Europe: A History* (1987), 997.
68. Byers, *Custom, Power and the Power of Rules*, 22.
69. Joachim von Elbe, The Evolution of the Concept of Just War in International Law, 33 *AJIL* (1939), 684–685.
70. Kritsiotis, When States Use Armed Force, supra, 51.
71. Louis Henkin, *How Nations Behave*, supra, 88–89.
72. Francis Boyle, International Law and the Use of Force: Beyond Regime Theory, *in* Miller/Smith (Eds.), *Ideas and Ideals: Essays on Politics in Honor of Stanley Hoffmann* (1993).
73. Brownlie, supra, 83.
74. Thomas Franck, *The Power of Legitimacy Among Nations* (1990), 16.
75. Yoram Dinstein, *War, Aggression and Self-Defence* (2001), 75.
76. Kritsiotis, When States Use Armed Force, supra, 53.

77. Ibid., 76.
78. See Christopher Greenwood, The Concept of War in Modern International Law, 36 *ICLQ* (1987), 283.
79. Dinstein, supra, 4–14.
80. Westel Woodbury Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935).
81. Brownlie, supra, 85.
82. Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (2000), 9.
83. Yasuaki Onuma, International Law in and with International Politics, supra, 128.
84. Martti Koskenniemi, The Politics of International Law, 1 *EJIL* (1990), 31.
85. Martti Koskenniemi, *From Apology to Utopia*, 48.
86. Kritsiotis, supra, 55.
87. Declaration of the United States recognising as compulsory the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the International Justice, 1 U.N.T.S. 11.
88. The "Connally Reservation", ibid., see also 92 CONG.REC. 10,694 (1946): "[W]e never intended that the United Nations—and the International Court is a part of the United Nations structure – should ever have jurisdiction of essentially domestic issues".
89. ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, 1984 ICJ Reports 392.
90. ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment, 1986 ICJ Reports 14.
91. Franck, *Fairness in International Law and Institutions*, 32.
92. Ibid., 32–33.
93. Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI.
94. Brownlie, supra, 112, 114.
95. Derek Bowett, *Self-Defence in International Law* (1958), 152.
96. Randelzhofer/Dörr, Article 2 (4), *in* Simma et al. (Eds.), *The Charter of the United Nations: A Commentary* (2012), 209.
97. ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), 1986 ICJ Reports 14, 109, 110.
98. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226, 244.
99. The use of force, *in* Michael Schmitt (Ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017), Chapter 14, Rule 69 (Definition of use of force), 330–337.
100. Kritsiotis, When States Use Armed Force, supra, 58.
101. ICJ, *Corfu Channel Case* (United Kingdom v. Albania), Pleadings, Vol. III, 296; David J. Harris, *Cases and Materials on International Law* (2004), 892.

102. ICJ, *Legality of the Use of Force* (Yugoslavia v. Belgium), Oral Pleadings, 10 May 1999, CR/99/15 (1999), 16–17.
103. Thomas Franck, Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States, 64 *AJIL* (1970), 809.
104. Ibid., 835–836.
105. Louis Henkin, The Reports of the Death of Article 2(4) Are Greatly Exaggerated, 65 *AJIL* (1971), 545.
106. ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), 1986 ICJ Reports 14.
107. Ibid.
108. Ibid., 98.
109. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 331, Articles 61 and 62.
110. See Michael J. Glennon, How War Left the Law Behind, *The New York Times*, November 21, 2002, A37.
111. Christine Gray, *International Law and the Use of Force*, 18.
112. O'Connell, supra, 169.
113. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Reports 136, at 215 (separate opinion of Judge Higgins).
114. O'Connell, supra, 172.
115. Michael Walzer, *Just and Unjust Wars*, 12.
116. Martti Koskenniemi, Faith, Identity and the Killing of the Innocent, 10 *Leiden Journal of International Law* (1997), 355.
117. Kritsiotis, When States Use Armed Force, supra, 63.
118. Rosalyn Higgins, *Problems and Process*, 247–248.
119. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963), xx.
120. See Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985), 37.
121. Letter from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council, 7 October 2001, UN Doc. S/2001/946.
122. John Yoo, International Law and the War in Iraq, 97 *AJIL* (2003), 574.
123. Oscar Schachter, Self-Defense and the Rule of Law, 88 *AJIL* (1989), 267.
124. Mary Ellen O'Connell, Game of Drones, 109 *AJIL* (2015), 889.
125. Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, 27 January 1967, 610 U.N.T.S. 205.
126. NATO, Brussels Summit Communiqué (14 June 2021), paragraph 33: https://www.nato.int/cps/en/natohq/news_185000.htm.

127. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397, Article 88: "*The high seas shall be reserved for peaceful purposes*".
128. John Moore and William Schachte, The Senate Should Give Immediate Advice and Consent to the UN Convention on the Law of the Sea, 59 *Journal of International Affairs* (2005), 1–23 (also making the explicit link to the similar language in the Outer Space Treaty applying to the moon and other celestial bodies, while allowing activities in accordance with international law in the interest of maintaining peace and security).
129. Michal Schmitt, International Law at NATO's Brussels Summit, *EJIL Talk*, 30 June 2021: https://www.ejiltalk.org/international-law-at-natos-brussels-summit/.
130. Woomera Manual on the International Law of Military Space Activities and Operations: https://law.adelaide.edu.au/woomera/.
131. O'Connell, supra, 172.
132. See John Yoo, Using Force, 71 *Chicago Law Review* (2004), 740–741.
133. Letter from Secretary of State Webster to Lord Ashburton, *in* J. B. Moore, *A Digest of International Law* (1906), Vol. 2, 409.
134. Judith Gardam, *Necessity, Proportionality and Use of Force by States* (2004), 151.
135. Mary Ellen O'Connell and Maria Alevras-Chen, The Ban on the Bomb—and Bombing: Iran, the U.S., and the International Law of Self-Defense, 57 *Syracuse Law Review* (2007), 504–505.
136. Ibid.
137. Review of the Secretary General's Report "In Larger Freedom: Towards Development, Security and Human Rights for All", 6–8 April 2005, UN Doc. A/59/PV.85, A/59/PV.86, A/59/PV/87, A/59/PV.88, A/59/PV.89, A/59/PV.90.
138. Marko Milanovic, The Soleimani Strike and Self-Defence Against an Imminent Armed Attach, *EJIL Talk*, 7 January 2020: https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/.
139. Mary Ellen O'Connell, The Killing of Soleimani and International Law, *EJIL Talk*, 6 January 2020: https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/.
140. See Marko Milanovic, Iran Unlawfully Retaliates Against the United States, *EJIL Talk*, 8 January 2020: https://www.ejiltalk.org/iran-unlawfully-retaliates-against-the-united-states-violating-iraqi-sovereignty-in-the-process/. "*[T]he only legal theory that Iran could reasonably rely on is the one that the US had previously used against it. Relying on such a theory would of course implicitly validate the US position, on the law if not on the facts*".

141. President Barack Obama, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 5 December 2016: https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.
142. Brunée and Toope, *Legitimacy and Legality*, 292.
143. ICJ, *Oil Platforms Case* (Iran v. United States), 2003 ICJ Reports 161 186–187, paragraph 51.
144. See e.g. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 287 (1949); International Committee of the Red Cross, Commentary of 2016, Article 2: Application of the Convention, paragraph 236.
145. ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), 1986 ICJ Reports 14, 101, paragraph 191.
146. Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (2005), 138; but see the separate opinion of Judge Simma in the *Oil Platforms Case*, supra, 331–332, arguing in favour of the permissibility of defensive military action against smaller-scale use of force, provided the defensive measures fall equally short of the quality and quantity of action in self-defence against an full-scale armed attack.
147. The use of force, *in* Michael Schmitt (Ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017), Chapter 14, Rule 71 (Self-defence against armed attack), 339.
148. Michal Schmitt, International Law at NATO's Brussels Summit, *EJIL Talk*, 30 June 2021: https://www.ejiltalk.org/international-law-at-natos-brussels-summit/.
149. O'Connell, supra, 187–188.
150. ICJ, *Oil Platforms Case*, supra, 191–192.
151. Gray, supra, 196–197.
152. See ICJ, *Case Concerning Armed Activites on the Territory of the Congo, (Congo v. Uganda)*, 2005 ICJ Reports 168, 223; Dinstein, supra, 206.
153. Michal Schmitt, International Law at NATO's Brussels Summit, *EJIL Talk*, 30 June 2021: https://www.ejiltalk.org/international-law-at-natos-brussels-summit/.
154. NATO, Brussels Summit Communiqué (14 June 2021), paragraph 32: https://www.nato.int/cps/en/natohq/news_185000.htm.
155. The use of force, *in* Michael Schmitt (Ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017), 342.
156. Gazzini, supra, 139.
157. Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force by States: Beyond the Charter Paradigm* (1993), 186.
158. Nico Schrijver, Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"? 48 *Netherlands International Law Review* (2001), 284–285.

159. ICJ, *Legal Consequences of the Construction of a Wall In the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Reports 136, 194 (paragraph 139).
160. Ibid., paragraph 139.
161. See e.g. UN Doc. S/RES/1267 (1999); S/RES/1373 (2001); S/RES/2253 (2015); S/RES/2199 (2015).
162. See Security Council Report, *The UN Security Council Handbook* (2019), 13.
163. See Michael Schmitt, The Sixth United Nations GGE and International Law in Cyberspace, *Just Security*, 10 June 2021: https://www.justsecurity.org/76864/the-sixth-united-nations-gge-and-international-law-in-cyberspace/.
164. Michael Schmitt, In Defense of Due Diligence in Cyberspace, 125 *Yale Law Journal Forum* (2015), 68: http://www.yalelawjournal.org/forum/in-defense-of-due-diligence-in-cyberspace.
165. Steinberg, Wanted—Dead or Alive: Realism in International Law (2013), 152.
166. Richard B. Miller, Justification of the Iraq War Examined, 22 *Ethics and International Affairs* (2008), 49.
167. See Bowett, supra, 191–192.
168. Brunée and Toope, *Legitimacy and Legality*, 300.
169. See Philippe Sands, International Law and the Use of Force, *in* UK House of Commons—Foreign Affairs Committee, *Foreign Policy Aspects of the War on Terrorism*, Seventh Report of Session 2003–2004, Vol. II, Ev. 91, 92–93.
170. Grotius, supra: "[F]ear with respect to a neighbouring power is not sufficient cause. For in order that a self-defence may be lawful it must be necessary; and it is not necessary unless we are certain, not only regarding the power our neighbour, but also regarding his intention; the degree of certainty required is that which is accepted in morals".
171. See Thomas Franck, The Power of Legitimacy and the Legitimacy of Power, 100 *AJIL* (2006), 98: "[The] desire to make clear that the United States would act preemptively, more or less at will, whenever it thought its security threatened, was not taken seriously as a legal proposition, since its was not remotely advanced as a new reciprocal right, one tenable by any nation, but, rather, in the unilateralist spirit of Thucydides' characterization of the law governing relations between Athens and little Melos during the Peloponnesian Wars: that the powerful do as they will, while the weak do as they must".
172. See Nico Krisch, International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, 16 *EJIL* (2005).
173. Walzer, supra, 79.

174. David Luban, Preventive War, 32 *Philosophy and Public Affairs* (2004), 227.
175. Vaughan Lowe, The Iraq Crisis, What Now? 52 *ICLQ* (2003), 865.
176. Abram Chayes, *The Cuban Missile Crisis*, 65.
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253. Gareth Evans, The Responsibility to Protect: An Idea Whose Time has Come…and Gone? 22 *International Relations* (2008), 292.
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287. See Karl Deutsch et al. (Eds.), *Political Community and the North Atlantic Area* (1957), 5.
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292. Michael Taylor, *Community, Anarchy, and Liberty* (1982), 29.
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314. See Abram Chayes, *The Cuban Missile Crisis*, 78: "The Council is and usually conceives itself as a political body, fostering political solutions to political problems. Such solutions are not readily developed in terms of 'right' and 'wrong' but in terms of accommodation of the interests at stake".
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335. Michael J. Glennon, Why the Security Council Failed, 82 *Foreign Affairs* (2003), 16.
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339. David M. Malone, The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter, 35 *NYU Journal of International Law* (2003), 514, 516.
340. See Ian Johnstone, Security Council Deliberations: The Power of the Better Argument, 14 *EJIL* (2003), 463, who argues that "A larger Council could be less cohesive and reasoned discourse could become more difficult. As a thin normative consensus emerges, discourse based on shared understandings and intersubjective meanings, if not values, is possible. Conceivably, a dramatic expansion of the Council would jeopardise that minimal consensus. Debates would be more open and inclusive, but could lose their discursive bite".
341. Barnett, supra (1997), 540–541.
342. Hurd, supra (2014), 6–7.
343. O'Connell, *The Power and Purpose of International Law*, 203–204.
344. Un Doc. A/RES/377 (U) A, 3 November 1950:

> "[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore".

345. O'Connell, supra, 204.
346. Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland.
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348. Ibid.

349. Tom Farer, The Prospect for International Law and Order in the Wake of Iraq, 97 *AJIL* (2007), 625–626.
350. See e.g. James M. Lindsay, The Case for a Concert of Democracies, 23 *Ethics and International Affairs* (2009), 5.
351. See e.g. Antoine Rougier, La théorie de l'intervention d'humanité, 17 *RGDIP* (1910), 468–526; Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of Modern International Law: 1870–1960* (2002), 127–132, 136–143.
352. Stephen Schlesinger, Why a League of Democracies Will Not Work, 23 *Ethics and International Affairs* (2009), 13.
353. UN Charter, Article 39.
354. Ibid.
355. Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002), 21–31.
356. See Chayes, *The Cuban Missile Crisis*, 85: "The legal approach of the United States did not, on the whole, seek to identify rules or norms of conduct and to analyse these by the familiar techniques of legal reasoning to show that they were or were not applicable to the situation. The central concepts in the debate – armed attack in Article 51, threat to the peace, breach of the peace or act of aggression in Article 39 […] – all these are treated by the United States analysis as essentially political categories. They provide broad, general guides to political decision, but they are not susceptible to much elaboration or refinement by legal techniques".
357. Brunnée and Toope, *Legitimacy and Legality*, 320.
358. See A. Mark Weisburd, *Use of Force: The Practice of States Since World War II* (1997).
359. Security Council Report, *The UN Security Council Handbook* (2019), 22.
360. Security Council Report, *Special Research Report: The Veto*, 19 October 2015: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf, 3.
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362. See e.g. Glennon, supra (2002).
363. Marc Weller, *Iraq and the Use of Force in International Law* (2010), 143, 184–185.
364. UN Doc. S/RES/678 (1990), paragraph 2.
365. UN Doc. S/RES/1441 (2002), paragraph 2.
366. Ibid., paragraph 13.
367. Harold Hongju Koh, On American Exceptionalism, 55 *Stanford Law Review* (2003), 1517.
368. Weller, supra, 176.

369. Koh, supra, 1518.
370. Weller, supra, 178–180.
371. Ibid., 180.
372. Reus-Smit, *The Politics of International Law*, xii.

    It has to be noted, though, that the efforts of the United States were rather reluctant, as the Administration wanted to preserve its position that it had the authority to use force irrespective of whether there was a second resolution or not, and thus was in no mood to subject its claimed freedom of action to a further decision by the UN Security Council. Weller, supra, 186.

    See also Testimony of Lord Goldsmith, UK Attorney General, to the Iraq Inquiry (27 January 2010): http://www.iraqinquiry.org.uk/media/43803/100127-goldsmith.pdf, 87.

    "I was told by the State Department, legal adviser, the only red line that the negotiators had was that they must not concede a further decision of the Security Council because they took the view they could move in any event […] if they had agreed a decision which said the Security Council must decide, they would have then lost that freedom".
373. Weller, supra, 274.
374. Remarks of the State Department Legal Adviser William H. Taft IV before the National Association of Attorneys General, 20 March 2003 ("*The President may also, of course, always use force under international law in self-defense.*"): http://www.state.gov/s/l/2003/44408.htm. See also Abraham D. Sofaer, On the Necessity of Pre-emption, 14 *EJIL* (2003), 209; John Yoo, International Law and the War in Iraq, 97 *AJIL* (2003), 574. However, the statements of the United States Administration in this sense seem mainly to have been directed at the political arena, and no further attempt was made to pursue the argument of pre-emptive self-defence beyond the claim that the invasion was necessary to "defend the United States and the international community from the threat posed by Iraq", see Marc Weller, Iraq and the Use of Force in International Law (2010), 143.
375. ICJ, *Nicaragua* (1986), supra, 110.
376. Thomas Franck, What Happens Now? The United Nations after Iraq, 97 *AJIL* (2003), 611.
377. Letter from Ambassador John Negroponte, United States Representative to the United Nations, to the President of the Security Council, UN Doc. S/2003/353 (20 March 2003).
378. Weller, supra, 220.

379. The Parliamentary Answer of the Attorney General, Lord Goldsmith, of 17 March 2003 (available at: http://www.guardian.co.uk/uk/2005/mar/11/politics.iraq), reads as follows:

Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security:

1. In resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
2. In resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under resolution 678.
3. A material breach of resolution 687 revives the authority to use force under resolution 678.
4. In resolution 1441 the Security Council determined that Iraq has been and remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.
5. The Security Council in resolution 1441 gave Iraq "a final opportunity to comply with its disarmament obligations" and warned Iraq of the "serious consequences" if it did not.
6. The Security Council also decided in resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of resolution 1441, that would constitute a further material breach.
7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach.
8. Thus, the authority to use force under resolution 678 has revived and so continues today.
9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.

380. See Weller, supra, 222. At the time of the events, this memorandum was classified and not available in the public domain. The UK inquiry into the Iraq war later revealed that this legal advice was initially not circulated beyond a narrow group of ministers.

381. The Iraq Inquiry, Executive Summary, 66–67: http://www.iraqinquiry.org.uk/media/247921/the-report-of-the-iraq-inquiry_executive-summary.pdf.
382. See e.g. Anne-Marie Slaughter, *Is the U.S. at Risk of Violating International Law*, Council on Foreign Relations, 3 March 2003: http://www.nytimes.com/cfr/international/mustreads030403.html?pagewanted=print&position=bottom; Letter to the Editor, War Would be Illegal, *The Guardian*, 23 March 2003, 13: http://www.guardian.co.uk/politics/2003/mar/07/high, ereducation.iraq—joint letter by Prof. Ulf Bernitz, Dr Nicolas Espejo-Yaksic, Agnes Hurwitz, Prof. Vaughan Lowe, Dr. Ben Saul, Dr. Katja Ziegler (University of Oxford), Prof. James Crawford, Dr. Susan Marks, Dr. Roger O'Keefe (University of Cambridge), Prof. Christine Chinkin, Dr. Gerry Simpson, Deborah Cass (London School of Economics), Dr. Matthew Craven (School of Oriental and African Studies), Prof. Philippe Sands, Dr. Ralph Wilde (University College London), Prof. Pierre-Marie Dupuy (University of Paris I, Pantheon-Sorbonne): "there is no justification under international law for the use of military force against Iraq"; see also the international law submissions to the Iraq Inquiry available at http://www.iraqinquiry.org.uk/other-material/submissions-international-law/.
383. Hans Blix, Blair Told Me The Intelligence Was Clear. That Was a Disastrous Failure of Judgement, *The Guardian*, 6 July 2016: https://www.theguardian.com/commentisfree/2016/jul/06/blair-intelligence-clear-failure-war-iraq.
384. Rapport Commisie van onderzoek besluitvorming Irak: http://vorige.nrc.nl/multimedia/archive/00267/rapport_commissie_i_267285a.pdf (English summary available at http://www.iraqinquirydigest.org/?page_id=7576).
385. Muge Kinacioglu, Review Article: Yoram Dinstein, War Aggression and Self-Defence, 18 *EJIL* (2007), 781.
386. UN Doc. S/PV.4726 (26 March 2003), 14.
387. Franck, supra (2003), 612. This appears all the more plausible given that the Security Council has no practice of explicitly terminating authorisations to use force once the stated objectives have been achieved or the crisis has otherwise been resolved.
388. Ibid.
389. In this context, it is significant to note that during the 2010 hearings of the UK Iraq Inquiry, the then-UK Foreign Secretary confirmed that "[…] the French were profoundly concerned that there should […] be no automaticity; in other words, that the first resolution that became 1441, should not provide approval or authority of itself for immediate military action as 687 had done. We accepted that […] and the architecture of 1441 was without question one which had two stages", Jack

Straw, Chilcot Testimony, 8 February 2010, 37: http://www.iraqinquiry.org.uk/media/49448/20100802-straw-final.pdf.

390. S/RES/678 (1990), paragraph 2: "Authorises Member States […] to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".

391. S/RES/1441 (2002) does contain a mention of "all necessary means", however, this reference in the Preamble refers to resolution 678 and does not form part of the operative provisions of resolution 1441. And while the United Kingdom and the United States might have thought the mention of "serious consequences" to be sufficient for "reviving" the authorization contained in resolution 678, this was—in any case—conditioned upon the "final opportunity to comply" given to Iraq in paragraph 2 of resolution 1441 as well as the requirement in paragraph 12 of a further meeting by the Security Council in the event of non-compliance by Iraq with its obligations, see Weller, supra, 153, 157.

    This was also the initial view of the UK Attorney General after the adoption of resolution 1441: "It was very clear from Resolution 1441 (2002) that, in the event of Iraq's non-compliance, there would have to be further discussion in the Security Council […] The decision of whether there was a serious breach or not was for the Security Council alone", *quoted in* Weller, supra, 159.

392. According to the then Legal Adviser to the U.S. Department of State, however, while the underlying arguments of the United States were not accepted by any state, some of them were at least aware that the United States considered that the resolution "left intact our authority to use force without further authorization from the UN Security Council if Iraq failed to comply. We stated that this was our understanding of the situation in our explanation of the vote on Resolution 1441. Other States expressed different understandings of what the resolution required at the same time. We felt that the language that we had drafted provided better support for our position than for theirs. What was important, we thought, was that no one could be in doubt about our intentions and the basis of it", William H. Taft IV, The Bush (43rd) Administration, *in* Scharf/Williams (Eds.), *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser*, 133.

393. Following the adoption of Resolution 1441, France indicated: "*Cette résolution conforte le rôle et l'autorité du Conseil de sécurité. C'était là l'objectif principal et constant de la France tout au long des négociations qui viennent de s'achever. Nous avions traduit cet objectif en demandant que soit établie et respectée une «approche en deux temps», assurant que le Conseil de sécurité conserve la maîtrise du processus à chaque étape.*", see Record of the 4644th Meeting of the United Nations Security Council,

S/PV.4644 (8 November 2002), 5; similarly, Syria declared that it had "voted in favour of the resolution, having received assurances from its sponsors […] through high-level contacts, that it would not be used as a pretext for striking against Iraq. The resolution should not be interpreted, through certain paragraphs, as authorising any State to use force. It reaffirms the central role of the Security Council in addressing all phases of the Iraqi issue", ibid., 11.

394. Brunée and Toope, *Legitimacy and Legality*, 316.
395. Michael Walzer, *Just and Unjust Wars*, 107.
396. Anne Orford, Moral Internationalism and the Responsibility to Protect, supra, 85.
397. Michael Walzer, *Just and Unjust Wars*, xxi.
398. UN Security Council, 4726th meeting, UN Doc. S/PV.4726 (26 March 2003), 3.
399. Koh, On American Exceptionalism, supra, 1524.
400. Ian Johnstone, The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism, 43 *Columbia Journal of Transnational Law* (2005), 384.
401. See UN Doc. S/RES/1441 (2002), Preamble.
402. UN Charter, Articles 41 and 42.
403. Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), 189; Vaughan Lowe, The Iraq Crisis: What Now? 52 *ICLQ* (2003), 867.
404. Franck, supra (2003), 616–618.
405. Brunnéée and Toope, supra, 322.
406. See The Iraq Inquiry: http://www.iraqinquiry.org.uk/about.aspx.
407. The Iraq Inquiry, Statement by Sir John Chilcot, 6 July 2016: http://www.iraqinquiry.org.uk/media/247010/2016-09-06-sir-john-chilcots-public-statement.pdf.
408. Elisabeth Wilmshurst, We Ignored the Rule of Law—The Result Was Iraq, *The Guardian*, 7 July 2016: https://www.theguardian.com/commentisfree/2016/jul/07/ignored-rule-law-war-result-was-iraq-un-charter-foreign-office-lawyer-2003.
409. Hans Blix, Blair Told Me the Intelligence Was Clear. That Was a Disastrous Failure of Judgment, *The Guardian*, 6 July 2016: https://www.theguardian.com/commentisfree/2016/jul/06/blair-intelligence-clear-failure-war-iraq.
410. Weller, supra, 275.
411. Dapo Akande, How and Why International Law Matters—Lessons from the UK's Iraq Inquiry, *EJIL Talk*, 31 January, 2010: http://www.ejiltalk.org/how-and-why-international-law-matters-lessons-from-the-uks-iraq-inquiry/#more-1891.

412. See Note from the Foreign Secretary to Sir Michael Wood (FCO Legal Adviser) re Iraq: Legal Basis for the Use of Force (29 January 2003): http://www.iraqinquiry.org.uk/media/43511/doc_2010_01_26_11_04_18_456.pdf.

    "I note your advice, but I do not accept it […] I hope (for political reasons) we can get a second Resolution. But there is a strong case to be made that UNSCR 687, and everything which has happened since (assuming that Iraq continues not to comply), provides a sufficient basis in international law to justify military action".

    Thus, the Foreign Secretary was personally arguing against the position of his own expert advisers. Weller, supra, 213–214.
413. Tony Blair, Testimony to the Iraq Inquiry, 29 January 2010, 150: http://www.iraqinquiry.org.uk/media/43909/100129-blair.pdf.
414. See Foreign and Commonwealth Office, *Iraq: Legal Background*, 8 March 2002: http://downingstreetmemo.com/iraqlegalbacktext.html; Notes from Michael Wood (FCO Legal Adviser) to the Foreign Secretary's Private Secretary re Iraq, 4 October 2002 and 15 October 2002, both *quoted in* Weller, *Iraq and the Use of Force in International Law*, 206–207.
415. Akande, supra (2010).
416. https://www.gov.uk/government/publications/syria-reported-chemical-weapons-use-joint-intelligence-committee-letter; https://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21.
417. Security Council Report, What's in Blue, *Syria: What Role for the Security Council?* 13 September 2013: http://www.whatsinblue.org/2013/09/developments-on-syria.php.
418. Harold Koh, Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward), *EJIL Talk*, 4 October 2013: https://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/.
419. UK House of Commons debate on Syria, 30 August 2013: http://www.parliament.uk/business/news/2013/august/commons-debate-on-syria/.
420. Security Council Report, What's in Blue, *Syria: From Stalemate to Compromise*, 27 September 2013: http://www.whatsinblue.org/2013/09/syria-adoption-of-a-chemical-weapons-resolution.php.
421. S/RES/2118 (2003).
422. Security Council Report, What's in Blue, *Briefing on Syria Chemical Weapons: Removal Complete, Verification and Destruction Activities Re*main, 3 July 2014: http://www.whatsinblue.org/2014/07/briefing-on-syria-chemical-weapons-removal-completed-verification-and-destruction-activities-remain.php.

423. Thomas Franck, What Happens Now? The United Nations after Iraq, 97 *AJIL* (2003), 620.
424. Security Council Report, *The Rule of Law: Retreat from Accountability*, 15: https://www.securitycouncilreport.org/research-reports/the-rule-of-law-retreat-from-accountability.php.
425. Ibid., 2. 17.
426. Ibid., 28.
427. Ronald Krebs and Jennifer Lobasz, Fixing the Meaning of 9/11: Hegemony, Coercion and the Road to War in Iraq, 16 *Security Studies* (2007), 409.
428. Ian Johnstone, *The Power of Deliberation*, 113. The decision of the United States was legally important because it reaffirms the carefully circumscribed set of exceptions to the prohibition on the use of force. When pushed for legal justification for the invasion in Iraq, the United States did not choose to push the boundaries of what is permissible under international law.
429. Ibid., 111.
430. Ian Hurd, The UN Security Council and the International Rule of Law, 7 *Chinese Journal of International Politics* (2014), 18.
431. Franck, supra (2003), 608.
432. Weller, supra, 275.
433. Johnstone, supra, 204.
434. Abram Chayes, *The Cuban Missile Crisis*, 102.
435. Kritsiotis, When States Use Armed Force, supra, 78.
436. Chayes, supra, 5.
437. Kritsiotis, ibid.

CHAPTER 5

The International Criminal Court

In July 1998, after years of preparatory work and weeks of intensive negotiations, 120 states at the Rome Treaty Conference voted to approve the Rome Statute intended to establish the International Criminal Court (ICC).[1] As one of the major players during the *travaux préparatoires* leading up to the conference, the United States was initially predisposed to support efforts at creating this institution, since the draft elements of the proposed statute, going into the Rome conference, were largely crafted in a way to accommodate its preoccupations.[2] Before the conference had opened, the United States had not formulated a clear and comprehensive position.[3] Therefore, there were expectations that certain of its demands were merely negotiating positions that would be amenable to flexibility.[4] Other actors had also formulated specific demands,[5] but none openly doubted the desirability of the ICC as an objective.[6] And as the negotiations began, the United States had reason to believe that its views would attract enough support to generate an outcome that it could support.[7] However, at the conclusion of the Rome conference, the United States felt compelled to vote against the statute, joined only by China, Iraq, Israel, Libya, Qatar and Yemen.[8] In effect, during the negotiations and thereafter the establishment of the Court, the United States had failed to attract the adherence of most actors present at the conference on the large majority of issues it deemed of outmost concern to its interests.

