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Contemporary International Rulemaking and the Public Character of International Law

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**CONTEMPORARY INTERNATIONAL RULEMAKING
AND THE PUBLIC CHARACTER OF INTERNATIONAL LAW**

Jean d'Aspremont

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Jean d'Aspremont*

ABSTRACT

There is a growing consensus in international legal scholarship on the idea that International Law is also public because it can address matters that concern the International Society as a whole. Such an assertion requires that the extent to which international rulemaking is directed at global interest be correctly appraised. The classical studies that tackled that question and that are widely referred to in the literature fail to provide an adequate account of the role of global interests in international lawmaking. This paper is an attempt to offset that deficiency with a fresh analysis of the various interests driving contemporary international rulemaking processes with the view of providing a better understanding of this new underpinning for the public character of International Law.

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INTRODUCTION

International Law is the common shorthand for *Public International Law*. The latter is more common in the French legal scholarship.¹ Anglo-Saxon² and German³ authors are rather prone to use the former. This is however not the indication of any controversy whatsoever. All scholars and practitioners agree that when we refer to *International Law*, we mean *Public International Law*.

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).⁴ In the wake of the Osnabrück and Münster peace treaties, the public aspect of International Law became incrementally alluded to as the *Droit public de l'Europe* (Public Law of Europe).⁵ It was however not until the 1802 French translation of J. Bentham famous *Introduction to The Principle of Moral and Legislation* (1780) that – maybe under the influence of I. Kant who had referred to the *jus publicum civitatum*⁶ – the expression “Droit International Public” became commonly used.⁷

The adjective “public” was at that time a nod to the *making* of International Law understood as a set of rules *established by* public entities *to regulate relations between* public entities.⁸ In that sense, the public character of International Law referred to its *inter-public* character.⁹ Back then, the explicit mention of the public character of International Law was somewhat idle since there did not exist any international regulations other than between States. It is the emergence of a body of rules applying to international relations between individuals – that is Private International

¹ See among others J. Verhoeven, *Droit international public* (Larcier, 2000); A. Pellet & P. Dailler, *Droit international public* (LGDJ, 2002); J. Combacau & S. Sur, *Droit international public* (Montchrestien, 2004); P.-M. Dupuy, *Droit international public*, (Dalloz, 2002); D. Alland (ed.), *Droit international public* (Presses Universitaires de France, 2000); H. Thierry, *Droit international public* (Montchrestien, 1986); C. Rousseau, *Droit international public*, (Dalloz, 1987); D. Ruzié, *Droit international public* (Dalloz, 1987); D. E. Adouki, *Droit international public* (L'Harmattan, 2002); P. Vellas, *Droit international public: institutions internationales : méthodologie, historique, sources, sujets de la société internationale, organisations internationales* (R. Pichon et R. Durand-Auzias, 1967). Likewise, see, among, the most prominent French journal devoted to International Law, the *Revue générale de droit international public* (<http://www.rgdip.com>).

² M. N. Shaw, *International Law* (CUP, 2003); M. D. Evans (ed.), *International Law* (OUP 2003); M. Koskenniemi (ed.), *International Law* (New York University Press, 1992); A. Cassese, *International Law* (OUP, 2005); Richard K Gardiner, *International Law* (Longman, 2003); J. O'Brien, *International Law* (Cavendish, 2001); D. P. O'Connell, *International Law* (Stevens, 1970); Barry E. Carter, Phillip R. Trimble, *International Law* (Little Brown, 1991); Georg Schwarzenberger, *International Law* (Stevens, 1957-1986); D. J. Harris, *Cases and Materials on International Law* (CUP, 2004). But see I. Brownlie, *Principles of Public International Law* (OUP, 2003).

³ 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* (Wien, Springer, 1964); Ignaz Seidl-Hohenveldern, *Völkerrecht* (Köln : C. Heymann, 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).

⁴ Some authors like Suarez, Zouche or even Francisco de Vitoria, sporadically used the expression of *jus inter gentes*.

⁵ Abbé de Mably, *Droit public de l'Europe fondé sur les traités conclus jusqu'en l'année 1740*, at 1776 (Genève, 1748, 5th ed). For a critical approach of the European origins of International Law, see A. Orakhelashvili, ‘The Idea of European International Law’, 17 *EJIL*, 315-347 (2006). See also *infra* I.B.

⁶ *Méthaphisiques des Mœurs*, 1st part, par. 53 (1797).

⁷ According to A. Pellet et P. Dailler, *Droit international public*, *supra* note 1, at 37.

⁸ Y Serra, ‘Théorie du droit international public’, 173 *Collected Course* 32 (1981-IV). 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* 427 (1988); Kurt T. Gaubatz, ‘Democratic States and Commitment in International Relations’, 50 *International Organizations* 108 (1996).

⁹ See B. 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 Pr. Thomas Nagel and Pr. Ronald Dworkin (October 20, 2005) – to be published soon.

Law – that stirred a need to expressly mention the public character of the rules applying to inter-States relations.¹⁰

Modern international relations between States are obviously not as elementary as they were when the adjective “public” was first used to qualify them. Indeed, many authors have stressed that Public International Law nowadays goes beyond mere States intercourse through the classical diplomatic channels.¹¹ These developments whereby national entities have gained a greater say in International Law making – for instance through the rise of “governmental networks”¹² – have nevertheless not undermined the idea that International Law is the byproduct of public entities.

International Law has also undergone other noticeable modifications since the translation of Bentham’s *Introduction to the Principle of Moral and Legislation*. Some of these changes have even provided further underpinnings for the public character of International Law. Indeed, there is nowadays a growing consensus among authors to acknowledge that International Law is also public because it can address the matters that concern the International Society as a whole. For instance, B. Simma contends that the promotion of the interest of the International Society “publicizes” International Law.¹³ In the same vein, B. Kingsbury argues that the promotion of a global interest in international rulemaking constitutes the “publicness” of International Law.¹⁴

If International Law is also public because it serves a global interest, then there is, I argue, a need for an exact assessment of the role played by the global interest in modern international lawmaking. The significance of global interest in international lawmaking is however not a novel question as it has already been the object of a couple of seminal works. The most famous studies that tackled that question are probably Wilfred Jenks’ *Common Law of Mankind*¹⁵, Schwarzenberger’s *Frontiers of International Law*¹⁶, Friedmann’s *Changing Structure of International Law*¹⁷ or R.-J. Dupuy’s distinction between *relational society* and *institutional society*.¹⁸

Although these “classical” accounts of the post-world war legal order are still widely referred to¹⁹, they have proved to be insufficient to provide a correct appraisal of the role played by the

¹⁰ E. Hambro, ‘Some remarks on the relations between public International Law and private International Law’, 39 *Journal de droit international* 613-637 (1962).

¹¹ See Jessup’s concept of *Transnational Law*, (Y.U.P. 1956); McDougal, ‘International Law, Power and Policy: A Contemporary Conception’, 82 *Collected Course* 137 (1953). For more recent developments, see, among others, Anne-Marie Slaughter, ‘The Real New World Order’, 76 *Foreign Aff.* 183 (1997); David Zaring ‘Informal Procedure, Hard and Soft, in International Administration’, 5 *Chi. J. Int’l L.* 547 (2005); B. Kingsbury, ‘Sovereignty and Equality’, 9 *Eur. J. Int’l L.*, 611-613 (1998). On International Law as a multilateral institution see J. Ruggie, ‘Multilateralism: The Anatomy of an Institution’, 46 *International Organizations* 561, at 568-574 (1992).

¹² See A.-M. Slaughter, ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’, 24 *Mich. J. Int’l L.* 1041 (2002-2003); ‘Accountability of Government Networks’, 8 *Ind. J. Global Legal Stud.* 347 (2000-2001); ‘The Real New World Order’, 76 *Foreign Aff.* 183 (1997); David Zaring, ‘Informal Procedure, Hard and Soft, in International Administration’, 5 *Chi. J. Int’l L.* 547 (2005).

¹³ The expression is from B. Simma, ‘From Bilateralism to Community Interest’, 250 *Collected Course* 234 (1994-VI).

¹⁴ B. Kingsbury *supra* note 9.

¹⁵ C. Wilfred Jenks, *The Common Law of Mankind* (London, Stevens, 1958).

¹⁶ G. Schwarzenberger, *The Frontiers of International Law*, 29 (London, Stevens, 1962).

¹⁷ F. Friedmann, *The Changing Structure of International Law*, (Columbia University Press, 1964).

¹⁸ R.-J. Dupuy, ‘Communauté internationale et disparités de développement’, 165 *Collected Course* 9 (1979-IV).

¹⁹ See the articles published by the *European Journal of International Law* dedicated to the ‘The Changing Structure of Law Revisited’ (1997). Among others, see Ch. Leben, ‘The Changing Structure of International Law Revisited By Way of Introduction’, 8 *Eur. J. Int’l*

global interest in contemporary international rulemaking.²⁰ Indeed, for they did not completely ignore this phenomenon²¹, these studies have failed to make due allowance for rulemaking processes driven by *special* global interest. These depictions of the post-world war II order can also be faulted for their assumption that international cooperation necessarily presupposes a global interest-driven rulemaking.²² This paper argues that the role of global interest in international rulemaking, while being an obvious reality in modern international lawmaking, is more limited than what is commonly professed.²³ Eventually, these accounts of the post-world international legal order have failed to deduce from the existence of common interest-driven lawmaking processes any conclusions pertaining to the public character of International Law.²⁴ This paper is thus an attempt to offer a fresh insight on the role of global interest in international lawmaking with the view of providing a better understanding of this new underpinning for the public character of International Law.

The promotion of a global interest in international rulemaking does not go without raising theoretical problems, especially regarding the existence of an International Society. These questions are considered in the first part of this paper (I). In the second part, a distinction between three situations of international rulemaking is drawn to gauge the actual extent of the “publicness” of International Law. These two parts are preceded by some preliminary remarks about the limits of the arguments developed in this paper.

L., 399 (1997) or J. H. H. Weiler and Andreas L. Paulus, ‘The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?’, 8 *Eur. J. Int’l. L.* 545 (1997).

²⁰ See also the criticism leveled by G. Abi-Saab as regards the limited ambit of the classification elaborated by Friedmann. G. Abi-Saab, ‘Cours général de droit international public’, 207 *Collected Course* 320 (1987-VII).

²¹ See for instance Friedmann, *supra* note 17, at 62.

²² Schwarzenberger, *supra* note 16, at 29, 34; Friedmann, *supra* note 17, at 68, 367.

²³ G. Abi-Saab, *supra* note 20, at 321.

²⁴ See however B. Simma, *supra* note 13, at 234.

PRELIMINARY REMARK: RULEMAKING AND THEORIES OF COMPLIANCE

The thesis developed in this paper has a limited ambit. My case is confined to the *making* of International Law and is entirely extraneous to the question of *compliance*.²⁵ My assessment of how States comprise their interests is limited to the very moment of their consent to a given rule, whether or not they subsequently comply with it. While acknowledging that rulemaking and compliance are in some respects interconnected²⁶, I believe that a clear distinction must be drawn between the *lawmaking* and the *compliance* levels. Indeed, what drives States to agree to a rule of International Law differs from what entices them to abide by that rule at a later stage. To put it differently, what is induced by normative considerations at the lawmaking level can be self-serving at the compliance level and vice-versa. The necessity to distinguish rulemaking and compliance can be illustrated as follows. It is utterly conceivable that a State signs and ratifies – let's say – the third Geneva Convention on Prisoners of War because it genuinely contends that it furthers a global interest. It might later refuse to abide by it because the effect of that convention is at odds with some compelling national interests.²⁷ Drawing on the necessity to distinguish between rulemaking and compliance, this paper leaves aside the mainstream theories of compliance²⁸ and focuses on the interests at stake in modern international rulemaking.

²⁵ For a critical approach of the concept of compliance, see B. Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Mich. J. Int'l L.* 345 (1997-1998).

²⁶ See C. Tomuschat, 'General course on Public International Law', 281 *Collected Course* 44 (1999).

²⁷ Katharine Q. Seelye, 'A Nation challenged: Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare', *NY Times*, January 28, 2002, A6; T. Golden, 'Threats and Responses: Tough Justice; After Terror, a Secret Rewriting of Military Law', *N.Y. Times*, 24 October 2004, S1-1.

²⁸ See among numerous theories of compliance: Abraham Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995); T. M. Franck, *The Power of Legitimacy Among Nations* (O.U.P., 1990); L. Henkin, *How Nations Behave* (2d Edition, 1979). J. L. Brierly, *The Law of Nations* (6th ed, 1963); Claire K. Kelly, 'Enmeshment as a Theory of Compliance', 37 *N.Y.U. J. Int'l L. & Pol.* 101 (2005); Harold H. Koh, 'Why do Nations Obey International Law?', 106 *Yale Law Journal* 2599 (1997); Andrew Guzman, 'A Compliance-Based Theory of International Law', 90 *Calif. Law Review* 1823 (2002); Anthony Clark Arend, 'Do Legal Rules Matter? International Law and International Politics', 36 *VA J. Int. Law* 107 (1998); Beth A. Simmons, 'Compliance with International Agreements', *Annual Review of Political Science*, 75-93 (1998). According to Goldsmith and Posner, these theories of compliance can usually be divided into two schools. To the understanding of the first one, a state complies with the rule at stake because it assumes it is the right thing to do. For the second school, compliance derives from the maximization of self-interest : a state will abide by a treaty when it is consistent to its interest. J. L. Goldsmith and E. A. Posner, *Limits of International Law* 100-106 (OUP, 2005). Regarding the question of compliance with a specific emphasis on international customary law, see M. Koskenniemi, 'The Normative Force of Habit: International Custom and Social Theory', 1 *Finnish Yearbook of International Law* 77-153 (1990) or Goldsmith and Posner, *Limits of International Law*, 23-43.

