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# The Foundations of the International Legal Order

Jean d'Aspremont\*

## Introduction

This is an article about international law. It expresses the thoughts of an international legal scholar on the much-disputed question of the foundations of the international legal order. It attempts to refresh and modernize, without repeating, the classic *hobbesian* understanding of international law. In that sense, it strives to shed some lights on the pitfalls to which contemporary liberal and constitutionalist doctrines of international law may lead. Because the compound question of the foundations of the international legal order mirrors similar debates that took place in other social sciences, the arguments developed here occasionally allude to non-legal disciplines. References to such disciplines should by no means be construed as an endeavour to borrow authority from non-legal sciences, which international legal scholars — and particularly this author — rarely fathom completely. The insight that they provide can nonetheless help international legal scholars unravel some of the theoretical uncertainties that beset efforts to unravel the foundations of the international legal order.

The question of the foundations of the international legal order which is examined here should not be conflated with that of its *validity*. The latter has long tormented international legal scholarship too. Its indeterminacy and the alleged failure of international legal positivism to provide a satisfactory answer to it has produced new and critical streams of legal scholarship into “politicizing” international law

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and demoting it to a mere discourse<sup>1</sup>. It is not the aim of this paper to revert to the ever-lasting debate about the validity of the international legal order as a whole. Indeed, the author of this paper does not believe that, as such, the question of the validity of a legal order has ever made sense at all. There is not such a thing as a valid or invalid legal order. While it is of the utmost importance to appraise whether a given rule has been adopted in conformity with the systemic and substantive principles of the legal order in which this rule yields its effect, the existence of a legal order itself does not need to be judged in a similar manner. The existence of a legal order is basically not a question of validity but a question of fact<sup>2</sup> – this actually is why the attempts to purify international law through the recourse to a presupposed and hypothetical ‘grundnorm’ may have eventually ended up unwittingly and unnecessarily weakening legal positivism as a whole<sup>3</sup>. When looking at the foundations of the international legal order, this paper accordingly disregards the issue of the validity of the international legal order and simply zeroes in on the reasons why States make law in the first place.

The question that this paper tries to disentangle echoes a controversy that riddled philosophy a century ago and that stretched out over some decades. Indeed, as it is well-known, both Nietzsche and Heidegger have attempted to demote the status of philosophy as the queen of politics and sciences<sup>4</sup> and, for that reason, have been portrayed as the forefathers of postmodernity. Although in a different way and to a different extent, they have both faulted the traditional anthropocentric tables of values which they saw as the bedrock of nihilism. Yet, Heidegger is probably the only one that has truly advocated an utterly sceptical rejection of values. Contrary to Nietzsche whose endeavor to destroy values through the ‘Will to Power’ ultimately aimed at the construction of a new morality based on better and renewed values, Heidegger never faltered in his struggle against values and nihilism, thereby challenging the values-validation inclination of mainstream philosophers.<sup>5</sup>

Probably because his later alleged support of Nazi theories retrospectively sullied his whole work, Heidegger’s thought partly fell into oblivion in the second half

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<sup>1</sup> See for instance Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70 *Modern Law Review* (2007) 1-30.

<sup>2</sup> See generally Herbert L. A. Hart, *The Concept of Law*, (Oxford University Press: Oxford, 1997) 100-110; for a criticism of the “retreat” of positivists in the direction of empirical sources, see Sean Coyle, ‘Hart, Raz and the Concept of Legal System’ 21 *Law and Philosophy* (2002) 288-289

<sup>3</sup> See for instance H. Kelsen, ‘Théorie du Droit International Public – Problèmes Choisis’, 42 *Collected Courses* (1932–IV) 124-137..

<sup>4</sup> See Gregory Bruce Smith, *Nietzsche, Heidegger, and the Transition to Postmodernity* (The University of Chicago Press: Chicago, 1996).

<sup>5</sup> Martin Heidegger, *An Introduction to Metaphysics* (translated by Ralph Manheim, Yale University Press: New Haven, 1959) at 199. On this controversy between Heidegger and Nietzsche, see David Detmer, ‘Heidegger and Nietzsche on “Thinking in Values”’, 23 *Journal of Value Inquiry* (1989) 275-283.

of the twentieth century and his influence on other social sciences faded away. The international legal scholarship is no exception to that. While postmodern philosophy incrementally started to trickle into legal theory and, subsequently, international legal theory, international legal scholars have remained averse to the utter scepticism towards values that was conveyed by Heidegger. It is particularly noteworthy that several prominent German (and Austrian) international legal scholars who grew up at a time Heidegger was still in his prime — although diminished because of his earlier political positions — have offered an unconcealed value-oriented understanding of the international legal order.<sup>6</sup> These scholars — classically inventoried as *international constitutionalists* — have advocated an understanding of the legal system that corresponds to a table of global values. Although the present author may be guilty for overgeneralizing the respective positions on the idea of global values, it can still be contended that supporters include Christian Tomuschat,<sup>7</sup> Hermann Mosler,<sup>8</sup> Jost Delbrück,<sup>9</sup> and, to some extent, Bruno Simma.<sup>10</sup> The need to buttress existing rules and mechanisms by underlying global values is not limited to the German constitutionalist school. Other constitutionalists — or scholars whose discourse is occasionally tinged with constitutionalism — like Erika de Wet,<sup>11</sup> Anne Peters,<sup>12</sup> Pierre-Marie Dupuy,<sup>13</sup> Nico Schrijver,<sup>14</sup> Georges Abi-Saab,<sup>15</sup> Verra Gowland-Debbas,<sup>16</sup>

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<sup>6</sup> See the remarks of Jan Klabbers in his review of Ulla Hingst, *Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge* (Duncker & Humblot: Berlin, 2001), 16 *Leiden Journal of International Law* (2003) 201-207.

<sup>7</sup> Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law', 281 *Collected Courses* (1999) 9-438, see esp. at 237, 306.

<sup>8</sup> Hermann Mosler, *The International Society as a Legal Community* (Sijthoff & Noordhoff: Alphen aan den Rijn, 1980) at 17-18 and 84-91.

<sup>9</sup> See in general Jost Delbrück and Ursula E. Heinz (eds), *New Trends in International Lawmaking: International 'Legislation' in the Public Interest* (Duncker & Humblot: Berlin, 1996) at 18-19.

<sup>10</sup> Bruno Simma, 'From Bilateralism to Community Interest', 250 *Collected Courses* (1994-VI) 217-384, esp. at 233.

<sup>11</sup> Erika de Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) 51-76, and 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden Journal of International Law* (2006) 611-632.

<sup>12</sup> Anne Peters, 'Compensatory Constitutionalism: The Function of Potential of Fundamental International Norms and Structure', 19 *Leiden Journal of International Law* (2006) 579-610.

<sup>13</sup> See for instance, Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', 16 *European Journal of International Law* (2005) 131-137. See also his 'L'unité de l'ordre juridique international: cours général de droit international public', 297 *Collected Courses* (2002) 9-489, esp. at 218 ff.

<sup>14</sup> On the question of the United Nations and the development of global values, see Nico Schrijver, 'The Future of the United Nations', 10 *Max Planck Yearbook of United Nations Law* (2006) 1-34, and 'Les valeurs générales et le droit des Nations Unies', in Régis Chemain and Alain Pellet, *La Charte des Nations Unies, Constitution Mondiale?* (Pedone: Paris, 2006) 85-88. See also the research project carried out at

Jonathan Charney,<sup>17</sup> Robert McCorquodale<sup>18</sup> have also embraced such a value-oriented understanding of the international legal order.

International constitutionalists do not have the monopoly on the abovementioned representation of the international legal order; there are many others.<sup>19</sup> For the sake of this paper, it suffices to mention another mainstream strand of international legal thinking which espouses such a value-oriented understanding of the international legal order, namely international liberalism. Indeed, (neo-)liberals like Louis Henkin,<sup>20</sup> Thomas Franck,<sup>21</sup> Fernando R. Tesón,<sup>22</sup> or Anne-Marie Slaughter<sup>23</sup> — to name only a few — analyze the legal order through the lens of global values as well. Many of all the aforementioned scholars have been drawing on the earlier works of Wilfred Jenks,<sup>24</sup> Georg Schwarzenberger,<sup>25</sup> Wolfgang Friedmann,<sup>26</sup> or

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Leiden University on the United Nations and the Evolutions of Global Values and the work of Otto Spijkers, <[www.law.leidenuniv.nl/org/publiekrecht/ipr/nieuw\\_onderzoeksproject.jsp](http://www.law.leidenuniv.nl/org/publiekrecht/ipr/nieuw_onderzoeksproject.jsp)> or <[www.1948blog.com](http://www.1948blog.com)>.

<sup>15</sup> Georges Abi-Saab, 'International Law and the International Community: The Long Road to Universality' in Ronald St. J. MacDonald (ed.), *Essays in Honour of Wang Tieya* (Martinus Nijhoff: The Hague, 1994) 31-41.

<sup>16</sup> Vera Gowlland-Debbas, 'Judicial Insights into Fundamental Values and Interests of the International Community' in A. S. Müller, David Raič and J. M. Thuránszky (eds), *The International Court of Justice: Its Future Role After Fifty Years* (Martinus Nijhoff: The Hague, 1997) 327-366.

<sup>17</sup> Jonathan I. Charney, 'International Lawmaking: Article 38 of the ICJ State Reconsidered', in Delbrück and Heinz (eds), *New Trends in International Lawmaking*, *supra* note 6, 171-191, esp. at 189; Jonathan I. Charney, 'Universal International Law', 87 *American Journal of International Law* (1998) 529-551.

<sup>18</sup> Robert McCorquodale, 'An Inclusive International Legal System', 17 *Leiden Journal of International Law* (2004) 477-504.

<sup>19</sup> The same could be said of the New Haven School of International Law, see generally Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society* (Martinus Nijhoff: The Hague, 1992). On a criticism of this movement, see Richard A. Falk, 'Casting the Spell: The New Haven School of International Law', 104 *Yale Law Journal* (1995) 1991-2008.

<sup>20</sup> See Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff: The Hague, 1995), esp. chap. X.

<sup>21</sup> Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press: Oxford, 1995).

<sup>22</sup> Fernando R. Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53-102.

<sup>23</sup> Anne-Marie Slaughter, 'A Liberal Theory of International Law', 94 *Proceedings of the American Society of International Law* (2000) 240-253; 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations', 4 *Transnational Law and Contemporary Problems* (1994) 377-419; 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995) 503-538.

<sup>24</sup> C. Wilfred Jenks, *The Common Law of Mankind* (Stevens: London, 1958).

<sup>25</sup> Georg Schwarzenberger, *The Frontiers of International Law* (Stevens: London, 1962) at 29.

<sup>26</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press: New York, 1964).

René-Jean Dupuy,<sup>27</sup> all of whom had long recognized the role of collective interest in international lawmaking but had linked it to the existence of global *values*. Their views have enjoyed a prominent position in Western scholarship and they have occasionally permeated the work of the *Institut de droit international*.<sup>28</sup>

Constitutionalism and liberalism doctrines have been barely contested on this point. Asian scholars, reflecting visions often expressed in international lawmaking in Asia,<sup>29</sup> have ventured to defy this value-oriented conception of the international legal order. It is not concealed that the understanding of the international legal order offered by these scholars has been significantly instrumental to the representation that is defended here. In particular, the works of Yasuaki Onuma<sup>30</sup> and Muthu Sor-

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<sup>27</sup> René-Jean Dupuy, 'Communauté internationale et disparités de développement', 165 *Collected Courses* (1979-IV) 9–232.

<sup>28</sup> See for instance the Resolution of the Institut de droit international of 26 August 2005 on the Universal criminal jurisdiction with regard to crimes of genocide, crimes against humanity and war crimes (Session of Krakow — August 2005) adopted pursuant to the work of Christian Tomuschat and which considers that 'fundamental values of the international community are infringed by serious international crimes as defined by international law' and which affirms that 'universal jurisdiction is designed to protect and uphold these values, in particular human life, human dignity, and physical integrity, by allowing prosecution of international crimes'. See also Article 1 of the Resolution of the *Institut de droit international* of 27 August 2007 on the obligation erga omnes: 'For the purposes of the present articles, an obligation erga omnes is ... an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action ...' Available at <www.idi-il.org>.