A. Germeaux, *The International Legal Order in Global Governance*,
https://doi.org/10.1007/978-3-031-16057-8_5

It may be possible, of course, to explain this phenomenon largely in terms of material factors, along the lines of conventional interest-based analyses of international law and politics. Such an explanation, however, would be unable to shed light on many important aspects of the creation of the ICC.[9] Realism considers that international law and organisations favour the powerful actors and their political ends. In this view, the United States aimed for an international criminal court that would further its international interests, and when it did not get what it wanted, it withdrew its support, which should have doomed the project from the outset. Yet, despite the fierce opposition of the United States and other powerful actors such as China, India and later Russia the Rome Statute was nonetheless adopted by an overwhelming majority of participants. It thereafter took only three years for it to reach the threshold of sixty ratifications to bring it into force and establish the ICC, and less than ten years more to complete the Rome Statute with the amendments on the crime of aggression.

In order to preserve their latitude in acting domestically and internationally, it could be presumed that actors' interests consist in shielding their actions from any authoritative external scrutiny. Eyal Benvenisti and George Downs have highlighted how hegemonic actors in particular aim to establish differentiated legal regimes favourable to their own interests, and that in doing so they tend to avoid to the extent possible, the creation of judicial institutions endowed with a significant independent authority, or at least aim to circumscribe this authority.[10] Assessments by a third party may not strictly be enforceable, nonetheless a finding that an action is contrary to international law by a recognised international court, could significantly affect international and domestic support for the selected course of action.[11]

The ICC clearly addresses security policy issues, as the conduct from nationals of any state is potentially subjected to scrutiny and criminal prosecution by an independent third party.[12] It also interferes with the core of national sovereignty, namely "the ultimate application of the power of the state to persons within its territory".[13] Further, interest-based analyses, based on rational actors in pursuit of efficient means to realise individual and collective interests, cannot adequately reflect the outcome of the ICC negotiations. From a rationalist point of view, the prosecution of international crimes represents a collective action problem; whereby all actors would benefit from cooperating, but each individually has an

incentive to defect. Prosecuting international crimes needs the participation of most, if not all, actors, but individual incentives are low, thus requiring an institution that involves high degrees of centralised decision-making or delegation in order to internalise externalities.[14] However, as the creation of the ICC may entail a significant impact on states parties' freedom of action, one could expect high levels of asymmetric control of the institution by privileged voting rights to powerful actors or the inclusion of flexibility mechanisms such as opt-out provisions.[15] The Rome Statute does reflect the intention to solve a collective action problem in creating a permanent international forum, thus reducing the transaction costs involved in establishing ad-hoc tribunals for specific cases. It was, however, driven more fundamentally even by a desire on the part of many participants in the negotiations to develop and stabilise norms of legitimate behaviour,[16] hence the reluctance to accord specific privileges to a limited set of actors. This was true to a certain extent even for those actors that had most to lose from more stringent international legal constraints, or in the words of David Scheffer, then Ambassador at-large for war crimes, and head of the United States delegation in Rome: "*There can no longer be the gap in the international system that has existed in the past; namely, the possibility that an individual in a leadership position of significant political character or military or paramilitary or police rank can plan or otherwise participate in the commission of atrocity crimes and yet enjoy virtual impunity. Internationally, that possibility is no longer tolerable even though it may well exist for some time to come before the rule of law and its enforcement takes hold through a combination of international and national efforts. The tide is turning against unqualified arguments that would have the 'act of state doctrine'*[17] *shielding the commission of atrocities by individual leaders, or the protections of 'head of state immunity'*[18] *or 'diplomatic immunity'*[19] *permanently absolving leaders of criminal responsibility and accountability of atrocity crimes. The notion that political imperatives immunize any individual from criminal law with respect to the worst possible crimes directed against humankind is quickly losing credibility, and no democratic government […] could champion such impunity and remain true to the fundamental governing principles of a modern civilized society*".[20]

According to David Wippman, a more complete understanding of the establishment of the Court requires consideration of the "reasons for action"[21] of the various actors involved, as well as the context of the negotiations, which pushed actors to articulate their positions in forms

that resonated with the underlying aim to create a legal institution. The creation of a new institution necessarily involves questions that cannot be resolved simply by applying pre-existing legal principles; in this, law and politics were inseparable. Simultaneously, an accurate assessment cannot ignore how international law came to bear upon the contested issues concerning the ICC. A number of issues did not give rise to contestation for the very reason that the participants viewed them as largely determined by existing international law: "given that the aim […] was the creation of a legal institution, even contested issues were not negotiated in a vacuum, since this effort took place – and could only make sense within – the larger context of existing international law and institutions".[22] And because international law has its own "language of justification",[23] much of the exchanges took the form of legal arguments.[24] It has been stated that these legal arguments were put forward in support of the interests of the particular actors making the arguments, but the process of invoking and pursuing legal argumentation in turn helped shape the range of possibilities viewed as permissible by the actors involved. In the context of the ICC, the arguments of both its proponents and critics reflected a combination of normative, material and identity-based concerns. More than other international instruments, the significance of the Rome Statute is as much symbolic as it is practical and its effects are mostly indirect through deterring the commission of future atrocities and strengthening national prosecutions in line with the complementarity principle.[25] Its significance extends beyond establishing international criminal responsibility for individual conduct: it symbolises and embodies certain fundamental values; most notably that accountability is necessary for lasting peace and security.[26] The concerns on both sides reflect fundamentally divergent conceptions of the role of international law and organisations in international relations. Those in favour of the court conceive of international law as an instrument to frame the expression of politics and advance a conception of the international system based on the rule of law. Those suspicious about the court are animated by scepticism concerning the efficacy and desirability of this vision underlying international law,[27] as well as criticism of the court as an embodiment of a western-centric view of international order and pressures for the court to "get out of Africa".[28] The view of the ICC as an instrument of change and social progress, delivering a solution to the issue of accountability, is contrasted with perceptions of the court as a problem, for instance, through political prosecutions and misguided indictments against African heads of state.

1 Towards an International Criminal Court

The idea of prosecuting those who initiate "unjust" wars has deep roots, although it was not until the post-World War II era that the international community identified the launching of an aggressive war as a criminal act—a "crime against the peace". It reflected the reasoning contained in the London Charter that established the International Military Tribunal at Nuremberg in 1945 and set forth in the judgement of the tribunal, that waging of a war of aggression was considered as the "supreme international crime":

> To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[29]

After the Nuremberg trials, the United States chief prosecutor Robert Jackson stated that the prohibition of aggressive war, by force of a "judicial precedent", had become "a law with a sanction".[30] Yet, Jackson's famous promise that, from that moment on, the new norm of international criminal law against aggressive war would be applied against all violators[31] was doomed to remain unfulfilled for many subsequent decades. Although the idea of an international criminal court was floated shortly after the Nuremberg trials when the UN General Assembly mandated the International Law Commission (ILC) to consider the desirability and possibility of establishing such a body, it proved to be impossible to achieve consensus on this issue during the Cold War era. Nonetheless, this period saw continued normative developments pertaining to international criminal law. By the end of the Cold War, the United Nations had managed to agree on a definition of aggression and had adopted the Genocide Convention, the Convention against Torture, the Convention against Apartheid, and seen the development of the Geneva Conventions and their Additional Protocols. At best, these instruments could be said to impose a duty of *aut dedere aut judicare* on states (either prosecute perpetrators at the national level or to extradite them).[32] What was missing was a standing international institution to enforce these norms.

1.1 The Travaux Préparatoires

A significant breakthrough occurred when the end of the Cold War allowed for certain convergences among the permanent members of the Security Council. The idea of an ICC was then reinvigorated in the early 1990s by Trinidad and Tobago, and the UN General Assembly adopted a resolution requesting the ILC to reconsider a draft statute for a permanent court.[33] In parallel, the UN Security Council, under enormous public pressure to act following the atrocities committed in former Yugoslavia and Rwanda, finally decided to establish an International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993,[34] followed by the International Criminal Tribunal for Rwanda (ICTR) in 1994.[35] Against this background, the General Assembly reacted to the final ILC draft for an international criminal court in 1994[36] by setting up an ad-hoc committee in 1995,[37] followed in 1996 by a Preparatory Committee (PrepCom),[38] to discuss the ILC draft and finalise it in view of a diplomatic conference at which it could be adopted.[39]

Initially, the ILC draft constituted the accepted basis for negotiations. Attempting to reflect the perceived political consensus of the day, it envisaged the ICC as a non-permanent institution that could be activated when needed to address war crimes, crimes against humanity, genocide and aggression.[40] The proposed court would be empowered to intervene only if national systems were unavailable and its jurisdiction was heavily dependent on consent. With the exception of genocide, accepting the court's jurisdiction was to be optional. After ratification, states parties were to choose, following an opt-in mechanism, for which crimes they were willing to accept the court's jurisdiction. The proposal was for a court closely affiliated with and readily available to the Security Council, which had the power to refer cases to it irrespective of whether the actors in question consented.[41] Finally, the court could only take up cases the Council was not already seized with under its Chapter VII responsibilities. The ILC's commentary reveals that this architecture was based on both "practicability" and achieving "the widest possible adherence of states"[42] to the statute. Several of the permanent members of the Security Council had indeed voiced criticism from an early stage and considered that it was premature to engage in actual drafting until the political climate matured enough to allow the process to move to a more concrete level.[43]

1.2 The Rome Statute

As established by the Rome Statute, the ICC has jurisdiction over the crimes of genocide, crimes against humanity and war crimes, and following the Kampala amendments, the crime of aggression.[44] In line with the principle of complementarity, the ICC will act only if a state is unwilling or unable to prosecute matters on its own.[45] The court has automatic jurisdiction if either the territorial state or the state having custody over the suspect consent to or are parties to the statute.[46] An investigation before the court can be launched according to three mechanisms. First, states parties can submit a "situation" to the prosecutor. Second, the Security Council can refer situations under Chapter VII to the ICC, in which case the court automatically has jurisdiction without any requirement of state consent. Third, the statute grants the prosecutor the right on her or his own behalf start an investigation.[47] Additionally, the Security Council has the authority to defer investigations, by a resolution adopted under Chapter VII of the UN Charter.[48] From this outline of the statute, it appears that a large majority rejected the model envisaged by the ILC. On all matters regarding the independence of the court, the Rome Statute differs significantly from the ILC draft. In this, and against the predictions of adherents of realist and institutionalist theories, the statute decidedly changed the existing normative framework and institutional setup. Although the statute formally establishes an institution designed to enforce compliance with already existing norms, it also reflects a more general trend towards recognising that ensuring accountability for the most serious crimes is integral to achieving lasting peace and security.[49] And even though the United States is generally favourable to the idea of international criminal justice, the head of its delegation to the Rome conference later acknowledged that it had failed to achieve consensus on one of its primary concerns, that the ICC would be firmly anchored in the mechanisms of the UN Security Council with a very limited prosecutorial discretion.[50] The mechanisms of bargaining between the different groups which eventually led to this outcome have already been analysed at length and we shall not repeat this endeavour here.[51] Rather, what is of interest in the instance of the ICC is the distinction between legal and political arguments in international criminal justice, and how international law framed what the actors can legitimately advance as a valid argument.

The actors viewed the statute that was to be established as a means to constrain the behaviour of individuals and governments, and to coordinate the response to particular crimes. While the creation of an institution that touches upon the essence of actors' key prerogatives is inherently political, the provisions of the statute are designed to be applied, and can only produce their effects, within the wider framework of existing international law,[52] such as *pacta sunt servanda*. Further, the participants viewed the process as legitimate, and the actors present as competent to enact binding legal norms.[53] The actors naturally also conceived the process of establishing an international criminal court as a political process, but they nonetheless viewed law and politics as relating to distinct modes of argumentation. In practice, international law, like all law, emerges and evolves through political processes. There is a conceptual difference, however, in that the application of international law is presumed to circumscribe political action, rather than political outcomes being determined by power and interest alone: "Once the legal rules are set, outcomes should not depend on the relative power of the disputants. To identify the operation of political power within an institution of law is to discover a 'defect', a site at which reform must be pursued if the values of law are to be maintained".[54]

1.3 Law and Politics in the ICC Negotiations

There is no rigid distinction between international law and politics, however. We have seen that beyond constraining actors in the choice of available alternatives and justifying courses of action, law creation can also be viewed as an opportunity for the powerful to establish norms to further their own interests.[55] The application of legal norms can likewise be considered as political. No matter how precise legal norms may appear, they are by design phrased in abstract and general terms. Their application to a given situation will therefore always require choices between defensible alternative interpretations concerning which norms apply and what they require.[56] Because international law does not assist in arbitrating those options, the choices are necessarily political.

At the same time, however, it would be overly simplistic to conclude that the creation of new norms and institutions is only about actors' particularised interests. David Wippman has elaborated upon how creating legal norms and establishing international institutions does not take place in a vacuum, where everything is up for negotiation and

outcomes are the result of relative power among the protagonists.[57] Law creation instead takes place within a framework of intersubjective understandings, which shape and circumscribe the range of options viewed by the participants in the process as permissible, and which simultaneously influence the process itself[58]: These contextual elements framing the negotiations to create new legal norms in turn determine the validity and appropriateness of particular arguments and modes of reasoning among the participants, thereby impacting the positions they are seeking to advance. "*There is pressure to frame interests in legal terms, to argue that a provision should be adopted or rejected because it is mandated by, or contrary to, existing international law, that it strengthens or weakens international law, or that it furthers the collective interest of the international community rather than individual […] interests [of particular actors]*".[59] Most issues concerning the ICC centre on legal arguments; even when international law does not compel a particular outcome, ideas about law shape the arguments put forward.[60] At the same time as law was feeding into the negotiating parties' arguments, law itself was seen as a means to further underlying political positions. Many actors deliberately intended to constrain and shape politics through the creation of new international law. Their aim was to shift the authority for decision-making from the domestic level to an independent international institution, thereby limiting the discretion of individual states through the obligation to consent to international criminal jurisdiction in the future. More fundamentally, the objective was to establish a consensus that impunity for the most serious crimes of concern to the international community is no longer accepted.[61] This effort is both legal and political; it reflects the endeavour to achieve political ends through law. It builds on existing international law and legal institutions and represents a conscious attempt to advance human rights and the rule of law at the international level, as well as expanding the reach and impact of international humanitarian law (IHL).[62]

As has been noted by Wippman, for dominant or hegemonic actors, the ICC presents both a risk and an opportunity. While they may value the primacy of their own political and legal freedom of action, undermining the norms upon which their very dominance is set might create a perilous precedent. The United States broadly subscribes to the notions inherent in international criminal law, but maintains an ambiguous relationship with international law, as it has long been cautious in recognising it as self-executing domestically and does not afford it status equal or above

the Constitution.[63] International human rights law, and institutions like the ICC, challenge this premise in favour of a set of cosmopolitan ethics that transcends national conceptions of law and politics.[64] The ICC aims to overcome the limitations of power politics by providing an international forum for legal cases asserted on behalf of individuals against states and other individuals. This approach can be at odds with the interests of powerful actors, notably the P5. They are weary that the court might be used as an instrument to constrain their freedom of action, including on the use of force.[65] At the same time, the United States was an early proponent of international criminal justice and despite its scepticism did not withdraw from its obligation to provide the largest share of financing to both the ICTY and ICTR. It has done so not only out of a sense of circumstantial self-interest, but also because it realised that accountability can usefully serve in a broader context to marginalise belligerent parties and foster regional stability. For the United States, the challenge consisted in establishing norms permitting international prosecution of grave violations of human rights and IHL without simultaneously acting as a constraint on its own freedom of action.[66]

1.4 Defining the Crime of Aggression

The adoption of the Rome Statute brought into force the possibility of international criminal prosecution, but at first did not change the situation with regard to the crime of aggression, as it had proven impossible to agree on a definition of the crime, and divisions remained regarding the crucial issue of the role of the Security Council with respect to proceedings before the ICC. There remained, however, a widespread belief that the crime of aggression should ultimately form part of the ICC's jurisdiction.[67] This resulted in the compromise contained in the former Article 5 (2) of the statute, confirming the ICC's jurisdiction over the crime once a provision has been adopted by states parties to define its content and setting out the conditions for the court's exercise of jurisdiction.[68] Soon after the entry into force of the Rome Statute in 2002, the Assembly of States Parties (ASP) expressed its desire to continue and complete the work on the crime of aggression. Consequently, the ASP established the Special Working Group on the Crime of Aggression (SWGCA),[69] which concluded its work with a set of proposals in 2009.[70] The definition of crime of aggression was the most uncontroversial part in the negotiations, with the draft definition of the *travaux préparatoires* being adopted

without any changes to the text produced by the Special Working Group. The "crime" of aggression as such, in terms of individual criminal liability, did not give rise to contestation. What proved difficult to define was the "act" of aggression underlying the crime.[71] There was strong agreement that individual criminal liability for the crime of aggression be linked to the command- and decision-making level, in accordance with the Nuremberg Charter. The relevant part of Article 8bis (1) later included in the statute provides:

> For the purpose of this Statute, 'crime of aggression' means the planning, perpetration, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of the State, of an act of aggression […].[72]

The definition of the act of aggression generated considerable debate and the SWGCA proceeded in two phases to settle the issue.[73] First, it defined an act of aggression in the same way as Article 1 of UN General Assembly resolution 3314 (XXIX) of 14 December 1974—namely, as the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".[74] Second, in response to concerns that such acts of aggression might include minor incidents as well as legally uncertain violations of the UN Charter, the draft of the SWGCA required the act of aggression, "by its character, gravity and scale", to constitute a "manifest violation" of the Charter.[75] Accordingly, only the most serious instances involving the use of force in violation of international law would be covered by the jurisdiction of the ICC over individual conduct,[76] thereby excluding those cases where the legality of the action may be subject to reasonable questioning, such as use of force aimed at preventing mass atrocities against civilians without Security Council authorisation.[77]

Two major issues remained: some form of consent of the alleged aggressor state would be required, and the role of the Security Council once the ICC prosecutor intends to proceed from a preliminary investigation to the formal opening of a case.[78] To a certain degree, the crime of aggression negotiations therefore related to arguments about jurisdiction rather than definition. Accordingly, the negotiations up to the finalisation of the amendments to the Rome Statute focused primarily on the court's jurisdiction over the crime of aggression.[79]

In May and June 2010, delegations gathered in Kampala, Uganda for the first Review Conference of the Rome Statute of the International Criminal Court.[80] Despite an, albeit fragile, consensus on the definition of the crime of aggression, most contentious issues were yet to be decided.[81] The specific difficulty of reaching consensus resulted from the fact that the crime by its nature involves both state action and individual conduct. Establishing jurisdiction over the crime of aggression thus necessarily implies that a court is to pronounce itself on the policy decisions of a state. From virtually the beginning of the negotiations, it was therefore argued that an aggression prosecution should not proceed without the certainty that a clear act of aggression had been committed.[82] Where delegations diverged was in deciding which instance should be empowered to determine this consensus: the Security Council, in accordance with its role under the UN Charter as entrusted with the primary responsibility for maintaining international peace and security, or a different body, including even the ICC itself.[83]

The P5, along with a number of allies, sought to circumscribe the definition of aggression.[84] In particular, this group insisted that the UN Charter and policy considerations required that the Security Council have the exclusive power to authorise prosecutions over the crime of aggression. The "like-minded" group, featuring the European Union and its member states, many members of the group of Latin American and Caribbean States (GRULAC), the African Group, as well as other smaller states parties, defended an expansive definition of the crime. They also pushed for a jurisdiction that would apply without requiring state consent and would not be controlled by the Security Council. Throughout the negotiating process, actors drifted between two antagonistic positions: At the one end, the role of the Security Council as the organ entrusted with the primary responsibility for the maintenance of international peace and security; at the other end the nature of the ICC as an independent judicial institution that should operate without interference by political institutions or requiring the consent of states.[85]

1.5 The Crime of Aggression Amendments

The outcome of the negotiations subjects the jurisdiction of the ICC to Article 12 of the Rome Statue,[86] but with two important caveats added in order to reassure the P5. First, an opt-out option for states parties from the jurisdiction of the court on the crime of aggression[87] and, second, the

exclusion of jurisdiction of the court under the consent-based pillar over crimes committed by nationals of non-states parties or on the territory of such states.[88] However, the Security Council is not required to make a prior determination of an act of aggression, according to the idea that it may wish to let an investigation go ahead without explicitly determining the existence of an act of aggression under Article 39 UN Charter.[89]

The crime of aggression provisions strike a compromise between the asymmetric reality of power relations in the international system and the ideal of universal jurisdiction.[90] It was clear over the course of the negotiations that the P5 were reluctant to add the crime of aggression to the Rome Statute. Although activating the ICC's jurisdiction in this respect was considered as a judicial instrument that the Security Council may resort to in situations of conflict when none of the other crimes in the statute would be applicable, the P5 were less than enthusiastic about its addition to the Council's "toolbox".[91] Given the interest of the P5 in preserving Security Council primacy, the rejection of an exclusive competence of the Council for the crime of aggression demonstrates the resilience of the Rome Statute's aspiration towards the equal application of international criminal law. Despite the intense resistance against treating the crime of aggression in the same way as other crimes under international law, the outcome is distinctly shaped by existing norms of international law.[92] Contrary to the aims of the P5, the Security Council was not ultimately accorded any additional powers regarding prosecutions by the ICC; in fact most participants revealed a willingness to extend international criminal jurisdiction to their own nationals and their own foreign policies. It has been stated that the Kampala amendments will "complete the regime of collective security with a judicial tool". The international criminal justice system will "make sure that state leaders now think twice before they resort to force in dealing with international disputes, which will certainly not make the world less safe than it is today".[93]

In this regard, it is noteworthy that when the two states parties among the P5[94] were faced with the choice between a system based at least partly on state consent and not Security Council primacy, and no outcome at all, they chose to uphold the emerging norms of international criminal justice rather than reject the final compromise and have the negotiations collapse. In other words, it can be said that when time came for the final compromise, they chose a posture of systemic leaders in upholding the norms of the international system within which they exert their privileged status,

rather than act according to their interest as mere powerful actors and simply reject a norm that does not suit their more immediate purposes.[95] The crime of aggression negotiations insofar reflect the concept of power as a social attribute, which is dependent on the type of relationship that exists among actors in the international system, resulting in role strain created by the tension between authority *within* the international system and increased obligations *towards* the system.[96]

The significance of the crime of aggression amendments could be considerable in the long term, both a deterrent to aggression and as an instrument of accountability.[97] Robert Jackson's promise at Nuremberg was that:

> The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose, it must condemn, aggression by other nations, including those which sit here in judgment.[98]

In 2017, with the ratification of the Kampala amendments by the required 30 states parties and the adoption of the resolution on the activation of the crime of aggression by the 16th Assembly of States Parties, the jurisdiction of the ICC over this crime is now a reality as of 17 July 2018, despite the resistance by some of the most powerful actors in the international arena.[99]

2 Ideas and Power Politics in International Criminal Law

Once the negotiations leading to the Rome Statute started, it became clear that the draft prepared by the ILC was far from uncontroversial.[100] Some aspects of the court's statute could be drawn from the pre-existing statutes of the ICTY and ICTR. For the most part, these aspects relate to relatively uncontroversial issues concerning technical features of the court like the registry and the process for selecting judges. To a large extent, however, the disagreements centred on issues with regard to which existing international law did not offer any obvious solutions. Throughout the Rome Conference were disagreements as to whether the court would resort to an adversary-accusatorial common law type of procedure or an

inquisitorial civil law procedure.[101] The sharpest differences among delegations did, however, pertain to the scope of the court's jurisdiction and means by which crimes within the court's jurisdiction would be referred to it for prosecution. Likewise, the powers of the Office of the Prosecutor, the elements of different crimes, the role of the Security Council and the procedure for amending the statute were equally contested.[102]

2.1 The Role of the UN Security Council

One of the most contentious issues was the role that the UN Security Council should play in conferring jurisdiction on the ICC and the relationship between the two bodies. The position of the United States at the start of the Rome conference was based on a firm view of UN Security Council primacy, which constituted the appropriate forum for referring situations to the court. For permanent members of the Council, this proposal had the obvious advantage of precluding prosecutions that they would view as unacceptable. For that very reason, most participants vigorously opposed the proposal.[103] The very point of creating a permanent court was to provide a mechanism that went beyond the monopoly of the Security Council and the selective nature of the ad-hoc tribunals it had created in the past.[104] This argument became even stronger over time with the Security Council's "retreat from accountability" in recent years, in particular when political alliances are involved.[105] It was therefore generally accepted at the outset that the court's Statute would provide for the right of individual states to refer cases or situations to the court.[106] While international law had no direct link with either of the positions, both sides in the debate framed the issue in legal terms. Other participants considered this position an undue interference with the independence of the court and its prosecutor. Some participants further linked this question with the wider debate on the reform of the working methods and the membership of the Security Council, contending that the lack of representativeness would reflect negatively on the legitimacy of the ICC and transform it into another selective institution in which the permanent members of the Security Council would use their veto to block prosecution of their nationals and the nationals of their allies.[107] The United States stressed that the Security Council is the body entrusted by the UN Charter with the primary responsibility for the maintenance of international peace and security, and that "the possibilities for compromise that exist in a political environment guided by prudential calculations are

constricted when political deliberation must compete with an independent judicial process […] The best strategy for stability often depends on context and contingent political factors that are not reducible to a rule of law".[108] The United States therefore argued that the Security Council serve as arbiter to decide on the situations to be referred to the court. This argument failed to gain traction with the majority of other delegations, since neither the letter nor the spirit of the UN Charter relate to an exclusive prerogative of the Security Council to decide which cases or situations should be referred for criminal prosecution. At the same time, no provision in international law explicitly precluded that the ICC operate on the sole basis of Security Council referrals. Given the formal equality of the participants, the numerically superior camp then held the upper hand.

While opponents of Security Council primacy were in the majority, the concerted opposition of the P5 might well have proven insurmountable, as there was little hope for the success of an international institution opposed by all the permanent members of the Security Council. The defection of France and the United Kingdom from the P5 position then allowed resolution of the issue by compromise.[109] Under a proposal drafted by Singapore, the Rome Statue eventually allocated a unique and important role to the Security Council with regard to the court's jurisdiction, as the Council can, under Chapter VII of the UN Charter, refer situations to the court or temporarily defer them, the latter reflecting a reverse prerogative of the Council as ultimate arbiter on prosecutions going forward. In both cases, the veto power of the permanent members of the Council applies. What was finally included in the statute was a central, though not exclusive, role for the Security Council, recognising the connection between the maintenance of peace and security and accountability for the most serious crimes. The role of the Security Council in activating the jurisdiction of the court is further enhanced by the fact that the referral can be seen as a conferral of powers from the Council onto the court, which thus may extend to non-states parties nationals.[110] This proposal tries to strike an adequate balance between the political role of the Security Council as it is entrusted with the primary responsibility for the maintenance of international peace and security, and the legal role of the ICC as an independent judicial body not subject to political interference. The proposal accepts that in particular circumstances, political considerations may at least temporarily outweigh the need for criminal accountability; however, it left intact the underlying

concern of the United States, China, Russia and others that the ICC might prosecute their nationals.[111] Article 54 (1) of the Statute further requires the court to investigate all parties to a conflict and precludes one-sided prosecutions at the behest of powerful states, a requirement of objectivity that was confirmed by the jurisprudence of the ICC which holds that a "situation" before the court must be "generally defined in terms of temporal, territorial and in some cases personal parameters", rejecting a definition of situations in terms of groups or parties to a conflict.[112]

When the time came to examine the role of the Security Council in activating jurisdiction on the crime of aggression, the negotiations centred once again on the issue to determine which entity, whether political or judicial in nature, whether within or external to the ICC, would be competent to determine if a specific action constituted a "manifest" violation of the UN Charter. This, in turn, linked to the issue of whether court would be entrusted with some measure of autonomy from the Security Council regarding the crime of aggression in the event of Council inaction—the "question of questions" in the negotiations.[113] From a political perspective, the possible role of the Security Council had become the most delicate issue in the negotiations. Article 23 (2) of the ILC draft statute for an ICC suggested making the court's proceedings for the crime of aggression dependent upon a prior determination of the Security Council of an act of aggression. This proposal, however, provoked criticism from within the ILC in that it would "introduce into the statute a substantial inequality between States members of the Security Council and those that were not members, especially between the Permanent Members of the Security Council and other States".[114] The overwhelming majority of participants in the negotiations shared this criticism and critics within the ILC therefore accurately predicted that such a solution was "not likely to encourage the widest possible adherence of States to the statute".[115]

The contentious and sensitive nature of the Security Council's role resulted from the fact that determining the commission of an act of aggression is at the core of the Council's function. It is explicitly mentioned in Article 39 of the Charter and may thus trigger enforcement action under Chapter VII. The role of the Security Council in future aggression cases before the ICC was not explicitly mentioned in former Article 5 (2) of the Rome Statute, which merely mandated that the provisions on the crime of aggression "be consistent with the relevant provisions of the Charter of the United Nations".[116] The concrete

meaning of this reference, especially in relation to the role of the Security Council, had been a matter of dispute ever since the PrepCom took up negotiations on this crime.[117] The P5 favoured the ILC approach designating the Security Council as an exclusive and determinate filter. Under this system prosecution would be conditioned on the prior Security Council determination that the actor in question had committed an act of aggression. This approach would have required not only nine affirmative votes in the Council, but also to gain the affirmative vote or abstention of the P5.[118] It was questioned whether the veto would be applicable, although it was clear that members of the P5 would not easily renounce their veto rights in the aggression context.[119]

The idea was premised on the underlying argument that the Council enjoys the primary, if not exclusive, role of addressing threats to international peace and security in the UN Charter system.[120] Accordingly, an investigation by the ICC into a crime of aggression—which, by definition, presupposes the occurrence of an act of aggression—should not proceed absent an express determination by the Council.[121] While the issue has been subject to some debate, it could well be argued that Article 39 UN Charter and former Article 5 (2) of the Rome Statute did not imply any necessity for such an exclusive competence of the Security Council.[122] The majority of delegations considered that this solution would create an inequity between the P5 and other actors and allow the permanent members to politically control and interfere with the judicial process of the court. They argued that Article 39 merely required the Council to determine an act of aggression for the purpose of deciding Chapter VII measures and did not bear on any other Charter organ, such as the ICJ, or any other institution, such as the ICC, from making a determination of aggression for its own purposes.[123] It was further contended that the Charter accorded the Council the primary, but not the exclusive, responsibility for maintaining international peace and security.[124]

It was uncontested during the negotiations that the Security Council *could* function as an aggression gatekeeper.[125] Thus, debates centred on whether the UN Charter *required* that the Council serve this function, especially in light of the fact that it was already entrusted with another potential safeguard in the form of the Article 16 deferral prerogative.[126] The interventions made by the P5 identified Security Council primacy and exclusivity in aggression prosecutions as both a legal imperative and a political principle.[127] Their arguments were Charter-based and turned on, inter alia, the language in Articles 12 (1), 24 (1), and 39 UN Charter.