I. THE GLOBAL INTEREST AND THE PROMOTION OF THE INTEREST OF THE INTERNATIONAL SOCIETY

It is thus argued by a growing number of scholars that International Law is public, not only because of its inter-public character, but also because it can promote a global interest. A rule can be seen as promoting a global interest when it addresses matters of concern to the International Society. This requires a clearer understanding of what the International Society may be.

The concept of *society* is obviously hard to fathom. It is probably easier to grasp its meaning and its content if one zeroes in on the way it is mirrored in social institutions. The substance of social institutions – including law – can provide clear indications of what the society is.²⁹ This approach is however of little avail here. Since the aim of this paper is to determine whether a given social institution – International Law in this case – is capable of taking the interest of the entire society into account, we must first look at the International Society itself, not at its reflection in a social institution. The starting point of this analysis is accordingly not law but the interest of the society that underwrites the rules concerned. This means that instead of reading law backwards to determine what the interest of the International Society is, we must clarify the concept of International Society in its application to international rulemaking.

In the following paragraphs, I seek to shed some light on the concept of International Society (A). I subsequently demonstrate why the International Society is intrinsically linked with self-determination and the post-colonial era (B). I finally expound the difficulties of capturing the interests of the International Society *in abstracto* (C).

A. The International Society

Though this idea was already touched upon by Hugo Grotius³⁰, the concept of *International Society* (*Gesellschaft*) is not echoed in positive International Law which only enshrines the notion of *international community*³¹ (*Gemeinschaft*) – first developed by I. Kant³² and later tackled by many legal scholars.³³ Legal scholarship accordingly fails to teach us any insightful lessons on the concept of International Society.

²⁹ See M. Koskeniemi, *From Apology to Utopia* (Oxford, OUP, 2005) at 474.

³⁰ See Claire A. Cutler, 'The Grotian Tradition in International Relations', 17 *Review of International Studies* 41-65 (1991).

³¹ For some examples of references to the International Community in positive International Law, see article 53 of the Vienna Convention on the Law of Treaties; former article 19 of the draft articles on State Responsibility for international wrongful act (1996). See also the ruling of ICJ in the case concerning the *Barcelona traction*, ICJ Reports 1970, at 3, par. 33 or the case concerning the *diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, at 43.

³² *Metaphysical First Principles of the Doctrine of Right*, par. 61.

³³ It is mostly through the lens of the International Community that the question was grappled with. Among others see, H. Lauterpacht, *Function of Law in the International Community* (1966); C. De Visscher, *Theory and Reality of International Law* 89-101 (1957) (he does not seem to differentiate international society and international community); R.-J. Dupuy, *La Communauté internationale entre le mythe et l'histoire* (Unesco, Economica, 1986); M. Lachs, 'Quelques réflexions sur la communauté internationale', *Mélanges Virally* 349 (Pédone, 1991); G. Abi-Saab, 'International Law and the International Community: the Long Road to Universality', in *Essays in Honour of Wang Tieya* 31 (Nijhoff, 1993); B. Simma, *supra* note 13, at 221-384; P.-M. Dupuy, 'Cours général de droit international public', 297 *Collected Course*, 245-268 (2002); C. Tomuschat, 'General Course on Public International Law', 281 *Collected Course*, 72-90 (1999); I. I. Lukashuk, 'The Law of the International Community. International Law as the Constitution of Mankind', in *International Law on the Eve of the 21st Century. Views from the International Law Commission*, 51-68 (1997).

In contrast to international legal scholarship, many authors of international relations have cunningly grappled with the concept of International Society as illustrated by the work of – to name only a few – Hedley Bull³⁴, E. H. Carr³⁵, C.A.W. Manning³⁶, Martin Wright³⁷, Gerrit Gong³⁸ or Adam Watson³⁹. Among them, Hedley Bull's account is probably the most instructive in the context of this paper. He offers a functional conception of the International Society – tinged with realism⁴⁰ – drawing on the three elementary goals of this society: the protection against violence; the security of agreements; and the protection of property.⁴¹ In such a society, rules can emerge only because they are of a mutual benefit and States cooperate because of the possibility of gain.⁴² Such a conception partly dovetails with J. Bentham's famous aggregative definition of the public interest⁴³.

This paper partly borrows from Bull's understanding of the International Society. I argue that most rules remain the product of a search of individual profit. This is what I call the *mutualization of interest*. The concept of mutualization of interest developed here rests on a realist and rationalist understanding of International Law.⁴⁴ From such a rationalist perspective, international cooperation and international lawmaking is a means to insure predictability, pacification and stabilization. In that sense, States are still amenable to their national and individual interests and inter-States cooperation remains largely swayed by their individual interest. Though I believe that each States is itself the emanation of a society whose interest it purports to promote, I thus reject any "grotian" understanding of International Law as moral project.⁴⁵

Despite I point out the decisive importance of the mutualization of interests in international rulemaking, my account does not rest on an utter realist understanding of the International

³⁴ H. Bull, *The Anarchical Society* (London, Macmillan, 1977).

³⁵ E. H. Carr, *The Twenty Years Crisis*, 2d edition (London, Macmillan, 1946), at 162-69.

³⁶ C. A. W. Manning, *The Nature of International Society* (London, LSE, 1962);

³⁷ Martin Wight, 'Western Values in International Relations' in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations* (London, Allen and Unwin, 1966), 89-131; Martin Wight, *Systems of States* (Leicester, Leicester University Press, 1977); Martin Wight, *Power Politics* (Harmonsworth, England, Penguin, 1979).

³⁸ Gerrit W. Gong, *The Expansion of International Society* (Oxford, OUP, 1984); Gerrit W. Gong, *The Standards of "Civilisation" in International Society* (Oxford: Clarendon Press, 1984).

³⁹ Adam Watson, *The Evolution of International Society* (London, Routledge, 1992).

⁴⁰ A. Hurrell, 'Society and Anarchy in the 1990s' in B. A. Roberson, *International Society and the Development of International relations Theory*, (London, Pinter, 1998) at 19; Barry Buzan, 'From International System to International Society: Structural Realism and Regime Theory Meet the English School', 47 *International Organization* (1993), at 334-355.

⁴¹ H. Bull, *supra* note 34, at 4-5.

⁴² A. Hurrell, *supra* note 40, at 20-21.

⁴³ See *An Introduction to the Principles of Morals and Legislation*, Ed. J. H. Burns AND H.L.A. Hart, 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"⁴³. 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 the society. For a rehabilitating understanding of Bentham, see J.A.W. Gunn, 'Jeremy Bentham and the Public Interest', 1 *Canadian Journal of Political Science* 398-413 (1968).

⁴⁴ L. L. Martin, 'Interests, Power, and Multilateralism', 46 *International Organization* 765-792 and esp. 783-789 (1992) (from the vantage point of dominant States).

⁴⁵ See H. Lauterpacht, 'The Grotian Tradition in International Law', 23 *B. Y. Int'l L.* 1, at 28, 30-35 (1946).

Society. I do not share the skepticism of realists like Hans Morgenthau⁴⁶ or even Neo-Realist like to Kenneth Waltz⁴⁷ towards the existence of an International Society and their correlative idea that States are incapable of taking global interest into account. States are not inherently self-interested.⁴⁸ I accordingly argue that the model of cooperation between States as the exclusive byproduct of a calculation of interest in the light of the existing distribution of power⁴⁹ is insufficient to explain some contemporary leanings of international rulemaking. I thus adopt a more liberal view of the International Society⁵⁰ in that I strongly lean towards the belief that an International Society requires a degree of “cultural unity among its members”.⁵¹ It 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, irrespective of their self-interest.⁵² In that sense, the International Society is strongly intertwined with a share identity. This understanding of the International Society still rests on a rationalistic understanding of law. States remains rational but the unit on the basis of which they assess the utility of their action is the group.⁵³

Building on the idea that the promotion of a global interest presupposes the existence of a society, this paper argues that International Law could not address the concern of the International Society as long as there was not such a society. The promotion of a global interest is accordingly a feature of the postcolonial era⁵⁴ as this is explained in the following paragraphs.

B. The Postcolonial Emergence of the International Society

Despite the dominant universalistic outlook of its so-called founding fathers as Vattel or Wolff⁵⁵, the mainstream doctrine contends that International Law – whose origin is theoretically and classically traced back to the 1648 Munster and Osnabrück Treaties – first developed as a set of

⁴⁶ See the depiction of Realists by M. Koskeniemi, ‘Image of Law and International Relations’, in M. Byers (ed.), *The role of Law in International Politics, Essays in international relations and International Law*, at 28 (OUP, 2000).

⁴⁷ 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 behavior of States as a magnification the flawed human nature). This said, Neo-Realists yet treat States as self-interested. For an overview of the different strands of realism, see K. L. Shimko, ‘Realism, Neorealism and American Liberalism’, 54 *The Review of Politics* 281-301 (1992).

⁴⁸ A. Wendt, *Social Theory in International Politics*, CUP, 2004, 234.

⁴⁹ See the depiction of realism by S. M. Walt, ‘International Relations: One World, Many Theories’, 110 *Foreign Policy - Special Edition: Frontiers of Knowledge* 29-46 (1998). See also Anne-Marie Slaughter, ‘International Law and International Relations Theory: A Dual Agenda’, 87 *Am. J. Int’l L.* 205 (1993).

⁵⁰ See Anne-Marie Slaughter, ‘A Liberal Theory of International Law’, 94 *Am. Soc’y Int’l L. Proc.*, 240 (2000).

⁵¹ M. Wight, *supra* note 37, at 33.

⁵² A. Wendt, *supra* note 48, at 242 & 337. See H. 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 34, at 13); Comp. with B. Simma, *supra* note 13, at 235. Others seems to fonder the global interest on ideological principles or values. See e.g. Friedmann, *supra* note 17, at 48; Ph. Allot, *The Concept of International Law*, 10 *Eur. J. Int’l L.* 31, at 36 (1999); C. Tomuschat, ‘General Course on Public International Law’, *supra* note 26, at 78; see also J. H. H. Weiler who speaks about “spiritual assets”, ‘The Geology of International Law’, 64 *Zaöfv* 556-557 (2004).

⁵³ *Ibid.*, at 337.

⁵⁴ Barry Buzan, *supra* note 40, at 349.

⁵⁵ See A. Orakhelashvili, *supra* note 5, at 316-317. For M. Koskeniemi, the “universalism” of early jurist as Grotius or Vattel (and latter Lubet and von Martens) should not be overstated since their universalism was a projection of their Western humanism. This is the hypocrisy of the flip side of universalism, that is “the technique of including the non-European into a universe of European concepts by doing away with native identity”. M. Koskeniemi, *The Gentle Civilizer of Nations* 131 (CUP, 2004).

rules designed to regulate relationships between European *Christian* Nations.⁵⁶ This is allegedly illustrated by the seminal works of Kent⁵⁷, Phillimore⁵⁸ or Wheaton⁵⁹.

Drawing on the numerous treaties signed between European and Asian Sovereigns or between non-European powers (see for e.g. the famous treaty signed between the Egyptian and Hittite Sovereigns in the wake of the *Qadesh* battle) – to name only a few, a strong argument can however be made against this idea of a European International Law.⁶⁰ It may indeed be true that the origin of International Law lie outside Europe and emerged between regional civilizations. The mainstream doctrine nonetheless leans towards the belief that International Law consolidated as the *droit public de l'Europe*⁶¹, that is, a body of rules elaborated by the European Christian powers. According to this understanding – which is attributed to the rise of positivism⁶², the *droit public de l'Europe* did not regulate the relations between non-Christian entities the Christian European Nations.⁶³ This paper builds on this idea of a European International Law to demonstrate that, under such a regime, the International Society was a mirage or, at best, boiled down to a European Christian society.⁶⁴ In this schema, International Law could only be *public* because of its inter-public character and not because it served a global interest.

Later, through colonization, International Law came to cover, though not to apply to, nearly the entire world.⁶⁵ But even the admission of Turkey (through the 1856 Treaty of Paris) and Japan (via the 1899 Hague Conference) as members of the “Family of Nations”⁶⁶ did not usher in any universalization of the society.⁶⁷ This “extension” only evidenced the secularization of membership to that society. On the whole, the 19th century thus furthered the model of

⁵⁶ A. Nussbaum, *A Concise History of Law of Nations* ix (MacMillan, 1954).

⁵⁷ J. Kent, *Commentary on International Law* (Deighton, Bell, and Co, 1878).

⁵⁸ R. Phillimore, *Commentaries upon International Law* (Butterworths, 1879-89).

⁵⁹ H. Wheaton, *Elements of International Law* (Stevens & Sons, 1880).