<sup>29</sup> See for instance the Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 March — 2 April 1993, A/Conf.157/ASRM/8 and A/Conf.157/PC/59, 7 April 1993: 'expressing concern that [international human rights mechanisms] relate mainly to one category of rights'; 'recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious background'. See more generally the paper issued by the Chinese government Human Rights in China (1991), *Beijing Review* 34 (4-10 November 1991) at 9. See also the statement by Mr. Nirupan Sen, Permanent Representative on Justice and the Rule of Law: The United Nations Role at the Security Council on October 6, 2004, available at <www.un.int/india> — Statements — Security Council — 2004: 'The UN should play a supportive and facilitating role, without seeking to impose an outside optic or values of any particular country or group of countries on the delicate process of establishing the rule of law'. In the same mould, see Statement by Mr. V.K. Mambiar, Permanent Representative on Non-Proliferation of Weapons of Mass Destruction at the Security Council on April 22, 2004, available at <www.un.int/india> — Statements — Security Council — 2004: 'India will not accept externally prescribed norms or standards, what ever their source, on matters pertaining to domestic jurisdiction of its Parliament, including national legislation, regulations or arrangements which are not consistent with its Constitutional provisions and procedures or contrary to its national interests, or infringe on its sovereignty'.

<sup>30</sup> He has taken aim at the West-centric modern civilization and criticized the "cultural imperialism" that plagues international human rights law and has elaborately spoken of human rights law in terms of "usefulness" highlighting that human rights have proven to be the most effective way to protect hu-

narajah<sup>31</sup> have been of paramount importance in this respect, although regrettably ignored in Western legal scholarship.<sup>32</sup> A similar scepticism — although of a lesser intensity — towards the role of universal values in the international legal order is also observable in the work of some Eastern European legal scholars. As illustrated by Milan Šahović<sup>33</sup> and Rein Müllerson,<sup>34</sup> a fair number of Eastern European scholars have been circumspect as to the role that universal values may play in the international legal order, offering an interest-based and pragmatic<sup>35</sup> understanding of it.<sup>36</sup> Mention must also be made of the comparable interest-oriented understanding that pervades the work of the Kenyan scholar Yash Ghai.<sup>37</sup> But leaving these few strands

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man interests and fulfill the universal quest for human well-being; see in particular Yasuaki Onuma, 'In Quest of Intercivilizational Human Rights: "Universal" vs. "Relative"', 1 *Asia-Pacific Journal on Human Rights and Law* (2000) 53-88 at 55, 72, 79.

<sup>31</sup> Muthu Sornarajah, 'Power and Justice in International Law', 1 *Singapore Journal of International Law* (1997) 28–68 at 40; Muthu Sornarajah, 'An Overview of the Asian Approaches to International Humanitarian Law', 9 *Australian Year Book of International Law* (1985) 238-244.

<sup>32</sup> On the contribution of Asian scholars to this debate, see generally, Jean d'Aspremont, 'International Law in Asia: the Limits to the Constitutionalist and Liberal Doctrines', 13 *Asian Yearbook of International Law* (2008) 89-111.

<sup>33</sup> Milan Šahović, 'The Concept of International Law at the End of the Twentieth Century', in R.S. Pathak and R.P. Dhokalia (eds.) *Essays in honor of M. Singh* (Martinus Nijhoff: Dordrecht, 1992) 87-93 at 90-93; Milan Šahović, 'Est-il possible de démocratiser le droit international?' in *Liber Amicorum Boutros Boutros Gali* (Bruxelles: Bruylant, 1999), vol. II, 1331-1343, esp. at 1334.

<sup>34</sup> Rein Müllerson, 'On Cultural Differences, Levels of Societal Development and Universal Human Rights' in Jerzy Makarczyk, *Essays in Honour of K. Skubiszewski: Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International: The Hague, 1996) at 931. See also, Rein Müllerson and Vladlen S. Vereschchetin, 'International Law in an Interdependent World', 28 *Columbia Journal of Transnational Law* (1990) 291-300 at 292; Rein Müllerson, 'Human Rights and the Individual as Subject of International Law: A Soviet View', 1 *European Journal of International Law* (1990) 33-43; Rein Müllerson, 'Right to Survival as Right to Life of Humanity', 19 *Denver Journal of International Law and Policy* (1991) 47-53 at 49-50; Rein Müllerson, 'Selfdetermination of Peoples and the Dissolution of the USSR' in MacDonald (ed.), *Essays in Honour of Wang Tiewa*, *supra* note 15, 567-585 at 568.

<sup>35</sup> 'The most importance universal human values are those connected with the resolution of global problems. Diminishing the threat of world war, nuclear catastrophe and the use of force in international relations generally accords with the interests of all peoples and individuals. Similarly, protection of the environment and maintaining ecological security are generally accepted human interests. Social injustice, economic underdevelopment, hunger and disease in the developing world are potentially explosive global problems, the resolution of which is also in the common interest of all nations', Müllerson and Vereschchetin, 'International Law in an Interdependent World', *supra* note 34, at 292; see also Müllerson, 'Right to Survival as Right to Life of Humanity', *supra* note 34, at 50.

<sup>36</sup> Rein Müllerson, 'On Cultural Differences', *supra* note 34, at 946-947.

<sup>37</sup> He has asserted that human rights boil down to a mechanism for 'balancing different interests that surround the right' and has focused on the 'function' of human rights. Yash Ghai, 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims', 21 *Cardozo Law Rev.* (2000) 1095-1102; see also Yash Ghai 'Human Rights and Governance: The Asia Debate', 15 *Australian Year Book of International Law* (1994) 1-34 at 21.

of the international legal scholarship aside, the liberal and constitutionalist visions of the foundations of the international legal order have remained mostly unchallenged.

Without denying the oversimplification inherent to any of the aforementioned categorizations of scholars, this paper is an attempt to question such *Kantian* or *Grotian* conceptions of the international legal order that are conveyed by the liberal and constitutionalist doctrines. It aims at laying out an understanding of the international legal order based on (individual and common) interests rather than global values. Indeed, drawing on the idea that the main tenets of the international legal order are determined by forces underlying international lawmaking, this paper offers an understanding of the international legal order which is stripped of reference to global values and exclusively rests on individual and common interests.

It is acknowledged that the differences between common interests and global values are not always obvious. They can overlap each other; for example, what may constitute a global value can simultaneously serve the interest of all. It should be made clear that this paper does not try to reconsider the role of global values under the guise of common interests. As far as this paper is concerned, common interests, as is explained below, can always be distinguished from global values, since the former are fundamentally relative, context-dependent and ever-evolving. On the contrary, the concept of global values rests on the idea that there is such a thing as an objective truth independent from its factual context of application.<sup>38</sup> It is precisely because this paper assumes that the driving forces of international lawmaking are not immutable and are subject to constant and contingent changes, that it plays down the importance of global values and zeroes in on common interests.

By defending a representation of the international legal order based on interests, this paper will seek to revive a neo-*Hobbesian* vision of the legal order; one that has taken a backseat in contemporary international *legal* scholarship.<sup>39</sup> By reviving a neo-*Hobbesian* approach to the foundations of international law, the paper simultaneously helps modernize international legal positivism in a manner that strips it of the ideological overtones that have classically kindled its critique<sup>40</sup>. Because Hobbes has been perceived as the precursor of so many radically opposite understandings of the international society, it is important to stress that, for the sake of this paper, a

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<sup>38</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press: Oxford, 2006) at 17-19. On this discussion, see *infra*, text accompanying footnotes 73 ff.

<sup>39</sup> For an account of the various traditions of international law, see Bruno Simma and Andreas Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *European Journal of International Law* (1998) 266-277.

<sup>40</sup> For a criticism of the idea that Hobbes has been the precursor of legal positivism, see Sean Coyle, 'Thomas Hobbes and the Intellectual Origins of Legal Positivism' 16 *Canadian Journal of Law and Jurisprudence* (2003) 243-270; see also David Dyzenhaus, 'Hobbes and the Legitimacy of Law' 20 *Law and Philosophy* (2001) 461-498.

Hobbesian understanding of the legal order should not be conflated with the widespread (neo-)realist interpretations of Hobbes<sup>41</sup> and, to that extent, is disparate to the recent work of Jack Goldsmith and Eric Posner.<sup>42</sup> The (neo-)realist school has always centred on the Hobbesian ‘state of nature’ as a breeding ground for the vying for power.<sup>43</sup> Even though it does not deny the overarching importance of self-interests in contemporary lawmaking, this paper distances itself from such (neo-)realist theories. Rather, it seeks a focused conceptualization of Hobbes on the role played by common interests, which is a feature that realists such as Hans Morgenthau<sup>44</sup> or neo-realists like Kenneth Waltz<sup>45</sup> have adamantly disputed. It is argued here that Hobbes, although he might have been ‘guilty of gross and dangerous crudities’,<sup>46</sup> recognized that common interests (and not only individual interests) were playing a role in international relations.<sup>47</sup> In that sense, this paper provides a Hobbesian understanding of the international legal order which significantly borrows from the *rationalist* approach of the English School of international relations as is explained in the first part of this paper.

It is not contested that a growing number of rules serve the public good and, in that sense, they reinforce the public character of international law. Accordingly, the second part of this paper focuses on those rules that allegedly serve the public good in order to demonstrate that they are not resting on any sort of global values but are rather supported by (individual and common) interests. The extent to which our interest-oriented conceptualization of the international legal order contributes to the public character of international law is also examined in this part.

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<sup>41</sup> For a criticism of the neo-realist understanding of Hobbes, see Donald W. Hanson, ‘Thomas Hobbes’ Highway to Peace’, 38 *International Organization* (1984) 329-354.

<sup>42</sup> Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press: Oxford, 2005).

<sup>43</sup> Hans Morgenthau, *Politics Among Nations* (4th edn, Alfred A. Knopf: New York, 1967) at 113.

<sup>44</sup> See the depiction of Realists by Martti Koskenniemi, ‘Image of Law and International Relations’, in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press: Oxford, 2000) 17-34 at 28.

<sup>45</sup> Kenneth Waltz is said to be a neo-realist in the sense that he is not endorsing the conservative and pessimistic analysis of men and favors a more top-down analysis of international relations based on the deficiencies of the international system (whereas Morgenthau, Kennan and Niebuhr construe the behaviour of States as a magnification of the flawed human nature). This said, Neo-Realists yet treat States as self-interested. For an overview of the different strands of realism, see Keith L. Shimko, ‘Realism, Neorealism and American Liberalism’, 54 *The Review of Politics* (1992) 281-301.

<sup>46</sup> George E. G. Catlin, ‘Thomas Hobbes and Contemporary Political Theory’, 82 *Political Science Quarterly* (1967) 1-13.

<sup>47</sup> In the same vein, see Larry May, *Crimes against Humanity: A Normative Account* (Oxford University Press, Oxford, 2005) 14-16. See also Michael C. Williams, ‘Hobbes and International Relations: A Reconsideration’, 50 *International Organization* (1996) 213-236.

It must be acknowledged, however, that the Hobbesian approach offered by the English School of international relations is tinged with a Grotian vision of the world order.<sup>48</sup> It is well-known, for instance, that Hedley Bull has been decisively influenced by Grotius.<sup>49</sup> Although embracing most of the rationalist theory of international relations, this paper ultimately does away with the Grotian overtones of the English School's reading of Hobbes in order to demonstrate the inapplicability of global values in the international legal order. In particular, it is argued here that interests are inherently subjectively contingent and cannot be subject to any objectivization. Interests remain ever changing and their perception is inescapably subject to the context and the position of each individual lawmaker, which in turn arguably condemns the interpreter to a complete relativism. The relativism inherent in the conceptualization of the international legal order offered in this paper is precisely what differentiates an approach based on 'interests' from one resting on 'values' as is explained in the third section.

The latter point means, in philosophical terms, that this paper does not seek to reproduce any 'Nietzschean' moral revolution — to which was alluded above — by replacing one system of values by another in all but name. Seen through this lens, the vision of the international legal order conveyed here is thus rather inspired by the relativism of Heidegger. It should be highlighted, however, that the ultimate aim here is by no means to support any 'incorporation' of the philosophy of Heidegger in the international legal doctrine.<sup>50</sup> The former is far too complex and subtle to constitute a direct means of interpretation for a simple and rudimentary system like international law. Above all, international law, as a system, has a logic of its own and does not need to 'borrow' from other social sciences to ensure its internal coherence<sup>51</sup>. It is precisely by drawing on the logic of that system that this paper seeks to play down the liberal and constitutionalist idea that the international legal order rests on global values and rather to put the emphasis on common interests.