In light of these provisions, the P5 argued that without a determination by the Security Council no act of aggression could be considered a "manifest" violation of the Charter. They also argued that reserving an exclusive role for the Council was consistent with the text, logic and intent of General Assembly resolution 3314, which constitutes the basis for the definition of the crime of aggression.[128]

The arguments for an exclusive competence of the Security Council nonetheless failed to gain the adherence of other actors,[129] essentially for lacking a clear basis in the UN Charter and being inconsistent with UN practice. The Charter indeed accords the Council the competence to determine the presence of an act of aggression in the framework of enforcement measures under Chapter VII. It could, however, be argued that the assignment of "primary" responsibility to the Council in Article 24 (1) implies that this power is not "exclusive".[130] There is also the possibility for a request to the ICJ to determine the legality of uses of force, conceivably allowing the ICJ to serve this function in a filter capacity for aggression prosecutions as well.[131]

The P5's initial arguments were not found compelling by other delegations, and subsequent arguments were then based on the coherence of international organisation.[132] The United Kingdom noted that the ICC would be most effective when working in cooperation with the Council, as the latter seeks to maintain, or restore, international peace and security.[133] Given that the crime of aggression involves both state and individual action, the P5 posited that the Rome Statute should reflect the core institutional competencies of the Council, thus protecting both the integrity of the Charter system and the legitimacy of the ICC.[134] The United States raised the spectre of a conflict of competencies within the UN if the ICC convicted an individual of the crime of aggression in the absence of an aggression determination by the Security Council. It posited that the Security Council determination requirement would ensure that the ICC remain consistent with the current state of international relations, as ultimately determined by the Council.[135] Implicitly underlying these debates was the argument of political prudence already put forward during the Rome conference that a safeguard role by the Security Council would reflect the reality that uses of force are rarely evaluated on the basis of their conformity with international law alone; rather political, moral and even consequentialist considerations inevitably come into play.[136] Preserving a determinative role for the Council in prosecutions for the crime of aggression would enable it to insulate from

prosecution instances of legitimate use of force that, despite a meritorious objective, may qualify as acts of aggression under the Rome Statute.[137]

The arguments revolving around the Charter system not being able to account for multiple interpretations of aggression proved unpersuasive in part because this potential for inconsistency already exists in the UN framework: the Security Council, the General Assembly and the International Court of Justice may all address the same situation pursuant to their mandates under the Charter. In its 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ confirmed that to the extent that there may once have been a Charter prohibition on simultaneous action, subsequent practice has superseded that prohibition.[138] The legal and political arguments of the P5 gained little traction in the face of the Council's inconsistent past practice relating to actions that might be deemed to violate the UN Charter.[139] The perceived arbitrariness in past precedents cast doubt on the ability of the Security Council to make unbiased, principled or even consistent aggression determinations, since the Council might be paralysed by political dissension that would carry over to the ICC.[140] The practice of the Council with regard to ICC referrals may have added to the scepticism of the like-minded delegations. At the time of the Review Conference, the Council had referred a single situation to the ICC and only one additional situation was added to this count in the following years even though others might arguably have deserved to be referred to the court. In 2014, a draft resolution referring the situation in Syria to the ICC, co-sponsored by 65 member states, obtained 13 votes in favour, but was vetoed by two permanent members.[141] Thus the Security Council filter, while presenting the advantage of simplicity, did not gain the adherence of most participants.

Arguments centred on competing interpretations of international law, and in the end the interpretations underlying the position of the P5 and that of the proponents of an independent ICC proved irreconcilable. The latter agreed that the ICC should not be subject to any restrictions by the Security Council other than the Article 16 deferral power, even in the context of the crime that touches most closely on the Council's prerogatives.[142] For their part, the P5 viewed any erosion of Security Council exclusivity as critically undermining the UN Charter and the veto power.[143] Their arguments mirrored those put forward during the Rome conference, noting that the Security Council is the body entrusted by the UN Charter with the primary responsibility for the maintenance of

international peace and security and that it should be up to the Council to decide on the appropriate means of conflict resolution according to political prudence. What the P5 considered as a legitimate and necessary safeguard to the Council's prerogatives in situations involving threats to international peace and security, most participants considered undermining the principle of judicial independence. In their view, it implied the risk of "politicising" the ICC into a mere instrument of the Council's permanent members.[144] Despite all the indications contained in earlier drafts about the role of the Security Council,[145] it was eventually decided that basic principles of due process demanded that the ICC would not be bound by any determination on aggression by any external entity.[146] This was to ensure the independence of the court, the right of the accused to present a full defence on every element of the crime and the maintenance of the burden of proof on the prosecution.[147]

2.2 The Role of International Law and Institutions

As previously noted, contrary to other sceptics of the court, the United States entered the negotiations committed to the common aim of establishing an international criminal court. Where it differed with most participants were issues concerning the appropriate role of international criminal law and international judicial institutions in a decentralised international legal order.

The majority of delegations clearly adopted the premise of establishing a legal institution under international law, tasked with applying international criminal law to individuals. Even some critics of the ICC saw the creation of the court through an international treaty, rather than the Security Council, as a positive development. Some Security Council members, including among the P5, had criticised that the Council acted *ultra vires* of its Charter powers when adopting the statue of the ICTY.[148] That the court would ultimately depend on the uncertain cooperation of states for its enforcement, did not dissuade actors from considering the creation of the ICC as a legal, rather than political, undertaking. The United States likewise never cast doubt on the validity of international law per se, rather its concerns related to the role of international law. Critics considered that the ICC represents a dangerous attempt to substitute international law for politics.[149] In this view, peace and justice are commonly seen as not necessarily compatible and the important decisions regarding the response to mass atrocities should be political. Policy actors both within and outside

the affected states will have to determine the optimum balance between peace and justice on a case-by-case basis. Whether to grant an amnesty as the price of a peace accord, to rely on a truth commission or to prosecute offenders are seen as questions that require political answers, which could not reasonably be determined in advance or entrusted to the discretion of a court with a mandate to prosecute offenders regardless of other considerations.[150]

The actors favourable to the court of course had a sharply different vision of the court's role. From their perspective, the purpose of the ICC is precisely to substitute the rule of law for the failure of politics. The experience of the post-Cold War era has shown that left to their own devices, states rarely prosecute individuals responsible for atrocities. Thus, when some voice concerns about the risk of politicised prosecutions; others see an opportunity to move beyond justice being constrained by politics, understood as actors' short-term interests. Rather than being mutually exclusive, peace and justice are considered by proponents of the ICC as mutually reinforcing based on the premise that there "is no peace without justice and no justice without accountability". The Rome Statute likewise insists that: "the most serious crimes of concern to the international community as a whole must not go unpunished".[151] The fundamental assumption underlying the position of the proponents of the ICC is that international judicial institutions need to operate, to the extent possible, in isolation from politics and policy in order for justice to be served impartially and independently.[152] In this, the creation of the ICC is seen by some of its critics as reflecting a renewed commitment to international idealism. They argue against the vision of a universalist court guided by its mission of ending impunity and in favour of a positivist view based on state consent, limiting the court to holding its members to account for norms they have explicitly subscribed to.[153] The alternative view would ignore *the limits of idealism* by discounting the continued importance of power distribution and economic interests.[154] Accordingly, they contend that for the court to function effectively, the relevant actors cannot disregard power relations, interests and the consequences of particular policies. In short, to the logic of appropriateness inherent in the arguments in favour of an ICC, they oppose a consequentialist ethics based on political prudence.[155] The differing views on international criminal law and the ICC are the product of actors' ideas about the effectiveness of norms and institutions in an international system devoid of central authority. At the same time, the spectre depicted by the critics

represents a distorted mirror image of the promise advocated by the court's proponents. The two sides were led by the idea that the ICC could restrain the expression of politics; that "*the court can lead governments and individuals to take decisions they would not otherwise make*".[156]

The proponents of the court arguing for an independent prosecutor considered that the legal criteria guiding the Office of the Prosecutor should differ from the political considerations that may be employed by national governments or even international organisations. The ICC is to prosecute and indict individuals even in those cases where at least some actors are concerned that this could impede peace negotiations or conflict with other policy objectives.[157] The court, as, established, is designed as an autonomous institution capable of making its own legal and political determinations. It has notably been created to enable prosecution by an independent court in situations where the normal dynamics of the United Nations, particularly within the Security Council, would not likely yield such an outcome.[158] While individual criminal accountability forms part of the Security Council's rule of law agenda, the overall picture of recent years is one of increasingly inconsistent upholding of these principles when the interests of Council members, in particular the P5, are concerned. In the past, the Council has created or supported a number of ad-hoc and mixed tribunals to serve international criminal justice, but often did not consistently follow these initial steps with the necessary institutional and financial support for them to adequately accomplish their tasks.[159] Indeed, one of the aims of the ICC was precisely to obviate the need to specifically consent to ad-hoc or special tribunals in the future.[160] The difficulties in establishing, financing and enabling the Special Tribunal for Lebanon (STL) to discharge its mission are but one example of the many complicating factors involved in setting up a jurisdiction in particular situations after crimes have taken place.[161] The same holds for ongoing situations, such as in Syria where the Security Council noted that widespread violations and abuses of human rights and violations of IHL are committed but did not follow up with suggestions for establishing accountability mechanisms. Likewise, the Council is unable to act on accountability in the Ukraine situation since 2014, again due to the involvement of a permanent member in the conflict.[162] The reverse argument here is that a generalised *ex ante* consent to prosecutions for situations in the future might then affect cases where some actors would prefer prosecutions not to take place. Such concerns are particularly acute for those actors with a greater propensity to engage in foreign military

interventions. They tend to defend their position by insisting on the particular responsibilities that come with such interventions undertaken under the mantle of acting in the interests of the wider international community.[163] The impact of the various arguments then depends on how actors' individual interests are framed.

2.3 Logics of Interaction in Negotiating the ICC

The respective positions of the United States and the like-minded group in the ICC negotiations can be linked to Wendt's analysis of role structures within different "logics of anarchy".[164] Each role structure involves a distinct posture or orientation of the Self towards the Other. The posture of rivals is one of competitors that pursue their interests, if necessary through force, but recognise Other's rights and therefore self-restrain their resort to force to settle conflicts. Here, relative power matters to outcomes because resort to force is always an option. The posture of friends, by contrast, is one of allies that do refrain from using force to settle their disputes and work collectively against security threats. Collective security entails that relative power becomes less salient, as members of a system act according to generalised reciprocity and the prevalence of a rule of law limits what actors can legitimately undertake to advance their interests. Norms are seen as legitimate restraint and enforced collectively. These postures in turn fed back into the role structures during the negotiations.

The definition of interests depends to a certain extent on the perception by the actor, and these perceptions may be broadened by persuasion. In the course of the negotiations, the respective parties' interests were thus not necessarily static, but ultimately a question of the range of acceptable interpretations.[165] These interpretations were fed, at least in part, by competing ideas about the nature and functioning of international law and institutions.[166]

The United States, while sensitive to others' concerns, was adamant to ensure that the court would not curtail its relative power in the international system. Even within the United States, however, proponents of the court argued that its position on the ICC would undermine the interests of the United States in building support for international norms and institutions, from which it disproportionately benefits. For other actors, relative power was much less of an issue; notably, it was not considered an indispensable security asset. Rather, they believed in a collective

enterprise, the establishment of international court that would further strengthen international norms of behaviour, and thus protect them. This increasing discrepancy between the United States' interests in the negotiations and what other actors were willing to concede also highlights the specific difficulties it encountered in its role as hegemonic actor. On the one hand, its disproportionate power should have conferred it with significant leverage in the negotiations to shape the outcome according to its interests, or to withdraw and have the conference collapse if it did not succeed. At the same time, its very interests as hegemon compelled it to engage with international law, as it disproportionately benefits from the norms that underpin and stabilise its very dominance. Withdrawing from the negotiations would have undermined its interest in stable international norms and institutions, and left it unable to bear upon new ones being created.[167]

Nicole Deitelhoff's analysis of the discursive dynamics in the negotiations has illustrated how bargaining and arguments shaped outcomes.[168] Despite the apparent leverage that its relative power should have conferred upon the United States, it failed to put forward arguments that were seen by others as compelling or overriding. Abram Chayes and Anne-Marie Slaughter highlighted that the United States depends on international law to facilitate cooperation in furthering its interests, including in areas of security policy such as arms control and the non-proliferation agenda. In order to realise its objectives, the United States is reliant on other actors' cooperation. Refusing to support the ICC would equate to undermining international law and the institutions it relies on to instantiate its power and maintain its privileged position in the international system.[169] It is difficult to promote international cooperation while simultaneously requesting an exemption from the same rules.[170]

This is even more acute in the field of international security, where effective solutions often have to be multilateral. The United States increasingly relies on non-military measures to achieve its objectives. Individually, but also collectively in the UN Security Council's efforts to maintain international peace and security, such measures include various types of sanctions such as travel bans, asset freezes, export controls and restrictions on certain financial transactions, which require the cooperation of other actors to be effective.[171] Adopting a position at odds with the majority of the international community on an issue like the ICC risks undermining the willingness of other actors to support the hegemon's foreign policy.[172]

While the ICC sits uncomfortably with some actors,[173] the United States' initial stance progressively gave way to a form of limited engagement with the court. It has been argued that by exhibiting greater flexibility early in the negotiations and demonstrating a more genuine engagement with the endeavour, the United Sates could have achieved a more favourable outcome.[174] The Rome Statute applies to the nationals of non-states parties. As a result, the possibility that the ICC will adversely affect the decision-making of the United States exists even though it currently remains among the non-states parties.

Further, the United States has played, and continues to play, a substantial role in ad-hoc criminal tribunals such as the ICTY, ICTR, as well as their Residual Mechanism (IRMCT), and has expressed its continuing interest in bringing war criminals to trial. During a Security Council debate on the ad-hoc tribunals in 2013, on the occasion of the 20th anniversary of the ICTY, the United States Permanent Representative observed that "in the twenty years since the Security Council established the ICTY, the Tribunal has made a significant contribution to international justice […] the bedrock principle of providing fair trials for the accused and the opportunity for every defendant to have his day in court […] has been a hallmark of international justice since the Nuremberg trials and remains critical to advancing the rule of law internationally".[175] The collective effort in creating the ICC was significant, and the United States participated seriously in this effort.[176] Given that the court was created as a permanent forum for ensuring accountability for the most serious crimes and now has the support of two thirds of UN membership, the United States had to consider how its approach to the ICC would affect its ability to maintain a relevant role in international criminal justice.[177]

2.4 Law and Politics in the Crime of Aggression

These considerations carried forth into the deliberations on activating the Court's jurisdiction on the crime of aggression. Each element of the negotiations once again implicated concepts of international law: the supremacy of the Security Council in the face of breaches of the peace, judicial independence and the principle of consent. The negotiations were accordingly conducted within the framework of existing international law and institutions. And due to international law's specific "language of justification", most of the arguments put forward by the parties took the

form of legal arguments, deployed in pursuit of the interests of the particular actors involved, but here again the process of invoking and pursuing claims by reference to international law shaped the "horizon" of possibilities viewed as permissible. The participants considered some types of reasoning and argumentation as valid and others as not, depending on the coherence with existing international law.[178] Here again, there was pressure to frame interests in legal terms, to argue that a provision should be adopted or rejected because it was mandated, or contrary to, existing international law, which in turn fed back into the positions the parties were seeking to advance.[179] In short, legal argument was at the centre of debates. Even when international law did not compel a particular outcome, ideas and legal concepts helped shape the positions advanced by the different actors and in turn fed back into the formulation of policy interests.

The competing positions can be seen again as reflecting Wendt's logics of interaction in the international system. Such an analysis allows shedding light on the diverging social roles invested by the P5 and the like-minded group, respectively, during the negotiations. The P5 were essentially driven by their own self-interest in preserving the exclusive prerogatives of the body in which they held a privileged position. While they did not per se shy away from the exercise of creating international law, they did engage in the negotiations with a considerable degree of caution, wary of any possible repercussions on their relative power in the international system. The like-minded group, on the other hand, can be said to have followed a Kantian logic of interaction premised on a deeply held belief in collective security and establishing international institutions to that end. For the like-minded group, enabling jurisdiction over the crime of aggression was a further step in the creation of international legal norms that would deter recourse to force and contribute to the security of all actors. The more the ICC could operate unimpeded by the distribution of power in the international system, the greater its potential contribution to strengthening the international rule of law.

The deliberations increasingly highlighted the "role strain" experienced by the main protagonists. The negotiations being enmeshed in international law, the actors involved were limited in the range of claims that could conceivably be put forward as valid arguments. In adopting a Lockean logic of rivalry, the P5 advanced arguments premised on safeguarding their privileged position in the international system and aimed at furthering their specific interests. The like-minded group, on the other

hand, can be said to have largely conformed itself to a Kantian logic of friendship and favoured the establishing of collective international institutions, coupled with a strong reluctance to afford special privileges to any particular actor or group. In other terms, the P5 were wary to compromise the ability of the institution in which they hold a predominant position to serve as the ultimate arbiter in matters related to international security and the use of force. The like-minded group, by contrast, was driven by a collective belief that conferring jurisdiction over the crime of aggression to a mechanism that did not allow for any derogation in applying the provisions was most likely to strengthen collective security. Over the course of the negotiations, the P5 came under increasing strain between their more narrowly conceived self-interest and their larger interest in creating international law whose norms disproportionately benefit them. The legal nature of the undertaking accordingly limited the "horizon" of possibilities open to the participants and conditioned the type of arguments that actors could conceivably advance in defence of their interests. Despite the apparent indifference of some members of the P5 regarding any meaningful outcome of the negotiations on the crime of aggression, it is significant that none of them resorted to the ultimate option of withholding consensus even when it became clear that on key elements of the compromise they would not get their way. For the P5, the long-term preservation of the international legal order, including the UN Charter which enshrines their privileged position in the international system, ended up superseding their more narrowly conceived political aims.

The principles of sovereignty, non-intervention and respect for domestic jurisdiction have long been conceived as cornerstones of international law. The increase in international criminal courts and tribunals with ensuing trials has, however, contributed to a shift towards greater emphasis on the necessity of ensuring accountability for the perpetrators of the most serious crimes and better protection of human rights. States ever more voluntarily subject themselves and their nationals to international judicial institutions, a phenomenon that in turn feeds back into the normative structure of international law.[180] The majority of participants involved in the negotiations on the crime of aggression largely shared a willingness to subject themselves to a collective system that would both constrain and, it is likely hoped, protect them.[181] During the negotiations, both groups framed their interests in terms of international law. In the face of this new cosmopolitan dynamic, however, the arguments

advanced by the P5 were not persuasive enough, and hence much less determining.

3 From Ideas to Reality: Upholding Universality and Integrity of the Rome Statute

In the period following the entry into force of the Rome Statute and the establishment of the ICC, the court was subjected to challenges both externally from non-states parties such as the United States, and internally from within its membership, such as the relations of the ICC with the African continent. The compromises coming out of the negotiations for the Rome Statute could not entirely untangle the relations between international law and politics. The early years of the ICC's existence were therefore characterised by an uncertainty regarding the position of the court in the wider institutional structure of the international arena. Various types of relations had to be established, such as between the court and states parties, between the court and the United Nations, as well as, most notably, between the court and the major powers among the non-states parties aiming to secure their privileged position either through ignoring it or by securing special arrangements for their nationals and in peacekeeping operations involving the use of force.[182]

Policy objectives can be achieved by different means. Initially, the United States engaged actively in multilateral negotiations to try to preserve its autonomy without sacrificing the aim of bringing war criminals to justice through the ICC.[183] This approach changed once the court was established. In an attempt to limit the reach of the Rome Statute, which didn't reflect its interests fully, the United States engaged in intense efforts, both at the multilateral level and bilaterally, to carve out exemptions for its own nationals. The United States had initially signed the Rome Statute in 2000, but subsequently communicated its intent not to be bound by it, which it conceived as a form of "un-signing" the treaty.[184] Given that this announcement was, however, not followed by a formal deposit of an instrument of withdrawal, the United States remained a signatory to the treaty. It therefore did not discharge itself from the obligation of refraining from acts contrary to the object and purpose of the statute under Article 18 of the Vienna Convention on the Law of Treaties.

Russia pursued a similar approach, initially signing the treaty emanating from the Rome Conference, but refraining from ratifying it and becoming a party to the ICC. This policy of neglect towards the court changed from

2014 and the conflict in Ukraine. While neither Russia nor Ukraine are states parties to the court, the Ukrainian authorities voluntarily accepted the jurisdiction of the court under Article 12 (3) of the Rome Statute for acts committed on the territory of Ukraine from February 2014.[185] This acceptance then conferred potential jurisdiction on the court for acts committed by Russian nationals on the territory of Ukraine. While the Russian Federation considered the Crimean peninsula as part of its territory from 2014 and the oblasts of Donetsk and Luhansk as independent of Ukraine from 2022, this was not recognised by the international community. As a reaction of Ukraine's voluntary acceptance of jurisdiction of the ICC, Russia proceeded to declare the withdrawal of its signature from the Rome Statute. Since Russia had not become a state party to the court, it was not directly under any obligation of loyal cooperation with the ICC.[186] The aim, apart from sending a political signal, was therefore to avoid any obligation to refrain from acts contrary to the object and purpose of the treaty under the VCLT. It also effectively put an end to any cooperation of Russia with the ICC in the Georgia and Ukraine investigations.

Shortly after the Rome Statute establishing the ICC came into force in 2002, the United States adopted national legislation restricting cooperation with the ICC and, with the exception of NATO members and some key non-NATO allies, as well as rendering support of peacekeeping operations and military aid conditional on the conclusion of bilateral agreements with other states precluding that its nationals could be subjected to the jurisdiction of the ICC.[187] The United States thereafter initiated a concerted effort to establish carve-out provisions for its national in the relations with third countries, exerting strong pressure on other actors to conclude such agreements.[188]

3.1 Upholding the Jurisdictional Reach of the ICC

The aim of a so-called "non-surrender" agreement based on Article 98 of the Rome Statute[189] is to assure exclusive criminal jurisdiction of one or both of the signatories over their forces in the host state.[190] The United States was adamant about concluding such agreements with as many states as possible to preclude the risk of what it perceived as politically motivated prosecutions and the possible surrender of its nationals to the court. Other actors, by contrast, were strongly pushing in the opposite direction, as proponents of the court were eager to see it fully operational and

effective rather swiftly following its establishment. The European Union adopted Common Position 2003/444/CFSP on its approach in support of the ICC, accompanied by an Action Plan to support the universality and integrity of the Rome Statute.[191] The Action Plan adopted by the Council of the European Union strongly discouraged the signing of bilateral agreements with jurisdictional carve-outs on the ICC. The EU position was met with resistance by the United States, which accused the EU of undermining the protection of its nationals from prosecution and warned of "very damaging" repercussions.[192] Issues of consistency were raised across Europe. When the effort of the United States took shape, the European Union[193] reiterated that:

> The EU will continue to oppose efforts that would undermine the ICC. The EU […] expects State Parties to comply with their obligations under the Rome Statute. In this respect, the EU cannot support bilateral Non-Surrender Agreements that do not conform with the Rome Statute in the way indicated by the Guiding Principles, as endorsed by the EU with regard to these agreements.[194]

However, there was no direct economic pressure, nor has there been any record of explicit consequences imposed by the EU on a country for signing a bilateral agreement. Further, the 2002 EU Guiding Principles allowed EU member states and candidate countries for accession to cooperate with the United States if they considered this necessary.[195] Thus, while persuasion by the EU might have influenced certain actors, it was not on the same intensity as the pressures exerted by the United States and consequently cannot in itself explain why actors might have chosen to comply with the Rome Statue, rather than accede to the demands of the United States. Although some EU member states considered signing agreements, they were unable to negotiate texts that were acceptable to them.[196]

The Council of the European Union affirmed that: "Entering into United States agreements – as presently drafted – would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties".[197] The EU and its member states therefore based their decisions on the Council Common Position adopted in 2003, which stressed that the terms of the agreements were legally incompatible with ratification of the Rome Statute and that they would undermine

the purpose of the ICC.[198] It is noteworthy that candidate countries for accession to the EU which were not yet under the supranational cover of the Union used similar arguments to justify not entering into bilateral agreements incompatible with the Rome Statute, just as other larger and more powerful actors preferred adherence to the Rome Statute to accommodating the concerns of the United States.

The position of the European Union in support of the ICC has remained a constant fixture independently of the policy approaches taken by other major actors after the establishing of the court. In 2011, following the Kampala Review Conference, the initial Common Position was replaced and updated by Council Decision 2011/168/CFSP, accompanied by a revised Action Plan adopted in the same year.[199] The Council Decision and Action Plan state the objective of the European Union of the widest possible participation in the Rome Statute and its full implementation, a policy that is streamlined into the common foreign and security policy. While the European Union does not exert overt pressure on third countries with regard to the ICC, its policy on universality and integrity of the Rome Statute is included in policy dialogues, regional strategies, relevant Council Conclusions, the work of various EU Special Representatives and EU action at the United Nations. Adherence to the Rome Statute is expected from countries acceding to the European Union, and it has also become standard EU practice to negotiate clauses on the ICC into agreements with third countries as well as European Neighbourhood Policy Action Plans. In the same vein, the European Union has maintained its strong position on maintaining the integrity of the Rome Statute and upholding the duty of states parties for full cooperation with the court. While the initial years of the ICC's existence were characterised by an effort to counter the aim of the United States for jurisdictional carve-outs through bilateral agreements, the scope of the European Union's policy has widened rather than narrowed over time. In addition to upholding the jurisdictional reach of the court, the EU further advocates for national implementation legislation to give full effect to the Rome Statute crimes in domestic legal systems of states parties, as well as for the widest possible ratification of the Agreement on Privileges and Immunities of the Court (APIC).[200] The latter provides officials and staff of the ICC with the privileges and immunities necessary to perform their duties independently and effectively, another precondition for the court to investigate situations and exercise its jurisdiction.

In 2020, under the then-United States administration, tensions with the ICC exacerbated with direct measures against the personnel of the court. Through an Executive Order adopted in September 2020, the United States designated the Prosecutor and the Head of the Jurisdiction, Complementarity and Cooperation Division, subjecting them to an asset freeze in the United States, revoking their entry visas and placing them under a travel ban into its territory.[201] Beyond the threat against the court's personnel and the possibility of further sanctions against the court, these measures were also problematic in an immediate sense since they raised questions regarding the ability of court principals to travel to the headquarters of the United Nations for updating the Security Council on situations it referred to the ICC and attending Assembly of States Parties meetings held in New York.[202] Despite the intense pressure exerted by the United States, however, states parties to the Rome Statute and the European Union in particular did not deviate from the policy in support of the court and its personnel. Given the potential of extraterritorial application of the Executive Order, the European Union went as far as to consider to which extent its own legislation could impede such effects and protect the court. In this context, the EU's "blocking statute" (in fact a Council Regulation) was designed to protect operators in the European Union from the extraterritorial effects of legislation enacted by third countries.[203] The regulation was initially adopted as a reaction to economic sanctions adopted by the United States, based on the EU's position that it does not recognise extra-territorial effects of legislation enacted by third countries, and considers such effects as contrary to international law. The aim of the regulation is to shield operators in the EU engaged in lawful international trade, movement of capital or related commercial activities, as well as to prohibit compliance with any requirement or interdiction based on the third country legislation.[204] While the annex to the regulation currently only lists the United States' measures concerning Cuba and the Islamic Republic of Iran, the 2020 Executive Order against the ICC and its personnel initiated reflections on possible amendments to the blocking statute. In early 2021, the European Commission published a communication on "The European economic and financial system: fostering openness, strength and resilience".[205] The communication stated the willingness of the Commission to amend the regulation in order to further deter and counteract the extraterritorial application to EU operators of legislation enacted by third countries. This was followed by an impact assessment and a public consultation

conducted in the same year. While the review of the regulation has not yet led to an amendment, the episode nonetheless illustrates the willingness of the European Union to oppose the extraterritorial effect of United States' financial sanctions should they impede the functioning of the court.

