Article 2(4). The innocent party would have the right of self-defense under Article 51, which is exercisable at its sole volition. It could also appeal to the Council to institute collective measures against its attacker under Chapter VII.

Any other reading of Article 51 would base the right of self-defense not on a victim state's "inherent" powers of self-preservation, but upon its ability, in the days following an attack, to convince the fifteen members of the Security Council that it has indeed correctly identified its attacker. As a matter of strategic practice, any attacked state is very likely to make an intense effort to demonstrate the culpability of its adversary, limited only by inhibitions regarding the operational effect of sharing intelligence methods. As a matter of law, however, there is no requirement whatever that a state receive the blessing of the Security Council before responding to an armed attack. Were this not so, how many states would deliberately agree to subordinate their security to the Council's assessment of the probity of the evidence on which they based their defensive strategy of self-preservation?

THOMAS M. FRANCK

HEGEMONIC INTERNATIONAL LAW

One increasingly sees the United States designated as the hegemonic (or indispensable, dominant, or preeminent) power.[1] Those employing this terminology include former officials of high rank as well as widely read publicists. The French, for their part, use the term "hyper-power." A passage by Charles Krauthammer in *Time* best captures the spirit: "America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will."[2]

The idea of hegemony has begun to work its way into the world of international law to the point where a session of the annual meeting of the American Society of International Law in 2000 was dedicated to "the single superpower."[3] A new undersecretary of state, John Bolton, while still at the American Enterprise Institute, wrote in an article entitled *Is There Really "Law" in International Affairs?* that we "should be unashamed, unapologetic, uncompromising American constitutional hegemonists."[4] Since the terrorist attacks of September 11, 2001, the shapers of American foreign policy are showing some signs of second thoughts about the U.S. hegemonic position or at least of thinking of hegemony as a form of leadership rather than command. But it is still appropriate to ask whether there is such a thing as hegemonic international law (HIL) and what it would look like.[5] Bolton answers in the negative, but this Editorial maintains that there can be, and has been, such a thing as HIL. It does not take a position as to whether the United States is or should be a hegemon but merely addresses the lawyer's question of what the legal implications would be if it is.

[1] The term "the indispensable nation" was coined by President Clinton in a White House speech on December 5, 1996, and echoed by Secretary of State Madeline Albright at that time. *See* White House Press Release, Remarks by the President in Announcement of New Cabinet Offices (Dec. 5, 1996), *at* <http://www.hri.org/news/usa/usia/96-12-index.usia.html>; *see also* Henry Kissinger, *America at the Apex: Empire or Leader?* NAT'L INTEREST, Summer 2001, at 9, 9 (stating that "the United States is enjoying a pre-eminence unrivaled by even the greatest empires of the past").

[2] TIME, Mar. 5, 2001, at 42. More negative views on hegemony appear in Lewis H. Lapham, *The American Rome: On the Theory of Virtuous Empire*, HARPER'S MAG., Aug. 2001, at 31; William Pfaff, *The Question of Hegemony*, FOREIGN AFF., Jan./Feb. 2001, at 221; G. John Ikenberry, *Getting Hegemony Right*, NAT'L INTEREST, Spring 2001, at 17.

[3] *The Single Superpower and the Future of International Law*, 94 ASIL PROC. 64 (2000); *see also* Symposium, *American Hegemony and International Law*, 1 CHI. J. INT'L L. 1 (2000).

[4] John R. Bolton, *Is There Really "Law" in International Affairs?* 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000).

[5] For a succinct treatment of HIL, see Konrad Ginther, *Hegemony, in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 685 (Rudolf Bernhardt ed., 1995).

I. HIL IN HISTORICAL CONTEXT

To review the history of HIL, one may resort to three German international law scholars who paid much attention to it. The first is Heinrich Triepel, whose *Hegemonie, Ein Buch von führenden Staaten* (Hegemony, a Book of Leading States) of 1938 stands as the first and still classic historical and legal study. The second is Carl Schmitt, who prided himself on being Hitler's "general counsel"; he studied hegemony with a view to justifying the Nazi order in Europe (the *Grossraum* or "grand space") and drew heavily on American precedents in connection with the Monroe Doctrine.[6] His work can be taken as an example of where hegemonic thinking leads if taken to its limit. The third is Wilhelm Grewe, whose long career as a scholar and diplomat began in a defeated Germany chafing under the indignities of the Versailles settlement, passed through the moment of German hegemony in Europe, and continued into a world where the United States first shared power with the Soviet Union and then stood alone. His historical work, *The Epochs of International Law,*[7] which gives a prominent role to shifting patterns of hegemony, is the most accessible of the three for Americans because it is available in English.