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<sup>48</sup> For a criticism of a moral reading of Hobbes, see Thomas Nagel, 'Hobbes's Concept of Obligation', 68 *The Philosophical Review* (1959) 68-83.

<sup>49</sup> Hedley Bull, *The Anarchical Society* (Macmillan Publishers: London, 1977) at 4-5. On the appeal held by Grotius for Hedley Bull and the discrepancies between the former and the latter, see Benedict Kingsbury, 'A Grotian Tradition of Theory and Practice? Grotius, Law and Moral Skepticism in the Thought of Hedley Bull', 17 *Quarterly Law Review* (1998) 3-33.

<sup>50</sup> See the critical remarks of Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Oxford University Press: Oxford, 2004) at 264-265.

<sup>51</sup> See generally Joseph Raz, *The Concept of Legal System* (Clarendon Press: Oxford, 1980); see also Jean d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's From Apology to Utopia revisited', 19 *Revue québécoise de droit international* (2006) 353-360.

## I. Individual and Common Interests

Even liberals and constitutionalists agree that States first strive to promote their own interests. As States are both primary lawmakers and subjects of international law<sup>52</sup>, they naturally act to maximize the interest of their constituency given their perception of the interests of other States and the distribution of State power.<sup>53</sup> International cooperation first stems from a *convergence* of individual interest, as explained by De Visscher.<sup>54</sup> This convergence entices States to cooperate and create multilateral frameworks for their actions.<sup>55</sup>

One should not bemoan the fact that States primarily seek the satisfaction of their individual interests. Their own interest is not especially that of the State as an independent abstract entity. It may also come down to the interest of the constituent *populis*, whether it is for the sake of their welfare or the more cynical desire to gain their support. One could say that the foregoing is consistent with the essence of *representation*. It could even be argued that, generally speaking, the reinforcement of the liberal democratic structure of governance at the national level, on the heels of the Cold war,<sup>56</sup> has enhanced the tendency for a government to strictly advocate the interest of its people at the international level, especially in international lawmaking.<sup>57</sup>

The conception of the international legal order supported here does not however, rest exclusively on the individual interest of States. Contrary to what (neo-)realist theorists have contended, States are not inherently self-interested.<sup>58</sup> They are sometimes prone to promote the interest of all and not only their pure self-interest.

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<sup>52</sup> Charney, 'Universal International Law', *supra* note 17, at 533.

<sup>53</sup> In that sense, I agree with Goldsmith and Posner that "State interests are not always easy to determine, because the state subsumes many institutions and individuals that obviously do not share the identical preferences and outcomes. Nonetheless, a state — especially one with well-ordered political institutions — can make coherent decisions based upon identifiable preferences, or interest, and it is natural and common to explain state action on the international plane in terms of the primary goal or goals the state seeks to achieve". *Limits of International Law*, *supra* note 39, at 3 and 6.

<sup>54</sup> This is discussed by Charles De Visscher, *Theory and Reality of International Law* (Princeton University Press: Princeton, 1968), at 144-153; see also Goldsmith and Posner, *supra* note 39, at 13, 88-90.

<sup>55</sup> Mohamed Shahabuddeen, 'Developing Countries and the Idea of International Law' in Macdonald (ed.), *Essays in Honour of Wang Tieya*, *supra* note 32, 721-736 at 733.

<sup>56</sup> On democracy in International Law, see Jean d'Aspremont, *L'Etat non-démocratique en droit international: Etude critique du droit positif et de la pratique contemporaine* (Pedone: Paris, 2008).

<sup>57</sup> See generally on the changing constitutional order of the State after the Cold War, Dennis Patterson and Ari Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (Cambridge University Press: Cambridge, 2008). See also Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Knopf: New York, 2002), and the comments of Dennis Patterson, 'The New Leviathan', 101 *Michigan Law Review* (2003) 1715-1732.

<sup>58</sup> Alexander Wendt, *Social Theory in International Politics* (Oxford University Press: Oxford, 2004) at 234.

It is nonetheless true that, in many respects, States accept to promote a common interest because they feel that they will also benefit individually. Such an understanding of the common interest is probably what Niebuhr depicted as the ‘wise’ or ‘enlightened’ self-interest.<sup>59</sup> It is also somewhat similar to Jeremy Bentham’s famous aggregative definition of the public interest.<sup>60</sup> As it has been explained by Myres McDougal and Michael Reisman, ‘the most important “national” interests of a particular state may be its inclusive (“international”) interests with other states’.<sup>61</sup> Friedmann noted that it is ‘possible to work for the strengthening of international law and authority from the standpoint of “enlightened national interest”, as being the best or even the only way of ensuring national survival’.<sup>62</sup> This is what I have elsewhere termed, ‘mutualized interests’.<sup>63</sup>

Even though a common interest may sometimes boil down to a mutualized interest, there are hypotheses where States are truly and genuinely amenable to the interest of all, irrespective of the benefit that they can reap from the rule concerned. It can be argued that States sometimes seek to pursue the general well-being of human beings, wherever the beneficiaries may be located. In these hypotheses, the common interest underlying international lawmaking goes beyond the ‘Benthamian’ aggregate or mutualized common interest and embraces a quest for a general well-being of *individuals*. It is thus not only the interest of all States that is taken into account but also the interests of individuals whose condition will be affected by the measure concerned. This is exactly what has been supported by Yasuaki Onuma<sup>64</sup> through the concept of ‘usefulness’. The protection of human beings or of the environment, as will be explained later, both constitute good examples of ‘useful’ rules

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<sup>59</sup> Quoted by Robert C. Good, ‘The National Interest and Political Realism: Niebuhr’s ‘Debate with Morgenthau and Kennan’, 22 *The Journal of Politics* (1960) 597-619 at 601.

<sup>60</sup> See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns and H.L.A. Hart, eds, Athlone Press: London, 1970) at 12: ‘The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what? — the sum of the interest of the several members who compose it’. Bentham’s conception of the public interest as a “sum-of-particular-interests” has usually been criticized for failing to distinguish private interests from the welfare of the community and leaving no room for the interest of society. For a rehabilitating understanding of Bentham, see J.A.W. Gunn, ‘Jeremy Bentham and the Public Interest’, 1 *Canadian Journal of Political Science* (1968) 398-413.

<sup>61</sup> Myres S. McDougal and Michael Reisman, ‘The Changing Structure of International Law’, 65 *Columbia Law Review* (1965) 810-835 at 813. See also Simma, ‘From Bilateralism to Community Interest’, *supra* note 7, at 242.

<sup>62</sup> Friedmann, *The Changing Structure of International Law*, *supra* note 26, at 48.

<sup>63</sup> Jean d’Aspremont, ‘Contemporary Rulemaking and the Public Character of International Law’, *Institute for International Law and Justice Working Papers Series* 2006/12.

<sup>64</sup> Yasuaki Onuma, ‘In Quest for Intercivilizational Human Rights’, *supra* note 28, at 76-77.

in that sense.<sup>65</sup> It is important to stress that the common interest in these hypotheses cannot be conflated with a value in disguise. Indeed, the well-being of individuals, as will be explained, is subject to continuous reappraisal and is fundamentally relative, making it alien to objective determination. The common interest construed in terms of ‘usefulness’ remains void of any value-related overtones. The examples that will be provided in section II will help support that assertion.

It must be pointed out at this stage that an understanding of the legal order as based on interests rather than global values is not conceptually incompatible with the existence of an *international society*. Common interests may be those of the international society. This is in line with a *functional* conception of the international society as the one developed by thinkers of the rationalist English school of international relations like Hedley Bull.<sup>66</sup> In such a society, rules can emerge because they are of *mutual benefit* and States cooperate because of the possibility of gains (*for all and for themselves*).<sup>67</sup> The imprint of Hedley Bull’s thought on this paper does however not stretch any further, as Bull himself did not rule out the existence of ‘a consensus about common interest and global *values* that provides the foundations of its common rules and institutions’.<sup>68</sup> As was made allusion to earlier, the minimal conception of international lawmaking advocated in this paper leaves little room for the *Grotian* understanding of the international society as a moral project.<sup>69</sup>

Although the understanding of the international society found here is rather minimal, it is not incompatible with the conception that pervades the famous and influential work of Alexander Wendt, according to whom the existence of an ‘international society’ requires a degree of ‘cultural unity among its members’.<sup>70</sup> An ‘international society’ thus presupposes some form of global identification, that is, a sense of being a group (‘we’). Provided that they share this ‘feeling’, States can seek the welfare of the group.<sup>71</sup> But such a common identification is not necessarily the

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<sup>65</sup> Liberals have made a similar argument. See for instance, Henkin, *Politics and Values*, *supra* note 18, at 284.

<sup>66</sup> Bull, *The Anarchical Society*, *supra* note 46 at 4-5.

<sup>67</sup> Andrew Hurrell, ‘Society and Anarchy in the 1990s’ in B.A. Robertson (ed.), *International Society and the Development of International Relations Theory* (Pinter: London, 1998), at 20-21.

<sup>68</sup> Bull, *The Anarchical Society*, *supra* note 46, at 315-316.

<sup>69</sup> See Hersch Lauterpacht, ‘The Grotian Tradition in International Law’, 23 *British Year Book of International Law* (1946) 1-53 at 28, 30-35.

<sup>70</sup> Martin Wight, ‘Western Values in International Relations’ in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations* (Allen and Unwin: London, 1966) at 33.

<sup>71</sup> Wendt, *Social Theory in International Politics*, *supra* note 55, at 242, 337. See Bull who argues that 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 of themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions’. *The Anarchical Society*, *supra* note 46, at 13.

reflection of any global value. Common identification simply means that the unit on the basis of which States assess their action (and its impact) is the group.<sup>72</sup> If States accordingly feel that they belong to a group whose interests should also be promoted, they remain inspired by interests, not by global values. It can therefore be contended that the understanding of the international legal order that is carved in this paper is not incompatible with the concept of international society as devised by many international relations theorists.

The neo-Hobbesian view of the international legal order offered in this paper greatly relies on the role played by common interests in international lawmaking, a feature that differentiates the approach of this paper from a mere (neo-)realist account of rulemaking. The next section explains the role played by common interests in contemporary lawmaking with a view of demonstrating that international law can serve the public good without necessarily being the manifestation of any global value.

## II. Common Interests in International Lawmaking and the Public Character of International Law

According to the prevailing European and positivist tradition against the backdrop of which the idea of international law was carved, international law boiled down to a set of rules *established by* public entities *to regulate relations between* public entities.<sup>73</sup> In that sense, international law was undoubtedly public. This aspect of the public character of international law was rarely highlighted during the early stages of its development as scholars only resorted to the expression *jus gentium* (law of nations).<sup>74</sup> Back then, the explicit mention of the public character of international law was somewhat idle since international legal rules only applied to relations between States. It was however before the emergence of a body of rules applying to international relations between individuals — that is private international law<sup>75</sup> — that the expression ‘public international law’ was created. In the wake of the Osnabrück and

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<sup>72</sup> Wendt, *Social Theory in International Politics*, *supra* note 55, at 337.

<sup>73</sup> Truyol Y. Serra, ‘Théorie du droit international public’, 173 *Collected Course* (1981-IV) 9-443 at 32. On the eclectic character of States as public entities, see Robert D. Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’, 42 *International Organizations* (1988) 427-460; Kurt T. Gaubatz, ‘Democratic States and Commitment in International Relations’, 50 *International Organizations* (1996) 108-139.

<sup>74</sup> Some authors like Suarez, Zouche or even Francisco de Vitoria, sporadically used the expression of *jus inter gentes*.

<sup>75</sup> Edvard Hambro, ‘Some Remarks on the Relations between Public International Law and Private International Law’, 39 *Journal de droit international* (1962) 613-637.

Münster peace treaties, the public aspect of international law was already adverted through the expression *Droit public de l'Europe* (Public Law of Europe).<sup>76</sup> When Bentham first coined the expression 'international law' in the preface of his *Introduction to the Principles of Morals and Legislation*,<sup>77</sup> there was, however, no hint at its public character. The 1802 translation by Etienne Dumont<sup>78</sup> for the very first time mentions the public character of international law with the help of the expression 'Droit International *Public*', which is a direct reference to the authors and subjects of international law. This aspect of the public character of international law is nowadays taken for granted and uncontested. In the Anglo-Saxon<sup>79</sup> and German<sup>80</sup> legal scholarship, the shorthand 'international law' is often preferred to 'public international law' although they do not dispute that international law is public. Only the French legal scholars continue to systematically resort to the expression 'public international law'.