3.2 Interest, Norms and Ideas in Compliance with International Agreements

When opposition to the court began, the international community—and states parties to the ICC in particular—were faced with two interrelated principled concerns.[206] The first concern was to maintain the momentum for the court, which was seen as a landmark achievement in the development of international law and international criminal justice. The second concern related to consistency: would states parties to the Rome Statute that concluded non-surrender agreements or complied with the Executive Order be in violation of their obligations under the statute? Contrary to the position held by the United States, most international actors argued that such actions are incompatible to the objective and purpose of the Rome Statute.[207]

From the vantage point of realism, international law will not constrain behaviour if it conflicts with security interests. As the United States exerted intense pressure on other actors, the intent of the latter could be presumed to consist in cooperation with the dominant actor. This is not what happened here, though, as many actors, even those heavily dependent on military aid as well as good relations with the United States, refused to follow suit. The interests of the relevant actors, in this case, conflicted with established norms of international law.[208] The principle of *pacta sunt servanda* entails that once actors enter into agreements under international law they find themselves constrained as their behaviour is assessed not only against the substantive obligation (not undermining the ICC), but also against the very principle of complying with international legal obligations.[209] States parties to the Rome Statute largely considered acceding to the demands of the United States as inconsistent with the statute, as it conflicts with its main objective: to ensure the independent operation of the court, regardless of where crimes may have been committed. Some actors therefore refused to comply with the demands of the United States, despite their material interest to the contrary. The difficulty with the link between norms and causation is that if, in this case,

actors calculate the costs of compliance prior to ratification, then international law may only falsely appear to have a causal effect on behaviour.[210] For the ICC, however, it was difficult for most actors to adequately anticipate the costs. While at the time of ratification, they may have known about the scepticism of the United States over elements in the Rome Statute, they could not have included the future period of hostility to the ICC by the United States into their cost-benefit calculations, nor were there any precedents indicating that the United States would go as far as sanctioning court principals. Therefore, those states that had already ratified the Rome Statute when the United States articulated its position would have been unable to calculate the expected costs of a future confrontation with the United States against the benefits of ratification when making their decision.[211]

For the ICC, it can be contended that many actors based their decision primarily on normative considerations, relating to international law and international criminal justice, as well as establishing a permanent international institution. Sceptics may dismiss this argument as simply restating that compliance with international law may just be a reflection of existing interests and expectations about future behaviour.[212] Unlike most international cooperation, however, the ICC is not intended to serve the maximisation of specific interests, since it is difficult, if not impossible, for any given actor to assess the potential benefits it could derive from the court in the future. It was even uncertain whether the ICC would even be able to function effectively.[213] Rather, the issue about the ICC is centred on norms of international law and international criminal justice, and we have seen that even a hegemonic actor has partly cast its concerns in normative terms.[214] Although violations of international law clearly do occur, the principle of *pacta sunt servanda*, as codified in the Vienna Convention on the Law of Treaties, remains one of the most fundamental norms in the international system.[215] Efforts to justify non-compliance with international law may therefore create a "cognitive dissonance" such that actors will to the extent possible aim to avoid openly violating international law[216]; thus, they will follow a "logic of appropriateness" and conceive of compliance with international law as the "right" thing to do. Of course, this does not exclude compliance with international law may also occur out of self-interested, practical aims, according to a "logic of consequences". Actors might even be seeking gains from iterated cooperation following Robert Axelrod's theory of strategic interaction.[217] As noted, however, it is difficult to see what gains an individual actor could

anticipate from adhering to the Rome Statute, and it seems unlikely that actors would link international criminal justice to other cooperation areas.[218]

Beyond the external challenges by non-states parties, the court has also been the subject to internal challenges within its membership. In particular, the focus of the court's first investigations on the African continent opened up a rift between the ICC and African states parties.[219] These tensions can be traced back to the referral of the situation in Darfur to the ICC in 2005 and the subsequent issuing of an arrest warrant against the President of Sudan, Omar Al Bashir, by the court.[220] The obligation under the Rome Statute to cooperate with the court in the arrest and surrender of indicted person brought to the fore conflicting views among states parties and with the African Union regarding the immunity of sitting heads of state. The issue was framed, initially, again as one of surrender or assistance under Article 98 (1) of the Rome Statute.[221] While the tensions may have also involved perceptions of a "western" institution focused on the African continent to the detriment of local dispute resolution mechanisms, the primary underlying concern was a conflict of specifically legal obligations. Namely, states parties are obliged under the Rome Statute to cooperate with the ICC, but might themselves be confronted with a parallel obligation under the international law of state immunities, which opposes such cooperation in the form of arrest and surrender. In the absence of an explicit conflict of laws rule resolving this opposition, African states parties had decided to let general international law on immunities prevail over their obligations under the Rome Statute.[222] The issue was, however, further compounded by the provisions in Article 27 of the Rome Statute on the irrelevance of official capacity and the fact that the UN Security Council, although Sudan is not a state party, had referred the situation in Darfur to the ICC.

The extent to which a Security Council referral may impose obligations on non-state parties has been subject to debate, but a reasonable interpretation holds that a referral, such as in Resolution 1593,[223] constitutes a conferral of powers to the court with the Rome Statute as the governing framework.[224] Therefore, even in the absence of an explicit mention in the referral resolution on the treatment of cooperation and immunities issues, non-states parties are considered in an analogous position to states parties with the Rome Statute applying in its entirety. This would also be in line with the UN Charter, Article 25 of which provides that the members of the organisation agree to accept and carry out the decisions

of the Security Council. Once the Security Council adopts a binding resolution under Chapter VII conferring jurisdiction on the court, Article 25 UN Charter as a matter of estoppel precludes members of the organisation from adopting a position inconsistent with the resolution.[225] It can therefore be taken that by virtue of a Security Council resolution and Article 25 UN Charter, the Rome Statute, including its Article 27 (2) on the irrelevance of immunities, are binding on the non-state party that is the subject of the resolution. The contrary view would entail depriving both the relevant provisions in the Rome Statute, and the relationship framework between the ICC and the United Nations, of their *effet utile*.

The contentious issue of head of state immunities becomes more complicated, however, when going beyond the question of the obligations of the national state of the indicted person. While Sudan was explicitly mentioned in Resolution 1593, other states were not. This then raised further questions regarding the cooperation obligations of other states towards the court, where such obligations could be conflicting both legally with the immunity of heads of state as well as with the conduct of international relations, for instance, by impeding the participation of the indicted person in bilateral or multilateral meetings held on the territory of another state. It also comes perilously close to the criticisms of the United States and other actors towards the ICC, were one to consider that, in effect, by creating the court, states parties to the Rome Statute had limited the rights of all states under international law, namely by doing away with general principles of immunities and inviolability.[226] To the vertical relationship between the ICC and the indicted person, respectively, her national state, this adds a horizontal dimension in terms of the relation between the state party requested by the court to arrest and surrender the indicted person, and her national state.[227] In complying with the ICC's request, the state party would in fact be overriding its obligations to the other state under general international law to uphold the immunity and inviolability that sitting heads of state would normally be entitled to. This conflict of obligations was most directly felt by states parties members of the African Union or the Arab League, as any visit and any participation of the then-Sudanese President in a meeting or Summit would raise the spectre of his potential arrest and surrender to the ICC. The legal view based on Article 27 (2) of the Rome Statute does, however, seem clear in that it removes immunities before the courts and national authorities when faced with a request by the ICC. It is consistent with the rules of treaty interpretation in Article 31 of the VCLT, as

well as ensuring the *effet utile* of Article 27 (2) of the Rome Statute and upheld by the ICC Pre-Trial Chamber in the non-compliance proceedings against Jordan and South Africa.[228] The Pre-Trial Chamber stated in this context that upholding immunities in such circumstances would create a situation with insurmountable obstacles to the court's jurisdiction and "clearly be incompatible with the object and purpose of article 27 (2) of the Statute".[229] This view is further backed by the *travaux préparatoires* of the Rome Statute and national implementing legislations in numerous states parties.

Given that the provisions in the Rome Statute are clearly orientated towards maintaining the efficacy of the court in the face of head of state immunities, the debates then moved in a different direction, with African states asserting that some situations would merit a deferral by the Security Council under Article 16 of the Rome Statute. The African Union first presented such a request to the UN Security Council to defer the indictment of Sudanese President Al Bashir in the situation concerning Darfur, a referral by the Security Council of a non-state party. A second request for deferral under Article 16 of the Rome Statute was later presented with regard to the situation in Kenya, a state party to the court where the court's investigations had also led to the indictment of President Uhuru Kenyatta. While the African Union was arguing that the deferrals were in line with the maintenance of peace and stability in the region, the Security Council in both cases did not take up these requests.[230] In the struggle between a view of the court as guided by its mission of ensuring accountability for the most serious crimes, and that of an institution rooted in the consent of its members, of which Articles 27 (2) and 98 (1) of the Rome Statute are one example, the delicate balance continues to tilt towards justice.

3.3 Withdrawing from International Criminal Law?

Despite the pressure of the United States, it appears that many actors rejected acceding to its demands not out of competing interests, but out of a sense of obligation towards international law and their commitment to the legal undertaking of creating an effective International Criminal Court. In this, it can be said that actors were following a logic of appropriateness rather than a logic of consequences, and also justified their decisions with arguments about complying with international law.

Rejection of the United States' request was determined by its incompatibility with the obligations of states parties to the ICC. The relevant actors in both the European Union and states parties on the Security Council emphasised their legal obligation to act consistently with the provisions of the Rome Statute and their commitment to the ICC.[231] The fate of the Rome Statute in the years following its entry into force therefore appears to validate Deitelhoff's analysis that persuasion and communicative interaction can induce a shift in interests and in turn affect decision-making. Altering the normative setting furthers the chance of persuasion. The establishing of the ICC illustrates not only the importance that actors attach to international law and international criminal justice from a normative perspective, but also how these norms can shape actors' interests and deemphasise material incentives.[232]

A similar picture can be drawn from the tensions between the African continent and the court. While the African Union did voice its dissent that both requests for deferrals by the Security Council under Article 16 of the Rome Statute were not acted upon, and stated the view that AU member states should not cooperate with the ICC in the arrest and surrender of Presidents Al Bashir and Kenyatta to the court, there is still significant support for the ICC. Many states parties share the view that concerns about the role of the ICC and its proceedings should be addressed internally within the framework of the Rome Statute, as opposed to withdrawing from the court. It is one thing to consider the ICC as placing a disproportionate focus on the African region. It is quite another to question the integrity and independence of the court as a whole and advocate for doing away with it altogether. In the end, only two states parties have withdrawn from the Rome Statute, of which one African state, Burundi. While South Africa had initially sent an instrument of withdrawal to the court, the High Court of South African subsequently held that the government could not decide on withdrawing from the Rome Statute without parliamentary approval. The government thereafter, in the absence of such approval and complying with the court order, revoked its instrument of withdrawal. The absence of a coordinated withdrawal of African states parties from the court demonstrates that adherence to the Rome Statute remains widespread. That there is no rejection of the ICC as such by African states also emanates from the conviction that concerns should translate into action to improve the proceedings of the court, for instance, by amendments to the Rules of Procedure and Evidence of the

Court. Likewise, the African Union has sought to act through mechanisms provided for in the Rome Statute, such as Article 16 deferrals, to make its case with regard to the Darfur and Kenya investigations, rather than act entirely outside of that framework.[233]

Through a policy of unilateralism in the early years of the ICC's existence, the United States has successfully limited the court's functional jurisdiction over its nationals in the short term. It has indeed managed to negotiate bilateral agreements limiting the extradition of its nationals to the ICC by a significant number of actors.[234] This active disengagement from the ICC did, however, also entail that the United States limited both its options with regard to it and a corresponding opportunity to actively influence the development of the ICC. Rather than being able to prevent the prosecution of its citizens through inside influence, the United States instead chose rely on bilateral agreements, if necessary backed by threat of force. This would not allow it to prevent indictments, only to stop its citizens from being transferred to the custody of the court. In any social system, however, coercion is a costly mechanism of control that generates resentment on the part of the subordinated actors. By opting instead for a policy of cautious support to the ICC, the United States might have defused the situation early on, without straining relations with many of its allies despite maintaining a large array of courses of action. A confrontational approach can be sustained only through a high expenditure of international political capital, which, even for hegemonic actors, is limited.[235] As the study on *The Rise and Fall of the Great Powers* illustrates, actors relying on relations of force alone, now matter how powerful, will eventually encounter the limitations of this approach.[236] Without persuasion and legitimating, power is a limited resource, and overreliance on force alone will lead powerful actors, even hegemons, to a state of "imperial overstretch" where such an approach loses traction.

Effective authority in international relations requires power as well as legitimacy. For a hegemonic actor, isolationist withdrawal is not a lasting option if it aims to shape the norms to have them suit its interests. Progressively, the unilateralist stance of the United States therefore gave way to a posture of benign neglect, and ultimately limited engagement with the ICC.[237] In 2005, the United States did not oppose the first Security Council referral of a situation to the ICC, abstaining when resolution 1593 concerning the situation in Darfur was put to a vote.[238] Come 2011, the United States voted in favour of resolution 1970 referring the situation in Libya to the ICC.[239] In 2012, the Security Council

open debate on peace and justice offered the occasion to take stock of how the relationship with the ICC had developed since the entry into force of the Rome Statute ten years earlier, and to consider the way forward. During the debate, the United States acknowledged that the ICC could be "an important tool for accountability".[240] It stated that it has engaged with the ICC's prosecutor and registrar to consider how to support specific prosecutions already underway and that it has responded positively to informal requests for assistance. When Bosco Ntaganda and Dominic Ongwen, two ICC-inductees surrendered to the court, the United States was instrumental in transferring them to the custody of the court.[241] In 2013, the United States sided with seven other Security Council members in not granting an Article 16 deferral regarding the situation in Kenya, despite intense lobbying by the African Union that the indictments were detrimental to efforts in combating terrorism in the horn of Africa, an aim that the United States supports.[242] And in 2014, when a draft resolution referring the situation in the Syrian Arab Republic was put to a vote, the United States delegation voted in favour whereas two other permanent members opposed the resolution and vetoed it.[243]

While other actors were likewise sceptical to the ICC, the United States was the only actor among the major powers to adopt what David Bosco has termed a policy of active marginalisation towards the court. In the period of 2001 to 2005, it sought to undermine the ICC through public statements, to limit the court's reach through bilateral agreements and its efforts in the Security Council, and by trying to discourage other actors to become states parties to the Rome Statute and support the ICC.[244] The preeminent role of the United States in the international system ensured that these efforts did indeed have a significant impact on the environment in which the court operated. Yet we have seen that this episode was, in the end, short-lived. The insistence of the United States to carve out exceptions in the Security Council and through bilateral agreements were perceived as in tension with the Rome Statute, and thus did not meet with sympathy from many other actors. By 2006, then, the United States' efforts had largely faded, as it became obvious that it was unable to induce other actors, and including many of its key allies, to join in marginalising the court. While there can be various explanations for this outcome, part of the reason is that the arguments of the United States mostly relied on legal and institutional concerns specific to its particular interests that had difficulty to gain traction in front of an international

audience when contrasted with the normative claims based on accountability deployed by the court's proponents. When issues related to the ICC were framed as a choice between accountability and impunity, the efforts deployed by the United States appeared as a mere exercise in exceptionalism. By consenting to refer the situation in Darfur, Sudan, to the ICC, the United States effectively ended its active marginalisation campaign against the court as the perceived diplomatic cost was simply deemed too high. The normative power of international criminal law thus appears to have curtailed the instruments for even major powers to control the operation of the court.[245]

The renewed period of hostility of the United States towards the ICC during the term of the Trump administration does not change this assessment in the longer term. The United States certainly aimed, once again, at marginalising the court. Its efforts even went beyond previous bilateral initiatives with other states, to now include sanctions directed at the ICC itself and its officials. While the revoking of visas and instating a travel ban did not affect territories other than the United States, the financial sanctions such as the asset freeze against court principals and potential further restrictive measures against the court could have entailed serious repercussions on the functioning of the court. Due to the extraterritorial effect of such measures, financial institutions holding or managing assets of the court might eventually have felt compelled to cease operations with the ICC to preserve their continued access to the United States market. It was important therefore, that other actors, notably the European Union, did not acquiesce to the 2020 Executive Order adopted by the United States and continued to strongly support the court instead. Contrary to the views of the then-United States administration, the European Security Strategy emphasises that the commitment to promoting a rules-based international order includes support to the ICC.[246] This also emanates from the larger aims of rule of law consolidation, respect for human rights, as well as preservation of peace and strengthening of international security in conformity with the UN Charter, as inscribed in Article 21 of the Treaty on European Union.[247]

The pressure of the United States against the ICC during that period was intense, but was not met with widespread international support or approval, nor was it meant to last. Executive Order 13928 was revoked soon after the taking of office of the Biden administration, ending the policy of sanctions against the court. The press release of the Department of State accompanying that decision acknowledges that "the measures

adopted were inappropriate and ineffective".[248] Rather than opposition to the court from the outside for what the United States conceives as undue assertion of jurisdiction over its nationals, the administration now states that "our concerns about these cases would be better addressed through engagement with all stakeholders in the ICC process". This internal reform of the court is qualified as "a worthwhile effort". While a new approach of the United States with the regard to the ICC is still being drafted, the statement also underlines that the rule of law, justice and accountability for mass atrocities are in the national interest of the United States. This has been put into sharp contrast with the aggression of Russia against Ukraine in 2022. While the United States is at the forefront of the international community's efforts to hold Russia responsible for its actions before international courts and tribunals, it would be difficult to credibly advocate for this policy when at the same time maintaining a hostile, exceptionalist approach towards the ICC. Invoking accountability against third parties requires actors to subscribe themselves to the principle of accountability. This holds all the more, even for major powers, as direct military intervention in the conflict between Russia and Ukraine has been excluded from the outset, making the United States and its allies dependent on the legitimacy of their actions to gain traction in the international community, as relying on force alone is simply not an option.

4 Expanding the Reach of International Criminal Justice

4.1 The Prerogative to Initiate Investigations

The court's jurisdiction was initially conceived as limited to referrals by the Security Council or states parties.[249] The Rome Statute substantially changed these, in that the Prosecutor may also initiate investigations on her or his own authority. States have traditionally been reluctant to use existing complaint procedures, both due to the principle of *par in parem non habet imperium* and because they must consider the diplomatic and political repercussions of referring situations for prosecution; they must also consider the likelihood of retorsion. Experience with inter-state complaint procedures in human rights treaties has shown that states are reluctant to make use of the full range of this instrument against others, as it is considered rather confrontational.[250] These constraints are much

less acute for an independent Office of the Prosecutor, although here as well it might be necessary to weigh the interest of prosecution against the potential consequences of acting against the interests of powerful actors whose political or financial support might be crucial to the viability of the ICC.[251] This has become evident in the case of the investigations into the situations in Afghanistan and Palestine, where to court has to balance the imperative of justice with the positions of major actors, including among the states parties.[252] At the Rome Conference, the court's proponents contended that both the Security Council and individual states would rely on inadequate political considerations when deciding on a referral to the ICC. The veto prerogative would shield the permanent members of the Security Council and their allies, whereas in the case of individual states, referrals would only be made selectively and in any case never against the powerful actors, since the more powerful a state is, the less others are inclined to direct a referral against it. A system that only permits referrals by individual states could therefore be expected to suppress referrals against the most powerful actors. Such a system might have practically have provided the P5 with de facto immunity from the court.[253] The result would have been selective justice and discretisation of the ICC as an independent legal institution.[254] To avoid a regime in which the court would render justice selectively, many actors therefore favoured the idea of an independent prosecutor.[255] The contrary argument also emphasised the primacy of law over politics, but reached an opposite conclusion. The United States cautioned against a prosecutor that would be unaccountable to any authority.[256] To the extent that the prosecutor chose to act independently of states and the Security Council, she or he would lack the necessary support for effective prosecutions. This, however, only reflects a tension inherent in the functioning of the ICC, between what is realistic and practical, and upholding international criminal justice even in instances where the prospects may not seem promising.[257] Underlying the argument against an independent prosecutor were concerns that investigations might be conducted when it was not in some actors' interest. Such concerns became particularly evident, for instance, in the Pre-Trial Chamber proceedings concerning the situation in Palestine. Whereas a number of intervening parties argued in favour of the political nature of the issue and deemed it non-justiciable by the ICC, the court held the view that, given the nature of the crimes covered by the Rome Statute, considering that political aspects in a case foreclosed their justiciability

would practically void the ICC's jurisdiction of all meaning.[258] The arguments against such a form of "political questions doctrine" before the ICC seem even stronger if one looks beyond international criminal law at the larger field of general international law. In the *Nuclear Weapons* advisory opinion, the ICJ stated that "*[t]he fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' […]*".[259] In the same vein, that a situation before the ICC has political elements to it should not, in and of itself, disqualify it for consideration by the court.[260]

The debate over the alleged African-centric focus of the ICC's some years into its existence illustrated that the decisions of the independent prosecutor are subject to intense political scrutiny and at the risk of being criticised for being unduly biased against certain states or carried out without regard to the democratic will of the populations concerned when states disapprove of prosecutorial decisions.[261] The disagreement reflected both a divergence of interests and a related heterogeneity in conceptions about the appropriate role of international law and institutions.[262] The United States considered that the conferral of such authority onto the prosecutor was not conceivable without accountability to some form of executive authority and political questions doctrine.[263] This, however, is not a deficiency inherent in international law, and this feature has previously been accepted by the United States. For instance, the Supreme Court considers that to ensure their effective and fully independent functioning, certain agencies may not be placed under direct executive control.[264] The majority of actors consider that the Rome Statute contains adequate safeguards to ensure that prosecutorial decisions are based on sound reasons, notably adequate jurisdiction and evidence, and admissibility of the case. The prosecutor may also take into account certain political considerations, as according to Article 53 (1) (c) of the statute he or she can assess if "there are […] substantial reasons to believe that an investigation would not serve the interests of justice". These same considerations are also applied by the Pre-Trial Chamber in deciding on whether to authorise the initiation of investigations or prosecutions such as in the Kenya and Afghanistan cases.[265] The scope of the notion of "interest of justice" in itself is not defined in the statute. The policy papers of the Office of the Prosecutor point to a more limited scope,[266] whereas one could also conceive it as encompassing both legal and non-legal factors relating to the achievement of the aims of the

ICC, namely the fight against impunity and deterring the most serious crimes.[267] These factors may then include elements such as the likelihood for cooperation, as well as political and financial support to successfully conduct an investigation, and in practice, the majority of *proprio motu* investigation requests indeed do not directly involve major powers. In traditional interest-based terms, the risk of politicised prosecutions was of course substantially lower for most if not all of the actors strongly supporting an independent prosecutor than it was for actors regularly engaging in military interventions, which are a far more likely target for complaint.[268] In the end, however, the United States position to further circumscribe the prosecutor's authority did not gain any traction.[269]

The outcome on this point represents an important change of course in the international system. The establishment of the ICC not only aims at securing more stringent prosecution of international crimes. By conferring the ICC with an independent prosecutor, the Rome Statue also takes away from individual actors the discretion to decide if, when and against whom, to initiate proceedings, a right that states, and especially the powerful actors, had until then considered a prerogative that is not to be left unfettered by political considerations.[270] This is all the more pertinent as the mandate of the Prosecutor under the Rome Statute require her or him to investigate alleged crimes committed by all parties to the conflict, therefore excluding one-sided investigations favourable to a particular party in that conflict or other actors supporting her. In the case of the investigation into the situation in Ukraine, given that none of the parties to the conflict was a state party to the Rome Statute, activating the jurisdiction of the court was only possible when Ukraine lodged a declaration of acceptance of the ad-hoc jurisdiction of the ICC for crimes committed on its territory from February 2014.[271] That Ukraine voluntarily accepted the jurisdiction of the court does not, however, entail that OTP would only investigate alleged crimes committed by other parties; rather the Prosecutor is obliged to investigate all sides to the conflict.[272] The joint referral of the situation in Ukraine to the ICC by a number of states parties in 2022 accordingly does not change the jurisdictional scope of the investigation; it merely facilitates allocating the necessary resources to OTP in order to effectively conduct its investigations.[273]

4.2 *Jurisdiction and the Consent Principle*

The 1994 ILC draft statute allowed to ratify the statute establishing the court without necessarily having to accept its jurisdiction over particular crimes; and except in cases of Security Council referral, the exercise of jurisdiction required the consent of both the state where the alleged crime was committed and the state of the accused's nationality.[274] This approach was criticised in ensuing negotiations for effectively rendering the court dependent on Security Council referrals, and it was further considered as undermining the court's legitimacy and efficiency, in that the ICC must be seen operating exclusively in the interest of the international community, unimpeded by external control and political manipulation.[275] Some actors argued in favour of abandoning the consent principle altogether and to adopt the principle of universal jurisdiction.[276] In this view, since existing international law, most notably the Geneva Conventions, confers on all states not only the right, but also the obligation to prosecute individuals responsible for genocide, crimes against humanity, and war crimes, the power held by individual actors could also be collectively delegated to the ICC, as an embodiment of states parties' collective prosecutorial authority—or obligation *erga omnes*.[277] The majority of participants was not willing to abandon the consent model altogether. The United States, for instance, wanted any prosecution conditioned on the consent of the national state of the accused individual, at least with respect to those states that had not ratified the statute.[278] This position would have placed a definite safeguard against the prosecution of its nationals, but the wider consequence would have been the impossibility of prosecuting other non-states parties' nationals absent their government's consent or a Security Council referral. Most actors considered this approach as undermining the ability of the ICC to prosecute serious crimes even in cases of Security Council deadlock, and therefore strongly favoured the compromise proposal by South Korea that eventually found its way into the statute. The court's jurisdiction can be exercised if *either* the state where alleged crimes were committed *or* the national state of the accused person consents.[279]

In order to improve the resonance with other actors, the United States attempted to wrap its arguments in a mantle more amenable to the international public interest. It contended that the potential risk of unjustified or politically motivated prosecutions by an international court would

discourage states from taking a greater share of responsibilities for peacekeeping missions and humanitarian action in the international arena.[280] Further, creating a court operating without at least the tacit support of key actors would negatively impact its perceived legitimacy by other actors and result in the ICC struggling to garner the financial, intelligence and logistical assistance necessary for its effective functioning.[281] While such material and political considerations may indeed have played a role in some situations before the ICC, notably the investigation concerning Afghanistan, the overall argument nonetheless is not convincing to a large number of actors, for declining to even open an investigation every time a major actor may potentially be involved would amount to abandoning without even trying for justice.[282] Faced with the lack of persuasion of political interest-based arguments, the United States then emphasised a legal argument,[283] arguing that treaty-based conferral of jurisdiction over the nationals of non-states parties were incompatible with Article 34 of the Vienna Convention on the Law of Treaties, as treaties may only bind the parties to them.[284] On this point, other actors acquiesced the general principle that treaties do not bind non-parties and the ICJ jurisprudence on the principle of consent in international adjudication under general international law; rather, disagreements centred on whether the Rome Statute would indeed contravene these principles.[285] The prevailing view was that the statute does not bind non-consenting states. Non-states parties are indeed exempt from the obligations that the statute imposes on states parties, such as to cooperate with the ICC in investigations or executing arrest warrants.[286] This has also been reflected in the Security Council referrals of the situations in Darfur and Libya to the ICC, as resolutions 1593 and 1970 do not impose cooperation obligations on non-states parties other than Sudan and Libya, respectively.[287] Consequently, the question then arises as to how the statute can confer prosecutorial authority on an international court regarding the nationals of non-states parties if the latter are not bound by the statute?[288]

The solution is linked to different conceptions concerning the source of the court's jurisdiction. The actors supporting the ICC consider that, since under existing international law, the territorial states are invested with jurisdiction to prosecute the crimes, it is consequently possible to delegate the right to exercise jurisdiction to an international court by ratifying the statute or by consenting ad hoc to the ICC's jurisdiction.[289] This delegated authority is indeed possible in international law, although

not entirely unproblematic in the Palestine situation.[290] Whereas the Pre-Trial Chamber did not elaborate on this point,[291] delegation can be questionable when the territorial scope is contested. Criminal jurisdiction in the Palestinian territories is governed by the Oslo Accords, whose Interim Agreement (Annex IV) excludes Israeli citizens, settlements and military installations from the jurisdiction of the Palestinian Authority, and creates differentiated regimes for Areas A, B and C. Following the rule that one cannot give more than one possesses (*nemo dat quod non habet*), only the limited jurisdiction resulting from the Oslo Accords could then be delegated to the ICC, which has also been considered in line with a functional interpretation of Article 12 of the Rome Statute.[292] Accordingly, relying on delegation theory alone the Palestinian Authority could not delegate any jurisdiction over Israeli nationals to the court. The United States does agree that "a state may delegate its territorial jurisdiction to another state in particular cases with the consent of the state of nationality of the defendants", but contended that "there seem to be no precedents for delegating territorial jurisdiction to another state when the defendant is a national of a third state in the absence of consent by that state of nationality".[293] The question, therefore, is whether the territorial state may transfer his authority to an international institution without the consent of the national state of the accused. It is linked to the principle that an international court or tribunal is not competent to adjudicate the rights and duties of third actors absent their consent.[294] According to this principle, articulated by the ICJ in the *Monetary Gold* case[295] and later reaffirmed in the *Case Concerning East Timor*[296] as well as the *Western Sahara*[297] and *Chagos*[298] advisory opinions, states cannot be forced to acquiesce to the jurisdiction of international courts. This is derived from the consent principle in general international law, and both the ICJ and its predecessor, the PCIJ, have held that courts cannot exercise their jurisdiction where this would imply adjudicating over the legal interests of a third actor not party to the dispute and which has not given its consent to the court's jurisdiction.[299] In the *Monetary Gold* judgement, however, the ICJ specifies that the preclusion from adjudication only applies to matters in which "the very subject matter" of the dispute involves the legal interests of third states that are not before it.[300] It is difficult to conceive how the legal interests of non-states parties could systematically form the very subject matter of an international criminal law case. It can therefore be advocated that the principle would only apply if the ICC would have to adjudicate specifically on the international responsibility or

lawfulness of the conduct of third states not party to the proceedings to decide a case. Since cases involving the nationals of non-states parties will not require the court to make a determination about a third state's legal responsibility to convict an individual for crimes under the Rome Statute, the court would not act in conflict with the consent principle.

