

Force and the Settlement of Political Disputes

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Debate with Alain Pellet

Colloquium on Topicality of the 1907 Hague Conference

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It's an honor to return to the Hague Academy today, all the more so to share the podium with my friend Alain Pellet. I first met Professor Pellet here in The Hague, twenty-three years ago. He was a member of the legal team of Nicaragua in its action against the United States; I was a witness for Nicaragua. When I walk into the Peace Palace today, I am still reminded of its picture on a post card written by Abe Chayes during the proceedings on the merits. The card was addressed to the State Department Legal Adviser, Abe Sofaer. It said simply: "Dear Abe: Having a great time. Wish you were here. Abe."

Some believe, of course, that the United States has too often been missing from the precincts of international law, gone, at least, from the regime governing use of force. Iraq, Kosovo, Grenada, Panama, Nicaragua, the Bay of Pigs — evidence, *arguendo*, is not lacking for their claim.

Yet evidence of transgression is broader than evidence of mere *American* transgression. The Secretary General's High-Level Panel found violations of the Charter use-of-force rules so numerous as to defy quantification.¹ By one count, the Panel said, from 1945 to 1989 "force was employed 200 times, and by another count, 680 times."² Other studies have reported similar results.³

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¹ "[F]or the first 44 years of the United Nations," the Panel concluded, "Member States often violated [the Charter] rules and used military force literally hundreds of times, with a paralyzed Security Council passing very few Chapter VII resolutions and Article 51 rarely providing credible cover." A More Secure World: Our Shared Responsibility, Report of the Secretary General's High-Level Panel on Threats, Challenges and Change (United Nations 2004), at 62 <<<http://www.un.org/secureworld/report.pdf>>>.

² *Id.* at 140, n. 104.

The central question today is this: What is the juridical significance of this deviant practice? Professor, now Judge, Rosalyn Higgins has observed that “what one identifies as international law will be closely dependent upon what one believes is the basis of legal obligation.”⁴ Legal obligation is the core issue: How does repeated and widespread violation of a rule by many states over an extended period of time affect states’ legal obligation to obey it?

One answer commonly given is that violation has no effect on obligation. This answer often rests, at least implicitly, upon the supposition that there is a moral obligation to obey treaty rules, and perhaps a special obligation to obey rules prohibiting aggression.⁵ But whether there is a moral obligation to obey any law can be answered, if at all, only by a moral system, not by a legal system. Lawmakers create legal obligations, not moral obligations. As the Court reminded us in the *Southwest Africa Case*, a court of law “can take account of moral principles only in so far as these are given sufficient expression in legal form.”⁶

At the other end of the spectrum, some respond that violation *vitiates* obligation — that in a voluntarist legal system, a state is obliged to honor only those rules to which it consents, and that violation signifies objection to a rule. This answer gets closer to the truth, recognizing as it does the positivist underpinnings of the contemporary international legal order. Few today would contend that states have *no* control over the rules by which they are bound, that

³ See, e.g., ARTHUR M. WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* (1997). Weisburd counted 100 interstate wars between 1945 and 1997. Franck counted the same number in 1970. See note 27 *infra*. K.J. Holsti K.J. counted 38 between 1945 and 1995. K.J. HOLSTI, *THE STATE, WAR, AND THE STATE OF WAR* 24 (1996). The Correlates of War Project has counted 23 between 1945 and 1997. Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 CONFLICT MANAGEMENT AND PEACE SCIENCE 123-144 (2000). Herbert K. Tillema counted 690 overt foreign military interventions between 1945 and 1996. Herbert K. Tillema, *Risks of Battle and the Deadliness of War: International Armed Conflicts: 1945-1991* (paper presented to International Studies Association, San Diego, Apr. 16-29, 1996) quoted in *New Actors, New Issues, New Actions in INTERNATIONAL INTERVENTION: NEW NORMS IN THE POST-COLD WAR ERA?* (Peter Wallensteen, ed., 1997). A report of the Carter Center in February, 1998 identified 30 “major ongoing wars.” The Carter Center, “Conflict Resolution Update: Update on World Conflicts,” February 9, 1998. See generally MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001).

⁴ Rosalyn Higgins, *The Identity of International Law* in *INTERNATIONAL LAW: TEACHING AND PRACTICE* 32 (Bin Cheng, ed., 1982).

⁵ This seems to have been the Panel’s conviction, urging the Security Council, as it did, to adopt just war principles. See Michael J. Glennon, *Platonism, Adaptivism, and Illusion in UN Reform*, 6 CHICAGO JOURNAL OF INTERNATIONAL LAW 613 (Winter, 2006).