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<sup>76</sup> Abbé de Mably, *Droit public de l'Europe fondé sur les traités conclus jusqu'en l'année 1740* (5th ed, Genève, 1748) at 1776. For a critical approach of the European origins of International Law, see Alexander Orakhelashvili, 'The Idea of European International Law', 17 *European Journal of International Law* (2006) 315-347.

<sup>77</sup> In a footnote, he stated: "The word *international* it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express in a more significant way, the branch of the law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to international jurisprudence. The chancellor D'Aguesseau has already made, I find, a similar remark: he says, that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens*'. Bentham, *Principles of Morals and Legislation*, *supra* note 60, at 296.

<sup>78</sup> Etienne Dumont has really transformed Bentham's labyrinthine manuscripts into coherent works: David Lieberman, 'From Bentham to Benthamism', 28 *The Historical Journal* (1985) 199-224, at 201. See also Ernest Nys, 'The Codification of International Law', 5 *American Journal of International Law* (1911) 871-900, esp. at 872, 876.

<sup>79</sup> Malcolm N. Shaw, *International Law* (Oxford University Press: Oxford, 2003); Malcolm D. Evans (ed.), *International Law* (Oxford University Press: Oxford, 2003); Martti Koskenniemi (ed.), *International Law* (New York University Press: New York, 1992); Antonio Cassese, *International Law* (Oxford University Press: Oxford, 2005); Richard K Gardiner, *International Law* (Longman: London, 2003); John O'Brien, *International Law* (Cavendish: London, 2001); Daniel P. O'Connell, *International Law* (Stevens: London, 1970); Barry E. Carter, Phillip R. Trimble, *International Law* (Little Brown: Boston, 1991); Georg Schwarzenberger, *International Law* (Stevens: London, 1957-1986); David J. Harris, *Cases and Materials on International Law* (Oxford University Press: 2004). But see Ian Brownlie, *Principles of Public International Law* (Oxford University Press: Oxford, 2003).

<sup>80</sup> Whether they resort to the expression 'Völkerrecht' or 'Internationales Recht', German authors do not mention the public character of International Law. See for instance, Alfred Verdross, *Völkerrecht* (Springer: Wien, 1964); Ignaz Seidl-Hohenveldern, *Völkerrecht* (C. Heymann: Köln, 1965). See generally, the *Jahrbuch für Internationales Recht* (German Yearbook of International Law) or the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law).

<sup>81</sup> See among others Joe Verhoeven, *Droit international public* (Larcier: Brussels, 2000); Alain Pellet & Patrick Daillier, *Droit international public* (LGDJ: Paris, 2002); Jean Combacau & Serge Sur, *Droit international public* (Montchretien: Paris 2004); Pierre-Marie Dupuy, *Droit international public*, (Daloz: Paris,

The public character of international law not only rests on its being a set of rules between public entities.<sup>82</sup> Nowadays, there is a growing consensus that the public character of international law can also be traced back to its promoting the public good.<sup>83</sup>

While the idea is uncontested that international rules may promote the public good, interpretations as to what constitutes the international public good vary. This is precisely where the conception of the international legal order supported here conflicts with the constitutionalist and liberal value-oriented theories. To illustrate the argument developed here, four categories of rules that arguably serve the public good are examined with a view to demonstrating that their adoption is not premised on global values but rests upon common interests. Mention will be made of rules that pertain to the preservation of peace (a), the efficiency of the international system (b), the protection of the environment (c), and the protection of human beings

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2002); Denis Alland (ed.), *Droit international public* (Presses Universitaires de France: Paris, 2000); Hubert Thierry, *Droit international public* (Montchrestien: Paris, 1986); Charles Rousseau, *Droit international public* (Dalloz: Paris, 1987); David Ruzié, *Droit international public* (Dalloz: Paris, 1987); Delphine Emmanuel Adouki, *Droit international public* (L'Harmattan: Paris, 2002); Pierre Vellas, *Droit international public: institutions internationales: méthodologie, historique, sources, sujets de la société internationale, organisations internationales* (R. Pichon et R. Durand-Auzias: Paris, 1967). Likewise, see one of the most prominent French journals devoted to International Law, the *Revue générale de droit international public*, <www.rgdip.com>.

<sup>82</sup> Although modern international law goes beyond mere State interaction through the classical diplomatic channels, international law remains public and is still made by public entities to regulate their interaction. Indeed, the increased presence of national entities in international lawmaking — for instance through the rise of ‘transnational law’ or ‘governmental networks’ — has not undermined the idea that international law is a product of public entities. The growing role played by non-state actors on the international level does not fault this idea either. These new actors are not endowed with any rulemaking power. They rather wield ample pressure on public entities which remain the ultimate law-makers. See Philip C. Jessup’s concept of *Transnational Law* (Yale University Press: New Haven, 1956); Myres McDougal, ‘International Law, Power and Policy: A Contemporary Conception’, 82 *Collected Course* (1953) 113-259 at 137. For more recent developments, see, among others, Anne-Marie Slaughter, ‘The Real New World Order’, 76 *Foreign Affairs* (1997) 183-197; David Zaring, ‘Informal Procedure, Hard and Soft, in International Administration’, 5 *Chicago Journal of International Law* (2005) 547-603; Benedict Kingsbury, ‘Sovereignty and Equality’, 9 *European Journal of International Law* (1998) 611-613. On International Law as a multilateral institution see John G. Ruggie, ‘Multilateralism: The Anatomy of an Institution’, 46 *International Organizations* (1992) 561-598 at 568-574. See Anne-Marie Slaughter, ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’, 24 *Michigan Journal of International Law* (2003) 1041-1076; ‘Accountability of Government Networks’, 8 *Indian Journal of Global Legal Studies* (2001) 347-367; David Zaring, ‘Informal Procedure, Hard and Soft, in International Administration’, 5 *Chicago Journal of International Law* (2005) 547-603.

<sup>83</sup> Simma, ‘From Bilateralism to Community Interest’, *supra* note 7. See also Benedict Kingsbury, ‘The Problem of the Public in Public International Law’, paper presented at New York University — School of Law for the Colloquium in Legal, Political and Social Philosophy organized by and under the auspices of Thomas Nagel and Ronald Dworkin (October 20, 2005); See also d’Aspremont, ‘Contemporary Rulemaking’, *supra* note 63.

(d). Finally, a few remarks will be formulated on those rules that belong to the international public order (e).

In examining the driving forces underpinning lawmaking in each of these areas, it will be shown that the common interests upon which a certain number of these norms rests outstrip the classical ‘Benthamian’ aggregated interest as it encompasses a quest for the general well-being. In that sense, the argument will draw upon the insightful as well as pragmatic concept of ‘usefulness’ circulated by Yasuaki Onuma.<sup>84</sup> This notion will prove especially decisive when one comes to explain international lawmaking in the area of human rights. Although the meaning of the concept of usefulness will reveal itself in the examples provided below it is important to stress at this stage that a rule will be ‘useful’ in the abovementioned sense when, in a way or another, it brings about an actual *improvement of the factual condition of individuals*. The contribution to the well-being of individuals by a rule is thus gauged here in very pragmatic terms. This is why lawmaking, when it is explained through a conception of the common interest based on the idea of usefulness, remains value-free and can be accommodated in the neo-Hobbesian vision of the international legal order defended in this article.<sup>85</sup>

#### a) Rules pertaining to the preservation of peace

It is not much disputed that peace constitutes a public good and that rules related to the preservation of peace serve a common interest. Those rules, as R. P. Anand has explained,<sup>86</sup> do not reflect merely any value but rest on a mutualization of interests as previously defined. The prohibition of the use of force is probably the embodiment of this type of rule. States may have consented to the said rule for self-serving reasons. Indeed, States, whatever their power and their clout, seem to believe that the scourge of war can, in a way or another, be detrimental to them and their own population. Small nations which were not backed by any major power must probably have construed the rule prohibiting the use of force primarily as a means to protect themselves against greater powers. In that sense, the rules pertaining to the use of force reflect the interests of the weaker States.<sup>87</sup> Major powers — whose might

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<sup>84</sup> Yasuaki Onuma, ‘In Quest of Intercivilizational Human Rights’, *supra* note 28, at 53.

<sup>85</sup> The foregoing does not mean that Yasuaki Onuma must himself be portrayed as a neo-Hobbesian. It is simply that his insightful notion of ‘usefulness’ of human rights law is exactly in line with the value-free account of the international legal order advocated here.

<sup>86</sup> Ram Prakash Anand, ‘Attitude of the Asian-African States towards Certain Problems of International Law’, 15 *International and Comparative Law Quarterly* (1996) 55-75, esp. at. 75.

<sup>87</sup> Hurrell, ‘Society and Anarchy in the 1990s’, *supra* note 64, at 20. See also Friedmann, *The Changing Structures of International Law*, *supra* note 24, at 32-35, or Shahabuddeen, ‘Developing Countries and the Idea of International Law’, *supra* note 52, at 722.

can deter other powers from threatening them — probably realized that their power could wane or be insufficient to prevent armful actions against them. Likewise, they have most likely understood that violence on the international level that is geographically remote from them can also impinge on their prosperity and the wealth of their population.<sup>88</sup> Those rules can also serve a common interest which goes beyond the abovementioned mutualized interests of States. These rules can be ‘useful’ in the sense described above. Indeed, there are some weighty reasons to believe that States also agreed to relinquish their right to resort to force to promote the welfare of all. The global consensus on the general prohibition of the use of force can thus be conceived without resort to any global value.<sup>89</sup>

Rules pertaining to peaceful dispute settlement mechanisms are intertwined with the prohibition to use force. The settlement of a dispute certainly serves the interest of the States involved in the dispute.<sup>90</sup> As Anand explained, one of the strictly individual interests that it promotes relates to the confidence-building effect that a commitment to a binding dispute settlement mechanism conveys.<sup>91</sup> But these rules also promote a common interest in that they bolster international peace. These rules are not adopted on the basis of any value (like an idea of corrective ‘justice’). They aim at preventing or toning down international disputes whose fallout could be harmful to all States.<sup>92</sup>

The situation of mixed dispute settlement mechanisms whereby standing is granted to individuals may be different. Indeed, monitoring bodies like the European Court of Human Rights or the Human Rights Committee — to name only a few — are not primarily aiming at the maintenance of peace but rather at ensuring the respect for human rights. The same can be said as regards the international criminal law enforcement mechanisms which ensure compliance with international

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<sup>88</sup> See for instance the reactions and speeches formulated on the occasion of the 60th anniversary of the International Court of Justice, available at <[www.icj-cij.org/60/index.htm](http://www.icj-cij.org/60/index.htm)>.

<sup>89</sup> Such a view is, for instance, supported by Asian governments: see the statement by Mr. V.K. Mambiar, Permanent Representative on Non-Proliferation of Weapons of Mass Destruction at the Security Council on April 22, 2004, available at <[www.un.int/india](http://www.un.int/india)>: ‘We believe that meeting new proliferation challenges requires fresh approaches, pooling together the efforts and resources of the international community. In the 1992 Security Council Summit on Non-proliferation, in which India participated, we had called for a new international consensus on non-proliferation. We renew that call today, with the hope that our endeavors will spur common efforts for mutual benefit and in the interests of a safe and secure world’.

<sup>90</sup> Thomas Hobbes, *Leviathan*, chapter 13.

<sup>91</sup> Ram Prakash Anand, ‘Role of the ‘New’ Asian-African Countries in the Present International Legal Order’, 56 *American Journal of International Law* (1962) 383-406 at 403.

<sup>92</sup> See Bhagevatula Satyanarayana Murty, *Diplomacy and Resolution of International Disputes*, cited by Pemmaraju Sreenivasa Rao, ‘General Principles of International Law and India’ in Bimal N. Patel (ed.), *India and International Law* (Nijhoff: Leiden, 2005) 33-65 at 64.

criminal law.<sup>93</sup> These mechanisms thus seek to shore up the protection of human beings, which, as is explained below, corresponds to common interests.