Proponents of the drafting that was finally included in the statute accordingly rejected the consent-based arguments, also noting that numerous international agreements already include provisions conferring jurisdiction on states parties, independently of the consent of the national state of the accused.[301] Then again, one could argue that just because states can use treaties to confer jurisdiction on each other, this should not necessarily be the case for an international court.[302] The underlying practical motive of this position is that the interest of states, notably powerful actors, is to avoid a delegation of jurisdiction to an institution where they cannot deploy their privileged bargaining position as they could in bilateral negotiations. The United States phrased this objection in more neutral terms, contending that when an individual actor accepts a delegation of authority to prosecute, it "must accept responsibility for the exercise of jurisdiction, and may ultimately be held accountable for it" by others. Given that an independent international court would operate distinctly from the diplomatic and political interactions that characterise inter-state relations, such safeguards on the exercise of delegated authority would not apply here.[303]

The argument was essentially framed as dissent over competing legal interpretations. For powerful actors, the primary notion was accountability *towards* political interests and priorities. For the majority of the court's proponents, the dominant notion was ensuring accountability *of* the perpetrators of the most serious crimes. Both sides considered their arguments as legally compelling.

The United States thus found itself caught between conflicting imperatives. Abbott and Snidal have shown how powerful actors structure international organisations to further their own interests.[304] The negotiation of the ICC was no exception to the temptation for them to shape the outcome according to their objectives. In order to succeed in this endeavour, they must operate in a way that induces weaker actors to participate. In the case of the ICC, many actors consider judicial independence as essential in order to limit the expression of power politics. Thus, a certain degree of autonomy in the court's operation was largely

considered a necessary prerequisite. On the flipside, the more independent the court is, the less likely it becomes that its decisions cater to the interests of the most powerful actors. It was proving particularly difficult for the United States to show flexibility in the face of these conflicting imperatives, as it had never recognised the authority of an international organisation to put its nationals to trial absent its consent or a mandate of the Security Council.[305] The United States was not alone in these concerns though, as evidenced by the later reactions of other actors. For instance, while Russia had not vociferously stated its position during the early years of the court's existence, this changed once the ICC considered investigations into situations with Russian involvement.[306] The opening of an investigation into alleged crimes committed on the territory of Ukraine in 2014 led to the Russian Federation reneging on its status as a signatory to the Rome Statute. Beyond the symbolic nature of this act, as mentioned above, also lies a legal dimension in rescinding any obligations for loyal cooperation in furthering the object and purpose of the treaty under the VCLT, thereby making clear that Russia would consider any adjudication of its nationals before the ICC as inconceivable.[307]

For the crime of aggression, the conditions for the exercise of jurisdiction had likewise become one of the crucial issues: namely whether the ICC should have the power to exercise its jurisdiction over the crime of aggression even in cases where the alleged aggressor had not consented to the amendments on the crime of aggression. The consent principle was taken up in the *travaux préparatoires* as a potential solution to the issue of how to limit the ICC's ability to exercise jurisdiction over the crime of aggression without further privileging the Security Council or rendering aggression prosecutions dependent on power politics. It was uncontested that the Security Council could refer a situation potentially involving the crime of aggression to the court independently of whether the relevant actors were parties to the statute or had consented to the amendments on the crime of aggression. The question of consent became relevant once the discussion extended to possible triggers or filter mechanisms outside of the Security Council.[308] The proponents of the consent principle adhered to the premise that the crime of aggression implicates sovereignty more than any of the other crimes in the statute, because the action of a state serves as a precondition for the prosecution of individuals for the crime of aggression. This perceived exceptionality of the crime of aggression as a function of state action therefore supported arguments in favour of premising jurisdiction on the consent requirement.[309]

It has been contended that the centrality of the determination of an act of aggression by a state to a prosecution for the crime of aggression again invokes the *Monetary Gold* principle, whereby states cannot be compelled to submit to international adjudication. It might of course be reiterated here that the principle does not apply to international criminal tribunals, such as the ICC, that do not strictly assert jurisdiction over the responsibility of states but only cover individual criminal responsibility.[310] Indeed, neither the Nuremberg nor the Tokyo tribunals enjoyed the consent of the aggressor state, unless Japan and Germany can be considered to have constructively consented to jurisdiction by virtue of their defeat, subjugation and occupation.[311] On the other hand, since prosecution of the crime of aggression is directly conditioned on a determination of the responsibility of a state for committing an act of aggression, the relevance of the principle is worth examining in this context.[312] The consequence would be that, given this "consent problem", any referral to the ICC of a situation involving a state not having explicitly consented to the court's jurisdiction on the crime of aggression would be a violation of the *Monetary Gold* consent principle; with the exception of an explicit determination of an act of aggression by the Security Council.[313] In this view, jurisdiction of the court over the crime of aggression is consequently premised upon either a Security Council referral or the express consent of the aggressor state to the court's jurisdiction by accepting the amendments to the Rome Statute.[314]

The P5 argued in favour of Security Council primacy, especially given the centrality of the consent principle in international law[315] and the apparent willingness of other actors to voluntarily renounce, or at least erode, what may have been considered core prerogatives of sovereignty.[316] They contended that states parties could not, by virtue of consent, create legal exceptions to the UN Charter, including the delegation of power and responsibility to the Security Council and its system of collective security.[317] This critique was based, however, on a view of Security Council primacy and exclusivity that was weakened by subsequent United Nations practice.[318] It became further undermined with the compromise eventually adopted, whereby the amendments would not apply to non-states parties while retaining Article 12 of the statute, thus without any consent requirement.[319] Absent a Security Council referral, jurisdiction over the crime of aggression would accordingly only cover those actors having consented to the amendment, thereby excluding non-states parties. It therefore became increasingly difficult for the P5 to

counter the crime of aggression amendments with credible legal arguments. The P5 resorted to political arguments, such as cautioning against impeding the legitimate collective use of force, which could lead to more unilateral actions by actors not covered by the amendments on the crime of aggression. Those purely policy-based arguments, however, failed to gain traction with other actors.

4.3 Positive Complementarity

The proponents of the ICC frequently highlight the safeguards contained in the statute aimed at preventing undue action by the court. The most prominent safeguard is the principle of complementarity within the meaning of Article 17 of the Rome Statute, according to which the ICC shall only investigate or prosecute if a state is unwilling or unable to genuinely carry out the investigation or prosecution.[320] Thus, to prevent one of its nationals accused of a crime, a state needs only demonstrate its willingness and ability to investigate. This in itself can give rise to contestation. In the Kenyan cases, for instance, the court and most states parties were not satisfied that there was a genuine willingness to investigate on the part of national authorities. The African Union, in turn, argued that prosecutions would undermine the aim of peace and stability in the horn of Africa and distract from national reconciliation mechanisms.[321] While the Security Council did not accede to a request for deferral under Article 16 of the Rome Statute, the Pre-Trial Chamber found that despite the absence of national investigations, continuing the cases was not in the interest of justice for lack of cooperation by the Kenyan authorities and low prospects for successfully bringing cases to trial.[322] For powerful actors, however, the issue transcends cases of rightly or wrongly accused individuals.[323] The concern is use of the court as a tool for influencing foreign policy decisions by holding at risk those who implement that policy.[324] Complementarity cannot fully erase such concerns, because this mechanism does not protect against investigations into a particular action that the perpetrator considers as legitimate under IHL whereas the court disagrees with the legal justification put forward. Any conflict or military action bears the possibility that instances occur in which the necessity and proportionality of a particular action may be contested after the fact.[325] Others might see what an actor considers a necessary and proportionate recourse to force, as a violation of IHL.[326] There may also be disagreements concerning the legitimacy of striking

particular targets. These assessments are likely to become more complicated in the future with potential cases involving acts without the use of kinetic force, such as in cyber warfare, and recourse to lethal autonomous weapons systems (LAWS), where the authoritative legal framework is still subject to debate. In such cases, complementarity does not necessarily constitute a shield against prosecution, when the relevant actor from the outset might consider the action concerned to not be a violation of applicable international law.[327]

From the vantage point of powerful actors, the issue goes beyond the possibility of prosecutions by the ICC against individuals. The deeper concern is that future decisions on the use of force and the means intended to meet military objectives could be impeded by the spectre of potential proceedings before an international court.[328] This compounded by the discussion over the territorial applicability of IHL. In recent years, the ICC Prosecutor has conducted preliminary investigations into situations, such as Afghanistan, involving coalitions of both states parties and non-states parties. The announcement of the Prosecutor on the Afghanistan investigation, for instance, referred to crimes committed on the territory of that country or "closely linked" to the situation and committed on the territory of other states parties.[329] This could potentially lead to investigations covering acts of non-states parties but committed on the territory of states parties in a situation over which the court has jurisdiction. It could also involve a pronouncement on the different conceptions regarding the applicability of IHL, whether it is territorially limited to the borders of a state where an armed conflict exists, or whether it applies irrespective of national borders as long as a sufficient link to an armed conflict can be established.[330] Different actors might be more inclined to one or the other of these positions, depending on their propensity to engage in military missions. And based on the principle of complementarity, national courts in states parties linked in some way to the conflict might be likewise required to pronounce themselves on such questions.

The proposal on jurisdiction of the P5 in the negotiations on the Rome Statute reflected this concern, in stating that the ICC's jurisdiction should not extend to official acts of the actor concerned.[331] The rationale consisted in arguing that since states were likely to repudiate war crimes and other atrocities, prosecution by the court of deliberate atrocities would remain unimpeded, while nonetheless preventing investigations over could be considered legitimate interpretative divergences

over the scope and content of IHL.[332] The intention to exclude official acts the scope of the court's jurisdiction is a reflection of the paradigm that the ICC's jurisdictional authority should be limited to the conduct of individuals, and that an assessment of the conduct of states by an international court be it indirectly by holding individuals accountable for official acts, represents an infringement on the authority of the Security Council as the principal political organ of the United Nations.[333] Other actors, by contrast, wanted to shift decision-making authority away from the political institution of the Security Council to an international court that would operate predominantly according to legal considerations. The *Monetary Gold* doctrine, as mentioned above, does not oppose the adjudication by an international court simply because a case would involve the interests of third actors. More explicitly, the ICC does accordingly not violate the consent principle for merely exercising its jurisdiction over official acts committed by individuals pursuant to a policy of a third state. The rationale for individual accountability in Nuremberg further supports this argument:

> Individuals have international duties which transcend the national obligations of obedience imposed by the individual state […] crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be upheld.[334]

The principle of complementarity entrusts national legal systems with the primary responsibility to prosecute the crimes covered by the Rome Statute. It aims to shield the court from overstretching its capacity in terms of caseload, as well as political and financial support, while protecting it from claims of undue interference by investigating only the most serious instances where national legal systems are unable or unwilling to intervene. This was also seen as a mechanism to get national legal systems to take on a more proactive role in national prosecutions, where there would otherwise have been no accountability at the domestic level. It was clear from the beginning that the ICC could only effectively prosecute a fraction of the crimes that fall under its jurisdiction. The risk of a finding of non-compliance with the complementarity obligations may, however, induce national courts to undertake such prosecution themselves. This is an objective the drafters of the Rome Statute clearly had in mind, in that one of the consequences of establishing a permanent

ICC would lead to an increase in prosecutions before national courts. It is the implementation of an obligation in international law through the vehicle of domestic law.[335] For many actors, complementarity represents an important step in the right direction of striking an appropriate balance between the international legal order and national legal systems. The European Union, for instance, consistently maintains that in accordance with the complementarity principle, "States have the primary responsibility to investigate and prosecute serious international crimes" while stressing the role of the court "in terms of its narrowing the accountability gap and bringing perpetrators of atrocity crimes to account".[336] One example of this dynamic of complementarity can be found in the situation in Colombia. The preliminary investigation by OTP was among the first launched after the establishing of the ICC, but no formal investigation was requested and no charges were filed until the Prosecutor announced the closure of the investigation in 2021. The spectre of action by the court nonetheless accompanied national efforts towards a peace agreement and the establishing of extraordinary transitional justice mechanisms, among which primarily a *Jurisdicción Especial para la Paz* (JEP—Special Jurisdiction for Peace). The justification of the Prosecutor's decision that Colombia is able and willing to effectively investigate the crimes committed on its territory or by its nationals relies on the conclusion of a cooperation agreement between the Colombian government and OTP.[337] The Colombian government thereby commits itself to supporting the national judiciary and the transitional justice mechanisms, whereas OTP will continue to monitor the situation and maintains the option to resume investigations at any time should the national mechanisms not work effectively. This approach of "positive complementarity" aims to empower national judiciaries while reassuring states acting in good faith that the court will not interfere in their proceedings.[338]

While for the United States and other sceptics these reassurances might not go far enough, it is doubtful that the court and the majority of other actors are willing to offer any further concessions. It is one thing to accept hegemonic leadership in a particular situation, but it is yet another to accept that dominant actors should, by virtue of their privileged power position in the international system, enjoy a legally supported de facto immunity from a functioning international criminal court. This argument can be placed in even starker contrast if one were to inverse roles, and it is hardly conceivable that the United States would concede to similar special treatment if, for instance, China were to replace it as the hegemonic actor in the international system.[339]

5 International Criminal Law and International Relations

The negotiation of the Rome Statute, the progressive establishing of the ICC and the subsequent addition of the crime of aggression to the court's jurisdiction highlight the interaction between international law and politics in the development of international criminal law. *Prima facie*, international criminal justice can be seen as a classic collective action problem, in that large scale human rights violations affect the international community as a whole, whereas incentives for individual states to take action or initiate prosecutions are low, since in order to preserve their range of options, both domestically and internationally, actors can be presumed to resist their conduct being subject to any form of external scrutiny. The creation of the ICC, at least to some extent, can thus be seen as an endeavour to reduce the transaction costs inherent to the establishing of tribunals for specific situations. This only helps to uncover part of the puzzle of international criminal justice, though, since the deliberations revolved around a fundamentally normative component, namely the aim to develop and stabilise norms of legitimate behaviour in the international arena. These interactions are not only embedded in a social context, but also framed by legal norms. International law, in turn, envelops actors in a particular "language of justification", and since the aim of the participants was the creation of a legal institution, most of the arguments put forward then took the form of *legal* arguments. These arguments reflected the underlying interests of the different actors, but the process of invoking and pursuing legal argumentation contributed in shaping actors' "horizon" of possibilities[340] and in turn the decisions taken by the participants.

It can be argued that the creation of the ICC was motivated by a desire to bring about a change in the system of expectations among actors on the international stage. The optimistic narrative deriving from the Nuremberg logic that the solution to the problem of the complex interaction between law and politics can been found in subordinating the latter to the former, does, however, fall short of adequately explaining the position of the ICC in the wider structure of the "international game". The unavoidable fragmentation brought about by the set of complex relationships of the court with the Security Council,[341] between the court and states parties, between Prosecutor and states parties in ensuring cooperation, as well as the relations of the court with non-states parties, especially among the

major powers, necessarily carves out space for the operation of political interests.[342] At the same time, when actors aim to realise their interests, they do not operate in an empty space, their decisions and actions take place within a social context structured by norms, which impacts upon the types of reasoning and arguments that can legitimately be put forward. Most of the key issues such as the role of the Security Council, the powers of the Prosecutor and the extent of the ICC's jurisdiction are addressed through legal reasoning and even when international law manifestly does not compel a particular outcome, the arguments put forward are shaped by actors' ideas about international law and international criminal justice. In this sense, international law frames the range of options available to the participants. Once the ICC had been established, efforts to limit the scope of the Rome Statute and constrain the functioning of the court conflicted with the norm of *pacta sunt servanda*. Even when faced with significant pressure, states parties found themselves constrained in their behaviour since once they had consented to an international legal obligation, that of not undermining the ICC, their actions would be assessed not merely with regard to a specific obligation, but also in terms of their reputation in the international system. The European Union consequently resisted pressures to accede to demands for special arrangements securing impunity for some actors before the ICC. In response to the threat of sanctions against the court and its principals, the EU and its member states maintained their "unwavering support for the international criminal justice system and in particular the International Criminal Court" and reaffirmed their commitment to "defend the principles and values enshrined in the Rome Statute and to preserve the ICC's integrity".[343] At the UN General Assembly debate on the Report of the International Criminal Court in November 2021, the European Union further insisted that the court "must be protected from outside interference and pressure in order to be able to deliver on its mandate. We will continue to protect the Court form attacks and actions intended to destabilise its judicial activity and undermine its legitimacy".[344]

The International Criminal Court puts into perspective how international law can shape the range of options that actors deem available to them. Simultaneously, the participants in the negotiations deliberately aimed to use the law-creating process to establish new norms that would in turn restrain the expression of politics by extending international criminal jurisdiction to their nationals and external relations. While it remains difficult to evaluate to what extent the ICC is able to prevent conflict

or deter atrocities, the court's existence impacts the calculus of actors in the international arena when deciding on the use of force and their conduct in an armed conflict. At the very least, the court helped stabilise the norms of international criminal law and contributes to delineating rules of acceptable behaviour. Some observers may see a confusing picture of the court's jurisprudence[345] and lack of principled reasoning on which cases are in the "interest of justice".[346] The selective nature of the ICC only prosecuting the perpetrators of the most serious crimes in situations of systemic violence necessarily creates a partial picture of justice, but this feature is inherent in the complementarity design of the ICC and does not equate to the court being ineffective. More significant in this context of legitimate expectations created by the court is the 2021 judgement of the Appeals Chamber on a jurisdictional challenge in the Darfur situation.[347] The defence of the indicted individual contented that following the principle of *nullum crimen sine lege*, only the crimes incorporated at the time of the alleged offences in Sudanese national law, international law applicable to Sudan or customary international could be applied, since Sudan was not a party to the Rome Statute. The court noted that "a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law",[348] emphasising the concept of foreseeability by reference to the jurisprudence of the European Court of Human Rights.[349] Applying this criterion, however, the court went on to reject the challenge of the defence, and held that even as a non-states party national, the defendant was both capable to comprehend his obligations under international law and of appreciating the penal consequences of non-compliance.[350] The Appeals Chamber explicitly mentions that the defendant was "in a position to know that his conduct could attract criminal proceedings relating to crimes under international law, which are represented in the Statute".[351]

The negotiations concerning Security Council primacy with regard to the crime of aggression and the extent of the consent principle were framed as legal arguments, but simultaneously related to the politically sensitive issue of the right to resort to force in international relations. The aim was to limit actors' future discretion either by consenting to the amendments on the crime of aggression or through the spectre of a possible referral by the Security Council. More broadly, the aim was to reshape the international legal framework for decisions regarding the use

of force in international relations, thus altering the "horizon of possibilities" for the relevant actors by narrowing down the range of acceptable options.[352] The Russian invasion of Ukraine demonstrates that while the existence of the ICC cannot by itself deter actors from committing acts of aggression, especially as the ratification of the crime of aggression amendments by the wider international community is still an ongoing process, the fact that the court may exercise its jurisdiction in a future such instance has begun to shape behavioural expectations. Whereas Russia's position as a permanent member predictably preluded action in the Security Council, almost three quarters of the United Nations membership voted in favour of a General Assembly resolution condemning the Russian aggression.[353] At the same time, there is an unprecedented effort to support the investigations of the ICC and to ensure accountability for the crimes committed in Ukraine.

The first 20 years of the International Criminal Court illustrate that while the court may not have altered the wider political realities in the international system, it has been instrumental in furthering international criminal law and international justice. The two decades of the court's existence also demonstrate how attempts to operate outside the legal framework of the Rome Statute and carve out preferential regimes for powerful actors equates to wielding a double-edged sword, as those actors may then find themselves unable to invoke the very norms of international criminal law that they rely upon to hold others accountable. Had the United States continued with its policy of active marginalisation of the ICC, it would have found itself in a rather difficult position to defend international criminal justice in the face of Russia's aggression against Ukraine. At the same time, the court is not a magic solution to transcend power politics or social conflict and put an end to violence. It is unrealistic to project upon the ICC promises that it is unable to deliver on, but in order to make a difference the court needs to balance between what is possible in the face of international realities and the aspirational in securing accountability.[354] It is both an institution that can stabilise norms of behaviour and a criminal court to hold the perpetrators of the most serious crimes accountable for their actions. The jurisprudence of the court is a reflection of the delicate balance between the realistic and the aspirational, but at least in some cases, has entailed real consequences for the perpetrators of international crimes. In recent years, the jurisdictional reach of the ICC has been expanding, with new crimes being added to the initial list contained in the Rome Statute, keeping in line

with developments in IHL. At the same time, efforts are continuing to provide greater guidance on the application of international criminal law to cyber warfare and better align the ICC with the increasing digitisation of international conflict and the challenges of cyber operations. The "Final Report of the Council of Advisers on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare", presented in October 2021, aims to explore the role of the court in the regulation of new types of warfare in the twenty-first century.[355] Along with these developments, the failure to marginalise the court and to delay or defer its proceedings on political grounds demonstrate that even major powers find themselves limited in their ability to successfully pursue any chosen course of action when it conflicts with international law.[356]

Notes

1. Rome Statute of the International Criminal Court (17 July 1998), UN Doc. A/CONF.183/9: http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm.
2. Deitelhoff (2009), 34.
3. Marcella David, Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law, 20 *Michigan Journal of International Law* (1999), 337.
4. Georg Nolte, The United States and the International Criminal Court, *in* Malone/Khong (Eds.), *Unilateralism and U.S. Foreign Policy* (2003), 73.
5. Cherif Bassiouni, Negotiating the Treaty of Rome, 32 *Cornell International Law Journal* (1999), 443.
6. Hans-Peter Kaul, Towards a Permanent International Criminal Court, 18 *Human Rights Law Journal* (1997), 172.
7. David Wippman, The International Criminal Court, *in* Reus-Smit (Ed.), *The Politics of International Law*, 152.
8. The final vote in Rome was unrecorded. As a result, there remains some uncertainty as too precisely which states joined the United States and Israel in voting against the treaty. The states mentioned here are the ones most often named in reports on the outcome, see e.g. Deitelhoff (2009), 37.
9. Deitelhoff (2009), 34.
10. Benvenisti and Downs, The Empire's New Clothes: Political Economy and the Fragmentation of International Law, 60 *Stanford Law Review* (2007–2008), 595.
11. Wippman, 152.

12. See Beth Simmons and Allison Danner, Credible Commitments and the International Criminal Court, 64 *International Organization* (2010), 226: "Not only does the ICC promise more stringent enforcement of international crimes, it also takes away from sovereign states the discretion to decide when to initiate prosecutions – a right they have heretofore jealously guarded".
13. James Crawford, The ILC Adopts a Statute for an International Criminal Court, 89 *AJIL* (1995), 406.
14. Wippman, 153.
15. Deitelhoff (2009), 40–41.
16. Wippman, ibid.
17. See Restatement of the Law (Third): The Foreign Relations Law of the United States (1987), § 443.
18. See ibid. § 451.
19. See ibid. § 464.
20. David J. Scheffer, Staying the Course with the International Criminal Court, 35 *Cornell International Law Journal* (2002), 51.
21. Kratochwil, *Rules, Norms and Decisions*, 9.
22. Wippman, 154.
23. Reus-Smit, *The Politics of International Law*, 40–41.
24. Wippman, ibid.
25. Bassiouni, Negotiating the Treaty of Rome, supra, 468–469.
26. Nolte, supra, 72.
27. Wippman, 156.
28. See Carsten Stahn, Why the ICC Should Be Cautious to Use the Islamic State to Get Out of Africa, *EJIL Talk*, 3 December 2014: https://www.ejiltalk.org/why-the-icc-should-be-cautious-to-use-the-islamic-state-to-get-out-of-africa-part-1/.
29. Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences, 41 *AJIL* (1947), 186.
30. *Report to the President by Mr. Justice Jackson*, 6 June 1945, *sub* IV: http://avalon.law.yale.edu/imt/jack63.asp.
31. Opening Speech of the chief Prosecutor for the United States, reprinted in *The Trial of Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (2001), 45.
32. Deitelhoff (2009), 36.
33. UN Doc. A/RES/44/39, 4 December 1989.
34. UN Doc. S/RES/827 (1993), 25 May 1993.
35. UN Doc. S/RES/955 (1994), 8 November 1994.
36. UN Doc. A/RES/49/53, 9 December 1994.
37. UN Doc. A/RES/50/46, 11 December 1995.
38. UN Doc. A/RES/51/207, 17 December 1996.
39. UN Doc. A/RES/52/160, 15 December 1997.

40. International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, UN Doc. A/49/10: www.untreaty.un.org/ilc/reports/english/A_49_10.pdf.
41. Deitelhoff (2009), 37.
42. ILC Draft (1994), 31.
43. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014), 40.
44. Rome Statute, Article 5.
45. Ibid., Preamble, paragraph 10; Article 17.
46. Ibid., Article 12.
47. Ibid., Article 13.
48. Ibid., Article 16.
49. Hampson et al. (Eds.), *Madness in the Multitude: Human Security and World Disorder* (2002), 62.
50. Scheffer, supra, 70.
51. See Nicole Deitelhoff, *Überzeugungen in der Politik: Grundzüge einer Diskurstheorie internationalen Regierens* (2006); Hans-Peter Kaul, The Continuing Struggle on the Jurisdiction of the International Criminal Court, *in* Fischer et al. (Eds.), *International Law and National Prosecution of Crimes Under International Law* (2001), 21–37; Philippe Kirsch and Darryl Robinson, Reaching Agreement at the Rome Conference, *in* Cassese et al. (Ed.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 67–71.
52. Wippman, 156.
53. It should, however, be noted that not all aspects of the negotiations were viewed as legitimate by all the participants. The United States, for example, strongly objected to the "rush" to conclude that characterised the final hours of the conference. See William Lietzau, International Criminal Law After Rome: Concerns from a US Military Perspective, 64 *Law and Contemporary Problems* (2001), 130.
54. Paul W. Kahn, American Hegemony and International Law. Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order, 1 *Chicago Journal of International Law* (2000), 1.
55. See Krisch, International Law in Times of Hegemony, supra.
56. Hurrell *in* Carlsnaes/Risse/Simmons (Eds.), 143.
57. Wippman, supra, 154.
58. Martha Finnemore, International Norm Dynamics and Political Change, 52 *International Organization* (1998), 897.
59. Wippman, 159.
60. Ibid.

61. On the question of whether the development of international criminal jurisdiction for serious human rights violations help deter future violations and eventually improve protection for human rights, see Kathryn Sikkink, *The Justice Casacade: How Human Rights Prosecutions Are Changing World Politics* (2011).
62. Wippman, 160.
63. International Law and Agreements: Their Effect Upon U.S. Law, *Congressional Research Service*, 18 February 2015: https://fas.org/sgp/crs/misc/RL32528.pdf.
64. Ibid., 9–11.
65. Lietzau, International Criminal Law After Rome, 126.
66. David Scheffer, Address before the Committee of Conscience, Washington D.C., 22 April 1998: http://www.state.gov/www/policy_remarks/1998/980422_scheffer_genocide.html.
67. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. I, Final Documents, Annex I, 72: "The [Preparatory] Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion on this statute. The provisions relating to the crime of aggression shall enter into force for the State Parties in accordance with the relevant provisions of this Statute".
68. Rome Statute, (former) Article 5 (2): "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations".
69. ICC-ASP/I/Res.1, adopted by consensus at the third plenary meeting on 9 September 2002: ICC-ASP/I/3, 328.
70. ICC-ASP/8/Res.6: www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf.
71. Stefan Barriga and Leena Grover, A Historic Breakthrough on the Crime of Aggression, 105 *AJIL* (2011), 521.
72. RC/Res.6, Annex I: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.
73. Barriga and Grover, ibid.
74. Annex to UN Doc. A/RES/3314 (XXIX), 14 December 1774 (Resolution 3314):

http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3314(XXIX)&Lang=E&Area=RESOLUTION.