⁶ *South West Africa (Second Phase)* (Eth. v. S. Afr.) (Liber. v. S. Afr.), 1966 I.C.J. 6, para. 49 (July 18).

there is a “brooding omnipresence in the sky” that somehow imposes legal rules on states notwithstanding their objection.

Yet this “pure” consent-based view of obligation, like its opposite, misses the mark. It presupposes an international legal order devoid of “informal” sources of coercion. States’ discretion is in fact circumscribed all the time — coercively — not only by governmental or quasi-governmental authority, but also by other states. It is unthinkable, for example, that one member state of the European Union would use force against another, not because of any specific treaty commitment but because informal, regional coercive forces are as powerful as they are. Whether such coercion creates legal obligations — whether there is a causal relationship between norm and conduct — is another question for another day.⁷ But it won’t do to dismiss a rule as “not law” merely because coercion does not flow from the top. A norm can be obligatory — policymakers within a state can feel “obliged” to honor it — even if the state has not freely consented to it.

How can this be so? Why do states do things that they do not want to do? Professor Pellet has provided a succinct and persuasive answer. “The short answer,” he has written, “is because they need to. Not only because they need money, technical assistance, urgent food help, and so on. But also because they feel very strongly the absolute necessity to ‘participate.’ And this holds true not only for treaties but, more generally, for international law, whatever its form.”⁸ States have, in other words, a *practical obligation* to comply with certain norms,⁹

⁷ We know that obligation alone does not create law. Social norms such as queuing are obligatory; one sometimes feels “obliged” to stand in line. But no law compels it. The harmonies as well as the pathologies of the international system often are idiopathic; comity, convenience, and coincidence can create an illusion of compliance with a legalist norm when in reality the “felt needs” of the community — the reasons for ostensibly compliant conduct — are in fact quite different. That is why the International Court has rightly insisted upon a causal relationship between practice and *opinio juris*. *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Reports 4 at 44-45 (“There is no evidence that they so acted because they felt legally compelled ... by a rule of customary international law obliging them to do so.”).

⁸ Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTRALIAN YBIL 22, 43 (1988-89)(hereinafter *The Normative Dilemma*).

⁹ See Michael J. Glennon, *How International Rules Die*, 93 GEORGETOWN L. J. 939 (2005).

an obligation generated by what Holmes called “the felt necessities of the times”¹⁰ and by states’ drives to meet those necessities. States are thus “obliged” to do certain things — “obliged” to comply with certain norms — not because they freely consent, but because the benefits of compliance, in light of states’ needs, outweigh the costs of non-compliance.

Conversely, Professor Pellet’s account also provides a cogent answer to the question of why some states decline to comply with some norms. The short answer is, because they don’t need to. States weigh costs against benefits and conclude that they don’t need whatever it is that they have to give up because of their violation — money, allies, reputation, whatever. They don’t feel a need to “participate.” This holds true for treaties as well as custom. States do not, in other words, feel “obliged” to carry out rules if the net benefits of compliance don’t meet their needs. That is why nineteen nato states representing 780 million people felt free to wage war in flagrant violation¹¹ of the use-of-force rules of the Charter. They did not feel obliged to honor the Charter’s most fundamental rules.

This needs-based approach to law places Professor Pellet in good company, at least from an American perspective. His analysis parallels Justice Holmes’ famous “bad man” theory. “If you want to know the law and nothing else,” Holmes wrote, “you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct...in the vaguer sanctions of

¹⁰ “The life of the law,” Holmes famously wrote, “has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 173 (M. Howe ed., 1963)

¹¹ The assessment of Bruno Simma is widely shared. He wrote:

[I]t may be concluded that the NATO threats of air strikes against the FRY, not having been authorized by the Security Council, are not in conformity with the UN Charter. In this regard, it makes little difference that the threat had not been carried out until now because Article 2(4) prohibits such threats in precisely the same way as it does the actual use of armed force. ...[T]here is no denying the fact that a requirement of Charter law has been breached.

Bruno Simma, *Kosovo: A Thin Red Line*, *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 10, no. 1 (1999) available at <http://www.ejil.org/journal/Vol10/No1/ab1-2.html#Heading2> (visited Aug. 2, 2007).

conscience.”¹² Professor Pellet’s insight is similar. In his words, “those who hold the most power and influence” shape international law to guide social conduct in their interest — not in the interest of “all members of society.”¹³ States inevitably “take the existence and relative power of other countries into consideration.” The needs of the powerful are different from the needs of the weak; the powerful don’t need to be concerned about penalties for violation that might dissuade the weak. Obligation is therefore a function of power and influence. A rule that “obliges” the weak may not oblige the powerful — even though the powerful may miscalculate and flout that rule to their peril.