⁶⁰ See the illuminating analysis of A. Orakhelashvili, ‘The Idea of European International Law’, *supra* note 5, 315-317. Comp. with Onuma Yasuaki, ‘When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective’, 2 *Journal of the History of International Law* 1-66 (2000) (He seeks to demonstrate that what most International Lawyers have called International Law during the sixteenth to the eighteenth century was just one of many normative systems which existed in various regions of the globe). For a criticism of this theory, see J. Fisch, ‘Power or Weakness? On the causes of the worldwide expansion of European Law’, 6 *Journal of the History of International Law* 21-26, (2004). See also Pierre-Marie Dupuy, ‘L’unité de l’ordre juridique international : cours général de droit international public’, 297 *Collected Courses* (2002), 9-489.

⁶¹ See for instance, G. F. Martens, *Précis du droit moderne de l’Europe fondé sur les traités et l’usage* (Dieterich, 1789). On the influence of European expansion on International Law, see J. Fisch, *Die europäische Expansion und das Völkerrecht* (Stuttgart: Steiner, 1984).

⁶² A. Orakhelashvili, *supra* note 5, at 317.

⁶³ H. Wheaton, *Elements of International Law*, *supra* note 59, at 51 (“The International Law of civilized Christian nations of Europe and America is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christian, is another and a very different thing”). See also the commentaries of M. Koskeniemi, *supra* note 55, at 151.

⁶⁴ Gong, ‘The Standards of “Civilisation” in International Society (Oxford, 1986) at 136; Yongjin Zhang, ‘China’s Entry into International Society: Beyond the Standard of Civilization’, *Review of International Studies* 17 (January 1991), at 3-16.

⁶⁵ Onuma Yasuaki, ‘When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective’, *supra* note 61, at 50, 63-64.

⁶⁶ On this controversy, see Onuma Yasuaki, ‘When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective’, *supra* note 61, at 33-39; W. McKinnon, ‘The Treaty of Paris and Turkey’s Status in International Law’, 37 *Am. J. Int’l L.* 262 (1943).

⁶⁷ For Oppenheim, Turkey was still not a member of the Family of States. It was only semi-civilised, L. Oppenheim, *International Law* 34 (3^d ed., 1912); G. Simpson, *Great Powers and Outlaw States* (CUP, 2004) at 244-245. See also William Edward Hall, *A Treatise on International Law* 39 (6th ed., 1909); G. Schwarzenberger, ‘The Standard of Civilization in International Law’, 8 *Current Legal Problems* 212 (1955). See generally Y. Ben Achour, *Le rôle des civilisations dans le système international. Droit et relations internationales* (Bruylant, 2003).

International Law characterized by a division of the world between “civilized” and “non-civilized nations”⁶⁸ as manifested by interventionist doctrines, unequal treaties⁶⁹ and the extraterritorial jurisdiction of European powers embodied in the mechanism of capitulations.⁷⁰

The beginning of the 20th century was marked by a dramatic rise in the number of States “allowed” to take part in the international system, as illustrated by the amount of delegations accepted to the 1907 Hague Conference in comparison with 1899. This culminated in the 1919 Paris Peace Conference which gathered a number of States never attained at that time.⁷¹ Despite the International Society of the beginning of the 20th thus turned to have some overtones of a universal society, the Pact of the League of Nations did not set the stage for a true universal “Family of Nations” but rather crystallized the colonization phenomenon in the mandate system.⁷² The famous article 22 of the Covenant on the League of Nations enshrined the idea of a chasm between the civilized and the non-civilized world.⁷³ Though in 1931 the *Institut de droit international* defined the mandatory relationship as coming under International Law and the powers of the mandatory as having been vested in the exclusive interest of the subject population⁷⁴, there was little doubt that it was the reproduction of the civilizing process. The

⁶⁸ It can be argued that these standards of civilization were almost exclusively elaborated by the doctrine. See B. Kingsbury, ‘Sovereignty and Inequality’, 16 *Eur. J. Int’l. L.* 369, at 605 (2005); M. Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 55, at 78. For a different opinion, see G. Abi-Saab, ‘General course on public International Law’, *supra* note 20, at 58..

⁶⁹ An example of unequal treaty is the Treaty of Nanking, available at www.isop.ucla.edu/eas/documents.nanjing.htm;

⁷⁰ An excellent definition of capitulations is provided by G. Simpson, *supra* note 67, at 234 and 246.

⁷¹ H. Bull, ‘The Emergence of a Universal International Society’, in Hedley Bull and Adam Watson (eds) *The Expansion of International Society*, 117-126, at 125 (Oxford, Clarendon Press, 1984).

⁷² On the mandates, see generally Chowdhury, *International Mandates and Trusteeship Systems. A Comparative Study* (Nijhoff, 1955); Albert Millot, *Les mandats internationaux. Etude sur l’application de l’article 22 du Pacte de la Société des Nations* (Paris, Larose, 1924); Henri Rolin, ‘Le système des mandats coloniaux’, *Revue de Droit International*, III/1, 329-363 (1920).

⁷³ Article 22 :

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League. There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population....

⁷⁴ 36 *Yearbook of the IDI* 233-234 (1931-II). Also available at www.idi-ill.org

article 38 of the Statute of the Permanent Court of International Justice also lived up to the idea of a dichotomy based on the criteria of civilization.⁷⁵

Backing the practice of colonization, International Law could not address the concern of the whole society. It is true that the “mission civilisatrice” was interpreted at that time as furthering the interest of the world as a whole. But it is posited here that, conceived as a body of rules allowing that some entities be subdued by others, International Law could not be promoting the interest of the International Society as a whole.

It is the principle of self-determination embodied in the 1945 UN Charter that has constituted the first substantial step towards the emergence of a truly International Society whose interest could be taken into account. Though the meaning of this principle, as laid down in the Charter, was clouded by competing and diverging interpretations⁷⁶, the dominant interpretation which finally emerged under the auspices of the UN General Assembly paved the way for universality.⁷⁷ Indeed, construed as a ground for decolonization, self-determination spawned real extension of International Law beyond the limits inherited from the 19th century and made possible the emergence of an International Society.

The universality brought about by decolonization was somewhat hampered by the Cold War.⁷⁸ Indeed, the ideological division of the world frustrated the universalization by almost giving rise to two subsets of subjects ignoring one another as illustrated by the systematic non-recognition of certain States or governments for ideological reasons.⁷⁹ These curtailments however disappeared with the end of the Cold War⁸⁰, despite some lingering non-pluralistic attitudes towards States disrespectful of the new values of the post-cold war order.⁸¹ The

⁷⁵ Article 38:

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

⁷⁶ T. D. Musgrave, *Self Determination and National Minorities* (Oxford University Press, 1997).

⁷⁷ For M. Koskenniemi decolonization was thought as the “final universalization of Western form of government” (*The Gentle Civilizer of Nations*, *supra* note 55, at 176).

⁷⁸ See generally K. Wilk, ‘International Law and Global Ideological Conflict: Reflections on the Universality of International Law’, 45 *Am. J. Int’l L.* 648-670 (1951); J. Weeramantry, *Universalising International Law*, esp. 9-11 (Nijhoff, 2004). See also E. Sauer, ‘Universal Principles in International Law’, 42 *Transactions of the Grotius Society, Problems of Public and Private International Law* 181-191 (1956).

⁷⁹ B. R. Bot, *Non-Recognition and Treaty Relations* (Ocean publications, 1968) See also J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine. Les relations publiques internationales* (Pédone, 1975).

⁸⁰ Barry Buzan, *supra* note 40, at 349.

⁸¹ These non-pluralistic attitudes have taken various forms, ranging from curtailments to immunity or hindering the right to compensation under State Responsibility. They have mostly concern States cast as non-democratic or supporting terrorism. Among many examples, see for instance the curtailment to the immunity of States supporting terrorism, Sec. 221. *Jurisdiction for Lawsuits Against Terrorist States (a) Exception to Foreign Immunity for Certain Cases*; See the *amicus curiae* submitted by US House of Representatives to a US District Court seized by plaintiff under the *Alien Tort Claim Act* and the *Torture Victims Protection Act* in a case involving Jang Zemin, former head of the People’s Republic of China, Brief of Amicus Curiae Relating to Issues Raised by the United States in Its Motion to Vacate October 21, 2002, Matters and Statement of Interest or, in the Alternative Suggestion of Immunity at 4 (June 9, 2003), Plaintiffs A, B, C, D, E, F v. Zemin, reproduced in 97 *Am. J. Int. L.* 975-976 (2003). See the text adopted by the US House of Representatives preventing the US government from making good the damage caused by the United States to

checks of the Cold War did however not forestall the realization of some significant lawmaking achievements directed at the interest of the International Society that had emerged from decolonization.

Let alone the experience of the Cold War, it can thus be said that self-determination constitutes the bedrock of an international rulemaking directed at the promotion of a global interest in that decolonization has opened the door to an international lawmaking amenable to the interest of the International Society.

C. The Interest of the International Society

If it can be said that there are abiding and structural national interests (to Realists, this comes down to survival, autonomy and well-being⁸²), it can then be argued that there are structural interests of the International Society. If this is true, these structural interests of the International Society mostly relates to the maintenance of some form of *order*⁸³, seesawing between the need for the preservation of the current order and the anticipation of its future alterations.⁸⁴ This paper however posits that even the almost obvious need of the International Society for order cannot constitute a global interest if it is not perceived as such. This ambiguity can be traced back to the concept of International Society itself. As explained earlier, its existence rests on a global identification. Although “interests” may be the “motivational force”⁸⁵ of identities, global interests presuppose a global identity. This means that States cannot appraise the needs of the society until they identify as a “we”⁸⁶. However, identities are very fickle. They are various and ever-changing⁸⁷. Accordingly, the determination of the global interest is inescapably contingent upon the perceptions of the lawmakers themselves.

Although there maybe some structural and objective interests of the International Society – mostly concerning the maintenance of the *order* of the society, the subjective perceptions of the parties are thus not irrelevant and must be taken into account. Each State has its own understanding of what this order is or should be. This is why there is no utterly objective criterion to determine the interest of the International Society. For the same reason, any attempt to lay out a definition of the global interest *in abstracto* would always prove unsatisfactory.

China on the ground that the claim of China for reparation was “the deluded daydream of a despotic regime”, House of Representatives, Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Acts, 18 July 2001, H4141

⁸² See for instance A. George and R. Keohane, “The Concept of national interests: Uses and limitations”, in R. George, *Presidential Decisionmaking in Foreign Policy*, Boulder: Westview, 217-238 (1980). D. Clinton, ‘The national interest: Normative foundations, 48 *Review of Politics* (1986), 495-519, esp. 497-505. For A. Wendt, the ‘self-esteem’ must also be accounted for one structural national interest. A. Wendt, *supra* note 48, at 236.

⁸³ De Visscher, *Theory and Reality of International Law*, *supra* note 33, at 71, 100; See also C. Tomuschat, ‘General course on public International Law’, *supra* note 26, at 78 (He tends to make a difference between peace and order).

⁸⁴ Ph. Allot, ‘The Concept of International Law’, *supra* note 52, at 31-50.

⁸⁵ *Ibid.*

⁸⁶ A. Wendt, *supra* note 48, at 231.

⁸⁷ *Ibid.* at 233.

There may of course be variations in the perception of the global interest. 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 superpower can understand the same rule as serving a global interest. But the differences of perception not only arise out of objective differences 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 International Society. This is the cause of what is called a *coexistence of interests*. Illustrations of rules that rest on a coexistence of different types of interest are provided in the second part of this paper.⁸⁸

The subjective contingency that swirls around the determination of the interest of the International Society is even more acute when we turn to the need for *justice*.⁸⁹ Indeed, the (structural) need of the International Society for justice is less self-evident, thereby leaving more room for subjective appraisals. It could even be argued that justice is not a structural interest of the International Society although it has been construed as such. Even if this is true, I posit that justice remains an interest of the International Society precisely because it is considered as such by States which, for the occasion, are driven to think as a 'we'.

Building on this conception of the global interest, the second part of this paper is aimed at examining some of the rules that makes contemporary international law to evaluate whether States can have understood them as fulfilling a global interest, thereby demonstrating that they have, at least occasionally, shared a (sub-) global identity.

II. MUTUALIZATION OF INTERESTS, SUB-GLOBAL INTERESTS AND GLOBAL INTERESTS

This part of the paper builds on a three-tiered taxonomy. It first argues that international lawmaking remains first and foremost the byproduct of shared individual interest. This is what I call "mutualization of interest" to which the first section is devoted (A). In the second section, I identify hypotheses where the rulemaking is neither purely self-serving nor directed at the interest of the International Society. These are the situations where rules are geared towards the promotion of the interest of a restricted group of States. This is what I call the "sub-global interest" (B). Finally, I elaborate on the situations where rules are actually adopted with the view of promoting the interest of the International Society as a whole (C). In this third section, I demonstrate the extent to which International Law has a bent for the promotion of a global interest and its actual importance as regards the public character of International Law.

A. Mutualization of interests

International Law remains the outcome of the competing national interests compromising with one another. This is anything but surprising. States are both primary lawmakers and subjects

⁸⁸ See *infra* II.5.e).