Eventually, rules regarding disarmament call for a few remarks, for some could contend that they probably fall into the same category. This is well illustrated by the Treaty on the Southeast Asia Nuclear Weapon-Free Zone that reflects the desire of Southeast Asian States to maintain peace and stability in the region.<sup>94</sup> To a certain extent, these rules can be seen as a means to bolster the peace as they restrict the means available to States to wage war at each other. But it could even be argued that disarmament treaties only serve self-interests of States and are alien to any common interest. When agreeing on a curtailment of their weaponry, States rather want a constraint to be imposed upon the other parties' powers. In so doing, one could argue that they can be seen as trying to cut back the cost of their own weaponry. The purpose of insuring a safer world or enhancing peace by limiting weaponry is accordingly not necessarily their overriding concern.<sup>95</sup> Be that as it may, these rules are not created following the belief of States concerned in any sort of global values. They originate in their (in this situation, individual) interests. It would be exaggerated to deem them directed at the well-being of all.

## b) Rules pertaining to the efficiency of the entire system

The international legal order is replete with rules that ensure the stability, the efficiency, and the predictability of inter-State relations.<sup>96</sup> So are the rules pertaining to the diplomatic or consular relations for instance.<sup>97</sup> The same conclusion probably

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<sup>93</sup> As regards the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, see in general Philippe Sands, Ruth Mackenzie, Yuval Shany, *Manual on International Courts and Tribunals* (Butterworths: London, 1999) at 253-300. See also William A. Shabas, *An Introduction to the International Criminal Court*, (2<sup>nd</sup> ed., Oxford University Press: Oxford, 2004).

<sup>94</sup> Robert C. Beckman, 'South East Asia and International Law — I. Treaty on the Southeast Asia Nuclear Weapon-Free Zone', 1 *Singapore Journal of International and Comparative Law* (1997) 414-420.

<sup>95</sup> One could even argue that weapons do not necessarily hamper the peace but can, under some circumstances, buttress it — as illustrated by the Cold War's policy of mutual assured destruction (MAD). See Colin S. Gray, 'Nuclear Strategy: The Case for a Theory of Victory', 4 *International Security* (1979) 54-87; Raymond L. Garthoff, 'On Mutual Deterrence: A Reply to Donald Brennan', 3 *International Security* (1979) 197-199; Horst Afheldt and Philipp Sonntag, 'Stability and Deterrence through Strategic Nuclear Arms', 10 *Journal of Peace Research* (1973), Special Issue: Peace Research in the Federal Republic of Germany, 245-250; Robert J. Art, 'Between Assured Destruction and Nuclear Victory: The Case for the 'Mad-Plus' Posture', 95 *Ethics* (1985), Special Issue: Symposium on Ethics and Nuclear Deterrence, 497-516; Michael McCaules, 'Machiavelli and the Paradoxes of Deterrence', 14 *Diacritics* (1984) 11-19.

<sup>96</sup> Charney, 'Universal International Law', *supra* note 14, at 532.

<sup>97</sup> See Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, in force 24 April 1964, 500 *United Nations Treaty Series* 95, and Vienna Convention on Consular Relations of 24 April 1963, Vienna, in force 19 March 1967, 596 *United Nations Treaty Series* 261, esp. their preambles. See also *Arrest War-*

applies to the rules providing immunity to heads of State and government.<sup>98</sup> On the one hand, there is little doubt that these rules serve a common interest as explained by the International Court of Justice in the *Diplomatic and Consular Staff* case<sup>99</sup> in that they help keep the international system working (for instance by ensuring the protection of high-ranking representatives). On the other hand, it can be argued that these types of rules merely stem from the individual interest of each State to ensure predictability and stability of international relations. In that sense, they originate in the aggregation of each States' individual interest, for each State is interested in having its high-ranking representatives protected. It is argued here that, whether they serve individual or common interests, they are not based on global values.

The same conclusion must be drawn as regards to the rules of the law of treaties. The Vienna Conventions on the Law of Treaties contain rules that can also be seen as dedicated to a better functioning of the entire system. Considering 'the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems',<sup>100</sup> it could be contended that the 1969 Vienna Convention on the Law of Treaties for instance 'promote[s] the purposes of the United Nations [as] set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations'.<sup>101</sup> The codification of the law of treaties is also a means to reduce the legal uncertainty which previously crippled international conventional relations.<sup>102</sup> In that sense, the Vienna Convention has clarified various aspects of the conventional rela-

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*rant (Congo v. Belgium)*, ICJ Reports (2002) 3 at 21, para. 52. On the interests underlying diplomatic privileges and immunities, see Henkin, *Politics and Values*, *supra* note 18, at 170.

<sup>98</sup> *Arrest Warrant (Congo v. Belgium)*, ICJ Reports (2002) 3 at 21-22, para. 53. On this case, see Jean d'Aspremont and Frédéric Dopagne, 'La loi de compétence universelle devant la Cour internationale de justice (aff. République démocratique du Congo c. Belgique)', 13 *Journal des Tribunaux* (2002) 282-288.

<sup>99</sup> *Diplomatic and Consular Staff in Tebran (United States of America v. Iran)*, ICJ Reports (1980) 3, at 43 para. 92: '[The violation by Iran of its obligation under the Vienna Convention on Diplomatic Relations due to the United States] cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected'.

<sup>100</sup> See preambles: Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331, and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 21 March 1986, not yet in force, Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II.

<sup>101</sup> *Ibid.*

<sup>102</sup> Goldsmith and Posner, *The Limits of International Law*, *supra* note 39, at 95-98.

tionships ranging from elaboration to termination. For these reasons, it can be submitted that the adoption of a set of rules regulating treaties has rested on interests, not on global values.

The rules of State responsibility fall under the same category.<sup>103</sup> Like the rules of the Vienna Convention on the Law of Treaties, rules pertaining to international responsibility — and, probably, all secondary rules of international law<sup>104</sup> — have been adopted to satisfy the same sort of interests as they provide legal clarity as regards the consequences of a breach.<sup>105</sup> The need of all States for legal clarity and legal security together with the interest in the efficient running of the whole legal system constitute the prime motivation for adopting these rules. For these reasons, it is contended here that these rules fall short of enshrining any global value.

The rules pertaining to the efficiency of the system are thus based on interests and not global values. The extent to which they are ‘useful’ and serve a global well-being is, however, not so obvious. It is not even certain that this idea has supported lawmaking in these areas. These rules are mostly prodded by classical common interests. However, there is little doubt that an efficient and stable legal system capable of providing legal certainty, in a way or another, fosters the well-being of all. While this may thus not be the primary concern of the lawmakers, mention of these rules must still be made here given their potential usefulness.

### c) Rules pertaining to the protection of the environment

It is commonplace to assert that rules pertaining to the protection of the environment serve a common interest. Such a belief is probably too all-embracing as there may be some environmental treaties that serve only individual interests of States. For instance, those rules dedicated to the prevention of the deterioration of a State’s environment by activities taking place outside the limits of its jurisdiction do not necessarily aim at the promotion of a common interest. Some of them are aimed at averting ‘transfrontier pollution’ as illustrated by the Convention on Long-range Transboundary Air Pollution of 13 November 1979.<sup>106</sup> Instruments of that kind are understood as protecting States themselves. Such situations where environmental lawmaking is driven by individual interests are rather limited. It is true that the most

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<sup>103</sup> Charney, ‘Universal International Law’, *supra* note 14, at 532.

<sup>104</sup> See Jean Combacau and Denis Alland, ‘Primary and Secondary Rules in the Law of State Responsibility’, 16 *Netherlands Yearbook of International Law* (1985) 81-109.

<sup>105</sup> See, for instance, Roberto Ago, *First Report on State Responsibility*, UN Doc., A/CN.4/217 and Corr.1 and Add.1 (7 May 1969 and 20 January 1970).

<sup>106</sup> Alexandre Kiss, ‘The International Protection of the Environment’ in Ronald McDonald and Douglas M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff: The Hague, 1983) 1069-1093 at 1071.

cynical view could also support that lawmaking in the field of environmental law is also a way in which States satisfy their constituency in alleviating the fears that life on the planet be hindered.<sup>107</sup> This does however not seem to suffice to explain lawmaking in this area.

It is anticipated that the idea that common interests lie behind environmental lawmaking will not prove very controversial. For the sake of this paper, it is more thought-provoking to note that the common interest that these treaties usually serve goes beyond the Benthamian common interest. It is contended here that they serve a common interest that embraces the well-being of all individuals. In that sense, it is argued that the rules pertaining to the protection of the environment are 'useful'. Indeed, States are amenable to the survival of mankind. States deem it in their interest, and in that of their governments and their peoples, that mankind is preserved. This is why environmental lawmaking can be depicted, as is explained by M. Sornarajah,<sup>108</sup> in terms of 'advantages'.

To illustrate the idea that environmental law serves individual and common interests rather than global values as well as the well-being of all, one could think of the protection of endangered fauna and flora<sup>109</sup> or the protection of cultural heritage in time of peace.<sup>110</sup> It is hard to infer any global value from these sets of rules. Even the regulation of outer space,<sup>111</sup> moon,<sup>112</sup> Antarctic,<sup>113</sup> seabed,<sup>114</sup> ozone layer,<sup>115</sup> and

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<sup>107</sup> See the comments of Bernard H. Oxman on the occasion of the International Symposium of the Kiel Walther-Schücking-Institute of International Law, March 1996, reproduced in Delbrück and Heinz (eds), *New Trends in International Lawmaking*, *supra* note 6, at 112.

<sup>108</sup> Sornarajah, 'Power and Justice in International Law', *supra* note 29, p. 38.

<sup>109</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, in force 1 July 1975, <[www.cites.org](http://www.cites.org)>; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, <[www.cms.int](http://www.cms.int)>.

<sup>110</sup> UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage, Paris, 23 November 1972, in force 17 December 1975, 1037 *United Nations Treaty Series* 151.

<sup>111</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, London, Moscow and Washington, 27 January 1967, in force 10 October 1967, 610 *United Nations Treaty Series* 205. See Shri C. Jayaraj, 'The Law of Outer Space and India' in Patel (ed.), *India and International Law*, *supra* note 92, \_ 265-288 at 265.

<sup>112</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 18 December 1979, into force 11 July 1984, 1363 *United Nations Treaty Series* 3, Article 4: 'The exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations'.

<sup>113</sup> Antarctic Treaty, Washington, 1 December 1959, in force 23 June 1961, 402 *United Nations Treaty Series* 71 and Protocol on Environment Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, 30 *International Legal Materials* 1461. See Joe Verhoeven, Philippe Sands and Maxwell Bruce, *The Antarctic Environment and International Law* (Graham & Trotman, London, 1992); M.

Kyoto protocol regimes<sup>116</sup> are not value-oriented.<sup>117</sup> They only protect those areas that States believe should be left free of any appropriation and exploitation. It is of course always difficult to capture all intentions underlying a given norm.<sup>118</sup> However, it is fair to surmise that the reason why States want to keep these areas untouched revolves less around any sort of global values, than around the idea that preserving their ecosystems amounts to the protection of humanity, and the belief of greater scientific benefit in the future. The protection of these areas can also boil down to the impossibility of an equitable apportionment among them.

If one considers the Kyoto Protocol's regime in particular,<sup>119</sup> it could also be argued that States agree to curb their CO<sub>2</sub> emissions because they acknowledge climate change is a global threat. Even though some States would probably be more affected by it than others, all States recognize that curbing climate change serves the interest of all, including individual interests. In doing so, they are not driven by any sort of global value. They just follow what they perceive to be in the interest of all, including their own and that of their population.

The same is true for the seabed provisions of UNCLOS. States agreed that the resources of the seabed are 'the common heritage of mankind'<sup>120</sup> and that 'the activities in the Area should be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked'.<sup>121</sup> It has been reaffirmed 'that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction ... are the common heritage of mankind' and that 'the importance of the Convention for the protection and preservation of the marine environment and of the growing concern for the global environment' does in no way imply that global values have constituted the driving forces of these ground-

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C. W. Pinto, 'The International Community and Antarctica', 33 *University of Miami Law Review* (1979) 475-487; M. C. W. Pinto, 'Governance in Antarctica' in MacDonald (ed.), *Essays in Honour of Wang Tieya*, *supra* note 15, 587-609.

<sup>114</sup> See The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 499 *United Nations Treaty Series* 311, part. IX.

<sup>115</sup> Vienna Convention for the Protection of the Ozone Layer, Vienna., 22 March 1985, in force 22 September 1988, 26 *International Legal Material* 1529.

<sup>116</sup> See Arvid Pardo and Carl Q. Christol, 'The Common Interest: Tension Between the Whole and the Parts' in McDonald and Johnston (eds.), *The Structure and Process of International Law*, *supra* note 106, 643-660, at 647.