That, in a nutshell, is how legal obligation emerges and also how legal obligation fades: states engage in a hard-headed, cold-blooded calculus, weighing the costs of violation against the benefits of compliance with an international norm. International norms are thus not irrelevant to state policy-making processes; norms probably are *a* factor in many if not most of the cases that present facts situations to which they apply. Norms pervade the international system and provide constant incentives and disincentives for compliance. When norms generate a sufficient measure of compliance, we call them “law.” But legal norms that are obligatory, like sub-legal norms that are not, are not the *only* things that affect states’ needs and policy-makers’ decisions. The quality of a state’s leadership, the power of domestic constituencies, the structure of the international system, the state’s relative military and economic power, its “soft power” and myriad other factors all contribute to states’ needs and all influence policy-makers’ assessment whether they need to violate or comply with the norm in question.

Now, the question arises whether consent to a rule, once given, can be withdrawn. The argument is made that “once a state...has entered into a treaty..., the trap closes; its will is bound and will be freed only through processes in which

¹² Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹³ *The Normative Dilemma*, note 8 *supra* at 46.

the will of an individual State will have little or nothing to do.”¹⁴ This is Professor Pellet’s claim. He writes that “[w]hen they want to terminate the treaty, the parties must act together. ‘All states’ must express the same will....”¹⁵ Why is this so? Because, he suggests, states have consented to this rule: this is the “clear result”¹⁶ of the Vienna Convention.

The problem with this argument is that its logic is circular. Professor Pellet suggests that states have individually willed a rule to the effect that they cannot individually withdraw their will to a rule.¹⁷ But what is the source of this rule? Professor Pellet’s insistence that a state cannot will that its will be withdrawn was refuted long ago by Humphrey Waldock in his rejoinder to the argument for *pacta sunt servanda*, demonstrating that that rule — like Professor Pellet’s corollary — is grounded upon an infinite regress.¹⁸ For bindingness, Professor Pellet’s rule relies upon its own bindingness. It’s turtles all the way down.

I’m a bit baffled by this argument because Professor Pellet elsewhere recognizes that “treaty-law changes....” It “lives,” he writes, “as does any part of law, either through an informal evolution (mainly thanks to interpretation), or formally.”¹⁹ But, of course, change implies the possibility of termination. When a treaty rule takes on a new and different meaning, the old rule terminates and a new rule takes its place. Adaptation and termination both involve ending an old rule. Both presuppose a new rule different from an original rule that no longer exists.

So let us not confuse semantics with substance: it is not true that “whatever its will, a State must abide by the law it entered into.”²⁰ Treaty-law lives, as does any part of law. Treaty law dies, as does any other part of law. And when treaty law dies, it may die not with a bang but with a whimper. When a significant

¹⁴ *The Normative Dilemma*, note 8 *supra* at 35.

¹⁵ *Id.* at 34.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ J.L. BRIERLY, *THE ORIGINS OF INTERNATIONAL LAW IN THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 57 (6th ed., Sir Humphrey Waldock, ed., Cambridge 1984).

¹⁹ *The Normative Dilemma*, note 8 *supra* at 33.

²⁰ *Id.*

number of states over an extended period of time engage in a substantial number of violations of a treaty norm — or a customary norm — it is no longer law. It has been allowed to fall into desuetude.

After up to 680 violations, that, I submit, is the fate of the obligation of Article 2(4) of the United Nations Charter. Article 2(4) has fallen into desuetude.

Here I disagree with Professor Pellet, whom I gather would continue to call this provision “law.” The issue is not morality, as he contended in his oral remarks in this Colloquium. The issue is simple analytic clarity. To Professor Pellet, law includes norms that are not obligatory.²¹ To me, and to many others, law must oblige. Oscar Schachter, for example, wrote that law “is in essence a system based on a set of rules and obligations. They must in some degree be binding”²² Rules that nobody cares to heed, Christian Tomuschat said in his 1999 Hague lectures, are not rules.²³ The view that a minimal level of effectiveness is a requirement for legal validity makes sense. As Hans Kelsen put it, “The validity of the law presupposes a minimum efficacy of the law.”²⁴ Roscoe Pound thus distinguished “working rules” that oblige from “paper rules” that do not.²⁵ Treaty rules as well as customary rules fall into desuetude when they change from working rules to paper rules. Clarity of analysis is not advanced by confusing the two; paper rules may still in some circumstances generate compliance—but not often enough to qualify as law, for the key element of obligation is missing.²⁶

That is what has happened to the UN Charter’s use-of-force rules. There is nothing innovative or novel in this conclusion. In 1970 Tom Franck forcefully

²¹ “[A]s long as it influences or guides,” he writes, “it is nonetheless a legal norm. *Id.* at 38.