75. ICC-ASP, Official Records on its 7th Session (1st and 2nd Resumptions), 19–23 January, 9–13 February, 2009, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/20/Add.1, 2nd Resumption, Annex II (2009): http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-20-Add.1-SWGCA%20English.pdf.
76. Thus for example, a genuine humanitarian intervention without Security Council authorization would, by its gravity and character, not fulfill the criterion of a manifest violation of the UN Charter since its legality under general international law is at least debatable, see Kaus Kreß, Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus, 20 *EJIL* (2009), 1129.
77. For a number of reasons, it would have been highly problematic to define that state conduct element of the crime of aggression by way of a mere reference to Resolution 3314. The definition of the term "act of aggression" contained in Articles 1 and 3 of the annex to the resolution was not written with the agreed understanding that it subsequently be used for defining the state conduct element of the crime of aggression under international criminal law. This lack of a shared understanding is made plain in the resolution itself, where the first sentence of Article 5 (2) in the annex only refers to a "war of aggression" as a crime against international peace. It is thus difficult to argue that Articles 1 and 3 in the annex to Resolution 3314 embody the state conduct element of the crime of aggression under general customary international law. Furthermore, a mere unqualified reference to Resolution 3314 would not have adequately responded to the fundamental challenge posed to any attempt to define the crime of aggression. We have previously seen that the prohibitions on the use of force under the UN Charter and under customary international law are surrounded by a grey area of legal controversy. According to Ambassador Rolf Fife, the focal point for the preparation of the Kampala Review Conference, a mere reference to Resolution might thus have created the risk of importing these controversies into the definition of the crime of aggressio, thereby putting the ICC at risk to become a forum for "a continuation of politics". See Thomas Bruha, *Die Definition der Aggression* (1980), 126; Elisabeth Wilmshurst, Aggression, *in* Cryer et al. (Eds.), *An Introduction to International Criminal Law and Procedure* (2010), 320; Rolf Fife, Criminalizing Individual Acts of Aggression by States, *in* Bergsmo (Ed.), *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjorn Eide* (2003), 53–73 (73).
78. Barriga and Grover, supra, 523.
79. Van Schaack, supra, 520.

80. The author not having himself been present at the Kampala Review Conference, the following sections draw from the accounts of the following participants: Beth van Schaack, member of the United States delegation to the Kampala conference, and Stefan Barriga, member of the Liechtenstein delegation chairing the conference. I have further benefited from subsequent exchanges with Stefan Barriga, David Scheffer and Christian Wenaweser.
81. The negotiations on the crime of aggression were complex and multifaceted, and it is not the aim nor within the ambit of the present enquiry to provide a comprehensive analysis of all the aspects involved in the process. Rather, the focus here will be on the most salient features at the centre of debates: the role of the Security Council and state consent. For a comprehensive overview of the negotiation history of the crime of aggression provisions, the reader is directed to the excellent account by Stefan Barriga and Klaus Kreß (Eds.), *The travaux préparatoires of the Crime of Aggression* (2011).
82. ICC-ASP, Official Records on its 4th Session, 28 November–3 December 2005, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, 13–15 June 2005: ICC-ASP/4/32, Annex II.A (2005): http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Annex_II_A_English.pdf.
83. Beth van Schaack, Negotiating at the Interface of Law and Power: The Crime of Aggression, 49 *Columbia Journal of Transnational Law* (2011), 513.
84. While only two of the permanent members of the Security Council, France and the United Kingdom, are currently states parties to the Rome Statute, the United States, Russia, India and China all participated in the Kampala Review Conference in their capacity as observer states, and should be noted that especially in the case of the United States as signatory of the Statute, it was highly unlikely, if not impossible, to imagine an outcome of the negotiations that would not take into account the comments of the United States delegation.
85. Van Schaack, supra, 507; on the negotiation dynamics at Kampala see also Stefan Barriga and Leena Grover, A Historic Breakthrough on the Crime of Aggression, 105 *AJIL* (2011), 520.
86. Rome Statute, Article 12:

    "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

    2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national. […]".

87. RC/Res.6, Annex I, Article 15 *bis* (4).
88. RC/Res.6, Annex I, Article 15 *bis* (5).
89. See David Scheffer, A Pragmatic Approach to the Crime of Aggression, *in* Roberto Bellelli (Ed.), *International Criminal Justice. Law and Practice from the Rome Statute to Its Review* (2010), 609–619.
90. Van Schaack, supra, 599.
91. Until now, the Security Council has only made scarce use of its referral powers under Article 13 (b) of the Rome Statute, which might partly result out of the initial analysis that the referral—and deferral—powers of the Council apply to a situation as a whole, not individual parties or limited aspects of a conflict. See Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (2005), 132. However, the intense controversy surrounding Security Council resolutions 1422 (2002) and 1487 (2003) suggests that the Council might at some point attempt to use its Article 13 (b) and Article 16 powers more surgically to dictate which charges may be brought in particular situations or cases, see e.g. Carsten Stahn, The Ambiguities of Security Council Resolution 1422 (2002), 14 *EJIL* (2003), 85; David Scheffer, The Complex Crime of Aggression Under the Rome Statute, 23 *Leiden Journal of International Law* (2010), 904. In practice, the Council resorts to careful drafting and specific provisions within referral resolutions to achieve the desired effect. For example, the draft resolution referring the situation in Syria to the ICC was drafted in a way to exclude the occupied Golan Heights from the Court's jurisdiction, in order to alleviate the concerns of the United States.
92. Kreß and Holtzendorff, supra, 1215.
93. Morten Bergsmo and Ling Yan (Eds.), *State Sovereignty and International Criminal Law* (2012), 128.
94. France and United Kingdom, the so-called P2.
95. It could even be argued that in this instance the P2 acted as 'proxies' for the hegemonic non-states parties in defending the post-World War II UN Charter *acquis* for the the P5.
96. Bruce Cronin, The Paradox of Hegemony, 7 *European Journal of International Relations* (2001), 110–111.
97. David Scheffer, States Parties Approve New Crimes for International Criminal Court, *ASIL Insight*, 22 June 2010: http://www.asil.org/insights100622.cfm.

98. Opening Speech of the Chief Prosecutor for the United States, reprinted in *Trial of Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (2001), 45.
99. Resolution ICC-ASP/16/Res.5 of 14 December 2017.
100. Deitelhoff (2009), 37. Two opposing negotiation groups rapidly emerged. The first group, which became known as the like-minded states, called for a strong, independent court with an independent prosecutor and automatic jurisdiction, as well as the limitation of the Security Council's power of referring cases to the court. The second group, dubbed the P5 group for being led by the permanent members of the Security Council, favoured the concept enclosed in the ILC draft. Thus, going into the Rome conference in June 1998, the draft statute contained numerous brackets on specific issues. Remarkably, however, at the closing of the conference the Rome Statute was not only adopted by a large majority, but it also contained many features that went considerably beyond the ILC draft.
101. The United Kingdom and United States both favoured an adversarial common law type approach, whereas France strongly argued in favour of a civil law type criminal procedure. The provisions finally included in the Rome Statute constitute a hybrid compromise largely characterised by a common law approach. This aspect of the statute has been considered overly formalistic, but was included as a concession to the United States delegation. While safeguarding due process rights of the accused, it has proven to also encumber the Court with procedural hurdles that hamper the effectiveness of the ICC's procedures due to lengthy procedures and procedural litigations. See Bassiouni, supra, 465.
102. Philippe Kirsch and John T. Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, 93 *AJIL* (1998), 4.
103. Scheffer, Staying the Course with the International Criminal Court, supra, 70.
104. David, Grotius Repudiated, supra, 351.
105. Security Council Report, Research Report, The Rule of Law: Retreat from Accountability, 23 December 2019, 2–3. Available at : https://www.securitycouncilreport.org/research-reports/the-rule-of-law-retreat-from-accountability.php.
106. Elizabeth Wilmshurst, Jurisdiction of the Court, *in* Lee (Ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 134.
107. Lawrence Weschler, Exceptional Cases in Rome: The United States and the Struggle for an ICC, *in* Sewall/Kaysen (Eds.), *The United States and the International Criminal Court: National Security and International Law*, 92.

108. Jack Goldsmith and Stephen Krasner, The Limits of Idealism, 132 *Daedalus* (2003), 55.
109. Wippman, 168.
110. Gabriel Lentner, UN Security Council Referrals and the Principle of Legality, *EJIL Talk*, 12 November 2021: https://www.ejiltalk.org/un-security-council-referrals-to-the-icc-and-the-principle-of-legality/.
111. Scheffer, supra, 70.
112. ICC, Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo* (Decision), ICC-01/04, 17 January 2006, paragraph 65: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01689.PDF; see also ICC, Presidency, Decision assigning the situation in Uganda to Pre-Trial Chamber II, ICC-02/04-01, 5 July 2004 (re-qualifying the referral of the "situation concerning the Lord's Resistance Army" as a referral of the "situation in Uganda"): https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_02419.PDF.
113. Klaus Kreß and Leonie von Holtzendorff, The Kampala Compromise on the Crime of Aggression, 8 *Journal of International Criminal Justice* (2010), 1194.
114. International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, UN Doc. A/49/10, supra, 87 *et seq.*
115. Ibid.
116. Rome Statute, Article 5 (2): "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations". This paragraph has now been deleted in accordance with RC/Res.6, Annex I, of 11 June 2010.
117. Barriga and Grover, supra, 527.
118. UN Charter, Article 27 (3): "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members […]"; it has become established practice of the Security Council to treat a voluntary abstention of a permanent member as not tantamount to a veto, see Security Council Report, *Special Research Report: The Veto*, 19 October 2015: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf, 2.
119. See van Schaack, supra, 535. Arguments that a resolution simply allowing the prosecutor to proceed would constitute a procedural decision exempt from the veto referred to Article 27 (2) UN Charter ("Decisions of the

Security Council on procedural matters shall be made by an affirmative vote of nine members"). According to this provision, nine of the fifteen Council members could give the approval for a prosecution to go forward without the support of the P5. However, an argument could be made that the process is sufficiently substantive to be subject to the veto, especially in light of the fact that both the Article 13 (b) referral and the Article 16 deferral processes in the Rome Statute are subject to the veto as well. In any case, the veto is the default procedure within Article 27 (3) UN Charter, which applies to "all other matters". And allowing an option for prosecutions that circumvented the veto, thus potentially subjecting nationals of the P5 to prosecution, would of course have been problematic from the perspective of the P5. Ultimately, it would have been for the Council to determine whether the green light option were to be considered a procedural or a substantive decision. By past practice, the decision regarding the preliminary question as to whether or not a matter is procedural is treated as a substantive one and thus subject to the veto: See Loraine Sievers and Sam Dawns, *The Procedure of the Security Council* (2014), 320.

120. ICC-ASP, Special Working Group of the Crime of Aggression, 6th Session, 30 November–14 December 2007, *Informal Inter-Sessional Meeting on the Crime of Aggression*, ICC-ASP/6/SWGCA/INF.1, § 25 (25 July 2007): http://www.icc-cpi.int/NR/rdonlyres/23C70E38-C413-4CBE-8F53-1BD15E142CCE/145880/ICCASP6SWGCAINF1English1.pdf.
121. These arguments, essentially advanced by the P5, were based on the language of the UN Charter, in particular Article 12 (1), stating that while the Security Council is engaged with a situation, the General Assembly must refrain from making recommendations regarding the dispute; Article 24 (1), which confers "primary" responsibility on the Council for the maintenance of international peace and security; and Article 39, which empowers the Council to determine threats to the peace, breaches of the peace and acts of aggression.
122. See Robert Schaeffer, The Audacity of Compromise: The UN Security Council and the Pre-Conditions to the Exercise of Jurisdiction by the ICC with Regard to the Crime of Aggression, 9 *International Criminal Law Review* (2009), 412.
123. Barriga and Grover, supra, 527.
124. See e.g. UN Charter, Article 24 (1).
125. Van Schaack, 561.
126. Rome Statute, Article 16: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the

Court to that effect; that request may be renewed by the Council under the same conditions".

127. Barriga and Kreß, *The travaux préparatoires of the Crime of Aggression*, 34.
128. See supra. The resolution recognizes at a number of points the unique role of the Security Council. In particular, Article 2 acknowledges that there may be situations when the Council would decline to make an aggression finding notwithstanding a violation of Article 2 (4) UN Charter of the resolution itself. In addition, resolution 3314 reflects the fact that the Council may deem certain uses of force to be legal or justified.
129. Barriga and Kreß, *The travaux préparatoires of the Crime of Aggression*, 30–31.
130. Indeed, in support of this argument, Article 1 (1) UN Charter lists the purposes of the United Nations as a whole as follows: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."
131. Barriga and Kreß, *The travaux préparatoires of the Crime of Aggression*, 13; see also Kari Fletcher, Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?, 65 *Air Force Law Review* (2010), 252–253.
132. Niels Blokker and Klaus Kreß, A Consensus Agreement on the Crime of Aggression: Impressions from Kampala, 23 *Leiden Journal of International Law* (2010), 894.
133. Van Schaack, 563; see also ICC-ASP, Resumed 5th Session, 29 January–1 February 2007, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/5/35, Annex II (2007), § 23: http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Report_SWGCA_English.pdf.
134. ICC-ASP, 6th Session, 30 November–14 December 2007, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ICC-ASP/6/SWGCA/INF.1, § 25: http://www.icc-cpi.int/NR/rdonlyres/23C70E38-C413-4CBE-8F53-1BD15E142CCE/145880/ICCASP6SWGCAINF1English1.pdf.
135. Van Schaack, supra, 564.
136. See Goldsmith/Krasner, The Limits of Idealism, supra.
137. Van Schaack, 565. The P5 mentioned, inter alia, instances like the rescue of nationals abroad, humanitarian interventions, or anticipatory

self-defence, arguing that the requirement of Security Council determinations would ensure that law and practice of the ICC remains consonant with the evolution of international relations.

138. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, 149.
139. Aggression determinations by the Council have either been asserted by inconclusive rhetoric (*e.g.* S/RES/368 (1976)—South Rhodesia), or members of the P5 have abstained in these determinations (*e. g.* S/RES/573 (1985)—United States abstention; S/RES/611 (1988)—United States abstention). In addition, it seems unlikely that all of the previous cases would qualify as aggression under Article 8bis of the Rome Statute (*e. g.* S/RES/405 (1977)—condemning private mercenary attacks in Benin). Further, there are just as many counter-examples, in which the Security Council failed to condemn conduct that would arguably fit the definition in GA Resolution 3334, even in situations that did not implicate one of the P5 or a key ally (*e. g.* S/RES/660 (1990)—qualifying the invasion of Kuwait by Iraq "a breach of international peace and security" rather than an act of aggression; S/RES/353 (1974)—refraining from condemning Turkey's action in Cyprus as "aggression").
140. ICC-ASP, Official Records on its 4th Session, 28 November–3 December 2005, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, 13–15 June 2005: ICC-ASP/4/32, Annex II.A (2005), §§ 63–74: http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Annex_II_A_English.pdf.
141. UN Security Council, 7180th meeting, UN Doc. S/PV.7180 (22 May 2014), with draft resolution in UN Doc. S/2014/348.
142. See ICC-ASP, Resumed 5th Session, 29 January–1 February 2007, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/5/35, Annex II (2007), § 25: http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Report_SWGCA_English.pdf.
143. Ibid., §26.
144. See Barriga and Kreß, *The travaux préparatoires of the Crime of Aggression*, 30–31.
145. *Report of the Ad-Hoc Committee on the Establishment of the International Criminal Court*, UN Doc. A/50/22, September 6, 1995, paragraphs 69–71.
146. ICC-ASP, Official Records on its 4th Session, 28 November–3 December 2005, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, 13–15 June 2005: ICC-ASP/4/32, Annex II.A (2005), § 71: http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Annex_II_A_English.pdf.

147. Ibid., § 61.
148. Security Council Report, *Cross-Cutting Report on The Rule of Law, The Institutional Framework: International Criminal Courts and Tribunals*, 20 August 2015: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_3_rule_of_law_2015.pdf, 9.
149. Goldsmith/ Krasner, supra, 57.
150. Ibid., 51–52.
151. Rome Statute, Preamble, paragraph 4.
152. See also E.H. Carr, *The Twenty Years' Crisis*, 28–31.
153. For the two competing views of the ICC, see Douglas Guilfoyle, Is the International Criminal Court Destined to Pick Fights with Non-State Parties?, *EJIL Talk*, 14 July 2020: https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/.
154. Goldsmith and Krasner, The Limits of Idealism, supra, 47.
155. Ibid., 48.
156. Wippman, 180.
157. Alfred P. Rubin, The International Criminal Court: Possibilities for Prosecutorial Abuse, 64 *Law and Contemporary Problems* (2001), 153–165.
158. On the Security Council's inconsistent practice with regard to accoutability, see Security Council Report, *In Hindsight: The Security Council's Quest for Accountability*, 27 December 2018. Available at: https://www.securitycouncilreport.org/monthly-forecast/2019-01/in-hindsight-the-security-councils-quest-for-accountability.php.
159. Security Council Report, Research Report, The Rule of Law (2019), supra, 2–3.
160. Wippman, 181.
161. Security Council Report, Cross-Cutting Report on the Rule of Law, supra (2015), 26–29.
162. Security Council Report, Research Report on the Rule of Law (2019), supra, 8, 20.
163. Scheffer, The United States and the International Criminal Court, supra, 12.
164. Alexander Wendt, *Social Theory of International Politics* (1999).
165. Nolte, supra, 81.
166. Wippman, 156.
167. Nico Krisch, International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, 16 *EJIL* (2005), 373.
168. Nicole Deitelhoff, *Überzeugungen in der Politik: Grundzüge einer Diskurstheorie internationalen Regierens* (2006).
169. Abram Chayes and Anne-Marie Slaughter, The ICC and the Future of the Global Legal System, *in* Sewall/Kaysen (Eds.), *The United States and the International Criminal Court*, 237.

170. William L. Nash, The ICC and the Deployment of the US Armed Forces, *in* Sewall/Kaysen (Eds.), supra, 162.
171. Security Council Report, *Sanctions*, 30 June 2014: http://www.securitycouncilreport.org/monthly-forecast/2014-07/in_hindsight_sanctions.php.
172. Wippman, 183.
173. Goldsmith/Krasner, supra, 56.
174. Scheffer, supra, 70. It could also be argued that in the ICC negotiations, due to issues relating to domestic politics, the United States was slow to develop a negotiating position, which created a false impression that the United States delegation possessed significant bargaining space. This turned out to be an illusion, confirming the ultimate United States inability to agree to a compromise in the decisive final phase of the conference. As such, the negotiations could be analysed as a classic two-level game, where the effects of a particular domestic political situation have made themselves felt more strongly than in other political situations. Internal disagreements within the United States government, however, did not constitute the core of the problem. After all, the other delegations knew about the structural basis of United States foreign policy, namely, that it is driven, often incoherently, by various domestic sources. They could have taken this into account. The question thus remains whether the Rome conference would have led to a substantially different outcome had the United States announced their final position from the outset. In all probability, other states would still have had to decide whether to accommodate the United States. objections or, alternatively, to create an institution that would work without the United States and its support in the foreseeable future. See John Washburn, The Negotiation of the Rome Statute of the International Criminal Court and International Lawmaking in the 21st Century, 11 *Pace International Law Review* (1999), 361–378; Ruth Wedgwood, Fiddling in Rome—America and the International Criminal Court, 77 *Foreign Affairs* (1998), 20–24.
175. UN Security Council, 6977th meeting, 12 June 2013, UN Doc. S/PV.6977.
176. See Michael Newton, Should the United States Join the International Criminal Court?, 9 *U.C. Davis Journal of International Law and Policy* (2002), 38: "[W]hen the ICC negotiations began […] the ICC was originally a United States idea. The United States was very strongly supportive".
177. Jean Galbraith, The Bush Administration's Response to the International Criminal Court, 21 *Berkeley Journal of International Law* (2003), 692.
178. See supra, section 1.
179. Wippman, 159.

180. See Anne-Marie Slaughter, Judicial Globalization, 40 *Virginia Journal of International Law* (2000), 1103.
181. See Kathryn Sikkink, *The Justice Cascade* (2011), arguing that international criminal trials have helped foster a shift in international relations towards the necessity of ensuring accountability for the perpetrators of the most serious crimes and a better protection of human rights.
182. Friedrich Kratochwil, *Praxis* (2018), 290.
183. See Hans-Peter Kaul, The Continuing Struggle on the Jurisdiction of the International Criminal Court, supra, 21–37.
184. U.S. Department of Defense, News Release No. 233-02, 6 May 2002: http://www.defense.gov/releases/release.aspx?releaseid=3337; this declaration was also important insofar as the United States, as a signatory to the Rome Statute, would otherwise have been legally obliged not to undertake any acts that would run counter the object and purpose of the treaty, see Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (1969), Article 18 (a). However, while the term "un-signing" may be convenient, it is not entirely accurate, and the complexities of the issue of whether the United States is still bound by obligations arising out of its signing of the Rome Statute cannot be fully explored here, see Curtis A. Bradley, U.S. Announces Intent Not to Ratify International Criminal Court Treaty, *ASIL Insight*, May 2002: http://www.asil.org/insigh87.cfm.
185. The government of Ukraine has, in fact, submitted two declarations of acceptance of ad-hoc jurisdiction by the ICC, in April 2014 with regard to the alleged crimes committed in relation with the Maidan revolution, on which the Prosecutor decided not to act, followed by a second declaration in September 2015 concerning the alleged crimes in Crimea and eastern Ukraine from 20 February 2014, which constituted the sole legal basis for the activities of the court until the joint referral by a group of states parties in 2022.
186. See Iryna Marchuk and Aloka Wanigasuriya, The ICC concludes its preliminary examination in Crimea and Donbas: What's next for the situation in Ukraine?, *EJIL Talk*, 16 December 2020. Available at: https://www.ejiltalk.org/the-icc-concludes-its-preliminary-examination-in-crimea-and-donbas-whats-next-for-the-situation-in-ukraine/.
187. Pub. L. 107–206, title II, Sec. 2001, 116 Stat. 899, 2 August 2002 (22 U.S.C. §§ 7421–7433).
188. Marc Weller, Undoing the Global Constitution: U.N. Security Council Action on the International Criminal Court, 78 *International Affairs* (2002), 709, 712.
189. The agreements are purportedly based on Article 98 (2) of the Rome Statute, see Markus Benzing, U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An

Exercise in the Law of Treaties, 8 *Max Planck Yearbook of United Nations Law* (2004), 183.

190. James Crawford, Philippe Sands, and Ralph Wilde, *Joint Opinion in the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements sought by the United States under Article 98 (2) of the Statute* (5 June 2003), paragraph 7: http://www.amicc.org/docs/Art98-14une03FINAL.pdf.
191. Council of the European Union, Doc. No. 5742/04, 28 January 2004, *Action Plan to Follow-Up on the Common Position on the International Criminal Court*, pp. 6–11: http://register.consilium.europa.eu/pdf/en/04/st05/st05742.en04.pdf.
192. U.S. Confronts EU on War Crimes Court, Immunity Pact Issue Threatens Resolution, *The Washington Post*, 10 June 2003, A17.
193. Prior to the entry into force of the Lisbon Treaty, the institutional arrangement for the external representation of the European Union consisted of the current and incoming rotating Presidency, as well as the European Commission, assised by the General Secretariat of the Council.
194. Council of the European Union, *Statement by the Presidency on Behalf of the European Union on Reaffirming the EU Position Supporting the Integrity of the Rome Statute*, Brussels, 27 July 2004, Doc. No. 11680/04 (Presse 235) P85/04.
195. Council of the European Union, 2450th session (General Affairs and External Relations), 30 September 2002, Doc. No. 12134/02, ANNEX: *EU Guiding Principles concerning Arrangements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court*: www.consilium.europa.eu/uedocs/cmsUpload/12134_02en.pdf.
196. Judith Kelley, Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements, 101 *American Political Science Review* (2007), 573.
197. Council of the European Union, *Statement by the Presidency on Behalf of the European Union on Reaffirming the EU Position Supporting the Integrity of the Rome Statute*, Brussels, 27 July 2004, supra.
198. See Council Common Position 2003/444/CFSP of 16 June 2003, O.J. L 150/67 (18 June 2003).
199. Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76, pp. 56–58 (22 March 2011).
200. Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002, 2271 U.N.T.S. 3 (2004).
201. Executive Order 13928 of 11 June 2020, *Blocking Property of Certain Persons Associated with the International Criminal Court*, 85 FR 36139.

202. See Beatrice Walton and Amir Ardelan Farhadi, The ICC and Retaliatory Visa Measures: Can the UN Do More to Support the Privileges and Immunities of the Prosecutor?, *EJIL Talk*, 23 April 2019: https://www.ejiltalk.org/the-icc-and-us-retaliatory-visa-measures-can-the-un-do-more-to-support-the-privileges-immunities-of-the-prosecutor/.
203. Council Regulation (EC) N° 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, pp. 1–6 (29 November 1996).
204. European Commission, Blocking Statute: Protecting EU Operators, Reinforcing EU Strategic Autonomy: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/blocking-statute_en.
205. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *The European Economic and Financial System: Fostering Openness, Strength and Resilience*, COM/2021/32 final (19 January 2021).
206. Kelley, supra, 576.
207. See Congressional Research Report, *U.S Policy Regarding the International Criminal Court* (3 September 2002), 10: fpc.state.gov/documents/organization/13389.pdf; Michael Scharf, The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 *Law and Contemporary Problems* (2001), 67–118.
208. Kelley, supra, 577.
209. Ibid., 573. In institutionalist terms, actors' behaviour is subject to the "shadow of the future", as their reputation among other actors in the international system may be negatively affected by instances of non-compliance with international legal obligations, thus increasing transaction costs in the future.
210. Beth Simmons, Compliance with International Agreements, 1 *Annual Review of Political Science* (1998), 75–93.
211. Kelley, supra, 574.
212. See e.g. Downs, Rocke and Barsoom (1996).
213. Kelley, supra, 577.
214. See Weller, Undoing the Global Constitution, supra.
215. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (1969), Article 26.
216. Kenneth Abbott and Duncan Snidal, Hard and Soft Law in International Governance, 54 *International Organization* (2000), 428.
217. Robert Axelrod, *The Evolution of Cooperation* (1984).
218. Robert Keohane, International Relations and International Law: Two Optics, 38 *Harvard ILJ* (1997), 487–502.

219. See Security Council Report, *Informal Interactive Discussion with the AU on the ICC*, 22 September 2016: https://www.securitycouncilreport.org/whatsinblue/2016/09/informal-interactive-dialogue-with-the-au-on-the-icc.php.
220. The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability, *ASIL Insight*, 22 August 2018: https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court.
221. Rome Statute, Article 98 (1): "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity".
222. Dapo Akande, Is the Rift Between Africa and the ICC Deepening? Heads of State Decide Not to Cooperate with ICC on the Bashir Case, *EJIL Talk*, 4 July 2009: https://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/.
223. UN Doc. S/RES/1593 (2005).
224. Gabriel Lentner, *The UN Security Council and the International Criminal Court* (2018), 49–53.
225. As a general principle of international law, estoppel protects the legitimate expectations of actors by precluding other actors from altering a legal situation that they created through their own conduct. It is reflected in the provisions on good faith and acquiescence in articles 31 (1) and 45 of the Vienna Convention on the Law of Treaties and confirmed by the ICJ in the *North Sea Continental Shelf Cases*, ICJ Reports 1969, 3.
226. Dapo Akande, ICC Appeals Chamber Holds That Heads of State Have No Immunity Under Customary International Law Before International Tribunals, *EJIL Talk*, 6 May 2019: https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/.
227. Dapo Akande and Talita de Souza Dias, Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27 (2) of the Rome Statute, *EJIL Talk*, 12 November 2018: https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/.

228. ICC, Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-309 (11 December 2017); ICC, Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision), ICC-02/05-01/09-302 (6 July 2017), paragraphs 74–76.
229. Ibid., paragraph 75.
230. Security Council Report, *In Hindsight: The Security Council and the International Criminal Court*, 31 July 2018: https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php.
231. Kelley, supra, 587.
232. Ibid.
233. See Dapo Akande, Is the Rift between Africa and the ICC Deepening? Heads of State Decide Not to Cooperate with ICC on the Bashir Case, supra.
234. See United States Department of State List of Treaties and Other International Agreements in Force on 1 January 2020 and 2021 Supplement to Treaties in Force: https://www.state.gov/treaties-in-force/.
235. Galbraith, supra, 699.
236. Paul Kennedy, *The Rise and Fall of the Great Powers* (1989).
237. Bosco, *Rough Justice*, 178–180.
238. UN Security Council 5158th meeting, 31 March 2005, UN Doc. S/PV.5158; UN Doc. S/RES/1593 (2005).
239. UN Security Council, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491; UN Doc. S/RES/1970 (2011).
240. UN Security Council, 6849th meeting, 17 October 2012, UN Doc. S/PV.6849.
241. Security Council Report, Cross-Cutting Report on the Rule of Law, supra (2015); see also UN Security Council, Statements to the Press by the President of the Security Council, UN Doc. SC/10956 of 22 March 2013 and UN Doc. SC/11744 of 20 January 2015.
242. UN Security Council, 7060th meeting, 15 November 2013, UN Doc. S/PV.7060, with draft resolution as UN Doc. S/2013/660; Security Council Report, Cross-Cutting Report on the Rule of Law, supra (2015).
243. UN Security Council, 7180th meeting, 22 May 2014, UN Doc. S/PV.7180, with draft resolution as UN Doc. S/2014/348.
244. Bosco, *Rough Justice*, 71.
245. Ibid., 74–75.
246. Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy, July 2016: https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf.