⁸⁹ Alex J. Bellamy, Introduction: International Society and the English School, in A. J. Bellamy, *International Society and its Critics*, (Oxford, OUP, 2005) at 10; see also A. Hurrell, *supra* note 40, at 20; Barry Buzan, *supra* note 40, at 335.

of International Law.⁹⁰ They naturally act – at least from a rationalist point of view – to maximize the interest of their constituency given their perception of the interests of other states and the distribution of State power.⁹¹ This is by no means at loggerheads with the establishment of international legal norms and international cooperation. As it has been explained by McDougal and Reisman, “the most important ‘national’ interests of a particular state may be its inclusive (‘international’) interests with other states”.⁹² As Friedman noted, 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”.⁹³ It is also what Schwarzenberger conceptualized in its three-tiered taxonomy on the basis of the concept of *Law of Reciprocity* construed as a compromise between the *Law of Power* and the *Law of Coordination*.⁹⁴

There are thus situations where States admit that the only means to promote their interest is the development of International Law and, possibly, the curtailment of their freedom. In such a situation, there is a *mutualization* of interests. Mutualization means *convergence* of interest as explained by De Visscher.⁹⁵ This convergence entices States to cooperate and adopt a multilateral framework for their action. This is what Niebuhr depicted as the “wise” or “enlightened” self-interest.⁹⁶ In that sense, mutualization of interests mirrors J. Bentham’s famous aggregative definition of the public interest⁹⁷. This mutualization excludes coercion in the sense of article 52 of the Vienna Convention of the Law of Treaties.

The following paragraphs illustrate the mutualization of interests, drawing upon the rules related to trade (1), communications (2), environment (3), disarmament (4) as well as the rules devoted to the efficiency of the international system (5).

⁹⁰ J. I. Charney, ‘Universal International Law’, 87 *Am. J. Int’l L.* 529, at 533 (1993).

⁹¹ Jack L. Goldsmith and Eric A. Posner, *Limits of International Law*, *supra* note 28, at 3 & 6 (“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”).

⁹² M. S. McDougal and W. M. Reisman, ‘The changing structure of International Law’, 65 *Colum. L. Rev.* 810, at 813 (1965). *See also* B. Simma, *supra* note 13, at 242.

⁹³ F. Friedmann, *supra* note 17, at 48.

⁹⁴ G. Schwarzenberger, *supra* note 16, at 15-16.

⁹⁵ This is discussed by De Visscher, *Theory and Reality of International Law*, *supra* note 33, at 144-153; *see* Jack L. Goldsmith and Eric A. Posner, *supra* note 28, at 13 & 88-90.

⁹⁶ Quoted by R. C. Good, ‘The National Interest and Political Realism: Niebuhr’s ‘Debate’ with Morgenthau and Kennan’, 22 *The Journal of Politics*, 597-619, at 601 (1960).

⁹⁷ *See An Introduction to the Principles of Morals and Legislation*, Ed. J. H. Burns and H.L.A. Hart, 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”⁹⁷. 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 the society. For a rehabilitating understanding of Bentham, *see* J.A.W. Gunn, ‘Jeremy Bentham and the Public Interest’, 1 *Canadian Journal of Political Science* 398-413 (1968).

1. Trade Treaties

The rules pertaining to international trade are probably the clearest illustration of a mutualization of interests. Even though trade enhances global wealth⁹⁸, it does not seem disputable that States primarily seek to promote their individual interest as it was clearly explained by the WTO Appellate Body in the *Japan – Taxes on Alcoholic Beverages* case:

“The WTO Agreement is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.”⁹⁹

2. Communications and Transportation related Treaties

A mutualization of interests is also underlying the law of international communications and transportation. It may be argued that States have consented to major international instruments devoted to communications and transportation because of self-interest.¹⁰⁰ When adopting rules regulating water¹⁰¹ or air transport¹⁰², navigation¹⁰³, postal relations¹⁰⁴ and telecommunication¹⁰⁵, it seems that States have first sought to enhance their individual wealth. This is also the opinion of Schwarzenberger.¹⁰⁶

⁹⁸ See the Preamble of GATT 1947: “Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods; Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce”.

⁹⁹ WTO Appellate Body, *Japan – Taxes on Alcoholic Beverages* case, AB-1996-2, 4 October 1996, at 15.

¹⁰⁰ J. H. H. Weiler, ‘The Geology of International Law’, *supra* note 52, at 556; but see G. Abi-Saab, ‘Cours général de droit international public’, *supra* note 20, at 441-442.

¹⁰¹ Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN), Geneva, 1 March 1973; Convention on the contract for the international carriage of passengers and luggage by inland waterway (CVN), Geneva, 6 February 1976; Protocol to the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) Geneva, 5 July 1978; United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978; International Convention on Maritime Liens and Mortgages, Geneva, 6 May 1993; European Agreement on Main Inland Waterways of International Importance (AGN), Geneva, 19 January 1996; European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN), Geneva, 26 May 2000.

¹⁰² See for instance the Convention on International Civil Aviation, signed at Chicago on 7 December 1944.

¹⁰³ Convention on the International Maritime Organization, Geneva, 6 March 1948; Convention regarding the Measurement and Registration of Vessels Employed in Inland Navigation, Bangkok, 22 June 1956; Convention relating to the unification of certain rules concerning collisions in inland navigation, Geneva, 15 March 1960; Convention on the registration of inland navigation vessels, Geneva, 25 January 1965; Convention on the measurement of inland navigation vessels, Geneva, 15 February 1966; Convention on a Code of Conduct for Liner Conferences, Geneva, 6 April 1974; United Nations Convention on Conditions for Registration of Ships, Geneva, 7 February 1986; International Convention on Arrest of Ships, 1999, Geneva, 12 March 1999.

¹⁰⁴ See the 1874 Treaty of Bern (creating the Universal Postal Convention)

¹⁰⁵ Convention relating to the distribution of programme-carrying signals transmitted by satellite, Brussels, 21 May 1974; Constitution of the Asia-Pacific Telecommunity, Bangkok, 27 March 1976; Agreement establishing the Asia-Pacific Institute for Broadcasting Development, Kuala Lumpur, 12 August 1977; Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, Tampere, 18 June 1998.

¹⁰⁶ Schwarzenberger, *supra* note 16, at 31. But see Friedmann, *The Changing Structure of International Law*, *supra* note 17, at 68.

3. Environmental Treaties

While there is not much disagreement about the idea that international trade and International Law of communication is first and foremost a vehicle of States' national interest, such a conclusion is more uncertain with respect to the rules pertaining to the protection of the environment. As it will be explained below, these rules are mostly enshrining a global interest. This is however not systematically so. Those rules dedicated the prevention of the deterioration of a state's environment by activities taking place outside the limits of its jurisdiction do not aim at the promotion of a global interest. They are rather meaning to avert "transfrontier pollution" as illustrated by the Convention on Long-range Transboundary Air Pollution of 13 November 1979.¹⁰⁷ Instruments of that kind are understood as protected States themselves. Be that as it may, the aforementioned environmental rules do however not constitute the bulk of international environmental law which is considered below as an illustration of the promotion of a global interest in international lawmaking.¹⁰⁸

4. Disarmament Treaties

It is asserted here that most disarmament treaties are also the outcome of a mutualization of national interests. Some would probably contend that this is due to the *reciprocity* which usually lies at the core of disarmament treaties. It is true that States are used not to pledge to the curtailment or the prohibition of the use of certain kinds of weapons as long as the others do not forswear the use of such weapons to the same extent. These treaties are built on reciprocity. They contain what is called "integral obligations".

It must be underscored that the integral character of an obligation does by no means exclude the existence of a global interest. As developed by Fitzmaurice as a Special Rapporteur of the International Law Commission on the Law of Treaties¹⁰⁹, integral obligations are those obligations whose performance is effectively conditioned upon and requires the performance of each of the others. If one party ceases to observe the treaty, the others have no longer any interest in complying with it. The integral character of an obligation is a decisive element as to determine whose *legal* interest is breached when a State compliance fall short.¹¹⁰ This is however not a key factor to determine the kind of interest which has led States to consent to such a rule at the lawmaking stage. That its *compliance* relies on each State's performance does not however mean that *the rule itself* does not promote a global interest. In other words, the integral character of a rule does not *necessarily* imply that it rests on a mutualization of national interests.

¹⁰⁷ A. Kiss, 'The international protection of the environment', in R. McDonald and D. M. Johnston, *The Structure and Process of International Law: Essay in Legal Philosophy Doctrine and Theory*, at 1071 (Nijhoff 1983).

¹⁰⁸ See *infra* II.C.

¹⁰⁹ I.L.C. Yearbook, 1957, vol. II, at 54.

¹¹⁰ See article 42 of the articles on State responsibility: "Invocation of responsibility by an injured State. A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) That State individually; or (b) A group of States including that State, or the international community as a whole, and the breach of the obligation: (i) Specially affects that State; or (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation".

I argue that disarmament treaties rest on a mutualization of interests for another reason. When agreeing on a curtailment of their weaponry, States rather want a constraint to be imposed upon the other parties' powers. In so doing, 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.¹¹¹ This is not to say that all weaponry-related treaties are from the same mold. Indeed, a number of treaties are aiming at the prohibition of armament deemed excessively injurious or seen as having indiscriminate effects towards individuals.¹¹² These obligations, as explained below, are directed towards the promotion a global interest.

5. Rules Pertaining to the Efficiency of the System

It is submitted here that rules and principles directed at a greater efficiency of the international system stem from a mutualization of interests. They have been laid down by States following a convergence of individual interests. These are, for instance, the rules that aim at ensuring the stability, the efficiency, and the predictability of inter-State relations.¹¹³ So are the rules pertaining to the diplomatic or consular relations for instance.¹¹⁴ The same conclusion probably applies to the rules providing immunity to head of States and governments as well. Indeed, each State is interested in having its high-ranking representatives protected. These rules help to keep the international system working, what benefits to each State. This is also the stance adopted by Schwarzenberger¹¹⁵ and Friedmann¹¹⁶.

The aforementioned observation might however cause some bewilderment as some could argue that, because these rules contribute to *the efficient functioning of the international system*, they promote a global interest. The *obiter* of the international Court of Justice in the *Diplomatic and Consular Staff* case may seem to underpin their conclusion:

“[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

¹¹¹ 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* 54-87 (1979); Raymond L. Garthoff, 'On Mutual Deterrence: A Reply to Donald Brennan', 3 *International Security* 197-199 (1979); Horst Afheldt and Philipp Sonntag, 'Stability and Deterrence through Strategic Nuclear Arms', 10 *Journal of Peace Research - Special Issue: Peace Research in the Federal Republic of Germany* 245-250 (1973); Robert J. Art, 'Between Assured Destruction and Nuclear Victory: The Case for the "Mad-Plus" Posture', 95 *Ethics - Special Issue: Symposium on Ethics and Nuclear Deterrence*, 497-516 (1985); Michael McCaules, 'Machiavelli and the Paradoxes of Deterrence', 14 *Diacritics* 11-19 (1984)

¹¹² See for instance the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997.

¹¹³ J. I. Charney, 'Universal International Law', *supra* note 90, at 532.

¹¹⁴ See the Vienna Convention on Diplomatic Relations of 18 April 1961 and the Vienna Convention on Consular Relations of 24 April 1963.

¹¹⁵ Under Schwarzenberger's famous classification, these rules were to be seen as a part of the Law of Reciprocity. See Schwarzenberger, *supra* note 16, at 30.

¹¹⁶ Friedmann's taxonomy is more manichean but relies on the same idea. See *The Changing Structure of International Law*, *supra* note 17, at 61.

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".¹¹⁷

I do not believe that States perceive the rules pertaining to the efficiency of the system as a whole as serving the global interest. To my understanding, the Court in the aforementioned case was only concerned with the question of compliance, not that of international lawmaking. Leaving the assertion of the World Court aside, it seems important not to conflate the interest of the system and the interest of the International Society. Indeed, that the system be properly working does not *necessarily* mean that it is consistent with the global interest.¹¹⁸ If the international system were – for instance – causing harms to human beings or preventing that authors of major violation of human rights be tried¹¹⁹, it is not certain whether the durability and the continuity of the system would be consistent with the global interest. Yet, it will be in favor of each State's interest. This is the reason why I argue that rules ensuring the proper functioning of the system very often rest on a mutualization of interests.

Not all rules ensuring efficiency of the system boil down to a mutualization of interest. Indeed, a reservation must be formulated with respect to the dispute settlement mechanisms. The rules pertaining to disputes resolutions undoubtedly contribute to a better functioning of the system. These rules are however serving other purposes, including the maintenance of peaceful international relations, and for that reason may promote a global interest as it will be demonstrated below.¹²⁰

In the same vein, a remark must be formulated as regards the type of interest that is promoted by the Vienna Convention on the Law of Treaties. This instrument contains rules that can also be seen as dedicated to a better functioning of the entire system. On the footing that "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"¹²¹, it could be sustained that the Vienna Convention on the Law of Treaties "promote[s] the purposes of the United Nations 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".¹²² It can however be argued that the codification of the law of treaties was first perceived as a means to reduce the legal uncertainty which previously crippled international conventional relations.¹²³ In that sense, the Vienna Convention clarified various aspects of the conventional relationships ranging from elaboration to termination. This is why I believe that the Vienna Convention originates in a mutualization of interests.

¹¹⁷ ICJ Reports 1980, 3, at 43, par. 92.

¹¹⁸ See Stephan Haggard & Beth A. Simmons, 'Theories of International Regimes', 41 *International Organizations* 491, at 496 (1987).