<sup>117</sup> Oxman, 'The International Commons, The International Public Interests and New Modes of International Law Making', in Delbrück and Heinz (eds.), *New Trends in International Lawmaking*, *supra* note 6, 30-33.

<sup>118</sup> See Jan Klabbbers, 'The Meaning of Rules', 20(3) *International Relations* (2006) 295-301.

<sup>119</sup> All documents are available at <unfccc.int>.

<sup>120</sup> Article 136 UNCLOS, *supra* note 111.

<sup>121</sup> Article 140 UNCLOS, *supra* note 111.

breaking regulations.<sup>122</sup> It is the perception that it was in the interest of all States as well as in the interest of individuals, and not at all for the sake of any global values, that States have promoted the international protection of the seabed.<sup>123</sup>

#### d) Rules pertaining to the protection of human beings

The idea that international lawmaking rests on the promotion of global values has probably never been as present as in contemporary legal literature pertaining to international human rights law and international humanitarian and criminal law.<sup>124</sup> As has already been explained, this paper argues that international lawmaking is based on individual and common interest and not on values.

It must first be acknowledged, however, that individual interests may play a significant role in international human rights lawmaking. Mention can be made of the neo-realist understanding of human rights lawmaking. For Goldsmith and Posner, human rights serve the individual interests of liberal (Western) States for they are instruments to impose ‘codes of conduct’ and coordinate ‘standards of civilization’. They can also foster the individual interest of non-liberal States as they allow to determine which behaviour will be rewarded or punished by Western liberal States.<sup>125</sup> For non-liberal States, they can constitute a means to unambiguously signal that they are engaged in a phase of transition from authoritarianism to liberal democracy.<sup>126</sup>

The role of individual interests in international lawmaking can also be explained by reference to the famous theory of Andrew Moravcsik. He construes human rights as the result of instrumental calculations about domestic policies. Drawing on the experience of postwar European democratization, Moravcsik argues that States are ready to relinquish a part of their sovereignty by adhering to a human rights regime in order to constrain the behaviour of subsequent domestic governments.<sup>127</sup> Applying his theory beyond the European framework, he claims that

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<sup>122</sup> See the preamble of the Agreement relating to the implementation of Part XI of UNCLOS, *supra* note 111, available at : <[www.un.org/depts/los/convention\\_agreements/texts/unclos/closindxAgree.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindxAgree.htm)>.

<sup>123</sup> See Shigeru Oda, ‘Some Reflections on Recent Developments in the Law of the Sea’, 27 *Yale Journal of International Law*. (2002) 217-221 at 219-220.

<sup>124</sup> See for instance the liberal theories of international law mentioned in the introduction. See also instance Judge Hisashi Owada, ‘Some Reflections on Justice in a Globalizing World’, 97 *American Society of International Law Proceedings* (2003) 181-190 or Alex Y. Seita, ‘Globalization and the Convergence of Values’, 30 *Cornell International Law Journal* (1997) 429-491.

<sup>125</sup> Goldsmith and Posner, *The Limits of International Law*, *supra* note 49, 128-130.

<sup>126</sup> *Ibid.*, at 131.

<sup>127</sup> Andrew Moravcsik, ‘The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54 *International Organization* (2000) 217-252, esp. 220; See also Terry Moe, ‘Political Institu-

newly established democracies use human rights regimes – in the broad sense – to ‘lock in’ credible domestic policies through international commitments.<sup>128</sup> Moravcsik’s theory is certainly not ill-founded and may explain part of the enthusiasm of governments for legal regimes that restrict their freedom. It is argued here that Moravcsik’s theory is however insufficient to explain all the motives lurking behind human rights lawmaking.

Other sorts of individual interests may constitute an enticement to make law in the area of human rights at the international level. For instance, States may be induced to make, sign and ratify human rights conventions simply because of the image conveyed by these instruments. In an era where democracy and human rights are among the significant criteria of ‘good governance’,<sup>129</sup> there is little doubt that refusing to adhere to the major human rights conventions makes a State run the risk of being tagged as pariah on the international level and of undermining the international legitimacy of its government.<sup>130</sup> This is why it is plausible that some States, classically reluctant to be bound by that kind of rules, will finally consent to them in order not to be labelled in such a way. It could also be said that lawmaking in the area of human rights is sometimes driven by economic calculations as human rights brings about significant economic benefits.<sup>131</sup> Likewise, as has been defended by Yash Ghai, it can be argued that human rights provide a workable framework for negotiating political and constitutional settlements of disputes as well as conflict prevention strategies.<sup>132</sup> Abuse of individual rights can also shock the conscience of each States’ population which may feel uncomfortable with the view of blatant vio-

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tions: The Neglected Side of the Story’, 6 *Journal of Law, Economics and Organizations* (1990) 213-253 at 227.

<sup>128</sup> Moravcsik, ‘The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe’, *supra* note 124, at 220.

<sup>129</sup> d’Aspremont, *L’Etat non démocratique en droit international*, *supra* note 53, pp. 39-50.

<sup>130</sup> Brad Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000); see Jean d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’, 38 *NYU Journal of International Law & Politics* (2006) 877-918; See also d’Aspremont, *L’Etat non démocratique et le droit international*, *supra* note 53.

<sup>131</sup> See generally David Law, ‘Globalization and the Future of Constitutional Rights’, 102 *Northwestern University Law Review* (2008) (forthcoming); see also Ernst-Ulrich Petersmann, ‘Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration’, 13 *European Journal of International Law* (2002) 621-650. *Contra* Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade law: A Reply to Petersmann’, 13 *European Journal of International Law* (2002) 815-848; see also the criticisms of Holning Lau, ‘Human Rights and Globalization: Putting the Race to the Top in Perspective’, *Northwestern University Law Review Colloquy*, available at <colloquy.law.northwestern.edu>.

<sup>132</sup> See Yash Ghai, ‘Universalism and Relativism: Human Rights as a Framework for Negotiating Inter-ethnic Claims’, *supra* note 35, at 1095. On conflict prevention strategies, see generally, Helen Quane, ‘Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies’, 47 *Vanderbilt Journal of International Law* (2007) 463-523.

lations of human rights. In the field of international human rights and criminal law, as was explained by Frédéric Mégret, the protection of each State's soldiers and people,<sup>133</sup> and the will to alleviate the concerns of public opinion, as well as the assurance not to be accused of some form of complicity, can explain why States set up rules and institutions to judge war criminals.<sup>134</sup> It could eventually — and cynically — be argued that the decision-makers of each State may wish to soothe their own conscience and seek to appear as the guardian of some sort of international morality.

There is undoubtedly some element of truth in these various explanations of human rights lawmaking through individual interests — even liberals themselves have acknowledged that it may be in the interest of States to ensure the respect for human rights.<sup>135</sup> These various individual interests of States as autonomous abstract entities do not suffice, however, to explain all the dimensions of contemporary lawmaking in the field of the protection of the rights of individuals. Indeed, besides the aforementioned individual interests, human rights lawmaking may also be prodded by classical common interests. For instance, the argument has been made that respect for human rights bolsters peace and security, in which each State is interested.<sup>136</sup> But it is submitted here that the common interest that drives international lawmaking in the area of human rights is not limited to these individual, 'mutualized' and 'Benthamian' common interests. Human rights lawmaking also reflects a pragmatic quest for the general well-being of individuals. Human rights norms are thus 'useful' in the sense described above.<sup>137</sup>

To understand how international lawmaking is directed at the well-being of all, it is necessary to recall that States are capable of seeking the satisfaction of the interests of individuals that are not especially 'under their jurisdiction', for States are capable of pursuing the general well-being of human beings, wherever the beneficiaries may be located. This quest for the general well-being of human beings is precisely what makes human rights law 'useful'. The usefulness of human rights law, in this situation, must be understood in the light of the core mission of any national lawmaker. Lawmakers — whether entrusted with executive or legislative powers — have been appointed to foster the well-being of the people. It probably matters little how these lawmakers have been brought to power. Although democratic types of

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<sup>133</sup> This is also acknowledged by liberals like Henkin, *Politics and Values*, *supra* note 18, at 171.

<sup>134</sup> See Frédéric Mégret, 'The Politics of International Criminal Justice', 13 *European Journal of International Law* (2002) 1261-1284. See also Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (St Martin's Press: New York, 1999).

<sup>135</sup> Henkin, *Politics and Values*, *supra* note 18, 284.

<sup>136</sup> Visnu Dutt Sharma, 'International Criminal Law: Crime Prevention and Punishment', in Patel (ed.), *India and International Law*, *supra* note 108, 189-190.

<sup>137</sup> Yasuaki Onuma, 'In Quest for Intercivilizational Human Rights', *supra* note 28, at 76-77.

domestic governance will almost automatically make lawmakers more amenable to the well-being of the electorate, it cannot be excluded that lawmakers having seized powers via non-democratic methods can also be receptive to the needs of the people they govern. It is true that ruthless tyrannies will more likely be focused on serving their own interests. But these countries hardly bind themselves by conventional human rights law or take part in the formation of customary international law.<sup>138</sup> Leaving these governments aside, it can be said that most governments will generally seek to maximize the well-being of the people on the basis of the economic, financial, natural, political, cultural and social resources available to them. And there is no reason why they would act differently at the international level. On the contrary, that a government remains committed in international decision-making processes to the improvement of the conditions of the people under its power is not surprising.

If one accepts that most governments are concerned with the expansion of their people's well-being, it can hardly be disputed that improving the respect for basic rights of individuals enhances the well-being of the individuals concerned. In that sense, human rights constitute the very first means available to improve the condition of individuals.<sup>139</sup> Human rights could even constitute the most effective legal mechanisms ever found so far to achieve that end.<sup>140</sup> This is especially true with respect to civil, social, economic and cultural rights. This is not to say that political rights do not bolster the well-being of people. However, the latter only achieve that end indirectly. For they aim at ensuring the participation of individuals in the domestic decision-making process as well as a free and fair framework for the political struggle for power; they guarantee, to a certain extent, that individuals can defend their own interests — or that of the group(s) to which they belong. Taken together with the accounts of human rights lawmaking based on States' individual interests, the understanding of human rights law based on its 'usefulness' — that is as a set of rules directed at enhancing human well-being — plays down the usual value-oriented conception that dominates the liberal and constitutional scholarship.

It is true that one could be lured into a value-based justification of human rights lawmaking by the continual references in the political discourse to the 'human dignity' or to 'humanity' as the driving force for any advancement in the field of human rights.<sup>141</sup> However, this value-loaded referencing is nothing more than a

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<sup>138</sup> d'Aspremont, *L'Etat non démocratique en droit international*, *supra* note 53, 274-285.

<sup>139</sup> This idea can also be found in J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press: Cornell, 2003) at 63-64.

<sup>140</sup> Yasuaki Onuma, 'In Quest for Intercivilizational Human Rights', *supra* note 28 at 76-77.

<sup>141</sup> See for instance the famous preamble of the International Covenant on Civil and Political Rights: 'Recognizing that these rights derive from the inherent dignity of the human person', 19 December 1966, New York, in force 23 March 1976, 999 *United Nations Treaty Series* 171; see also the preamble of

catchword that expresses less a value than the objective of serving individuals' well-being. More fundamentally, some scholars could be tempted to find support for their value-based account of lawmaking in the area of human rights and humanitarian law in a few pronouncements of the International Court of Justice — some of them echoing UN General Assembly resolutions.<sup>142</sup> For instance, in the *Corfu Channel* case, the Court famously recognized the existence in international law of 'certain general and well-recognized principles, namely: elementary considerations of humanity'.<sup>143</sup> Likewise, in its advisory opinion on the *Reservations to the Genocide Convention*, the Court recognized that the convention endorsed in legal form 'elementary principle of morality'.<sup>144</sup> A similar statement was made in the *Nicaragua* case as regards the fundamental general principles of humanitarian law.<sup>145</sup> The advocates of the idea that international lawmaking is driven by global values, especially when human rights are at stake, may be inclined to find further support in the declaration of the Court in the *South West Africa* cases according to which 'humanitarian considerations may constitute the inspirational basis for rules of law'.<sup>146</sup> More recently, in its decision on the *Application of the Genocide Convention*, the Court held that it had no power to rule on violations of obligations, other than those of the rules that prohibit Genocide, 'which protect essential humanitarian values, and which may be owed *erga omnes*'.<sup>147</sup>

This paper argues that it would be misleading to infer from the aforementioned *dictums* of the World Court that it considered that rules pertaining to the pro-

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the ILO constitution: 'The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization', The Treaty of Versailles, 28 June 1919, <[www.ilo.org/ilolex/english/constq.htm](http://www.ilo.org/ilolex/english/constq.htm)> (accessed 15 December 2008).