247. Article 21 (1) TEU provides that "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

    The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations".
248. Antony J. Blinken, Secretary of State, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court, 2 April 2021: https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.
249. ILC Draft (1994), supra.
250. Nolte, supra, 74.
251. Wippman, 169.
252. See e.g. ICC, Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan* (Decision), ICC-02/17 (12 April 2019), where the court decided not to grant the Prosecutor's request for authorisation of an investigation into the situation in Afghanistan, as it was, inter alia, dubitative about the cooperation and support by relevant actors for successful prosecutions.
253. David, Grotius Repudiated, supra, 409.
254. The like-minded group further argued that the prosecutors of both the ICTY and ICTR had been given *proprio motu* powers and that the ICC prosecutor should be given the same for the reasons mentioned above.
255. Nolte, supra, 75; see also Wilmshurst, Jurisdiction of the Court, 134.
256. Matthew Barrett, Ratify or Reject: Examining the United States' Opposition to the International Criminal Court, 28 *Georgia Journal of International and Comparative Law* (1999), 96.
257. Mark Kersten, Whither the Aspirational ICC, Welcome the 'Practical' Court?, *EJIL Talk*, 22 May 2019: https://www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court/.
258. ICC, Pre-Trial Chamber I, *Situation in the State of Palestine* (Decision), ICC-01/18 (5 February 2021), paragraphs 53–57.
259. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, ICJ Reports 1996, 226, 234.
260. ICC, Pre-Trial Chamber I, supra, paragraph 57.

261. Security Council Report, *The Council and the ICC*, 30 May 2014: http://www.securitycouncilreport.org/monthly-forecast/2014-06/in_hindsight_the_council_and_the_icc.php; ICC Assembly of States Parties, 12th Session, The Hague, 20–28 November 2013, Official Records: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/OR/ICC-ASP-12-20-ENG-OR-vol-I.pdf, para. 51.
262. Wippman, 169.
263. Goldsmith/Krasner, supra, 53–54.
264. Nolte, supra, 84.
265. ICC, Pre-Trial Chamber II, Afghanistan decision of 12 April 2019, supra.
266. ICC, Office of the Prosecutor, Policy Paper on the Interest of Justice; Policy Paper on Preliminary Examinations; Policy Paper on Case Selection and Prioritisation: https://www.icc-cpi.int/about/otp/otp-policies.
267. Dapo Akande and Talita de Souza Dias, The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice, *EJIL Talk*, 18 April 2019: https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/.
268. Goldsmith/Krasner, 53.
269. Barrett, United States' Opposition to the ICC, supra, 97.
270. David Bosco, *Rough Justice*, 40.
271. Letter of the Foreign Minister of Ukraine dated 8 September 2015, accepting the jurisdiction of the court from 20 February 2014 pursuant to Article 12 (3) of the Rome Statute: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.
272. Article 54 (1) of the Rome Statute, read in conjunction with the jurisprudence of the court that the definition of a "situation" cannot refer to just one party or group.
273. Joint letter of 2 March 2022 referring the situation in Ukraine to the International Criminal Court: https://www.icc-cpi.int/sites/default/files/2022-04/State-Party-Referral.pdf.
274. ILC Draft (1994), supra.
275. Report of the Ad-Hoc Committee on the Establishment of An International Criminal Court, UN Doc. A/50/22.
276. The principle of universal jurisdiction was originally upheld by Germany, a leading member of the like-minded group, see Kirsch and Holmes, supra, 8.
277. Congressional Research Report, *U.S Policy Regarding the International Criminal Court* (3 September 2002), 4: fpc.state.gov/documents/organization/13389.pdf.
278. Proposal submitted by the United States of America, Article 7, UN Doc. A/CONF.183/C.1/L.70 (1998).

279. Kirsch and Holmes, supra, 8.
280. Scheffer, Staying the Course with the International Criminal Court, supra, 72.
281. Goldsmith/Krasner, 57.
282. Mark Kersten, Whither the Aspirational ICC, Welcome the 'Practical' Court?, *EJIL Talk*, 22 May 2019: https://www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court/.
283. David Scheffer, The United States and the International Criminal Court, 93 *AJIL* (1999), 12.
284. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (1969), Article 34.
285. Madeleine Morris, High Crimes and Misconceptions: The ICC and Non-Party States, 64 *Law and Contemporary Problems* (2001), 26–52.
286. This is the case at least in situations that have not been referred to the ICC by the Security Council, as here only the provisions of the Rome Statute are applicable. In cases of Security Council referrals, the latter may well include cooperation obligations applicable to all UN members into operative part of the referral resolution, in virtue of its Chapter VII powers under the UN Charter.
287. UN Doc. S/RES/1593 (2005); UN Doc. S/RES/1970 (2011).
288. See Dapo Akande, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, 1 *Journal of International Criminal Justice* (2003), 618, 635–637 (arguing that the Court does not violate the consent principle in the case of genocide, war crimes and crimes against humanity, because it does not need to pronounce itself on the *state's* legal responsibility, but only on the individual criminal responsibility of the alleged perpetrators).
289. Wippman, 172–173.
290. Dapo Akande, The Monetary Gold Doctrine and the ICC: Can the ICC Determine the Territorial Boundaries of Israel and Palestine?, *EJIL Talk*, 16 June 2020: https://www.ejiltalk.org/the-monetary-gold-doctrine-and-the-icc-can-the-icc-determine-the-territorial-boundaries-of-israel-and-palestine/.
291. ICC, Pre-Trial Chamber I, *Situation in the State of Palestine* (Decision), ICC-01/18 (5 February 2021), paragraphs 126, 129.
292. Kai Ambos, "Solid Jurisdictional Basis"? The ICC's Fragile Jurisdiction for Crimes Allegedly Committed in Palestine, *EJIL Talk*, 2 March 2021: https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine/.
293. David Scheffer, International Criminal Court: The Challenge of Jurisdiction, Address to the Annual Meeting of the American Society of International Law, Washington D.C. 26 March 1999: http://www.state.gov/www/policy_remarks/1999/990326_scheffer_icc.html.

294. Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, Oxford Legal Studies Research Paper No. 10/2011, p. 14, available at: http://www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf.

    Akande argues that this principle is an application of the more general principle of consent and that the principle is derived from the more fundamental principle of the independence of states, thus the idea that states are not subject to external authority of other states or institutions created by other states.
295. ICJ, *Monetary Gold Removed From Rome in 1943*, 1954 ICJ Reports 19, 32–33. In this instance, the ICJ was asked to determine whether the United Kingdom or Italy had a superior claim to Albanian gold that had been held by Italy but seized by Germany during World War II. Italy claimed the gold as reparations for damage done by Germany; the UK sought the gold for the partial execution of the Court's *Corfou Channel* judgment. However, Albania was not a party to the case before the ICJ. Dismissing the case, the ICJ ruled that international tribunals cannot adjudicate a matter in which the very subject matter of the dispute involved the legal interests of states that are not before it. Albania would not have been bound by any judgment had the ICJ reached the merits; nonetheless the ICJ held that Albania was a necessary and indispensable party to the proceedings, as its legal interests in the matter would have been sufficiently implicated.
296. ICJ, *East Timor* (Portugal v. Australia), 1995 ICJ Reports 90. Here again, the ICJ declined to rule on the claim brought before it, holding that to do so would require it to pronounce upon the legality of the acts of a third state, not party before the Court.
297. ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, 12, 23.
298. ICJ, *Legal consequences of the separation of the Chagos archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95, 117.
299. PCIJ, *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (23 July 1923), 7, 27.
300. ICJ, *Monetary Gold*, supra, 32.
301. Nolte, supra, 76. But see Morris, High Crimes and Misconceptions, supra, 44, highlighting that no such transferal had yet occurred on an international institution. Still, while there might be specific dangers of abuse, no convincing reason exists why states should not be able to pool and transfer their criminal jurisdiction to an international institution, just as they have transferred various other state powers to international institutions, ibid., 45–47.

302. It is to be noted, though, that the member states of the European Union have transferred their power to regulate competition matters to the EU Commission. That Commission can and does issue punitive orders to United States. companies that act within its jurisdiction. This practice has not been questioned. It is difficult to see why EU member states should not be able to fully transfer their criminal jurisdiction to the EU. And if the EU can create a true international criminal court, why should a larger group of states not be able to do so? Nolte, supra, 76.
303. Lietzau, International Criminal Law after Rome, 135.
304. Kenneth Abbott and Duncan Snidal, Why States Act through Formal International Organisations, 42 *Journal of Conflict Resolution* (1998), 3–32.
305. Bosco, *Rough Justice*, 73.
306. In January 2016, following the decision by the ICC Prosecutor to open an investigation into the situation in Georgia, the spokesperson of the Russian Foreign Ministry declared that "*Russia stood at the origins of the ICC's founding, voted for its establishment and has always cooperated with the agency. Russia hoped that the ICC will become an important factor in consolidating the rule of law and stability in international relations. Unfortunately, to our mind, this did not happen. In this regard, and in the light of the latest decision, the Russian federation will be forced to fundamentally review its attitude towards the ICC*".
307. Russia announced its decision to withdraw its signature from the Rome Statute on 16 November 2016, following the preliminary report from the Prosecutor into the situation in Ukraine, qualifying the Russian presence in the country as an "ongoing occupation", stating that "the situation in the Crimea and Sevastopol is equivalent to the international armed conflict between Ukraine and the Russian federation" given that the "Russian federation employed members of its armed forces to gain control over parts of the territory of Ukraine without the consent of the government of Ukraine".
308. Van Schaack, supra, 578.
309. Ibid., see also Barriga and Grover, supra, 524.
310. Akande, The Consent Problem, supra, 28–32.
311. Ibid., 30, 32, noting that it could be argued that the post-World War II tribunals were essentially domestic occupation courts that would not be bound by the *Monetary Gold* principle.
312. Van Schaack, supra, 581.
313. Akande, The Consent Problem, supra, 17.
314. Ibid., 38.
315. See e.g.: *S.S. Lotus*, PCIJ (Ser. A) No. 10, 7 September 1927, 18: "[…] the rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as

expressing principles of law […] Restrictions upon the independence of States cannot therefore be presumed". But see also Alain Pellet, The Normative Dilemma: Will and Consent in International Law-Making, 12 *Australian Yearbook of International Law* (1988–1989), 22.

316. See Diane Marie Amann, The International Criminal Court and the Sovereign State, *in* Dekker and Werner (Eds.), *Governance and International Legal Theory* (2004), 185, 205.
317. Van Schaack, supra, 583.
318. See supra, on the arguments advanced in favour of Security Council primacy.
319. Barriga and Kreß, *The travaux préparatoires of the Crime of Aggression*, 50–51; see also Kreß and Holtzendorff, supra, 1207.
320. Rome Statute, Preamble, paragraph 10; Article 17.
321. Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2013/624 (22 October 2013).
322. ICC, Pre-Trial Chamber II, *Situation in the Republic of Kenya* (Decision), ICC-01/09 (5 November 2015), paragraph 25.
323. Wippman, 174.
324. Lietzau, supra, 136.
325. Wippman, 174.
326. Goldsmith/Krasner, supra, 53.
327. Nolte, supra, 80.
328. David, Grotius Repudiated, supra, 344–345.
329. ICC, Situation in the Islamic Republic of Afghanistan (Request), ICC-02/17-7 (20 November 2017), paragraph 1: "*the Prosecution seeks authorisation to investigate alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002*".
330. Elvina Pothelet, War Crimes in Afghanistan and Beyond: Will the ICC Weigh in on the "Global Battlefield" Debate?, *EJIL Talk*, 9 November 2017, https://www.ejiltalk.org/war-crimes-in-afghanistan-and-beyond-will-the-icc-weigh-in-on-the-global-battlefield-debate/.
331. Bosco, *Rough Justice*, 49–50; see also Proposal submitted by the United States of America, Article 7 ter, UN Doc. A/CONF.183/C.1/L.90 (1998).
332. Ruth Wedgwood, Speech Three: Improve the International Criminal Court, *in* Alton Frye (Ed.), *Toward an International Criminal Court?: Three Options Presented as Presidential Speeches* (1999), 67–68.
333. Wippman, 175.

334. *Quoted in* Security Council Report, *Cross-Cutting Report on the Rule of Law, the Institutional Framework: International Criminal Courts and Tribunals*, 20 August 2015: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_3_rule_of_law_2015.pdf, 9.
335. According to Article 17 (1) of the Rome Statute, the ICC operates on the basis of complementarity, whereby states are invested with the primary responsibility to investigate and prosecute cases that may fall under the court's jurisdiction. In order to effectively discharge this obligation, states parties are therefore required to implement the provisions of the Rome Statute into their domestic legal systems, so as to enable national jurisdictions to investigate and prosecute the crimes falling under the Rome Statute.
336. Statement of Ms Simona Popan on behalf of the European Union, UN General Assembly 76th Session, 29th plenary meeting, Agenda item 77: Report of the International Criminal Court, 10 November 2021, UN Doc. A/76/PV.29.
337. Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia, Bogotá 28 October 2021: https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf.
338. Kai Ambos, The Return of "Positive Complementarity", *EJIL Talk*, 3 November 2021: https://www.ejiltalk.org/the-return-of-positive-complementarity/.
339. Nolte, supra, 79.
340. John Mingers, *Self-Producing Systems: Implications and Applications of Autopoiesis* (1995), 157.
341. Rosa Aloisi, A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court, 13 *International Criminal Law Review* (2013), 147–168.
342. Kratochwil, *Praxis* (2018), 252, 255, 290.
343. Declaration by the High Representative Josep Borrell on behalf of the European Union, Brussels 16 July 2020: https://www.consilium.europa.eu/en/press/press-releases/2020/07/16/day-of-international-criminal-justice-declaration-by-the-high-representative-josep-borrell-on-behalf-of-the-european-union/.
344. Statement of Ms Simona Popan on behalf of the European Union, UN General Assembly 76th Session, 29th plenary meeting, Agenda item 77: Report of the International Criminal Court, 10 November 2021, UN Doc. A/76/PV.29.
345. See e.g. Kevin Jon Heller, The Taylor Sentencing Judgment: A Critical Analyis, 11 *Journal of International Criminal Justice* (2013), 835–855; Carsten Stahn, Justice Delivered or Justice Denied? The Legacy of the

Katanga Judgment, 12 *Journal of International Criminal Justice* (2014), 809–834.

346. Friedrich Kratochwil, *Praxis* (2018), 306–307 (noting that selectivity of prosecutions, coupled with a lack of coherence in the reasoning of the court, leads to a "partial print of justice").
347. Gabriel Lentner, UN Security Council Referrals to the ICC and the Principle of Legality, *EJIL Talk*, 21 November 2021: https://www.ejiltalk.org/un-security-council-referrals-to-the-icc-and-the-principle-of-legality/.
348. ICC, Appeals Chamber, *The Situation in Darfur, Sudan* (Judgment), ICC-02/05-01/20 OA8 (1 November 2021), paragraph 85.
349. The Appeals Chamber relies, inter alia, on ECtHR, Grand Chamber, *S.W. v. the United Kingdom*, Application No. 20166/92, Judgment of 22 November 1995, paragraph 35; ECtHR, Grand Chamber, *Korbely v. Hungary*, Application No. 9174/02, Judgment of 19 September 2008, paragraphs 76–77, 94; ECtHR, *Šimšić v. Bosnia and Herzegovina*, Application No. 51552/10, Decision of 10 April 2012, paragraph 24.
350. ICC, Appeals Chamber, supra, paragraphs 86–92 (92).
351. Ibid., paragraph 91.
352. Van Schaack, supra, 506.
353. UN General Assembly, Eleventh emergency special session, Aggression against Ukraine, 2 March 2022, UN Doc. ES-11/1.
354. Mark Kersten, Whither the Aspirational ICC, Welcome the 'Practical' Court?, *EJIL Talk*, 22 May 2019: https://www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court/.
355. The Council of Advisers' Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare, prepared by the Permanent Mission of Liechtenstein to the United Nations, August 2021: https://www.regierung.li/files/medienarchiv/The-Council-of-Advisers-Report-on-the-Application-of-the-Rome-Statute-of-the-International-Criminal-Court-to-Cyberwarfare.pdf.
356. Bosco, *Rough Justice*, 187–188.

CHAPTER 6

Conclusion

1 International Law in Global Governance

The aim of this study has been to trace out an empirical and theoretical path for international law capable of explaining, even under the contingencies of an international system devoid of central authority, the impact of international law on behaviour through means of social interaction. We have seen that with the influx of behavioural approaches the analysis of international law is undergoing a transformation from a discipline focused on practice and doctrine into one placing greater emphasis on theory and methodology. It has long been recognised that when actors are faced with decisions on the conduct of their external relations, a range of factors may be taken into consideration such as power, interest and norms. Today, the frontier of social science research is about establishing evidence rather than mutually exclusive paradigms. It focuses on when and how a combination of factors—power and norms among them—shape behaviour, and these insights can be translated into the analysis of international law.[1] This enquiry endeavours to contribute to the understanding of international law by developing a communicative action-based approach capable of explaining how international law affects behaviour in the international system.

To the question of whether international law impacts political action, it has often been held that at least the powerful actors have the capability to reshape norms, alter expectations and create new realities, opening up

A. Germeaux, *The International Legal Order in Global Governance*,
https://doi.org/10.1007/978-3-031-16057-8_6

ways to evade international law. Any approach to international law that aims to transcend the explanatory power of positivism and rationalism therefore bears a heavy burden of justification.[2] It is an inherent feature of international relations that powerful actors will always be tempted to do away with legal restraints when these do not fit their purposes.[3] Despite vast amounts of material resources, even hegemonic actors in the international system, however, have clearly been unable to do that in the longer term, and it is through this opening that this enquiry has sought to provide explanations for the effects of international law in international relations, drawing from both international legal theory and social theory. Insights gained through behavioural approaches have shown the limitations of explanatory models exclusively based on positivist, rational approaches, as actors may be rational but also fallible in their judgement. They are subject to a variety of influences inducing deviations from these models, such as intersubjective ideas affecting rational interest-calculations, two-level cognition or fundamental attribution bias. Furthermore, the integration of communicative action theories into international relations has come to highlight the importance of social communication. The key here is that social communication not only allows norms to diffuse across time and place, it also enables agents to fix the meanings of material reality. Meaning is *socially* constructed.[4] Material resources only acquire meaning for actors through the social understandings that they attach to them. Consequently, the notion of international law as a constraining factor in external relations does not entail any physical or material restraint on actors' behaviour.[5]

The approach used in this enquiry draws from Jürgen Habermas' theory of communicative action whereby social actors engage in a specific process of reasoning that helps demonstrate the validity of their arguments; this interaction in turn promotes intersubjective understandings. Applied to the field of international relations, it has generally been held that this "logic of argumentation" only relates to a "logic of appropriateness", thereby excluding the concept of strategic rationality inherent in a "logic of consequences".[6] International law, following the "logic of argumentation", could be considered a particular form of communication, whose purpose is to offer reasons for acting in a certain manner. According to Habermas, individuals' actions are primarily coordinated through means of language, and whenever actors employ language to coordinate their actions, they enter into a commitment to justify their actions on the basis of arguments deemed convincing by the relevant

audience.[7] This interaction is characterised by the fact that not every argument is equally convincing—actors need to present reasons for action that may be considered as relevant by the intended audience. This does not negate the impact of power relations on the argumentative process. It is undeniably the case that power and interests do matter in international relations, but at the same time outcomes are shaped by actors' engagement in legal argumentation to present justifications for action. As Jon Elster asserts, impartial arguments and appeals to collective interests always are more efficient than purely self-serving arguments, regardless of the actors' actual intentions. Elster has coined the reference to the "civilising force of hypocrisy": even if arguments are used hypocritically, the requirement to present plausible motives for action still limits actors' margins of manoeuvre as they cannot subsequently contradict earlier assertions and are curtailed by the range of arguments they can profess without undermining the normative system they are operating in.[8]

Communication-theory can be liable to the criticism of failing to consider whether actors may deliberately deploy and manipulate ideas and norms to better suit their interests.[9] In order to account for the fact that international law may never be innocent of politics and power asymmetries, this study, by contrast, posits that the logics of appropriateness and of consequences are not mutually exclusive. For the field of international law, it ensues that from a rational, utility-maximising perspective, actors may engage in any course of action materially available to them according to their position of power in the international system. The engagement in communicative processes of international law, however, places limitations on the plausibly available alternatives to actors through the requirement of justification and the structural constraints inherent in operating with legal norms. For March and Olsen, the logic of appropriateness entails duties and obligations to act, which may develop into a sense of legal obligation.[10] Actors' decisions, however, can be motivated by both consequentialist concerns and normative considerations.[11] Yet, how actors calculate the consequences of their actions is linked to the understanding of legal norms.[12] Rationality in this framework of communicative action theory does not merely refer to an instrumental understanding whereby actors aim for optimal strategies to maximise their interests. It extends to an intersubjective understanding of the social world they are operating in, that is, the range of interests that may be pursued legitimately and what norms are applicable in a given situation.[13]

Political science approaches have highlighted that international law, by facilitating communication among actors, "adds to the common grammar of statecraft."[14] International law therefore provides a common medium of communication and justification for international actors. The former UN Secretary General Boutros Boutros-Ghali has stated that "*even those who do not respect international law adopt its language and its terms of reference. Today, even the most flagrant violators of international law feel compelled to assert the compatibility of their actions with its principles […] International law is […] humanity's common language of communication. By means of this common language of communication, we are able, in a practical way, to address the challenges that constitute our most fundamental societal concerns […] As we face the challenges that lie ahead our goal must be to transform human relations so that international law becomes a true code of conduct, as well as a means of human communication. In international law itself we have both a strategy for pursuing this goal and a very practical means of taking action.*"[15]

Given the *dédoublement fonctionnel* of international law's creators simultaneously being its subjects, the emergence and existence of international law is dependent on the consent of its subjects. It is not something "out there" that is externally imposed on actors.[16] It reflects the interests and preferences of its subjects, and accordingly it can never be fully separated from material power.[17] At the same time, the use of international law as a means of social communication among actors cannot simply be equated with invoking power: international law "if not antithetical to assertions based on power, at least is in tension with the brute force of power."[18] International law, in this conception, represents a process of communicative action constantly arbitrating between apology and utopia. Instances of open violations of international law are the rare exception to the rule that actors, in most instances, want to be perceived as acting in compliance with international law. Even if the legitimacy of their ends may be disputable, actors generally refrain from discarding the relevance of the international legal framework and rather seek to reinterpret the relevant provisions in a manner that justifies their actions. Even hegemonic actors, which, due to their superior material resources and capacity to exert power, are less vulnerable than most actors on the international stage and therefore more able to bend international law in their favour, avoid being perceived as acting in open violation of international law. Furthermore, the concept of *jus cogens*, of peremptory norms of international law that do not tolerate derogation, limits the margin of manoeuvre

for even hegemonic actors in this regard, as they cannot simply interpret away norms encapsulating fundamental values of the international legal order or contract into conflicting obligations.

The necessity to articulate claims in terms of legal reasons imposes limits on the type and range of arguments that actors may present, it constrains the options available to them and frames how they explain and justify their choices to other actors.[19] In other words, international law narrows down the "horizon" of possibilities open to them when acting in the international arena. It is a natural occurrence that actors seek to interpret their obligations in a manner that is most advantageous to them, but having to do so in terms of international law implies that they frame their arguments based on motives that are logically independent of their own interests and aims.[20] International law links to intersubjective understandings—its provisions are considered of general applicability, binding all actors in similar situations.[21] It is here that the distinction between international law and politics becomes relevant: international law is generally applicable to all actors and consistent over time, whereas policy determinations are subject to the given circumstances of the situation and may swiftly be adjusted to changing contexts. International law, rather than a mere instrument of behavioural guidance, can therefore be considered as an elaborate argumentative structure, in which the tension between actors' competing interests and opposing claims is managed.[22]

The question remains though whether the norms of international law are ever clear enough to constrain policy preferences. Although it can be considered that international law has entered the post-ontological era, it is still the case that international legal norms are often open to competing interpretations, and this indeterminacy opens up space for the operation of politics.[23] The indeterminacy of many areas of international law coupled with the phenomenon of the fragmentation of legal regimes endows actors with a significant degree of latitude in the conduct of their external relations. This is the case with respect to formal treaties and other written international agreements; it is even more so in customary international law. Vagueness and indeterminacy may well be problems. Yet, it is still one thing to argue that where international law is legitimately open to differing interpretations, actors will naturally favour the interpretation most consonant with their desired course of action. It is quite another to claim that vagueness can be relied on by powerful actors to simply disregard international law or to pick and choose the norms that

best suit their purposes.[24] Rather than determining outcomes, international law thus shapes the context within which actors' adopt decisions to realise their interests. International law may not always dictate one singular conclusion, but instead provides boundaries, inside which decisions are taken. In doing so, it deliberately affords actors some latitude and discretion, but this does extend indefinitely.

Whether or not international law provides clear answers to contested cases does not negate the requirement for reasonable justification. International law therefore circumscribes actors' range of available options, given that not any argument is deemed acceptable.[25] There are limitations to the extent that any language can be plausibly stretched to fit a particular justification; this is also the case for international law.[26] These limits result, *inter alia*, from the fact that actors are usually engaged in a relationship characterised by repeated interactions. Iteration, in turn, leads to the emergence of some form of mutual expectations, as actors come to attach common meanings to their interactions. The scope of actors' options is circumscribed by the need to operate within a particular form of communicative action; their arguments need to persuade the audience and effectively justify the intended course of action.[27]

Furthermore, this form of communicative action generates intersubjective understandings through the justifications advanced in the process of actors' claims and counter-claims. Legal reasoning may not guarantee clear answers, but excludes those options that are outside the remit of international law while providing an interactive process for assessing the merits of particular justifications.[28] When actors reason on the basis of international law, they argue over the interpretation and application to the particular norm, rather than contest law's ontology as such, which induces actors to align their actions with the legal framework.[29] We have seen how, once powerful actors have subscribed to a particular negotiating framework, it becomes increasingly difficult for them to justify their actions outside the commonly agreed framework.

The mere fact that actors engage in communicative action does not, however, do away with the influence of material power. Powerful actors have more resources at their disposal to shape international law according to their interests; this is particularly the case for hegemonic actors who are endowed with disproportionate influence on the international legal order—but at the same time they can only reap the benefits of their privileged power position if they defer at least to some extent to international law.[30] The necessity to engage with international law thus partially levels

the playing field by providing those actors with fewer material capabilities a medium of leverage and ruling out those courses of action that cannot reasonably be justified under international law.

Habermas' theory of communicative action posits that international law enables and stabilises interaction among actors. It considers the operation of international law as the result of a rational process, which presupposes that actors share a common frame of reference, in turn implying the presence of common meanings and intersubjective understandings.[31] While the international system is often depicted in a materialist lens as a distribution of capabilities, this enquiry, by contrast, puts forward Alexander Wendt's concept of analysing the international system in social rather than material terms. Even if the international system may be considered as anarchic, anarchies only acquire logics as a function of what actors infuse them with—the consequence being that the structure of the international system is not immutable, but may comprise different logics.[32]

From this premise, Wendt underlines that actors and the structure of their relationships shape the meaning of anarchy.[33] The most important structures in this regard consist of norms and ideas, not material forces. The meaning of power itself is a social concept, determined by actors' ideas, which in turn shape actors interests and the means by which they pursue them. According to Wendt, anarchy can have at least three different logics, Hobbesian, Lockean and Kantian, which are based on different role relationships: enemy, rival and friend. These roles instantiate themselves in actors' representations of Self and Other as well as the practices actors are engaged in. There is thus no fixed and uniform degree to which international relations may be conflictual; rather, this element is contingent on the logic of interaction among actors. The latter then determines the degree to which the international system enables communicative action.[34]

It could, however, still be argued that the logics of interaction within the international system, in its current form, do not necessarily allow for international law to enable communicative interaction among actors in the Habermasian sense. It could even be claimed that the shortcomings or defaults of the international legal order are endured by those actors who would like them to disappear, while the powerful actors rely on material force to realise their ends.[35] In particular, those actors that rely on brute force instead of peaceful means to resolve their disputes automatically preclude options of the other party: "*[T]he country which wishes*

its dispute with the other to be settled by force of arms and not by any peaceful means imposes its choice on the other. It is therefore it, and not the peaceful, that determines the style of relations between the two."[36] It is thus the belligerent, not the law-abiding actor, which determines the logic of interaction. In this view, the international system is equated to a state of nature characterised by permanent latent conflict where international law has no significant role to play. Such an explanation would, however, be incomplete for ignoring an essential fact: if law-abiding actors cannot force powerful actors to conform themselves to the norms limiting the use of force and to participate in a more integrated international system, this does not preclude the former from nonetheless establishing international relations based on international law and institutions among themselves.[37] It has been argued that in the case of NATO or the European Union the relations among the relevant actors have successfully moved from a Lockean logic of rivalry to a Kantian logic of interaction.[38] And even powerful actors, in order to reap the benefits from the international legal order, have no choice but to engage with it.[39]

The logic of rivalry may yet characterise vast parts of the international system as a whole.[40] And since the subjects of international law are simultaneously its creators, one has to be mindful that "*the current state of international relations does not exist despite the efforts of governments but as a consequence of their policies and the resulting system is a desired system; the product delivered by the producers satisfies the consumers, who are the former; the states, responsible for international law, are also responsible for its 'weaknesses', its 'deficiencies', because they do not feel them as such and on the contrary hold them as valuable characteristics; overall, there is a very wide and powerful collusion on the current 'anarchic' society and on the place it reserves to law.*"[41] This relates to the *dual role* of international law both as restraint and as an instrument of the powerful actors.[42] Dominant actors are endowed with disproportionate influence to shape international law in order to safeguard and further their interests, as well as to express and perpetuate their power. Yet simultaneously, international law cannot simply be reduced to a mere reflection of power or to an instrument of the powerful to exert their dominance. For international law to have behavioural relevance, it needs to remain at least partially distinct from politics and thus constitute an obstacle to the exercise of power as much as an instrument to instantiate it: it is both apology *and* utopia.[43] This dual nature places international law in tension with powerful actors, resulting in patterns of how actors interact with

international law. Taking into account how power asymmetries reflect a multifaceted reality allows uncovering both how power enables powerful actors to shape international law in their favour, and how this ability is circumscribed.