¹¹⁹ L. M. Caplan, 'State Immunity, Human Rights and Jus Cogens : A Critique of the Normative Hierarchy Theory', 97 *Am. J. Int'l L.* 778-779 (2003); C. Tomuschat, 'L'immunité des Etats en cas de violations graves des droits de l'homme', 109 *R.G.D.I.P.* 51-74 (2005).

¹²⁰ Cfr *infra* II.C.5.

¹²¹ Preamble.

¹²² *Id.*

¹²³ Jack L. Goldsmith and Eric A. Posner, *supra* note 28, at 95-98.

The rules of States responsibility can fall under the same category.¹²⁴ I believe that, like the rules of the Vienna Convention on the Law of Treaties, rules pertaining to international responsibility – and, by the same token, all secondary rules of International Law¹²⁵ – rest on a mutualization of national interests as they provide legal clarity as regards the consequences of a breach.¹²⁶ By my account, the individual need of all States for legal clarity and legal security together with the individual interest that the whole legal system be running efficiently constitute the prime motivation for adopting these rules.

B. Sub-global interests

It is conceivable that a group of States consents to a rule in the very interest of the sole group. In such a situation, the rulemaking is directed towards the promotion of a sub-global interest.¹²⁷ This category of international lawmaking was only briefly touched on by Friedmann under what he called the “building of co-operative International Law [...] on different levels of universality”.¹²⁸

The existence of sub-global interest in International Law making is first and foremost buttressed by the dramatic development of regional international organizations. I do not argue that all international organizations serve the promotion of a global interest. International organizations may also be created to promote individuals interest. I submit that a fair number of regional organizations are however devoted to the promotion of a sub-global interest. The European Community is probably the most obvious example. Building on a fledging European identity, the last rounds of reforms of the European Union, though still betraying a strong commitment to national interest, have demonstrated the will of the European States to “end [...] the division of the European continent”.¹²⁹ Leaving aside the controversies related to its ratification, the Treaty establishing a constitution for Europe adopted by all the 25 States in June 2004 also bespeaks a true European endeavor to promote the global interest of the continent in that it is aiming at “continu[ing] along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived and [...] remain[ing] a continent open to culture, learning and social progress; and [...] deepen[ing] the democratic and transparent nature of its public life [...]” with the ultimate goal of “forging a common destiny”.¹³⁰ It can hardly be disputed that together with their intention to serve national interest, European States have also been driven by a common sense of what the global interest of the continent should be.

¹²⁴ J. I. Charney, ‘Universal International Law’, *supra* note 90, at 532.

¹²⁵ See J. Combacau et D. Alland, ‘Primary and Secondary Rules in the Law of State Responsibility’, 16 *Netherlands Yearbook of International Law* 81 (1985).

¹²⁶ See for instance the First report of the Special Rapporteur, Mr. Roberto Ago (21st session of the ILC (1969)) , U.N. Doc. A/CN.4/217 and Corr.1 and Add.1.

¹²⁷ For a similar opinion see J. H. H. Weiler, ‘The Geology of International Law’, *supra* note 52, at 556.

¹²⁸ Friedmann, ‘The Changing Structure of International Law’, *supra* note 17, at 62.

¹²⁹ Preamble of the Treaty of Nice, *Official Journal* C 80 of 10 March 2001.

¹³⁰ Preamble of the Treaty establishing a Constitution for Europe, *Official Journal* C 310 of 16 December 2004.

The intention of the member States of the Organizations of American States¹³¹ or the members of the African Union¹³², among others, to promote the interest of their continent, are also illustrative of the existence of sub-global interest in the international rulemaking. Most regional International Organizations can similarly be analyzed as an attempt to promote a sub-global interest. This paper does not intend to list them all here.

The autonomy that these International Organization are endowed with is usually a clear indication of the global interest that they may be serving. Indeed, the organs of these organizations will generally be able to wield their norm-making powers in accordance with the interest of the organization to the extent that they enjoy some independence from member States.¹³³ The promotion of the sub-global interest is even more likely when a judicial body has been established within the framework of the organization. This is well illustrated by the dramatic development of European Law in the interest of the European society as a whole through the jurisprudence of the CJEC.¹³⁴

It must be stressed that the interest of the organization is not necessarily identical to that of the sub-society of States composing the organization. An organization can possibly serve its own interest as an international legal subject and not the interest of the sub-society. This is a question of facts and any conclusion in that respect must rely on a case-by-case analysis. It can however be noticed that the adoption of self-serving norms by an international organization is however rare, precisely because the promotion of the interest of the organization generally serves the sub-global interest that the organization is devoted to. One could even take the example of the regulations pertaining to wages or social benefits of the agents of the organization. It can be argued that these rules do not only serve the sole interest of the organization concerned and its agents but also contribute to the achievements of the mandate that they are entrusted with.¹³⁵

Let alone international organizations, the existence of sub-global interests in international lawmaking can also be illustrated with the numerous regional treaties directed at the protection

¹³¹ See the preamble of the for instance of the Charter of Organization of American States: "Conscious that that mission has already inspired numerous agreements, whose essential value lies in the desire of the American peoples to live together in peace and, through their mutual understanding and respect for the sovereignty of each one, to provide for the betterment of all, in independence, in equality and under law; Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region; Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man; Persuaded that their welfare and their contribution to the progress and the civilization of the world will increasingly require intensive continental cooperation"; see also article 2: "The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: a) To strengthen the peace and security of the continent; [...] g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States".

¹³² The constitutive act of the African Union, recalls, for instance, "the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States", available at <http://www.africa-union.org/home/Welcome.htm>.

¹³³ R.-J. Dupuy, *supra* note 18, at 78.

¹³⁴ See for instance, ECJ, Case 294/83, *Les Verts/EP*, [1986] ECR 1339, para. 23; ECJ Opinion 1/91, *EEA*, [1991] ECR I-6079 para. 1

¹³⁵ Regarding the European Parliament for instance, see the draft statute under discussion which would equalize salary differences and make for transparency of MEPs' pay. On the recent development of this question see *Le Monde*, 23 June 2005.

of “shared resources” of watercourses¹³⁶, or marine areas¹³⁷ – which are usually concerned with geographically defined environmental resources¹³⁸ – or conventions devoted to the protection of wildlife in a determined area.¹³⁹

The promotion of sub-global interests by regional environmental treaties as well as the treaties constitutive of an international organization has some bearing upon the law of international State responsibility. Indeed, the obligations contained in the aforementioned treaties must be construed as *erga omnes partes* obligations under the law of State responsibility. These are obligations whose fulfillment every State of the group concerned has an interest in. An important reservation must however been made here. The obligations of an *erga omnes partes* character are all dedicated to the promotion of a sub-global interest.¹⁴⁰ But the opposite is not true. Not all rules serving a sub-global character amount to *erga omnes partes* obligations. This being so, the *erga omnes partes* character of the aforementioned treaties constitutes a clear indication that these rules are serving a sub-global interest.

The sub-global interest of a group of States – as promoted by the abovementioned international instruments – can sometimes overlap with a truly global interest. As J. H. H. Weiler argued, the goals of the European Union – for instance – “very often transcend any specific transactional interest and are of a ‘meta’ type – *i.e.* the overall interest in having an orderly or just international community”.¹⁴¹ This is particularly true as regards the peace and security¹⁴² or the protection of the environment¹⁴³ that some regional organizations surely sustain. It is even

¹³⁶ Convention on the Protection of the Rhine, Rotterdam, January 22, 1998; Convention on Cooperation for the Protection and Sustainable Use of the Danube River, Sofia, 29 June 1994; Treaty relating to cooperative development of the water resources of the Columbia River Basin, 17 January 1961; treaty between the United States of America and Canada relating to the uses of the waters of the Niagara River, Washington, 27 February 1950.

¹³⁷ Convention and Protocols for the Protection of the Marine Environment against Pollution in the Mediterranean, Barcelona, 16 February 1976; Convention on the Protection of the Baltic Sea Area, Helsinki, 22 March 1974; Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 23 March 1981; 1993 Convention for the Conservation of Southern Bluefin Tuna signed by Australia, New Zealand and Japan; Agreement between Canada and Norway on Sealing and the Conservation of the Seal Stock in the North-West Atlantic of 15 July 1971.

¹³⁸ A. Kiss, *supra* note 107, at 1083.

¹³⁹ African Convention on the Conservation of Nature and Natural Resources, Algiers, 15 September 1968; Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979.

¹⁴⁰ See the commentary of article 42 of the Articles on State Responsibility adopted by the International Law Commission: “States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and second, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of International Law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary International Law. Such obligations have sometimes been referred to as obligations *erga omnes partes*. [Such] obligations [...] have to be collective obligations, *i.e.* they must apply between a group of States and have been established in some collective interest. They might concern, for example, the environment or security of a region [...]”, Report of the International Law Commission, 53d session, G.A.O.R., 56th session, Supp. No. 10, A/56/10, at 320.

¹⁴¹ J. H. H. Weiler, *supra* note 52, at 556.

¹⁴² See the preamble of the Treaty establishing a European Constitution: strive for peace, justice and solidarity throughout the world; preamble of the Constitutive act of the African Union: “Conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda; determined to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law”, *Official Journal* C 310 of 16 December 2004.

¹⁴³ Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States, *Official Journal* L 194 25.07.1975 at 26; Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, *Official Journal* L 031 05.02.1976 at 1; Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, *Official Journal* L 129

more obvious in the case of regional organizations devoted to the protection of Human Rights.¹⁴⁴ Lawmaking in this situation falls under the category of rulemaking with the view of promoting of a global interest. This category of rulemaking is now further analyzed to assess the real extent of the “publicization” of International Law through the promotion of the International Society interest.

C. THE GLOBAL INTEREST

Before pinpointing global interest-driven rulemaking situations, it must be expounded that the global interest served by a rule is not subject to its universal adoption by States (1). By the same token, some light must be shed on the types of sources of International Law which are usually resorted to in the pursuit of a global interest (2). Because global interest-driven norms often mirror the *erga omnes* obligations under the law of State responsibility, the relationship between them will then be examined (3). The rules dedicated to the promotion of a global interest can also echo the idea of a public order and, for that reason, call for some comments in that respect (4). It is only after all these preliminary theoretical caveats that the international lawmaking situations directed at a global interest are analyzed (5).

1. Global Interest and the Universality of Rules

I argue that a rule of International Law can serve a global interest even though it only binds a couple of States. Indeed, it is conceivable that a handful of States agree on a treaty aiming at a global interest. The lack of universal adoption of such a rule will probably hinder its implementation at a later stage but does not quell the global interest that this rule seeks to promote.

One can take the examples of the Antarctic Treaty, CTBT, the Rome Statute on the ICC, the Kyoto Protocol, the Convention on Biodiversity or the Landmines Convention. These conventions do not bind all States whereas it can be reasonably posited that they serve a global interest.¹⁴⁵ A global interest-driven rule is usually not adopted universally when the interest that it seeks to promote is blatantly at loggerheads with some national interests. In these instances, there are always some States reluctant to support the rule furthering the global interest. If this is so, it means that the global interest of the rule concerned remains outweighed by overriding individual interests. This situation does however not prevent the rule from being directed at a global interest.

18.05.1976 at 23; Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters, *Official Journal* L 281 10.11.1979 at 47; Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances, *Official Journal* L 020 26.01.1980 at 43; Council Resolution of 7 February 1983 concerning the combating of water pollution; *Official Journal* C 046 17.02.1983 at 17; Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, *Official Journal* L 188 16.07.1984 at 20.

¹⁴⁴ Friedmann, ‘The Changing Structure of International Law’, *supra* note 17, at 63.

¹⁴⁵ The 1959 Antarctic Treaty signatories acknowledges in the preamble that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord as the Law of the Sea.

In such a situation, States reluctant to sacrifice their national interest do not necessarily refuse to acknowledge the existence of the global need that the rule seeks to alleviate. It is rather that, on the footing of a cost/benefit calculation, they are not ready to pay the price for serving that global interest.¹⁴⁶ For instance, the refusal of the United States to join the CTBT, the Rome Statute on the ICC, the Kyoto Protocol, the Convention on Biodiversity or the Landmines Convention does not mean that this country does not construe these international instruments as promoting a global interest. It is rather that this country is not willing to renounce its own interest for a global interest in the way prescribed by the instrument at stake. This well demonstrated by the fact that the uncompromising State(s) will generally adopt other mechanisms to address the global issue concerned.¹⁴⁷

2. Global Interest and the Sources of International Law

It is highly conceivable that some sources of International Law be more suitable and more resorted to for the promotion of a global interest. B. Simma touched upon that issue when he contended that “law-making by way of custom is hardly capable of accommodating community interest in a genuine sense”, thereby hinting that the treaty is the indispensable tool for fostering community interest.¹⁴⁸ The argument is hardly disputable as it is illustrated by the scarcity of customary rules pertaining to the protection of the environment.¹⁴⁹ Likewise, Human Rights rules first developed through treaty law before partially crystallizing in customary International Law.¹⁵⁰

The reason why customary International Law is not an appropriate means for the promotion of a global interest has some bearing upon the main characteristic of this source of law. It posited here that customary International Law can hardly be a “tool” for anything.¹⁵¹ On the footing that the development of customary International Law is a sheer passive normative phenomenon where the only option left to State is to persistently object from the onset or to silently assent, customary International Law can not be knowingly devised as a way to carry out any normative policy whatsoever. The active promotion of a given interest – whether national, sub-global or global – can only be sustained by more voluntary sources.