<sup>142</sup> See for instance GA Res. 96(I), 11 December 1946.

<sup>143</sup> *Corfu Channel (UK v. Albania)*, ICJ Reports (1949) 4 at 22.

<sup>144</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951) 15 at 23: 'The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object, on the one hand, is to safeguard the very existence of certain human groups and, on the other, to confirm and endorse the most elementary principle of morality. In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type, one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.'

<sup>145</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Reports (1986) 14 at 112-114.

<sup>146</sup> *South West Africa (Ethiopia and Liberia v. South Africa) (Second Phase)*, ICJ Reports (1966) 6 at 34.

<sup>147</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (2007) (forthcoming) at para. 147.

tection of human beings were adopted to promote global values. It is submitted here that the Court only meant that these instruments were not serving individual States interests but a common interest. As stressed by the Court itself in its opinion on the *Reservation to the Genocide Convention*, the ‘States do not have any interests of their own; they merely have, one and all, a common interest’.<sup>148</sup> Above all, it is far from certain that the Court aimed at taking a stand whatsoever on this theoretical and meta-judicial question. It is not even sure that the Court would have been interested in that. Even if the Court asserted that the aforementioned rules could mirror some kind of existing international moral principles, it did not claim that global values had been the driving force for adopting the rules concerned. Indeed, that the moral principles ‘constitute the inspirational basis for rules of law’ does not mean that States adopted these rules to promote any corresponding global values. Various normative orders can coexist without interfering with each other.<sup>149</sup> Should there be global moral values of human dignity, corresponding international legal norms are not necessarily an offshoot of them. In other words, global moral principles do not automatically constitute what prods international lawmakers to act when they adopt corresponding legal principles. In adopting rules that enshrine ‘elementary considerations of humanity’, as was indicated by the Court, States simply believe that promoting humanity is in the interest of all States as well as in the interest of all individuals whose well-being States promote. In other words, the ‘elementary considerations of humanity’ pointed out by the Court are nothing more than the underpinning of the ‘usefulness’ of the rule concerned.

Some may still be inclined to conflate common interests with global values and argue that the common interest in the protection of human rights — and especially the well-being of individuals — amounts to a global value. It is argued here that construing the common interest that permeates treaties related to the protection of individuals through the lens of global values is fundamentally flawed. Even provisions like the prohibition of torture which are almost unanimously accepted do not reflect pre-existing global values. If there were such global universal values pertaining to human rights in lawmaking, how would one explain that there are so many reservations to the treaties where these rules are enshrines? As shrewdly explained by Jan Klabbers, we can *in abstracto* agree that torture is bad and should be prohib-

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<sup>148</sup> *Supra* note 144, at 23.

<sup>149</sup> On the coexistence of normative order, see the critical approach of Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International: The Hague, 1996) 121-156. See also Gowlland-Debbas, ‘Judicial Insights into Fundamental Values and Interests of the International Community’, *supra* note 13, 344-347.

ited without necessarily agreeing *in concreto* on what justifies the prohibition.<sup>150</sup> One should thus refrain from inferring a global value from any universal consensus emerging among international lawmakers. In particular, a consensus on the pursuit of the well-being of human beings cannot, as such, be considered a value. The well-being is intangible. It is a fundamentally contingent notion. In this sense, human rights only reflect an agreement on the quest for human well-being, not an agreement on any sort of global values, nor an agreement on what well-being really is.<sup>151</sup> If conceived along these lines, human rights can thus be thought of in terms of ‘usefulness’. It is only then that it becomes possible to strip human rights lawmaking of all its value-trappings.

### e) The international public order

The four categories of norms that have been examined here show that common interests suffice to explain international lawmaking directed at the promotion of the public good. Accordingly, a resort to global values to justify the public character of international law is both superfluous and inconsistent with the demonstrated practice. International law is of a ‘public’ character because some of these abovementioned rules serve the common interest, not because they reflect any global value. This paper argues that this conclusion is not different as far as the rules of the *international public order (jus cogens)*<sup>152</sup> are concerned. Although many scholars think otherwise<sup>153</sup>, the present author argues that *jus cogens* cannot be regarded as a manifestation of global values.<sup>154</sup>

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<sup>150</sup> Jan Klabbers, ‘On Human Rights Treaties, Contractual Conceptions and Reservations’ in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff: Leiden, 2004), 149-182, at 155.

<sup>151</sup> Yasuaki Onuma, ‘In Quest of Intercivilizational Human Rights’, *supra* note 28, at 76. Although she adopts a value-oriented understanding of international, see for a similar conclusion that the quest for well-being is a relative notion, see Emmanuelle Jouannet, ‘What is the Use of International Law? International Law as a 21st Century Guardian of Welfare’, 28 *Michigan Journal of International Law* (2007) 815-862 at 853.

<sup>152</sup> The mainstream legal scholarship does not draw a distinction between international public order and *jus cogens*. See *contra* Robert Kolb, *Théorie du *jus cogens* international — Essai de relecture du concept* (Presses Universitaires de France: Paris, 2001) at 77, 172-181. Kolb argues that *jus cogens* is only a manifestation of the international public order and cannot be conflated with it.

<sup>153</sup> Christian Tomuschat, ‘Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes* — Concluding Observations’ in Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules of the International Legal Order* (Brill: London, 2005) 425-436; Simma, ‘From Bilateralism to Community Interest’, *supra* note 7, at 217; de Wet, ‘The International Constitutional Order’, *supra* note 8, at 56; Levan Alexidse, ‘Legal Nature of *Jus Cogens* in Contemporary International Law’, 172 *Collected Course* (1981-III) 219-270 at 247; Charles de Visscher, ‘Positivisme et *jus cogens*’, 75 *Revue générale de droit international public* (1971) 5-11 at 9. For a minimalist moral foundation of *jus cogens*, see May, *Crimes against Humanity*, *supra* note 47, at 24-39; Christine Chinkin, *Third Parties in International Law* (Oxford Univer-

In any legal order, there are rules that cannot be subject to any derogation whatsoever. The international legal order is not different in that regard as it also contains such rules. The remarkable feature of the international legal order in this respect, however, is that the public order has been created among sovereign States *in a conventional and contractual manner*.<sup>155</sup> Based on the consent of States — as rightly echoed by article 53 of the Vienna Convention on the Law of Treaties — the international public order has not been supranationally imposed upon the subjects of the international legal order. Obviously, this contractual character of *jus cogens* does not suffice to demonstrate the value-free foundation of *jus cogens*. States may well have consented to a hierarchy of norms in the international legal order to endow a few rules with a superior hierarchical standing, because they were convinced that they reflect a global value. There is thus a more fundamental reason to rule out a value-based representation of *jus cogens*.

It is argued here that *jus cogens* has been forged not for what it could represent but for the practical effect that it could generate. In other words, it is the practical consequences of *jus cogens* that have underpinned its creation, not any underlying global value.<sup>156</sup> This pragmatic account of *jus cogens* necessarily requires that the actual effect of *jus cogens* in the international legal order be recalled. These consequences remain mostly restricted to the law of international treaties. Indeed, *jus cogens* norms are, first and foremost, conceived as the rules from which conventional derogations are not permitted.<sup>157</sup> In that sense, States have contractually created the concept of *jus cogens* not because it was reflecting any global value, but because they deemed it useful to limit conventional derogations to some fundamental rules. Having been created as a functional device to preclude derogations of a few rules, the

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sity Press: Oxford, 1993), 349-356. They have been followed by the International Criminal Tribunal for the Former Yugoslavia. See the decision of the International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ICTY Trial Chamber, Judgment (10 December 1998) at 58. See also the decision *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992). See also Judge *ad hoc* John Dugard in his separate opinion to the 3 February 2006 judgement of the ICJ in the case related to *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports (2006) (forthcoming), separate opinion of Judge *ad hoc* Dugard, at para. 10.

<sup>154</sup> Stefan Kadelbach, 'Jus Cogens, Obligations Erga Omnes and Other Rules: The Identification of Fundamental Norms' in *The Fundamental Rights of the International Legal Order*, *supra* note 150, 21-40, at 34.

<sup>155</sup> On this point, see David Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', 4 *Transnational Legal and Contemporary Problems* (1994) 329-375, esp. 370.

<sup>156</sup> In that sense, see Mariano J. Aznar Gomez, 'Une vision provisoire du droit international actuel', in Emmanuelle Jouannet, Hélène Ruiz Fabri and Jean-Marc Sorel (eds.), *Regards d'une generation sur le Droit International* (Pedone: Paris, 2008) 45-73, at 66-67.

<sup>157</sup> Article 53 of the Vienna Convention on the Law of Treaties, *supra* note 97.

concept of *jus cogens* first serves the interest of the subjects of international law. It thus becomes possible to explain *jus cogens* without relying on global values.

*Jus cogens* does not only bring about a limitation to the exercise of treaty-making power. Mention must also be made of the (modest) consequences triggered by a violation of these norms. These consequences, however, fall short of any aggravated regime of State responsibility, and it is this absence — as well as the correlative abandonment of the concept of criminal responsibility of the State<sup>158</sup> — which can above all be explained by the absence of any practical added value hereto.<sup>159</sup> States did not deem it useful to create an aggravated regime of responsibility. This underpins the pragmatic conception of *jus cogens* advocated here. This notion has been designed for the sake of the practical effects that it generates, not for any global value that it could evidence. In the light of the usefulness of *jus cogens*, it would therefore be misleading to regard *jus cogens* as the expression of any underlying global value.

Based on the interests of States in the practical effects that it yields, *jus cogens* is not ‘useful’ in the same sense as human rights law is. In other words, it should not be inferred from the foregoing that *jus cogens* serves the well-being of all. It is only the rules that may be endowed with such a character that actually do. It is true that the determination of those rules remains beset by uncertainty. However, if one takes the former Article 19 of the Draft Articles on State Responsibility (1996) as an illustrative list, it can be contended that most of the rules traditionally seen as having a *jus cogens* character fall with the abovementioned categories of rules directed at the well-being of all. This means that the ‘usefulness’ of *jus cogens* aims indirectly, via a limitation of the exercise of treaty-making power, at strengthening rules that are themselves devoted to the general well-being.

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<sup>158</sup> See James Crawford, *Addendum 1 to the First Report on State Responsibility*, UN DOC, A/CN.4/490/Add. (11 May 1998). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 26 February 2007, ICJ Reports (2007) (forthcoming) at paras. 166-167. This judgment was deemed the “second death” of the concept of the crime of the State. See, P.-M. Dupuy, ‘Crime sans châtimeur ou mission accomplie?’, 111 *Revue générale de droit international public* (2007) 243-257 at 244 ; Jean-Marc Sorel, ‘Les multiples lectures d’un arrêt: entre sentiment d’impunité et sentiment de cohérence, une décision à relativiser’, 111 *Revue générale de droit international public* (2007) 259-272 at 270.

<sup>159</sup> On this question, see generally, Pierre-Marie Dupuy, ‘Dionisio Anzilotti and the Law of International Responsibility of States’, 3 *European Journal of International Law* (1992) 139-148.

### III. Relativism, Scepticism and the Infinitude of a Global Conversation on the Public Good

The rejection of an international legal order based on global values and the reliance on (individual and common) interests as advocated in this paper does not lead to the replacement, under the banner of ‘interests’, of a value system by a value system in all but name. In philosophical terms, there is nothing of a ‘Nietzschean’ project in the vision of international law which is submitted in this paper. Indeed, it is argued here that the individual interests as well as the common interests that drive lawmaking and underlie the public international order are *inherently contingent* and are in no way capable of any objective determination. In other words, there are no *a priori* individual or common interests.<sup>160</sup> What orientates international lawmaking is the way in which States *perceive* and *construe* their interests, the interests of their peers and the interests of the group.

Drawing on Hobbes’ concept of ‘self-preservation’, (neo-)realists have nonetheless argued that there are some structural individual interests (to realists, this comes down to survival, autonomy and well-being<sup>161</sup>) which must be deemed objective. As is explained above, this paper is at odds with realist interpretations of Hobbes because of their rejection of common interests. This author also disagrees with neo-realist thinking because of its objectivization of self-interests.