According to Christian Reus-Smit, the prevailing materialist understanding of the relationship between power and international law that underpins the critique of international law as an unsuitable tool in the conduct of external relations has a distinctive logic, consisting of four interlinked ideas: "*power is defined 'possessively' as a tangible resource that states command individually; it is understood almost exclusively in terms of material resources, most notably guns and money; politics is defined as a struggle for power, so understood; and a dichotomy is drawn between international politics and law, with the latter subordinated to the former*."[44] By contrast to the materialist view, the perspective advanced in the present enquiry relates to a conception of power as a *social* attribute, premised on the view of power as intangible resource that is relational rather than possessive. Not merely a reflection of material capabilities, power forms part of social agency and thus develops through the iteration of exchange among actors involved in a given relation.[45] Further, since social relations among different parties necessarily involve exchange and reciprocal adaptation between them, power is linked to interaction. In this view, power is not something that can be defined in isolation; rather it forms part of a relation of exchange between at least two parties, whereby it is constantly defined and redefined through interaction[46]: "*The lone individual, living outside of society but possessing abundant material resources, cannot be said to have power in any politically meaningful sense. It is only when actors seek to have a transformative effect in relation to other actors that they can be said to have, or not to have, power; and it is only in this relational context that the resources they conscript, material or otherwise, will have meaning or salience*".[47]

In all social systems, independently of actors' material resources, there is thus an inherent tendency for the expression of power to encompass more than mere coercion, since it is the socially transformative effect that matters and this may be realised with less resistance and more consistently when actors' view the process as legitimate rather than imposed upon them.[48] Communicative action theory helps to illustrate how international law structures power relations, whereby actors resort to legal reasoning to create and interpret behavioural norms, thereby defining and

redefining the courses of action that actors consider available to them at any given time and situational context.[49]

Absent a central authority endowed with the monopoly on the legitimate use of force, it is always possible for actors to resort to coercion and force to achieve their ends. However, as the vast majority of actors lack the resources to impose their will through force, one could presume that they remain committed to upholding international law.[50] Furthermore, when actors ignore or reinterpret an existing norm of international law according to their short-term interests, other actors might then rely on this precedent. The immediate gains from non-compliance in a particular instance are accordingly counterbalanced by the long-term effect of undermining the rule of law and rendering the international system less predictable, which increases transaction costs in the future.[51] This generally applies to all actors, but even more so to dominant actors, which face the "paradox of hegemony" when determining their actions in the light of international law.[52] As powerful actors, they are endowed with the material capabilities to simply ignore the norms of international law that do not fit their purposes. In their role as hegemonic actors aiming for leadership in the international system, however, they have an often conflicting long-term interest in refraining from undermining the international norms which facilitate their exercise of authority and sustain their hegemonic status through shaping the international system long beyond the zenith of their dominance.[53]

To a large extent, the second half of the twentieth century can be characterised by the commitment of the United States to the progressive development of international law and a multilateral international order. The United States took a leading role in shaping the current state of international organisation, as it recognised the long-term benefits it could draw from an international order amenable to its interests.[54] The contrary position would equate to the social identity of the hegemon at risk from being disassociated from the normative structures of the international system, thereby eroding the capacity to deploy "soft power". Since at the same time the majority of other actors can be expected to have an interest in maintaining their commitment to international law, the hegemon may find itself "socially" sidelined, having to rely disproportionately on material power and economic coercion to achieve its ends, as the erosion of its social status leaves it with a reduced and costly range of political and diplomatic options.[55]

In international practice, no major actor has ever persistently denied the relevance of international law.[56] This reflects the role of international law as both enabling and circumscribing the exercise of power: authority *within* the international system is accompanied by increased obligation *towards* the system.[57] Powerful actors in particular thus have to arbitrate between short-term aims and long-term interests.[58] International law accordingly operates as a restraint on actors even in instances where essential security interests are involved. Moreover, even where international law would appear to obstruct the realisation of external relations objectives, actors' long-term interest in maintaining stability and predictability in the international system favours courses of action that uphold the integrity of international law. This holds true independently of whether, in the particular instance, international law allows actors to validate a desired outcome. For Harold Koh, in his capacity as former Legal Adviser of the Department of State, therefore, "*[i]n most cases, following international law [coincides with actors'] interest. Like individuals who obey domestic law, [actors] who obey international law find that it is both the right and smart thing to do.*" The contrary would amount to actors squandering their authority in the international arena and thereby finding themselves with a reduced array of options and diminished capability to induce others into following their paths.[59] Accordingly, in the majority of instances, even hegemonic actors resolve this paradox by choosing to uphold the international legal order on which their very dominance is based over their short-term interests even though international law, as all law, can ultimately be ignored if only one is willing to pay the price. While the price for failing to provide a reasoned justification is generally only paid after the particular instance has occurred, the "shadow of the future" in terms of repeated interactions is relevant even to dominant actors, as the increase of transaction costs in the future will affect any actor deciding on a course of action incompatible with international law.[60]

Even in cases where essential interests are concerned, political processes have not displaced international law. The difficulties experienced by the international system in the maintenance of peace and security, such as with the Russian aggression against Ukraine in 2022, should not obscure that these events are nonetheless embedded in norms, whether with the international response to the invasion or the reasoning with regard to issues such as co-belligerency and the laws of armed conflict. Of course, one could consider that Brexit and the scepticism of the Trump administration about international structures of governance and multilateral

institutions have at least dented the virtuous spiral of continuously developing international law.[61] The COVID-19 pandemic has also seen a retreat inwards from those actors with the resources to weather the global health emergency, while numerous other actors found themselves relatively powerless in the face of vaccine egocentrism and restrictions on exports of medical equipment. At the same time, the resistance of the normative framework to these efforts also indicates the degree to which the international legal order has become integral to political processes. This is not to deny the controversial nature of instances related to the use of force, such as humanitarian intervention in Kosovo, the responsibility to protect in Libya or even outright unilateral action against Iraq, with the flipside of inaction in the face of the conflict in Syria or the annexation of Crimea. But international law was never absent from these instances, all of them reflecting the practice of war or resorting to armed force as a deeply normative phenomenon. The absence of central authority in the international arena likewise is not tantamount to an absence of accountability. The International Criminal Court is continuing to expand its caseload and covers an increasing range of international crimes under the Rome Statute. In parallel, the acceptance of the compulsory jurisdiction of the International Court of Justice under the optional clause has increased significantly over the past decades,[62] coupled with the development of specialised courts and tribunals whose dockets are replete with caseloads, for instance in law of the sea and investment disputes.

The notion of a legal wasteland in the international sphere therefore appears difficult to sustain, with actors seeking to close any gaps that may emerge, naturally in ways favourable to them. This can be done through the creation of international norms but, as we have seen, also through actors applying their own jurisdiction extraterritorially or seeking to shape international institutions in a fashion that is amenable to their ends. In this way, international law has seen a significant expansion in the range of issues that it covers, both territorially and substantially. In addition to the efforts to combat climate change and strengthen the resilience of the global health architecture, work is ongoing on the legal frameworks for other international interests such as cyber activities with the forthcoming Tallinn Manual 3.0,[63] the exploitation of space resources with the Artemis Accords[64] or the regulation of military activities in space with the Woomera Manual.[65] Expanding the reach of international law is not self-evident, of course, and sometimes fraught with difficulty such as evidenced in the implementation of the Paris Agreement

with the tension between the imperatives for collective action against anthropogenic climate change and the efforts to ensure energy supplies, independently of the carbon footprint, in the wake of the Russian invasion of Ukraine. But it is a continuing, progressive process, navigating the delicate balance between norms and power.

At the end, looking at "where we are now", we are left with the fact that no normative system can completely eliminate power asymmetries[66] There will always be actors in the international system more powerful than others, which cannot be entirely supplanted by communicative processes and social interaction. Power and interest matter, but at the same time they cannot and do not operate in isolation. Power itself is not purely material; it is an inherently social attribute that only acquires meaning or salience in the relational context with other actors. Interaction, in turn, requires a common framework for actors to communicate, which circumscribes the range of plausible arguments, claims and justifications. In this sense, international law is relevant in shaping actors' conduct even in instances involving essential security interests. International law "matters" not necessarily because of a direct causal relation to behaviour, but rather because it determines how actors reason and communicate when engaging in decision processes to devise their actions in the international realm. International law influences behaviour through "*legitimating political actions, communicating normative claims, imposing restraints, and persuading actors to engage in a course of action consonant with international law to achieve a desired outcome*."[67] Rather than living a "moth-like existence", invariably and precariously circling the flame of power,[68] international law might therefore better be thought of as a wave-like motion, waning and wavering with the challenges to the international legal order in shaping the expression of politics. In his work on "the law of peace" (*Du droit de paix*), Cornelius van Vollenhofen identified the entering of international law into actors' consciousness as a reflection of progress in international organisation.[69] In this view, the principal dynamic in the history of international law corresponds to what he defined as the epic struggle between the rule of law and the constant rupture by the forces of egoism and conflict.[70] International law can accordingly be narrated as a movement of the pendulum of history, swinging between advances and reverses, between hopes and disappointments, of the international legal order.[71] The facilitative posture of international law during the Cold War era thus gave way to the optimism in international organisation after the fall of the Berlin Wall, followed again by the resurgence of egoism in the

response to the COVID-19 pandemic and conflict with the aggression against Ukraine. Whether the starting point of the pendulum will ultimately move further towards the rule of law remains to be seen, but, just as in Wendt's characterisation of role relationships in the international system, whereas there may be no assurance for the continued expansion of a Kantian logic of friendship, there is also no indication of a regression from a Lockean logic of rivalry in the current state of international relations. While the future may yet be uncertain, the long tide of history points to a sometimes precarious, but ultimately secure place for the international legal order.

2 The Way Forward

From the investigation in the preceding chapters into where we are now in the international legal and methodological landscape, the question then necessarily arises as to where to go from here. While there may be no single right path ahead, the following sections shall sketch out orientations in setting the scene for the way forward in international law and international relations research. In his work on the philosophy and history of science, Thomas Kuhn conceived of scientific activity as a form of puzzle solving, applying theory to problems in generating an ever-sharper picture of the phenomenon under review. His *structure of scientific revolutions* was concerned with the process of change in paradigms, the latter denoting the intellectual frameworks enabling research.[72] Despite their differences in approach, Kuhn, just like Karl Popper, regarded science as primarily about theory whereas today, most scientific research is evidence-driven rather than theory-driven.[73] This also holds for international law, where it has been argued that the next frontier consists in mobilising evidence rather than proving or disproving theory. In parallel, as highlighted by Dunoff and Pollack, international legal research is in the process of adopting and adapting to new methods, notably of *experimenting with international law*.[74] The empirical turn in examining international law is evidenced, for instance, in the rise of empirical-based studies, involving the analysis of qualitative or quantitative data, such as pioneered in international economic law.[75] Adherents of these methodologies sustain that recourse to statistical techniques or data analysis allows for identification of previously unseen patterns or trends in the international sphere. Existing research has focused notably on mapping patterns of juridical citations and precedents in the behaviour

of international courts and tribunals,[76] identifying lines of influence across agreements and treaties, as well as from one area of international law to another.[77] The proponents of experimental approaches share with the advocates of empirical studies the concern that compliance may indicate little about the actual impact of international law on behaviour, noting the problem of isolating the effect of legal norms from other variables in the international environment and the issue of selection bias in observations.[78] The question then is how to obtain more precise findings that can inform both legal research and policy makers?

The increasing proliferation of empirical studies,[79] coupled with the advent of experimental methods in international law,[80] raises intriguing possibilities for future research that goes beyond merely mapping patterns of conduct and looks at probing studies in an aggregated fashion, in order to yield integrated results and identify general trends across a given topic. These forms of synthesis and meta-analysis are considered the "gold standard" for summarising scientific knowledge and are already used in other fields such as cognitive psychology, the principal dividing line between the various forms of enquiry being the focus on either qualitative or quantitative evidence. While international legal research has primarily been focused on qualitative-empirical studies, the field has seen an increasing turn to quantitative approaches under the influx from methods originating in political science. It may also be possible to proceed to a quantitative review of qualitative studies, when one or several factors amenable to quantitative data analysis can be isolated from the findings. Simplifying a more complex picture of the current methodological landscape, it can be said that through aggregation, the aim of such approaches is to devise findings with increased authority and accuracy compared to individual studies, notably by overcoming limited sample sizes and establishing statistical significance, thereby generating insights about the overall effect and direction of an intervention.[81] By being able to evaluate, model and better understand aspects of actors' behaviour, these approaches may thus further our understanding about the magnitude of an effect, such as how international legal norms impact outcomes under various conditions. In addition, through summarising complex information, the results of aggregated studies allow to present synthesised and solid evidence to decision-makers, as well as identify trends that can both provide directions for future research and inform practical decisions.

The relation between different approaches can be represented in the form of concentric circles, with a larger circle comprising systematic

reviews, and smaller circles encompassing meta-analyses, integrative or realist reviews, as well as meta-studies, that do partially overlap with the larger circle but are not identical with it.[82] Systematic reviews endeavour to gather, identify and synthesise the empirical evidence on a particular question according to specific criteria for ensuring the reliability of results. They are amenable to a variety of study designs and can accommodate both qualitative and quantitative methods, as well as mixed methodologies. The role of systematic reviews in the methodological landscape of the social sciences consists in providing, from an evidence-based perspective, summaries of the "state of the art" in a particular area, from which it is then possible to identify future research priorities, as well as address questions going beyond the scope of individual studies and generate new or evaluate existing theories about the phenomena under investigation.[83] There is consensus that teamwork and strategies for avoiding systematic error are essential and interrelated concerns in order to ensure generating accurate findings. The conduct of a review should only ever be done by a panel of experts, relying on multiple points of view, as this not only spreads the effort but also reduces the risk of bias in the study. Furthermore, the integration of perspectives from different disciplines can help in avoiding assumptions based on over-reliance on a particular discipline, such as international law or political science, and ensure the presence of both topical and methodological expertise.[84] The reliance on multiple points of view also aims to avoid or minimise the likelihood of systematic error in the results of the study. Systematic error relates to either selection bias with regard to the evidence under review, or recourse to evidence affected by issues of empirical quality, also termed internal validity.[85] Issues of external validity, which denotes the extent to which the results obtained in a particular setting can be generalised to the field in its entirety, may also affect studies.[86] Depending on the homogeneity or heterogeneity of the outcome of a review, the results may then be amenable to either meta-analysis or integrative review. The findings can also be displayed in a descriptive form, which is termed qualitative review, as opposed to meta-analysis, which is a quantitative approach.[87]

The turn to empirical and experimental approaches in international law may over the coming years yield a critical mass of studies with characteristics, notably in quantitative terms, which are amenable to meta-analytical methods for generating more precise findings and identify broader trends in the field.[88] Meta-analyses in essence aim at statistically combining the quantitative results of empirical studies to more precisely identify

the effect of an independent variable on an outcome.[89] By definition, they require studies to be comparable and open to scrutiny through statistical methods; they are therefore unsuitable tools for examining qualitative evidence. It is also good practice that a meta-analysis can only be conducted following a systematic review, since it quantitatively analyses the results of the studies synthesised in the prior review.[90] The advantage of meta-analyses is to allow for examining the direction and scale of an effect within an array of studies in a more sophisticated manner than qualitative summaries, as well as to improve precisions by combining the evidence of multiple studies and to address controversies arising from conflicting studies by explicating variations or generating new hypotheses for research.[91] Meta-analyses are subject to the same requirements with regard to teamwork and avoiding bias as with systematic reviews. They are particularly useful for actors engaged in decisions as their results yield a clear indication for the direction and magnitude of an effect, thereby informing policy choices on the basis of a summarised state of the available evidence. Not all effects within the field of international law may be accessible to an assessment in quantitative terms, however, and in those instances it might be preferable to defer to qualitative methods of review.

Integrative reviews, also termed realist syntheses, are methods for examining complex interventions that are not accessible to conventional meta-analyses. They are amenable to both qualitative and quantitative evidence, with a heightened sensitivity to the context of particular interventions.[92] These methods are deemed particularly useful in unwrapping the impact of complex interventions as they operate on the premise that how and why something works in different contexts is equally important in understanding phenomena than whether there is a measurable effect.[93] They are distinguished from more quantitatively focused methods through an increased focus on theory and an exploratory, rather than judgmental approach, allowing them to more easily generate knowledge across the boundaries of different disciplinary fields and policy areas. In other words, they are concerned more with how and why a mechanism operates in a particular setting than with validating or discarding the effect of an intervention.[94] The challenge in designing integrative reviews consists in determining an adequate balance between a sufficient level of abstraction to stand back from the detail and variation in the evidence, while still remaining specific enough to provide meaningful answers to the review question.[95] There are accordingly high demands placed on the

team of reviewers in terms of dealing with complexity.[96] Another difficulty with these types of reviews consists in generating findings that are standardised enough to inform policy choices or research orientations.[97]

Further down the spectrum of qualitative approaches are meta-studies, which trade statistical precision and parsimony for wider explanatory power by including theory, historical context and sociological factors in explaining phenomena. At its most simple, a meta-study can be defined as a method for analysing evidence and processes of generating scientific knowledge in qualitative research, as opposed to meta-analysis that is applied to quantitative studies.[98] Whereas systematic reviews and its progeny originate essentially from the fields of natural sciences and cognitive psychology, meta-studies trace their roots to sociology, notably the work of Robert Merton exploring the social conditions in the quest for scientific knowledge.[99] The key insight here is that meaning is socially constructed, therefore scientific knowledge is not something "out there" waiting to be found, but rather is informed by actors' ideas and identities, the process of knowledge production thus being shaped through the context in which it operates. This is particularly acute for social sciences, which, contrary to natural sciences, are mostly concerned with phenomena that are essentially transient and intangible; in other words they only become reality in actors' minds and behaviour. Following work in the field of sociology, meta-studies are comprised of three components, which are respectively focused on content, method and context.[100] Similar to systematic reviews, meta-studies start with summarising and integrating the findings in a number of studies, subjecting them to critical analysis. By contrast to integrative reviews, however, they also delve into the research process, notably how different methodologies and epistemologies have shaped the findings. Finally, they then proceed to scrutinising the philosophical, cognitive and theoretical perspectives involved in the research and how they relate to the context in which it was generated, with the aim of contributing to a more nuanced understanding about the application of theory in a particular area.[101] Meta-studies can be particularly appropriate the more the research under review is heterogeneous, as the aggregation focuses not only on results but also on process, thereby allowing for examining aspects of methodology and theory in empirical studies.[102] In this sense, meta-studies are theory-based rather than evidence-based. The flipside of the ability to aggregate heterogeneous results, however, is the increasing dilution of the findings, contrary to the standardised and precise outcomes of quantitative

studies. In case internal validity issues affect the end result, aggregation does not necessarily make evidence more compelling. Furthermore, as with other methods of synthesising scientific findings, decontextualising evidence from original studies entails the risk of affecting the external validity of the aggregated result.

Despite the differences in methodology and theory, there is no zero-sum game in international law and international relations approaches. The various types of synthesising research are not mutually exclusive, rather they can be seen as different methodologies in summarising and integrating findings, and serve separate but complementary purposes depending on the nature of the evidence under review. Instead of being in a hierarchical relationship, such approaches are supplemental in either synthesising data or findings, respectively, in deepening our understanding by providing interpretation and critique on an integrated result or trend across a topic.

In practical terms, the findings of these investigations can contribute to decisions being informed by an accurate and more reliable understanding of the pertinent evidence; it is therefore important to focus on questions that are relevant to actors having to make decisions. At the same, studies need to remain sensitive to the context and process that yielded the results, in order to better identify directions for future research. In this way, new methodologies can contribute to revealing the multitude of elements relevant in actors' decision-making processes and establish how different factors, such as norms and power, shape behaviour in the international system. Returning to the query at the beginning of this section, it can thus be said that the new frontier in international law research consists in mobilising integrated evidence on a given subject matter, in order to make complex information accessible for improving decisions on both policy in the international realm and directions for future research. This entails a different understanding of interdisciplinary, the sense of groups of people working together by integrating multiple disciplinary and methodological perspectives rather than adherents of one discipline conducting investigations into each other's fields, respectively probing their own subject matter with methodologies generated in other fields. Pushing the frontier in international law and international relations research thus requires new forms of collaboration rather than competition, with the potential of reaping the prize to have "the right evidence at the right time in the right format" in order for policy makers to make better decisions and research to more consequently engage with the challenges ahead. In the end, when it comes to external validity of the findings "a leap of faith is always required"[103] when applying the results of an

enquiry to the wider field—in making that jump, it is invariably necessary to strike an adequate balance between justifiable broad abstraction and drawing overly circumspect conclusions.

Notes

1. Emilie Hafner-Burton, David Victor and Yonatan Lupu, Political Science Research on International Law: The State of the Field, 106 *AJIL* (2012), 47, 49.
2. Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), 354.
3. See e.g. Carl Schmitt, *The Concept of the Political* (transl. of DER BEGRIFF DES POLTISCHEN, 1933) (1976); Hans Morgenthau, *Politics Among Nations* (1948); Goldsmith and Posner, *The Limits of International Law* (2005).
4. Alexander Wendt, Constructing International Politics, 20 *International Security* (1995), 73.
5. Emmanuel Adler, Constructivism and International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 98.
6. See Thomas Risse, "Let's Argue!" Communicative Action in World Politics, 54 *International Organization* (2000), 1–40.
7. Habermas himself calls these commitments "validity claims" (*Geltungsanspruch*), see Jürgen Habermas, *Theorie des komunikativen Handelns* (1981), Vol. I, 38–48.: "*Die» Stärke « eines Arguments bemißt sich, in einem gegebenen Kontext, an der Triftigkeit der Gründe; diese zeigt sich u. a. daran, ob ein Argument die Teilnehmer eines Diskurses überzeugen, d. h. zur Annahme des jeweiligen Geltungsanspruchs motivieren kann*."
8. Jon Elster, The Strategic Uses of Argument, *in* Arrow et al. (Eds.), *Barriers to Conflict Resolution* (1995), 249.
9. Brunné and Toope, International Law and Constructivism: Elements of an Interactional Theory of International Law, 39 *Columbia Journal of Transnational Law* (2000), 19–74.
10. March and Olsen, *Rediscovering Institutions* (1989), 23, 59.
11. March and Olsen, The Institutional Dynamics of International Political Orders, 52 *International Organization* (1998), 952.
12. Andrew Hurrell, *On Global Order*, 19: "At any point in time it may indeed be helpful to think of actors making choices between consequentalist calculations of interest and normative evaluations of appropriateness. But over time the obviousness of certain sorts of norms […] becomes such an accepted and natural feature of the international political and legal landscape that it becomes part of how actors routinely

calculate consequences, and the costs and benefits of alternative policy choices."

13. Deiteloff (2009), 35.
14. Keohane and Nye, Power and Interdependence Revisited, 41 *International Organization* (1987), 746.
15. U.N. Doc. SG/SM/5202.
16. Johnstone, *The Power of Deliberation*, 21.
17. Michael Glennon, *The Fog of Law: Pragmatism, Security and International Law* (2010), 44–50.
18. Kal Raustiala, Form and Substance in International Agreements, 99 *AJIL* (2005), 606.
19. Chayes and Chayes, *The New Sovereignty* (1995), 214; see also Kratochwil, *Rules, Norms and Decisions* (1989).
20. Andrew Hurrell, International Society and the Study of Regimes: A Reflective Approach, *in* Rittberger and Mayer (Eds.), *Regime Theory and International Relations* (1993), 49.
21. Johnstone, *The Power of Deliberation*, 23.
22. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), 40–41, 449–450.
23. Scharf and Williams, *Shaping Foreign Policy in Times of Crisis* (2010), 204.
24. Hurrell, Norms and Ethics in International Relations, *in* Carlsnaes/Risse/Simmons (Eds.), *Handbook of International Relations*, 143.
25. Friedrich Kratochwil, How Do Norms Matter? *in* Byers (Ed.), *The Role of Law in International Politics* (2000), 52.
26. Quentin Skinner, *Visions of Politics: Regarding Method* (2002), 156: "There is a Limit to Which any Language, Including the Language of International Law, Can Plausibly be Stretched."
27. Johnstone, *The Power of Deliberation*, 25.
28. Johnstone, ibid.
29. Ibid, 32–33; see also Henkin, *How Nations Behave* (1979), 45: "[T]he Fact That Nations Feel Obliged to Justify Their Actions Under International Law; That Justification Must Have Plausibility; That Plausible Justifications are Often Unavailable or Limited, Inevitably Affects How Nations Will Act."
30. Johnstone, supra, 32.
31. See Ulbert and Risse, Deliberatively Changing the Discourse: What Does Make Arguing Effective? 40 *Acta Politica* (2005), 352.
32. Alexander Wendt, *Social Theory of International Politics* (1999), 249.
33. Ibid.
34. Risse, supra, 16.
35. See e.g. Brigitte Stern, La coutume au coeur du droit international, in Stern (Ed.), *Mélanges offerts à Paul Reuter: Le droit international, unité et diversité* (1981), 479–499 (498–499).

36. Guy de Lacharrière, *Politique juridique extérieure*, 216 (my translation).
37. Ibid.: "*Une telle explication serait très insuffisante: si les justes et les pacifiques ne peuvent forcer les autres à se limiter aux procèdes excluant l'usage de la force et plus généralement à participer à un système international plus intégré, du moins ces justes et ces pacifiques pourraient faire fonctionner entre eux des institutions de ce genre. On verrait alors de telles institutions s'établir entre un nombre substantiel d'Etats en attendant que l'attraction exercée par cette réalisation conduise a son imitation et a son extension graduelle à l'ensemble […]*".
38. Wendt, *Social Theory of International Politics*, 301–302.
39. Nico Krisch, International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, 16 *EJIL* (2005), 408.
40. Lacharrière, supra, 216–217 (my translation).
41. Lacharrière, 217 (my translation).
42. Krisch, International Law in Times of Hegemony, supra, 408.
43. Ibid, 379.
44. Reus-Smit, *The Politics of International Law*, 279.
45. See Reus-Smit, *American Power and World Order* (2004).
46. Michel Crozier and Erhard Friedberg, *Actors and Systems: The Politics of Collective Action* (1980), 30–31.
47. Reus-Smit, *The Politics of International Law*, 280.
48. Ian Hurd, Legitimacy and Authority in International Politics, 53 *International Organization* (1999), 387.
49. Reus-Smit, supra, 282.
50. Ibid, 283.
51. Michael P. Scharf and Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (2010), 203–204.
52. See Bruce Cronin, The Paradox of Hegemony, 7 *European Journal of International Relations* (2001), 103.
53. Ibid, 103; see also Krisch, International Law in Times of Hegemony, supra, 369–408.
54. Lisa Martin, The Rational Choice of Multilateralism, *in* Ruggie (Ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (1993), 111.
55. Reus-Smit, supra, 284.
56. Scharf and Williams supra, 201.
57. Cronin, supra, 111.
58. Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (1979), 118–119.
59. Harold Hongju Koh, Introduction, *in* Scharf/Williams, *Shaping Foreign Policy in Times of Crisis* (2009), xv.
60. Scharf and Williams supra, 211.

61. Marc Weller, Hope and the Gradual Self-Constituting of Mankind, *EJIL Talk*, 16 October 2021: https://www.ejiltalk.org/hope-and-the-gradual-self-constituting-of-mankind/.
62. Out of the currently 73 states recognising the jurisdiction of the Court as compulsory under a declaration pursuant to Article 36, paragraph 2, of the Statute of the International Court of Justice, 36 were deposited with the UN Secretary General after the fall of the Berlin Wall: https://www.icj-cij.org/en/declarations.
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