²² Oscar Schachter, *International Law in Theory and Practice — General Course in Public International Law*, 178 RECUEIL DES COURS 25 (1982-V).

²³ Christian Tomuschat, *International Law : Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS 447, para. 31 (1999).

²⁴ HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS* 16 (1942).

²⁵ Roscoe Pound, *Law in Books and Law in Action*, 44 AM.L.REV. 12 (1910).

²⁶ The argument has been made that this difference is more semantic than substantive. See Glanville Williams, *International Law and the Controversy Concerning the Word “Law,”* 22 B.Y.I.L. 146, 151 (1945).

announced the “demise of Article 2(4).”²⁷ Jean Combacau,²⁸ Anthony Arend,²⁹ Richard Falk³⁰ and others have expressed similar views.

Others assert that Article 51 has not disappeared but has merely “evolved.” One view is that the scope of its prohibition has narrowed and that Article 51 now permits the use of defensive force in response to an “imminent” threat of attack. But this argument is unconvincing. The premise on which it rests is no different than the premise on which desuetude analysis rests: the premise of both approaches is that practice inconsistent with a treaty rule changes the rule. If incongruent practice can change a treaty rule a little, it can change it a lot, and if it can change a rule a lot, it can eviscerate the rule altogether. There is no conceptual difference between a process that creates a different rule and a process that creates a *laissez-faire* rule. What state practice supports the conclusion that the speeding sled of desuetude stopped abruptly three-fourths of the way down the hill but not at the bottom? Recall the reminder of *The Lotus* Court that the burden of persuasion is on he who advocates restrictions on states’ freedom to act, not

²⁷ Thomas M. Franck, *Who Killed Article 2(4)?*, 64 Am. J. Int’l L. 809, 809 (1970). “The practice of these states has so severely shattered [mutual confidence in] . . . the precepts of Article 2(4) that . . . only the words remain In the twenty-five years since the San Francisco Conference, there have been some one hundred separate outbreaks of hostilities between states. . . .” *Id.* at 810–11. “What killed Article 2(4) was the wide disparity between the norms it sought to establish and the practical goals that nations are pursuing in defense of their national interest.” Thomas M. Franck, *Who Killed Article 2(4)?*, 64 Am. J. Int’l L. 809, 837 (1970). Twenty years later Article 2(4) in Franck’s view remained dead: “[T]he extensive body of international ‘law’ which forbids direct or indirect intervention by one state in the domestic affairs of another [and] precludes the aggressive use of force by one state against another . . . simply, if sadly, is not predictive of the ways of the world.” THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 32 (1990). In 2003, following the U.S. invasion of Iraq, Franck concluded that Article 2(4) “has died again, and, this time, perhaps for good.” Thomas M. Franck, *Future Implications of the Iraq Conflict: What Happens Now? The United Nations after Iraq*, 97 A.J.I.L. 607, 610 (July, 2003).

²⁸ Reviewing practice under the Charter through 1986, Combacau concluded that “the international community no longer believes in the system of the Charter [and] is in fact back where it was in 1945: in the state of nature” Jean Combacau, *The Exception of Self-Defense in United Nations Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 9, 32 (A. Cassese, ed., 1986).

²⁹ “[T]hrough customary practice,” Arend observed, “states have withdrawn their consent” from Article 2(4); the argument that it is still in force denies “the dynamic nature of international law.” ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 75 (1999).