Triepel begins with ancient Greece, referring to the shifting patterns of power relations between Sparta and Athens and the leagues they dominated. He finds the first signs of HIL, however, in the Roman epoch. Rome, of course, was also an empire, which represents a step beyond hegemony, but at all times it also had client states. Its relations with them were analyzed by Roman lawyers in terms of a personal arrangement of private law, the patrocinium.[8] This relationship between a patron and his clients imposed obligations on each of them, although not reciprocal ones. In return for fidelity, the patron was supposed to provide protection and sustenance. Rome as patron tended to define the rights and duties of the relationship in its own interest. Triepel usefully reminds us that the Celestial Empire of China also had a long tradition of claiming hegemony.[9]

Grewe's account starts in the Middle Ages with the "dyarchy" of the pope and the emperor and continues through the periods of predominance of Spain (1494–1648), France (1648–1815), and Britain (1815–1919). Each of these hegemonies was centered on Europe, although British hegemony never functioned on the continent but was limited to the high seas and non-European places close to the seas. Meanwhile, the United States exercised hegemony in the Western Hemisphere. For a while, Japan's Greater East Asia Co-Prosperity Sphere played a similar role in the Far East. The hegemon in each case led the way in formulating the international law rules of the time. Grewe points out that, as every Frenchman would agree, the French language greatly assisted in the propagation of French ideas on the law of nations.[10] But alongside hegemony the practice of balance of power emerged, in which the other states banded together to countervail the strongest. While primarily a diplomatic exercise, it was tinged with legal overtones.[11]

We come, then, to the present, which finds the United States in a unique position. For the first time a state can project its military power into any corner of the world without substantial risk of incurring serious costs. The U.S. military budget is greater than those of all the other states combined. The nation also holds an enormous fraction of the world's wealth, another source of power. The terrible blows of September 11, 2001, raise the question whether the United States can or will act as a hegemon in a drastic way, that is, in Krauthammer's terms, whether it can carry out "unapologetic and implacable demonstrations of

[6] The most convenient source for those who do not read German is WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW (1999).

[7] WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW (Michael Byers trans. & rev., 2000).

[8] HEINRICH TRIEPEL, HEGEMONIE, EIN BUCH VON FÜHRENDEN STAATEN §22 (1938).

[9] *Id.* §16.

[10] GREWE, *supra* note 7, at 279.

[11] Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea,* 73 AJIL 555 (1979).

will." His Roman analogy suggests other questions. The Roman emperor Titus found civil unrest in the Middle East to be an irritation and imposed a solution. It proved to be enduring, though it was not the one that Krauthammer or I would regard as desirable. Titus was endowed with the hegemonic qualities Shelley ascribed to Ozymandias, "King of Kings," that is, "the wrinkled lip and sneer of cold command." Those traits have not been visible in the faces of recent American presidents. Nor does the United States have the political and psychological infrastructure hegemony calls for. Thus, the jury is still out on whether we will be a hegemon, and what follows is hypothetical.

II. HIL AS NORMATIVE

The received body of international law is based on the idea of the equality of states. The United Nations Charter in Article 2(1) proclaims that it is "based on the principle of the sovereign equality of all its Members."[12] In 1979 the General Assembly reinforced that idea by passing a resolution entitled "Inadmissibility of the Policy of Hegemonism in International Relations" (which the United States and three other members opposed).[13] To get to HIL, one must discard or seriously modify this principle. Note that equality is questioned by another influential body of international law thinking, the one that asserts that a different law prevails among liberal democracies than in the rest of the world.[14] HIL advocates would also say that norms cannot stray too far from reality and must therefore recognize inequalities of power. Schmitt spoke in terms of concrete order thinking and sought to move thinking on both German constitutional law and international law to focus on where power was located and what followed from that, including inequality between states.[15] Even classical publicists of international law acknowledged the role that power, and disparities in power, played in their subject.[16] In the scholarship of international relations, power has been a central object of study ever since the work of Hans Morgenthau.[17]

One might thus conclude that no law graces the hegemon's universe and this is what Bolton seems to say. But the historical record shows that it can be convenient for the hegemon to have a body of law to work with, provided that it is suitably adapted. Moreover, those subject to its domination may need clear indications of what is expected of them. The hegemon is also a trading party and the world of trade needs rules. While Bolton's national security world may be rather free of rules, his colleague, Special Trade Representative Robert Zoellick, has to operate in the highly legalized universe of the World Trade Organization.

III. HIL AND INTERVENTION

A shift to HIL most specially requires setting aside the norm of nonintervention into the internal affairs of states. Indeed, Bolton's objection to international law centers particularly on its attempted use to hamper unilateral intervention by the United States.[18] German thinking about hegemony centered on defending the legitimacy of German intervention

[12] For some observers, the permanent members of the Security Council constitute a collective hegemony within the United Nations.

[13] GA Res. 34/103 (Dec. 14, 1979). The probable reason for the U.S. opposition to the resolution was its condemnation of Zionism.

[14] For a critical review, see José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001).

[15] SCHEUERMAN, *supra* note 6, at 148–50.