It has been argued by some others that customary international is unsuitable to serve the global interest because it cannot dovetail with a compound set of obligation including monitoring systems and exchange of information as often required by the promotion of global interest in

¹⁴⁶ N. Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16 *Eur. J. Int’l L.* 369-408, esp. 378-380 (2005). See the example of the global warming issue considered below: See ‘U.S. Won’t Follow Climate Treaty Provisions, Whitman Says’, *NY Times*, March 28, 2001, A19; Edmund L. Andrews, ‘Bush Angers Europe by Eroding Pact on Warming’, *NY Times*, April 1, 2001, S3.

¹⁴⁷ See e.g. the US moratorium on nuclear test indicating their intent not to test nuclear weapons available on <http://www.fas.org/irp/offdocs/pdd11.htm>.

¹⁴⁸ B. Simma, *supra* note 13, at 324. See also Friedmann, *The Changing Structure of International Law*, *supra* note 17, at 371.

¹⁴⁹ Philippe Sands, *Principles of international environmental law* (Cambridge University Press, 2003) at 184.

¹⁵⁰ Paul Gordon Lauren, *The Evolution of International Human Rights : Visions Seen*, (University of Pennsylvania Press, 2003); Richard Clayton, Hugh Tomlinson, *The Law of Human Rights* (OUP, 2000).

¹⁵¹ For a criticism of the use of customs as a tool for implementing policies in an advanced and compound world, see W. M. Reisman, ‘The Cult of Custom on the Late 20th Century’, 17 *Cal. W. Int’l L. J.* 133, at 134 (1987).

the modern world.¹⁵² This is undoubtedly true. But the reservation regarding customs also applies to the mutualization of interest. The convergence of national interest in the contemporary world also requires complex mechanisms that customary International Law can hardly accommodate.

The insignificant role of customary International Law in the active promotion of a global interest does not mean that there is no customary rule directed at the promotion of a global interest. Indeed, treaty can crystallize into customs.¹⁵³ It is therefore conceivable that an international custom originating in a prior treaty enshrine some rules serving the promotion of a global interest. In that sense, international customary law can contain obligations aiming at the promotion of a global interest. But these customary rules originate in a treaty as illustrated by the norms pertaining to human rights or the use of force.¹⁵⁴

Touching on this issue, C. Tomuschat, in his course devoted to the “obligations arising for States without or against their will” at the Hague Academy of International Law, considered the case of “treaties protecting basic interest of the international community”.¹⁵⁵ He seemed to imply that these treaties could more easily crystallize into general international customs because they are deemed to “protect basic interest of the international community”. A similar argument was made by J. I. Charney when he pondered the issue of the need of universal norms to address global concern. This author hinted that the establishment of general International Law on all subjects regardless of the attitude of any particular State should be based on a less formal indication of consent or acquiescence.¹⁵⁶ It is submitted here that there is no reason why the global interest a treaty seeks to promote would *per se* lead to a quicker crystallization in customary International Law. But it is absolutely true that the *perception* of a treaty as serving a global interest will probably enhance the *opinio juris* of States and stimulate the belief that such a rule is stemming from general International Law, not only from a treaty.¹⁵⁷ In that sense only, the global interest driving the adoption a treaty can facilitate its subsequent crystallization into customary law.

The treaty is thus the primary instrument to actively promote a global interest. It is nevertheless not the only normative tool that can serve a global interest. One can imagine resorting to *soft law*.¹⁵⁸ In international lawmaking, soft law will usually be dedicated to very sensitive issues and constitute a fall back when States fail to agree on a conventional and binding instrument. It seems obvious that in cases where the promotion of a global interest is at odds with States’ national interest, States will be far less ready to commit themselves in a

¹⁵² Jack L. Goldsmith and Eric A. Posner, *supra* note 28, at 86.

¹⁵³ See generally ICJ, *Case concerning the North Sea Continental Shelf*, ICJ Reports (1969) at 3.

¹⁵⁴ Cfr *infra* II.C.5.

¹⁵⁵ C. Tomuschat, ‘Obligations arising for states without or against their will’, 241 *Collected Course* 269-270 (1993-IV).

¹⁵⁶ J. I. Charney, ‘Universal International Law’, *supra* note 90, at 529-551.

¹⁵⁷ On this question see R. R. Baxter, ‘Treaty and Custom’, 129 *Collected Course* 67-74 (1970-I). See also the opinions of Judges Tanaka and Lachs in the case concerning the *North Sea Continental Shelf*, ICJ Report (1969) at 176 and at 231.

¹⁵⁸ G. Abi-Saab, ‘Cours général de droit international public’, *supra* note 20 at 323. For a criticism of the concept of Soft Law see J. d’Aspremont, ‘Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice’, *Revue Belge de droit international*, 496-520 (2003/2); see also P. Weil, ‘Towards Relative Normativity in International Law?’, 77 *Am. J. Int’l. L.* 413 (1983).

binding instrument. This is why soft law will often materialize controversial policies aiming at the global interest. It might occasionally take a subsequent conventional shape. The foregoing thus demonstrates that “contractualization” – that is the recourse to treaties – is not the only manner to serve a global interest.¹⁵⁹ Nor is it necessarily the most efficient. Political instruments are not necessarily less obeyed than legal texts from the standpoint of compliance.¹⁶⁰

International norms can also be generated by International organizations. In that respect, a few comments must be formulated on the Security Council’s lawmaking powers. When acting under Chapter VII aegis – which entrusts the Council with rulemaking power¹⁶¹ –, the Security Council action is due to be directed at the peace and security. In that sense, the Security Council is, as explained below, purportedly aiming at a global interest, *i.e.* the peace and the security.¹⁶² There is little doubt that nowadays, the concept of peace and security has extended well beyond what was originally foreseen and embraces violations of Human rights¹⁶³, violations of self-determination¹⁶⁴, violent overthrows of government together with ensuing destabilizing consequences¹⁶⁵, proliferation and trafficking of arms¹⁶⁶ or weapons of mass destruction¹⁶⁷, terrorism¹⁶⁸. These phenomena have been construed as a threat to the world peace.¹⁶⁹

Few will dispute that the Security Council resolutions that are consequently adopted to tackle the aforementioned global issues rest on a form of global interest. It should nevertheless be noted that Security Council resolutions adopted with the view of preserving the world peace are not automatically directed at a global interest. From a theoretical vantage point, nothing precludes some eight governments holding a seat in the Security Council, including the five permanent members, to act in their own individual interest under chapter VII auspices and to create international rules binding all UN Member States.¹⁷⁰ Members of the Security Council, even the permanent ones, though entrusted with huge responsibilities as regards the maintenance of peace and security, are not barred from acting consistently with self-serving motives.¹⁷¹ This said, it must be acknowledged that the checks stemming from the equilibriums

¹⁵⁹ Jack L. Goldsmith and Eric A. Posner, *supra* note 28, at 91-100

¹⁶⁰ *Id.*, at 90.

¹⁶¹ Article 25 UN Charter.

¹⁶² See *infra* II.C.5.

¹⁶³ See Res. 794 (1992) on the situation in Somalia. *Comp.* with the resolution 929 (1994) on the situation in Rwanda where Human rights violations as such were not deemed to be a threat to the peace but only their consequences.

¹⁶⁴ Res. 216 (1965) on the situation in Rhodesia.

¹⁶⁵ Res. 841 (1993), 917 (1994), 933 (1994), 940 (1994) on the situation in Haiti and Res. 1132 (1997) on the situation in Sierra Leone.

¹⁶⁶ Res. 1521 (2003) on the situation in Liberia.

¹⁶⁷ Res. 1540 (2004) on non-proliferation of weapons of mass destruction.

¹⁶⁸ Res. 1368 (2001) on the threats to international peace and security caused by terrorist acts (though it was not strictly adopted under chapter VII).

¹⁶⁹ See P. d’Argent, J. d’Aspremont et al., ‘Article 39’ in J.-P. Cot, A. Pellet et M. Forteau, *Commentaire de la Charte des Nations Unies*, 1131-1170 (3d ed, Economica, 2005).

¹⁷⁰ Some have however seen the UN Security Council Resolution 1373 as “coincide[ing] with the hegemon’s perceived self interest”. See Jose E. Alvarez, ‘Hegemonic International Law Revisited’, 97 *Am. J. of Int’l L.* 878 (2003). See also EC Court of first instance, 21 September 2005, case T-306/01 and T-315/01 on the violation by some resolutions of the Security Council imposing sanctions in individuals of their right to make use of their property, right to a fair hearing and right to an effective judicial remedy, available at <http://curia.eu.int>.

¹⁷¹ For a different opinion, see C. Tomuschat, ‘International Law as the Constitution of Mankind’, in *International Law on the Eve of the 21st Century. Views from the International Law Commission*, 47 (New York, 1997) (“From a constitutional point of view, it is abundantly

within the Council, together with the uncertain legitimacy of that body¹⁷², will probably avert any abuse of power of that kind.

The Council can be proved to be acting for the promotion of a global interest at the expense of another global interest as illustrated by its measures addressing terrorism¹⁷³ and those imposing sanctions on individuals¹⁷⁴. The incompatibility of different global interests is however not a rare phenomenon. Any lawmaker is bound to make some tradeoffs between different kinds of concerns and the Security Council is not different in that respect.

3. Global Interests and Legal Interests

It is important to realize that the global interest that can drive international lawmaking is not strictly identical to a legal interest in the sense of the Law of State responsibility. There are nonetheless some common grounds. Under the law of State responsibility, the legal interest in the fulfillment of a given obligation is the yardstick to determine those States affected by its infringement. The extent to which a wrongful behavior impinges on a legal interest of other States will determine the kind of reaction that each of them is entitled to.¹⁷⁵ It is well established that some obligations are owed to all States in the sense that each of them has a legal interest in their fulfillment. Obligations owed to all States from the standpoint of State responsibility – that is the obligations of an *erga omnes* character¹⁷⁶ – are however not modeled on the global interest that the rule is directed at. Indeed State responsibility is concerned with the determination of the consequences flowing from a breach of International Law, that is, a question alien to the determination of the global interest in the international rulemaking. This being so, a rule in whose fulfillment all States have a legal interest from the vantage point of State responsibility is most of the time aiming at a global interest. One must however bear in mind that the opposite is not true in the sense that not all global interest-oriented obligations are of an *erga omnes* character.

clear that the permanent seats held by the “Big Five” have not been granted to them as individual entitlements in recognition of their factual position of power, but as a competence to be exercised in the interest of the international community. Juridically speaking, permanent seats do not have the quality of private assets; rather, they are public trust, to be handled responsibly in accordance with the general philosophy permeating the Charter of the United Nations. The whole system of collective security may therefore suffer serious harm if any of the Governments holding permanent seats publicly declares that it will use its Security Council position for the furtherance of its national policies only. [...] But if national interest is their only parameter of orientation, other nations will find it hard to recognize resolutions of Security Council as the legitimate exercise of world order institutions established by the international community”).

¹⁷² T. Frank, *The Power of Legitimacy among Nations* (New York, OUP, 1990) at 206.

¹⁷³ See for instance Resolution 1373 on international terrorism. See Eric Rosand, ‘Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism’, 97 *Am. J. of Int’l Law*, 333-341 (2003); see also the comments by Jose E. Alvarez, ‘Hegemonic International Law Revisited’, *supra* note 170, at 873-888.

¹⁷⁴ See the judgments of the European Tribunal of first Instance in the cases of T-306/01 and T-315/01, 21 September 2005 – ‘Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities’, available at <http://curia.europa.eu/>.

¹⁷⁵ Comp. articles 42 and 48 of the articles on State Responsibility for an international wrongful act and especially the commentary, Report of the International Law Commission, 53d session, G.A.O.R., 56th session, Supp. No. 10, A/56/10, at 294-301 & 318-324.

¹⁷⁶ On this concept, see in general M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997); André de Hoogh, *Obligations erga omnes and international crimes : a theoretical inquiry into the implementation and enforcement of the international responsibility of states* (The Hague ; Boston : Kluwer Law International, 1996).

4. Global Interests and the International Public Order (*Jus Cogens*)

The promotion of a global interest can bear upon the existence of an international public order. In any legal order, there rules of a public policy character. These rules usually enshrine some fundamental principles that lie at the core of the legal order concerned. These rules cannot usually be subject to any derogation whatsoever. The international legal order is not different in that regard as it also contains rules of a public policy character. These are the rules of *jus cogens* from which conventional derogations are not permitted.¹⁷⁷

It must be underscored here that rules pursuing a global interest are not necessarily peremptory norms (*jus cogens*) from which no conventional derogation is admissible. Indeed, State can still consent to a given rule to serve a global interest while not being ready to confer it a non-derogability status. The opposite is not true. Rules having a *jus cogens* character usually are rules directed at a global interest.¹⁷⁸ It is precisely because States consider that the only way to insure that the global interest concerned be not superseded by subsequent special interest that a rule is endowed with a *jus cogens* character.¹⁷⁹ It is probably for the same reason that it was once floated that the violation of some international obligations – these were the obligation having a *jus cogens* character – should be considered as a *crime* whose commission would entail very specific consequences.¹⁸⁰

The existence of rules having a *jus cogens* character is thus relevant to the determination of the rules serving a global interest. Yet, rules of a *jus cogens* character and rules of a global interest should not be entirely assimilated.