³⁰ Falk has opined that “the [Charter’s] formalized . . . renunciation of nondefensive claims to use force . . . provide little assured restraint upon state action. The decline of normative restraint can be seen in the broadening of the definition of self-defense and in the increasing resort to unilateral force by sovereign states. A consequence of this is to convert the rules of behavior embedded in the United Nations Charter into aspirational norms.” RICHARD FALK, *REVITALIZING INTERNATIONAL LAW* 96 (1989). “The conclusion,” for Falk, “is that the legal effort to regulate recourse to force in international relations has virtually collapsed in state-to-state relations.” *Id.* at 96-97.

upon advocates of freedom.³¹ Recall too the reminder of the Court in the *Nicaragua* Case: “The mere fact that States declare their recognition of certain rules is not sufficient,” it said. “The Court must satisfy itself that the existence of the rule in the *opinio juris* is confirmed by practice....” Ask yourself: What has been state practice? How many states have declined to use armed force in response to a serious threat because they believed that that threat was not yet imminent?

The question of course answers itself: there is no such practice, and there is no such practice for the obvious reason that as a matter of political reality, the so-called “imminence” requirement is a formula for national suicide. It would forbid a state from using *any* amount of force — even *de minimis* force against a *serious* and *likely* threat — until that threat has become imminent. In real-world practice, the gravity of a threat and the probability of its occurrence weigh far more heavily than a threat’s imminence. If a nation is faced with a threat from some rogue state or terrorist group that is both grave and probable, what real-world decision-maker would delay acting until that threat is immediate — until there are no alternatives — until it may be impossible for the state to defend itself?

Others argue, conversely, that Article 51 has evolved in the opposite direction. They insist that Article 51 has become more restrictive. They claim that Article 51 now *prohibits* a state from defending itself with armed force *even if that state has been subject to an actual armed attack* unless the Security Council has given its prior approval. Professor Pellet himself argued that the action taken by the United States against the Taliban and Al Qaeda in Afghanistan was unlawful because it was undertaken without prior authorization by the Security Council. Three weeks after the September 11 attacks — before the United States had taken or announced any military action in response — Professor Pellet was concerned about the United States’ “reflex for vengeance.” He wrote the

³¹ “The rules of law binding upon states . . . emanate from their own free will as expressed in conventions . . . [R]estrictions upon the independence of states therefore cannot be presumed.” *Lotus*, [1927] PCIJ ser. A, No. 10, at 18.

following: “It would be contrary to the letter as much as to the spirit of Article 51 that the United States, alone or with other states, were to by-pass the Council and proceed, alone and without its endorsement, with an armed response.”³² I ask again: what state practice supports this his new rule? How many states that have been subjected to an *actual armed attack* have waited for Security Council approval before defending themselves? The question, again, answers itself — there is no such practice.

Boutros Boutros-Ghali has taken Professor Pellet’s argument a step further. The former Secretary General insisted on September 6 at this Colloquium that, under the Charter, self-defense may be exercised only against an attack by a state, not a against a non-state actor like Al Qaeda. “Article 51 is talking about an aggression from a state against another state,” he asserted. “It is very clear....The concept of non-state actors is a new concept which has existed only for the last 5 or 10 years.” The United States therefore was not permitted under Article 51 to respond with the use of force to the attack by Al-Qaeda and the Taliban on the United States; it was not, he opined, part of the inherent right of self-defense.

It is mercifully understated, in my view, to suggest that this contention has no support in international law. Set aside considerations concerning consent, obligation, and desuetude, sketched out earlier. Assume that the United Nations Charter is still good law. The Charter in plain terms recognizes the “inherent right” of states to use armed force in response to an armed attack. Nowhere does it say that the attack in question must come from a state. The Security Council itself on September 12, 2001 underscored its recognition of that inherent right in unanimously adopting Resolution 1368, in which it “unequivocally condemn[ed]”

³² Alain Pellet, *No, This is Not War!*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, Discussion Forum, The Attack on the World Trade Center: Legal Responses, Oct. 3, 2001 available at http://www.ejil.org/forum_WTC/ny-pellet.html#fn (visited Aug. 13, 2007). “One can understand the United States’ reflex for vengeance,” Professor Pellet continued. “But to understand is not to approve.” *Id.* The action taken by the United States against the Taliban and Al Qaeda in Afghanistan was not, in his view, lawful because the United States did not seek the Security Council’s approval.

the previous day's attacks as an act of "international terrorism" that was a "threat to international peace and security."³³ How can it be, therefore, that the right to use force against an attacker encompasses only attacking *states*? Were the United States and Britain both wrong when they concluded in 1838, after *The Caroline* incident,³⁴ that force could lawfully be used against non-state actors (who had used the boat to support insurgents)? When did these and other states consent to a new, different rule that is at odds with the one that they accepted in the United Nations Charter?