While this paper has mainly embraced the interpretation offered by the rationalist school for the role that it has ascribed to common interests in Hobbes’ model, it nonetheless rejects the leaning of the latter towards the objectivization of common interests. Indeed, the rationalist school, as illustrated by Bull, still reckons with the possibility of ‘a consensus about common interest and *values* that provides the foundations of its common rules and institutions’.<sup>162</sup> For instance, it could be argued along these lines that the maintenance of *order* is structurally and objectively in the interest of all States.<sup>163</sup> This conclusion is not shared by the author of the present study.

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<sup>160</sup> Bernard H. Oxman, ‘The International Commons, The International Public Interests and New Modes of International Law Making’, in Delbrück and Heinz (eds), *New Trends in International Lawmaking*, *supra* note 6, at 27.

<sup>161</sup> See for instance Alexander George and Robert Keohane, ‘The Concept of national interests: Uses and limitations’ in Alexander George, *Presidential Decisionmaking in Foreign Policy* (Westview: Boulder, 1980), 217-238; David Clinton, ‘The national interest: Normative foundations’, 48 *Review of Politics* (1986) 495-519, esp. at 497-505. For Wendt, the ‘self-esteem’ must also be accounted for one structural national interest. See Wendt, *Social Theory in International Politics*, *supra* note 55, at 236.

<sup>162</sup> Bull, *The Anarchical Society*, *supra* note 46, 315-316.

<sup>163</sup> De Visscher, *Theory and Reality of International Law*, *supra* note 51, at 71, 100; See also Tomuschat, ‘General Course on Public International Law’, *supra* note 51, at 78. (He tends to make a difference

It is argued here that these allegedly structural interests — whether individual or common — can only drive lawmaking and underlie the international public order as long as they are *perceived* as such. The subjective perceptions of the parties are thus not irrelevant and must be taken into account. There are thus variations in the perception of interests. These differences can stem from objective contingencies. For instance, weaker States can construe a given rule as responding to their individual need as a weak subject whereas superpowers can understand the same rule as serving a common interest. But the differences of perception not only arise from objectively different situations. Should some States be in a very similar economic, political and geographical situation, they can also have a different view of their own needs and that of the interests of all. Whatever the reasons for these varying perceptions, it is thus assumed here that any attempt to capture individual and common interests *in abstracto* would always prove unsatisfactory. The direct consequence of such a contingent character of interests is an inevitable *scepticism* which is somewhat consistent with Hobbes' scepticisms towards the self-referentiality of reason.<sup>164</sup> According to him, no reason can be established without another reason, which inextricably leads to a complete *relativism*.<sup>165</sup> This abiding relativism on the determination of interest also echoes what Hobbes expressed in *De Cive* when he stated that 'the knowledge of good and evil belongs to each single man'<sup>166</sup> — an idea that may have been overlooked by the rationalist school.<sup>167</sup>

It is acknowledged here that the *relativism* brought about by the vision of the international public order supported in this paper bears some resemblance to that of the *critical legal school* although it derives from a radically different premise.<sup>168</sup> The deconstructivist approach of critical legal scholars leads them to challenge the legal objectiveness and to lay bare the conflict of values which lies at the heart of the legal discourse. But, contrary to constitutionalist or liberals, they do not uphold the su-

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between peace and order). This is also echoed in liberal literature: see Henkin, *Politics and Values*, *supra* note 18, esp. chap. VI.

<sup>164</sup> See the interpretation of Hobbes offered by Michael C. Williams, 'Hobbes and International Relations: a Reconsideration', 50 *International Organization* (1996) 213-236 at 229.

<sup>165</sup> See Boyle and Chinkin, *The Making of International Law*, *supra* note 36, at 19: 'In all cases the outcome is directed by the subjective evaluations and value preferences of those making the determination whether they are government policy-makers, members of the international bureaucracy, international judges, academics or civil society activists. Even from the standpoint of positivism, relativity is unavoidable in international law'.

<sup>166</sup> Thomas Hobbes, *De Cive* (1651) (Hackett: Indianapolis, 1993, Reprint) at 178.

<sup>167</sup> See generally, Williams, 'Hobbes and International Relations: a Reconsideration', *supra* note 44, 213-236.

<sup>168</sup> See generally, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Oxford University Press: Oxford, 2006). See also Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007) 1-30.

premacny of any sort of global values. In a way, the only 'value' which they could be supporting is procedural: the openness of the legal discourse. In that sense the legitimacy of a legal argument stems from a deliberation (or 'conversation' as they like to call it) which is not without reminding us of the Habermasian understanding of legitimacy. Even though the author of this paper does not espouse the critical legal scholars' rejection of any objective legal rationality,<sup>169</sup> the relativism that flows from the interest-based conceptualization of the international legal order that has been defended here points to a similar 'discussion'. Indeed, if interests cannot be subject to any objectivization, their determination is bound to be the fluctuating upshot of a continuous and abiding conversation. This is what corresponds to Hobbes' *appeal to politics*.<sup>170</sup> Politics being the organization of the debate about what a good society is, the determination of common interest is left to the world debate and the evolving and fickle consensus among States.

It goes without saying that the immediate result of such relativism is a continuous exposure to challenges of those principles that have been deemed serving the public good. Preventing such discussion or debate and cementing the conception of the public good at a given time is precisely the goal of all those who adopt, like constitutionalist and liberals, a Grotian understanding of international law based on global values. Indeed, under the guise of global values, they seek to crystallize the consensus about what promotes the public good and to prevent any attempt to question what has been at a given moment considered in the interest of all. In that sense, the value-oriented approach of the liberals and the constitutionalists expresses a *fear*.

The inextricable debate about the public good spawned by the interest-based vision of the international legal order laid down in this paper should, however, not be taken with such a dim view. One must not be apprehensive of the theoretical possibility of a relentless challenge of the conception of the public good. Drawing on the assumption that organs of States will always act rationally, it is contended here that the continuous discussion (about what serves the common interest) that follows the absence of global values does not necessarily bring about sweeping and incessant upheavals of those principles that have been construed as directed at a common interest. No such radical amendment of the principles directed at the public good must be anticipated as long as the background of the aforementioned inextricable debate meets certain conditions. In particular, the relativism and the infinitude of the quest for consensus encompassed in our vision do not carry any hazard as long as the conditions for an *open debate* are assured. This, among other things,

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<sup>169</sup> See d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship', *supra* note 51.

<sup>170</sup> Thomas Hobbes, *Leviathan*, *supra* note 163, at 80.

requires the representativeness of the lawmakers and the determination of those actors who should have their say in this conversation. These questions inevitably pertain to the more fundamental issue of the democratization of the international system. It is not at all evident that such a question is to be taken up by legal scholars, and certainly not here.

The continuous debate about the public good inherent to the conception of the international legal order defended here cannot be separated from the question of the role of international law, and, more basically, the role of international legal scholars. This author does not dispute that international law — provided that its universality is ensured — is endowed with a sweeping transformation capacity.<sup>171</sup> The potential capacity of international law to transform domestic orders as well as the global order does, however, not mean that legal scholars should construe international law as a normative project and correlatively see themselves as entrusted with a ‘mission’ to construct a better international order.<sup>172</sup> While international law can bring about significant changes in domestic societies, it is argued here that it does not necessitate international legal scholars to define these transformations. In other words, even if international legal scholars are without a doubt the sole experts of this extraordinary, transforming instrument, they should not be the ones determining the substance of the transformation.<sup>173</sup> It is not only that they do not have the required expertise thereto nor the power. It is, above all, that they do not hold the necessary legitimacy. It is interesting to note here that those international legal scholars who construe the international legal order as based on global values almost systematically perceive international law as a normative project. This is why the representation of an international legal order based on common interests rather than values also points to a more modest and realistic perception of the role of scholars. It is submitted here that instead of endorsing the (Grotian) idea of international law as a normative project<sup>174</sup> and striving to construct a ‘just’ order based on global values, international legal scholars should devote their efforts to help devise the instruments that make the abovementioned inextricable debate about the public good more transparent and open. Ensuring the transparency of the global debate about how to serve the public good by devising and streamlining the language of interna-

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<sup>171</sup> d’Aspremont, *L’Etat non démocratique en droit international*, *supra* note 53.

<sup>172</sup> On the classical controversies between Grotian Schools of International Law and the Vattelian Schools of International Law, see generally, R. Kolb (ed.), *A. Trivelpy Y Serra: Doctrines sur le fondement du droit des gens* (Pedone: Paris, 2007), 59-137.

<sup>173</sup> Jean d’Aspremont, ‘Softness in International Law: A Self-serving Quest for New Legal Materials’, 19 *European Journal of International Law* (2008) 1075-1093. See also Andrea Bianchi, ‘Une generation de ‘communautaristes’ in Jouannet, Ruiz-Fabri and Sorel (eds.), *Regards d’une génération sur le Droit International*, *supra* note 153, 95-105, at 105.

<sup>174</sup> *Supra* note 169.

tional law most likely corresponds to a far better use of international legal scholars' recognized expertise.<sup>175</sup>

International legal scholars should certainly not bemoan the modesty inherent to the conception of the international legal order presented here. They should rather consider it a leap forward in the advancement of international law as a whole. Indeed, there is no doubt that any 'progress'<sup>176</sup> can more easily be achieved through a more modest interest-based conception of the international legal order than through a Kantian or Grotian discourse. Even if this author believes that the fears of a hegemonic use of international law are very often far-fetched<sup>177</sup>, the perception of a hegemonic project that inextricably lurks behind a value-oriented conception of the international legal order<sup>178</sup> may severely undermine the universal acceptance of the latter. In that sense, it is not only that the international legal order *actually* rests on individual and common interests. It is also that, beyond the reality, the international legal order *should* be portrayed by international legal scholars as based on individual and common interests: stripping international law of any imperialistic and hegemonic overtones is the only manner in which legal scholars can foster its true universality. An interest-based conception of international law helps overcome the abiding perception that international law is a Western product without having to vainly wait for the emergence of any 'common ethics' or a 'global culture'.<sup>179</sup>

## Conclusion

This paper has tried to offer an alternative understanding of the international legal order that differs from the mainstream constitutionalist or liberal theses with a view

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<sup>175</sup> On the role of scholar, see the illuminating account given by Michel Virally, *La pensée juridique* (Pichon et Durand-Auzias: Paris, 1960) at XXII. See also the enlightening and famous interpretation of the role of scholars by Paul Reuter, *Principes de droit international public* (PUF: Paris, 1961), at 459.

<sup>176</sup> See Thomas Skouteris, 'The Vocabulary of Progress of Interwar International Law: An Intellectual Portrait of Stelios Seferiades', 17 *European Journal of International Law* (2006) 823-856.

<sup>177</sup> For a different opinion see Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law', 18 *European Journal of International Law* (2007) 379-407, esp. at 390-391 (who argues that we must not underestimate the perception that certain peoples, individuals and states have of these legal values and that there is a phenomenon of resistance that must be taken into consideration).

<sup>178</sup> See Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 50, at 98-166. See also Koskenniemi 'International Law in Europe: Between Tradition and Renewal', 16 *European Journal of International Law* (2005) 113-124.

<sup>179</sup> On this abiding perception and the emergence of a common culture or ethics as the only means to alleviate it, see Jouannet, 'Universalism and Imperialism', *supra* note 174, at 390.

of 'deconstructing' the value-oriented accounts of international lawmaking. In doing so, it has provided a conception of the international legal order based on individual and common interests. This has echoed a neo-Hobbesian conceptualization of the international legal order that has drawn on the arguments of the rationalist school of international relations rather than on the ones of the (neo-) realist thinking. With a view to mirroring debates similar to those that have permeated other social sciences, it has been explained that this 'deconstructivist' endeavor is less 'Nietzschean' than 'Heideggerian', as its purpose is not to destroy one system of values to replace it by a system of allegedly objective 'interests'. Interests remain ever-changing and their perception is inescapably subject to the context and the position of each individual lawmaker. It has accordingly been argued that we must refrain from conceiving the international legal order in terms of global values or any equivalent makeshift objective standards. We must simply come to terms with the inter-subjective and fickle character of the forces that drive lawmaking and underlie the international legal order. Such an approach inevitably leads to relativism and an eternal debate about what the public good is and how it should be promoted. It has been explained why this permanent discussion about the public good should not be feared nor be-moaned as long as the conditions for the transparency and representation of this conversation are ensured. While helping modernize international legal positivism in a manner that strips it of the ideological overtones that have classically underpinned its critique, this ever-ongoing discussion about what constitutes a common interest also offers a greater leverage to promote the universality of international law than any table of values open to suspicions of imperialism or hegemony.