5. Global Interest in Practice

In the following paragraphs, reference is made to international rulemaking processes promoting the interest of the International Society. Subject to environmental treaties that sometimes hint at

¹⁷⁷ Article 53 of the Vienna Convention on the Law of Treaties.

¹⁷⁸ R.-J. Dupuy, *supra* note 18, at 202.

¹⁷⁹ B. Simma, *supra* note 13, at 284. See also C. Tomuschat, 'General Course on Public International Law', *supra* note 26, at 281.

¹⁸⁰ See the former article 19 of the Draft Articles on State Responsibility adopted by the International Law Commission International crimes and international delicts. On this issue, see among others, M. Spinedi, 'Crimes of States: A Bibliography', in J.H.H. Weiler, A. Cassese & M. Spinedi (eds.), *International Crimes of State – A Critical Analysis of the International Law Commission's Draft article 19 on State Responsibility* 339-353 (1989) and N. Jørgensen, *The Responsibility of State for International Crimes* 299-314 (2000). In particular, see Georges Abi-Saab, 'The Uses of Article 19', 10 *Eur. J. Int'l L.* 339 (1999); Giorgio Gaja, 'Should All References to International Crimes Disappear from the International Law Commission Draft Articles on State Responsibility?', 10 *Eur. J. Int'l L.* 365 (1999); Alain Pellet, 'Can a State commit a crime? Definitely, yes!', 10 *Eur. J. Int'l L.* 25 (1999); C. Tomuschat, 'International Crimes by States: An Endangered Species?' in K. Wellens (ed.), *International Law: Theory and Practice* 253 (1998); Bernhard Graefrath, 'International Crimes and Collective Security', in K. Wellens (ed.), *International Law: Theory and Practice* 237 (1998); Shabtai Rosenne, 'State Responsibility and International Crimes: Further Reflection on Article 19 of the Draft Articles on State Responsibility', 30 *N.Y.U. J. Int'l L. & P.* 145 (1998); Derek Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility', 9 *Eur. J. Int'l L.* 163 (1998); Nina Jørgensen, 'A Reappraisal of Punitive Damages in International Law', 68 *B.Y.I.L.* 247 (1997); Robert Rosenstock 'An International Criminal Responsibility of States?' in *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission* 265 (1997); Alain Pellet, 'Vive la crime! Remarques sur les degrés de l'illicite en droit international', in *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission* 287 (1997); Giuseppe Palmisano, 'Les causes d'aggravation de la responsabilité des Etats et la distinction entre 'crimes' et 'délits' internationaux', 98 *R.G.D.I.P.*, 629 (1994); Geoff Gilbert, 'The Criminal Responsibility of States', 39 *B.Y.I.L.*, 345 (1990).

the interest of “mankind”¹⁸¹, international rules serving a global interest rarely mention their ultimate purpose and the interest that they seek to promote. The concern that they address can nonetheless be inferred from their actual content as well as the policies of States in connection with the adoption of such instruments. Doctrinal analyses sometimes provides relevant indications in that respect.

Human rights obligations (a), environmental obligations (b), rules pertaining to democracy (c) and dispute settlement mechanisms (d) are examined here. Rules related to the use of force in international relations will eventually be analyzed together with a bundle of other rules in that – more than any other – these rules illustrate the possible coexistence of a global interest with other kinds of interests in international rulemaking (e).

a) *Human Rights Obligations*

The most obvious illustration of the promotion of a global interest in international lawmaking is offered by the international protection of the rights of human beings. It is almost unanimously recognized that Human Rights rules serves a global interest.¹⁸² Indeed, aside from the realist theories which construe the adoption of Human Rights regimes as the outcome of the coercion by mighty States, very few authors venture to contend that Human Rights Law furthers the national interest of sovereign States.

Reference must however be made to Andrew Moravcsik’s theory. This author, building on Terry Moe’s work, developed what he called a *Republican Liberalist* view of Human Rights whereby he construes Human Rights as the result of instrumental calculations about domestic policies. Moravcsik argues that States are ready to relinquish a part of sovereignty by adhering to Human Rights regime in order to constrain the behavior of subsequent domestic governments.¹⁸³

It is not the intention of this article to discuss Moravcsik’s theory which has remained very isolated so far. My feeling is however that the only way *national interest* can induce States to sign and ratify Human Rights convention is related to the image conveyed by these instruments. In an era where democracy and human rights are among the significant criteria of

¹⁸¹ See the protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991 which provides that “the development of a comprehensive régime for the protection of the Antarctic environment and dependent and associated ecosystem is in the interest of mankind as a whole”; article 136 of UNCLOS: “the Area and its resources are the common heritage of mankind”; article 4 of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies: “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”; See article 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies: “The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind”.

¹⁸² Friedmann, *The Changing Structure of International Law*, *supra* note 17, at 63, 69.

¹⁸³ Terry Moe, ‘Political Institutions: The Neglected Side of the Story’, 6 *Journal of Law, Economics and Organizations* 227 (1990); A. Moravcsik, ‘The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54 *International Organization* 217-252 (2000).

“good governance”¹⁸⁴, there is little doubt that refusing to adhere to the major Human Rights conventions makes a State run the risk of turning a pariah on the international plane and undermining the international legitimacy of its government.¹⁸⁵ 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 labeled in such a way. I however believe that this inducement can hardly stand alone in international lawmaking. Given the extent of the impediment entailed by Human Rights rules to the leeway of States¹⁸⁶, the picture-improving impetus – though its importance should not be played down – need to be buttressed by other considerations. By my account, national interest cannot exclusively underwrite Human Rights lawmaking.

That Human Rights rules be the expression of a global interest is also underpinned by the fact that, unlike diplomatic protection which was devoted to the protection of *nationals* abroad and left to the discretion of each State¹⁸⁷, Human Rights are to be applied irrespective of the nationality of individuals and the will of State.

The rules related to the conduct of States during hostilities – which are a *lex specialis* of Human Rights law according to the International Court of Justice¹⁸⁸ – constitute another example of the promotion of a global interest. The same can be said of International Criminal Law in general.¹⁸⁹ For instance, no one would dispute that the rules concerning the prohibition of genocide are understood as directed at the promotion of a global interest, as expressly acknowledged by the International Court of Justice in its advisory opinion on *Reservations to the Genocide Convention*.¹⁹⁰

b) *Environmental Treaties*

Rules protecting the environment other than those dedicated to the prevention of transfrontier pollution or the protection of shared resources in a determined area are generally serving a global interest.¹⁹¹ This is usually so when a convention gives furtherance to the principle 2 of the 1972 Stockholm Declaration on the Human Environment, thereby building on the idea that “[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representatives samples of natural ecosystems must be safeguarded for the benefit of

¹⁸⁴ See J. d’Aspremont, “Legitimacy of Governments in the Age of Democracy”, 38 *NYU Journal of International Law & Politics* (Summer 2006); See also J. d’Aspremont, *Les Etats non démocratiques et le droit international* (Forthcoming - 2007).

¹⁸⁵ B. Roth, *Governmental Illegitimacy in International Law* (O.U.P., 2000).

¹⁸⁶ The impact of human rights rules is sometimes watered down through the adoption of sweeping reservations. See, for instance, the reservations to the International Covenant on Political and Civil Rights, available at http://www.ohchr.org/english/countries/ratification/4_1.htm.

¹⁸⁷ See the first report of ILC Special Rapporteur John Dugard on Diplomatic Protection, A/CN.4/506 and Corr.1 and Add.1.

¹⁸⁸ CIJ, Advisory opinion of 8 July 1996 on the *legality of the threat or use of Nuclear Weapons*, ICJ Reports (1996) at 240, par. 25; see also CIJ, Advisory opinion of 9 July 2004 on the *legal consequences of the construction of a wall in the occupied Palestinian territory*, ICJ Reports (2004), par 105-106.

¹⁸⁹ Friedmann, *The Changing Structure of International Law*, *supra* note 17, at 167.

¹⁹⁰ ICJ Reports, 1951, 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.”

¹⁹¹ A. Kiss, *supra* note 107, at 1084; C. Tomuschat, ‘General Course on Public International Law’, *supra* note 26, at 63.

present and future generations through careful planning of management, as appropriate".¹⁹² For instance, treaties concerning endangered fauna and flora¹⁹³ or conventions related to the protection of cultural heritage in time of peace¹⁹⁴ are arguably serving a global interest. The outer space¹⁹⁵, moon¹⁹⁶, Antarctic¹⁹⁷, seabed¹⁹⁸, ozone layer¹⁹⁹, and Kyoto protocol regimes²⁰⁰ are from the same mold.

Some realists could probably contend that the "safe-heavens" established to protect the Antarctic²⁰¹ or the seabed²⁰² further each State's individual interest in not having each other claiming a right to exploit their resources. In that sense, they could argue that the protection of the Antarctic or that of the seabed rest a mutualization of interests. This conclusion is however not convincing. That States be unwilling to commit themselves as long as others do not do the same is common ground. That does not mean that the rule at stake is not of a global interest. States can well recognize a need to meet a global concern through the adoption of international regulations. But they may simultaneously not be ready to address that concern at any price.

The foregoing can also be illustrated by the Kyoto Protocol's regime.²⁰³ States agree to curb their CO2 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 stemming climate change is a global interest. Of course some States are at odds with the causes of climate change or the means to curtail emissions.²⁰⁴ This does not imply that they do not acknowledge the importance of a legal regime that addresses that global issue.²⁰⁵ Likewise the "customized" character of the obligations laid down by the Kyoto Protocol does not mean that States parties are only seeking to serve its national interest. The "customization" of some obligations of that treaty relies on the assumption that the purpose of this treaty would be more realistically achieved if each State's individual situation is taken into account.

¹⁹² Available at <http://www.unep.org>.

¹⁹³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979

¹⁹⁴ UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage, Paris 23 November 1972.

¹⁹⁵ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, London, Moscow and Washington, 27 January 1967.

¹⁹⁶ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 18 December 1979, 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".

¹⁹⁷ Antarctic Treaty, Washington, 1 December 1959 and the Protocol to the Antarctic Treaty of 4 October 1991. See Joe Verhoeven, Philippe Sands, Maxwell Bruce, *The Antarctic environment and International Law* (Graham & Trotman, 1992).

¹⁹⁸ See UNCLOS, part. IX.

¹⁹⁹ Vienna Convention for the Protection of the Ozone Layer, 22 March 1985.

²⁰⁰ See Arvid Pardo and Carl Q. Christol, 'The Common Interest: Tension Between the Whole and the Parts' in R. St. J. McDonald and D. M. Johnston (eds), *The Structure and Process of International Law*, 647 (Nijhoff, 1983).

²⁰¹ Antarctic Treaty, Washington, 1 December 1959 and the Protocol to the Antarctic Treaty of 4 October 1991.

²⁰² See UNCLOS, part. IX.

²⁰³ All documents are available at <http://unfccc.int/>

²⁰⁴ See 'U.S. Won't Follow Climate Treaty Provisions, Whitman Says', *NY Times*, March 28, 2001, A19; Edmund L. Andrews, 'Bush Angers Europe by Eroding Pact on Warming', *NY Times*, April 1, 2001, S3.

²⁰⁵ As regards the US position on climate change, see 'In President's Words: A Leadership Role on the Issue of Climate Change', *NY Times*, June 12, 2001, A12; Andrew C. Revkin, 'White House In No Hurry With Options To Kyoto Pact', *NY Times*, 25 July 2001, A11; Eileen Claussen, 'The Global Warming Dropout', *NY Times*, 7 June 2002, A27.

The same conclusion applies to the seabed provisions of UNCLOS despite the dismay caused by their early rejection. States agreed that resources of the seabed are “the common heritage of mankind”²⁰⁶ 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”.²⁰⁷ Once again, that the implementation be somehow customized – as to allow for the interests and needs of “developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions” – does not exclude that the adoption of the rule be required by a global interest.²⁰⁸ Indeed, despite the loosening of some of its rules by the agreement to the implementation of Part XI of the United Nations Convention on the Law, 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 the “the importance of the Convention for the protection and preservation of the marine environment and of the growing concern for the global environment”.²⁰⁹

c) *Rules Related to Democracy*

The existence of an obligation to adopt a democratic form of government has caused some debate in the legal scholarship since the end of the Cold War. It is probably Thomas Franck in his groundbreaking article on *The Right to Democratic Governance* who first broached the question of democracy in the post-cold-war legal order in 1992.²¹⁰ Quickly followed by other scholars²¹¹, he argued that the legitimacy of governments was no longer confined to an assessment through purely national criteria but had to be gauged through the universal criterion of democracy.²¹² The ensuing doctrinal strand endorsing such a theory has been identified – though it is probably not as unitary as it may sound – as the “democratic entitlement school”.²¹³ It rapidly became the mainstream doctrine in that respect. It professes that a “democratic entitlement” has emerged in the international legal order. In sharp contrast with the “agnosticism”²¹⁴ that had prevailed before²¹⁵, such democratic entitlement is due to

²⁰⁶ Article 136 UNCLOS.