I know that some will respond, as Professor Pellet did in his oral remarks, that all this is just another argument that might makes right. I beg to differ. I make no claim that the law as I have described it today is "right" in any moral sense. My account of the law is *descriptive*, not *prescriptive*. I describe the law as it is, not the law as it should be. I look to the deeds of those who make that law, not to the words of those who would like to. Rules that work — the law as it is — are made by states, not by law professors. Rules created by states capture the complexity of the real world more fully — and therefore work better — than rules imagined by publicists. Rules that work are made by state policy-makers whose lives are grounded in geopolitical give-and-take, in power and weakness, in confusion and uncertainty, in conflicting cultures and clashing personalities. It is too easy for the professoriate to imagine a different world, too easy to create simplistic "models" that leave out what really matters, too easy to build castles in the sky grounded on logic but not experience.³⁵ This well-intentioned but misguided moralism is worse than pointless — it is ultimately destructive of the legalist ends that it seeks to achieve, for fanciful rules undermine real rules. They create the illusion that all international rules are merely hortatory and can be

³³ Sec. Res. 1368, Sept. 12, 2001.

³⁴ See Daniel Webster, Letter to Henry Fox, British Minister in Washington (Apr. 24, 1841) in Kenneth Bourne and D. Cameron Watt, eds., 1 BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE (Part I, Series C) at 153 (1986).

³⁵ See Holmes, note 10 *supra*.

violated with impunity. “Laws, like houses, lean on one another,”³⁶ as Burke put it. What would the international system actually look like, hobbled with this new utopian purity? Would it attract the states that, the moralists say, should participate more fully in the international legal system? What tools would their Kantian system wield to confront the very real crises that loom over humanity in this turbulent century — terrorism and genocide and climate change? The answer, one fears, is hinted in Charles Péguy’s remark to the effect that Kant’s ethics has clean hands — but it has no hands.

The challenge faced by the international legal order today is not to devise purer rules untainted by the of *sturm und drang* of geopolitics — rules that would be based, ultimately, upon values that the world does not share. “[T]here is grave danger,” Henry Cabot Lodge said, “in an unshared idealism.”³⁷ The challenge is to remember that states make international rules governing use of force for one overriding purpose — to enhance their security — and that rules that stand in the way of states’ security wind up on the back shelves of archives, gathering dust. The challenge is to assess states’ capacities before assessing their obligations — to ground legal discourse upon empiricism, not metaphysics — to begin our analysis with *description*, not *prescription*.

I conclude with the words of someone who similarly *described* the law. He described the effect of widespread violation of a regime intended to “enforce peace by providing security from and a deterrent against aggression....”³⁸ I trust that no one seriously would contend that he was making a veiled argument that might makes right. He wrote as follows:

The frustration of [its] overriding object...has gone so far that it is no longer merely a political fact constituting a regrettable departure from the law. That failure has now become part of the law; ...[I]ts impotence when

³⁶ Edmund Burke, *Tracts Relating to Popery Laws*, ch. 3, pt. 1 (1765; repr. in *THE WRITINGS AND SPEECHES OF EDMUND BURKE*, vol. 9, ed. by Paul Langford, 1991).

³⁷ Senator Henry Cabot Lodge, Address in Washington D.C. (Aug 12, 1919), available online at <http://www.firstworldwar.com/source/lodge_leagueofnations.htm> (visited Sept 18, 2005).

³⁸ Hersch Lauterpacht, Address to the Cambridge University League of Nations Union, Nov. 16, 1938, *reprinted in INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* (E. Lauterpacht, ed.) vol. 3, p. 576 (1977).

repeated, tolerated and willed, must tell in the end; its continued futility ceases to be a disappointment of legitimate expectations.... [T]here has disappeared a vital condition of the obligation of collective security.³⁹

These are not the words a “denier” of international law or of some mindless mouthpiece of hegemonic power. They are the words of Hersch Lauterpacht, spoken in November, 1938. He was referring to Article 10 of the League of Nations Covenant — the provision, he said, that had been “repeatedly described by leading lawyers as the backbone of the Covenant.”⁴⁰ His conclusion was that in light of its non-observance, the obligation of Article 10 had, as he put it, “been allowed to fall into desuetude.”⁴¹

The question that we confront today is a simple one, and the question is this: Was Hersch Lauterpacht wrong — and if not, why does the same conclusion not apply to the use-of-force rules in the UN Charter, which have been violated even *more* times by even *more* states from even *more* regions for even *more* years?

³⁹ *Id.* at 576, 578.

⁴⁰ *Id.* at 577.

⁴¹ *Id.*