²⁰⁷ Article 140 UNCLOS.

²⁰⁸ See the two-tiered understanding of UNCLOS of M. Koskeniemi, *From Apology to Utopia*, *supra* note 29, at 489.

²⁰⁹ See the preamble of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, available at : http://www.un.org/depts/los/convention_agreements/texts/unclos/closindxAgree.htm.

²¹⁰ T. Franck, ‘The Emerging Right to Democratic Governance’, 86 *Am. J. Int’l L.* 46 (1992); G. H. Fox, ‘The right to Political Participation in International Law’, 17 *Yale J. Int’l L.* 539 (1992).

²¹¹ Among others see Christina M. Cerna, ‘Universal Democracy: An International Legal Right or the Pipe Dream of the West?’, 27 *N.Y.U. J. Int’l L. & Pol.* 289 (1994-1995) or J. Crawford, ‘Democracy and International Law’, 44 *Brit. Y.B. Int’l L.* 113-33 (1993). See also O. C. Okafor, ‘The Concept of Legitimate Governance in the Contemporary International Legal System’, 64 *Neth. Int’l L. Rev.* 33 (1997).

²¹² For a criticism of the Democratic entitlement school, see B. R. Roth, *Governmental Illegitimacy in International Law* (OUP, 2000) at 28, 413, 420-426. See also S. Marks, *The Riddle of All Constitutions* (Oxford, OUP, 2003), at 37-42.

²¹³ G. H. Fox & B. R. Roth, ‘Introduction: the spread of liberal democracy and its implications for international law’, in G. H. Fox and B. R. Roth, *Democratic Governance and International Law*, (Cambridge University Press, 2000), at 10.

²¹⁴ S. Marks, *supra* note 212, at 31.

²¹⁵ L. Oppenheim, *International Law*, vol. 1 (Longmans, Green, 1905), at 403 (“The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution according to its discretion”).

spawn “a revolutionary transformation of the full array of international norms from norms governing recognition of States and governments to those governing the use of force”.²¹⁶

There is no need to consider these arguments in this paper. They have been extensively discussed in the literature.²¹⁷ It only matters here to examine whether the obligation pertaining to the democratization of States in the International Legal order pursues a global interest. The question is highly controversial. Building on the democratic peace theory²¹⁸, most of the proponents of this obligation probably perceive it as serving a global interest, that is, a world of democratic States where the will of the people lies at the centre of national governance. One must however come to terms with the rejection of this understanding of democracy by many States who perceive the aforementioned obligations as reflecting a self-serving whim of democratic countries. Even though the latter perception is probably far-fetched in some respects, one cannot avert that it be perceived that way.

Even though I do not enthuse about democratic peace theory, I construe the obligation to be democratic as serving a global interest. The democratization of States, if it does not necessarily bolster peace among democratic Nations, at least promotes respect for human rights and, in some regards, strengthens Nations stability. Drawing on the idea that democratic States would relish that their peer’s regimes bear some resemblance with their own system of governance, I do not however exclude that such a rule be tinged with some self-serving motives. But these self-serving motives of powerful democratic nations are easily dwarfed by the stability and the respect for human rights brought about by democracy. I accordingly believe that any obligation pertaining to the adoption of a democratic regime by States serves a global interest.

d) Dispute Settlement Mechanisms

A substantial number of norms are devoted to the settlement of international disputes. These rules are mostly treaty-based. From an Hobbesian point of view, there is no doubt that the settlement of a dispute serves the interest of the States involved in the dispute.²¹⁹ This assertion also dovetails with the aforementioned idea that rules enhancing the efficiency the efficiency of the system and their adoption can be analyzed as a mutualization of interest.²²⁰

That justice be, at the international level, administered first and foremost for the States does not avert international justice to serve the interest of the International Society as well. Although

²¹⁶ G. H. Fox & B. R. Roth, *supra* note 213, at 11.

²¹⁷ An entire book discusses the democratic entitlement theory: G. H. Fox & B. R. Roth, *Democratic Governance and International Law* (CUP, 2000).

²¹⁸ See the neo-Kantian Liberal and democratic peace theories: M. Doyle, ‘Kant, Liberal Legacies and Foreign Affairs’, *Philosophy and Public Affairs* 206-232 (1983); A.-M. Slaughter, ‘International Law in a World of Liberal States’, 6 *Eur. J. Int’l L.* 503 (1995); B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton University Press, 1993); K. A. Schultz, ‘Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War’, 53 *International Organization* 233-266 (1999); W. M. Reisman, ‘Humanitarian Intervention and Fledgling Democracies’, 18 *Fordham International Law Journal* 796 (1994-1995); J. W. Owen, *Liberal Peace, Liberal War: American Politics and International Security* (New York, Cornell University Press, 1997); J. N. Moore, ‘Beyond the Democratic Peace. Solving the War Puzzle’, 44 *Virginia Journal of International Law* 341-429 (2004).

²¹⁹ Th. Hobbes, *Leviathan*, chapter 13.

²²⁰ Cfr *supra* II.A.

legal disputes can have certain valuable characteristics as far as the law itself is concerned²²¹, few would fault the idea that international disputes may endanger the world stability and can have terrific ripples effects on humans' well-being. States have undoubtedly endorsed this idea.²²² In that sense, dispute settlement mechanisms are seen as addressing concerns of the International Society as a whole.

Conflict resolution mechanisms arguably pursue a global interest even if they are confined to a community of States. Despite its non-universal character, a dispute settlement mechanism still serves the interest of all States. The peace and the prosperity in a region contributes to global peace and wealth and, for that reason, is a matter of concern of the International Society.

The idea that the settlement of dispute serves a global interest is less certain in the case of mixed arbitral mechanisms like those established under the umbrella of the World Bank.²²³ These arbitrations allow private companies to bring a claim against a State.²²⁴ Although it could not be excluded that a dispute between a company and a State drifts into an inter-State dispute – for instance via diplomatic protection mechanism²²⁵ – these mixed arbitrations do not directly bolster international peace. But they are probably serving a global interest as they sustain stability of investment and prosperity.²²⁶

The situation of mixed dispute settlement mechanisms granting a standing to individuals is different. They surely promote a global interest. But this does not stem from some sort of pacification of international relations that they could enhance. 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. As a tool to ensure compliance with human rights, there is little doubt, as expounded earlier, that they pursue a global interest. The same can be said as regards the international criminal law enforcement mechanisms.²²⁷ They ensure compliance with international criminal law that itself serves a global interest as it has been expounded above.²²⁸

e) The Coexistence of Interests: Rules Pertaining to the Use of Force

²²¹ J. Collier and V. Lowe, *The Settlement of Disputes in International Law* (Oxford, OUP, 2000), at 2.

²²² See article 1 of the UN Charter: "The Purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". See also the reactions and speeches formulated on the occasion of the 60th anniversary of the International Court of Justice, available at <http://www.icj-cij.org/60/index.htm>.

²²³ See the International Centre for Settlement of Investment Disputes (ICSID) established in 1966 under the auspices of the World Bank, official documents available at <http://www.worldbank.org/icsid/>

²²⁴ See for instance article 36 of the Convention on the settlement of investment dispute between States and national of other States.

²²⁵ See *supra* note 187.

²²⁶ J. Collier et V. Lowe, *supra* note 221, at 60.

²²⁷ As regards the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, see in general P. Sands, R. Mackenzie, Y. Shany, *Manual on International Courts and Tribunals* (London, Butterworths, 1999), at 253-300. See also W. A. Shabas, *An Introduction to the International Criminal Court*, 2d ed., CUP, 2004.

²²⁸ Cfr *supra* II.C.5.a).

Rules pertaining to the use of force do not fit into the rigid taxonomy that has been laid down in this paper. Indeed, they illustrate the idea that interests promoted by a rule can be construed differently by each State. As R.-J. Dupuy, in his general course at the Hague Academy, explained :

“Ce qui est essentiel à saisir c’est que l’ordre institutionnel ne s’est pas substitué à l’ordre relationnel. Il ne s’agit pas d’un raisonnement diachronique. On s’y est souvent trompé : emportés par l’habitude d’étudier les phénomènes juridiques dans une perspective historique, certains de ceux qui ont lu ont cru que l’institutionnel succédait ou était appelé au relationnel. Cette interprétation relève d’un malentendu : l’institutionnel, et c’est là qu’est la tension dialectique, *coexiste* avec le relationnel”.²²⁹

While almost all States see Human Rights, Antarctic, Seabed or Kyoto regimes as promoting a global interest²³⁰, the *jus ad bellum* rules can be understood as serving different kind of interests. Some would contend that States have forsaken the possibility of using force unilaterally for normative consideration. Others would say that every States’ consent to such a rule was highly self-serving. The reality is probably in between.²³¹ On the one hand, small Nations who were not backed by any major power had probably 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 reflects the interests of the weaker States.²³² On the other hand, major powers – whose might can deter other powers from threatening them – could have been supporting such a prohibition to promote the global interest of a peaceful world. It is not the place to dwell upon that controversy. It only matters that these rules can to some extent be seen as a set of rules dedicated to the promotion of a global interest.

There are other examples where the interest served by an international instrument give rise to different understandings. The 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, the 1968 Nuclear Non-proliferation Treaty (NPT) and Under Water or the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT) can also be interpreted either as a mutualization of national interests or as serving a global interest. If one takes the NPT for instance, some would contend that it aims at preventing other Nations from acquiring nuclear weapons or a better technology whereas others would reckon it bolsters peace or protect the environment. While simultaneously protecting a global interest, treaties concerning the protection of “shared resources” of watercourses²³³ or marine areas²³⁴ can also be interpreted by some contracting parties as primarily aiming at the preservation of their industries or

²²⁹ R.-J. Dupuy, *supra* note 28, at 48-49.

²³⁰ Cfr *supra* II.C.5.a) & b).

²³¹ For an insight of the role of normative considerations in collective security, see M. Koskenniemi, ‘The place of Law in Collective Security’, 17 *Mich. J. Int’l L.* 455 (1995-1996). See also M. Koskenniemi, *From Apology to Utopia*, *supra* note 29, 497-501.

²³² A. Hurrell, *supra* note 40, at 20. See also Friedmann, *The Changing Structures of International Law*, *supra* note 17, at 32-35.

²³³ Convention on the Protection of the Rhine, Rotterdam, January 22, 1998; Convention on Cooperation for the Protection and Sustainable Use of the Danube River, Sofia, 29 June 1994; Treaty relating to cooperative development of the water resources of the Columbia River Basin, 17 January 1961; Treaty between the United States of America and Canada relating to the uses of the waters of the Niagara River, Washington, 27 February 1950.

²³⁴ Convention and Protocols for the Protection of the Marine Environment against Pollution in the Mediterranean, Barcelona, 16 February 1976; Convention on the Protection of the Baltic Sea Area, Helsinki, 22 March 1974; Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 23 March 1981; 1993 Convention for the Conservation of Southern Bluefin Tuna signed by Australia, New Zealand and Japan; Agreement between Canada and Norway on Sealing and the Conservation of the Seal Stock in the North-West Atlantic of 15 July 1971.

resources.²³⁵ Similarly, the *raison d'être* of a rule pertaining to the use of weapons during combats might be gauged, for obvious reasons, by neutral States differently from great powers.

There are thus some hypotheses where States can adopt a given rule to promote various kinds of interests. At the stage of its adoption, a rule may happen not to rest on an unqualified national interest or an exclusive global interest but may be supported on different grounds. This *intersubjectivity* of international lawmaking recalls that the instruments available in any societal project can simultaneously be wielded in many different ways. International Law is not different in that respect. It can be the vehicle of many simultaneous enterprises whether serving a mutualization of interest, a sub-global interest or a global interest. Whatever States are ready to promote, this paper has tried to highlight the extent to which International Law may be a tool to address the concern of the International Society as a whole. This does not mean that the global interest cannot be pursued outside the realm of International Law. It may well be served by politics. However, the practice demonstrates that States have not shied away from resorting to International Law to promote the interest of the International Society. Despite some common overstatements in the doctrine, the global interest plays a significant role in international rulemaking. The importance of global interest in international lawmaking thus underpins the looming consensus among scholars according to which International Law is also public because it addresses the concerns of the International Society.

²³⁵ For an analysis of a very specific case, see Eyal Benvenisti, 'The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies', 90 *Am. J. Int'l L.* 385-415 (1996).

CONCLUSION

There is a growing consensus among international legal scholars to acknowledge that International Law is also public because it can address the matters that concern the International Society as a whole. The studies that have tackled the role of global interest in international lawmaking and that are commonly referred to have however proved to be inadequate, especially against the backdrop of the dramatic developments of the international legal order. This paper has accordingly tried to offer a new insightful account of the interests driving contemporary international rulemaking. It has demonstrated that the convergence of interests remains the most important driving force of international lawmaking. This has been called the *mutualization of interests*. This part of the paper plays down the stretched presentations of the role of global interest that often pervade the literature. This paper has also pointed out that international rulemaking is not all black and white and that between mutualization of interests and global interest there is room for a third category: the sub-global interests. It has also been argued that, despite the significance of the mutualization of interests and sub-global interests, the role played by global interests in international rulemaking remains far-reaching. This portrayal of the interests driving modern international lawmaking seems to be the prerequisite for a correct evaluation of the public character of contemporary International Law.