[16] For example, see the treatment of the balance of power and of hegemony (suzerainty) in 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 75, 134, 185, 292 (1905).

[17] HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed. 1985).

[18] He speaks of the "hidden agenda" of international lawyers, "making the unilateral use of United States force harder by raising the political and military risks and costs and thus making it less attractive to senior decisions [*sic*] makers." Bolton, *supra* note 4, at 37.

within Europe for such purposes as protecting persons of German origin and attacking the appropriateness of intervention by nations outside the continent. The United States, as all students of history know, openly asserted through the Monroe Doctrine the right to exclude other powers from the Western Hemisphere. It is less generally remembered that the United States also assumed for itself the right to intervene militarily within that territory. In earlier years that assumption was quite overt and legalized. Schmitt hailed Article III of the 1903 Treaty on Relations with Cuba as a piece of hegemonic drafting. It stated:

> The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.[19]

An early fan of indeterminacy, Schmitt noted that indeterminacy in this agreement gave the key to the hegemonic power, which had the right to interpret the law, a doctrine he labeled "decisionism."[20] Since President Franklin D. Roosevelt withdrew the marines from Haiti and Nicaragua, we have been more circumspect about intervention but have not ceased the practice. Indeed, even without United Nations blessings we have projected military force into areas outside Latin America such as Sudan, Afghanistan, Libya, and the former Yugoslavia. A true hegemon would have reverted to the practice of overt intervention and would have demonstrated its unapologetic and implacable will by not canceling air cover for the Bay of Pigs invasion. Whatever changes that would require in international law would have been made.

IV. HIL AND TREATIES

Treaties, since they represent constraints at some level on unilateral action by the parties, irritate hegemonists. In particular, they would avoid agreements creating international regimes or organizations that might enable lesser powers to form coalitions that might frustrate the hegemon.[21] Of course, a hegemon can use an international organization to magnify its authority by a judicious combination of voting power and leadership, as the United States has often done. A dominant power can minimize the problem by refusing to enter into treaties it finds inconvenient; one need not call the roll of these agreements, starting with the Law of the Sea Convention and the Vienna Convention on the Law of Treaties and running to the convention on land mines. The hegemon can pronounce as customary law those portions of such a convention that suit its interests while ignoring the rest. Bent on ridding itself of an existing obligation, a power can resort to the *clausula rebus sic stantibus*, even if others have difficulty finding those circumstances. German international lawyers paid special attention to this doctrine.[22] Of course, a hegemon must set aside the rule enshrined in the Vienna Convention that treaties obtained through coercion are invalid.[23] The Reich's prevailing on Czechoslovakia to agree to the protectorate in 1939 exemplifies what the drafters of that rule had in mind.[24]

United States thinkers have increasingly chosen the route of declaring that treaties do not have legally binding effect. The American hegemonist school of thought specializes in resorting to the later-in-time rule, which puts internal laws above international law as a

[19] Treaty of Relations, May 22, 1903, Cuba-U.S., 33 Stat. 2248, 6 Bevans 1116.

[20] SCHEUERMAN, *supra* note 6, at 148–50. Schmitt's position is stated in *Völkerrechtliche Formen des modernen Imperialismus* (1932), *reprinted in* CARL SCHMITT, POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR—GENF—VERSAILLES 162, 170 (1988).

[21] Josef Joffe, *Who's Afraid of Mr. Big?* NAT'L INTEREST, Summer 2001, at 43, 48.

[22] Detlev F. Vagts, *International Law in the Third Reich*, 84 AJIL 661, 692–93 (1990).

[23] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 52, 1155 UNTS 331.

[24] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §331 reporters' note 2 (1987).

matter of American constitutional doctrine. According to Bolton, treaties are thus left with only political and moral standing.[25] Illustrative of the point is his showcasing of *Chae Chang Ping*[26] as decisive. But this decision can boast no more than a dubious relation to politics and morality. The misleading quality of Bolton's treatment starts by skipping the name of the case at the top of the page in the *United States Reports*—"The Chinese Exclusion Case." The *Chinese Exclusion Case*, as it is generally known,[27] is a monument to the shameful heritage of American racism—"an abiding embarrassment" as Professor Henkin says.[28] Even though China was then a militarily feeble state, the political ramifications of the statute involved in the case were so mortifying that it was quietly undermined by another agreement.[29] Memories are longer in Beijing than in Washington and these aspects of the case have not been forgotten there. To entrust a man who has written this straightforward celebration of America's power to break treaties with the task of negotiating new agreements is ironic. It stands in contrast to the more efficient double-facedness of Frederick the Great, who prefaced his ruthless pursuit of dominance in Europe by publishing *Anti-Machiavel*, in which he denounced the Florentine international relations expert for counseling the Prince not to feel bound by his agreements.[30]

V. HIL AND CUSTOMARY INTERNATIONAL LAW

A hegemon confronts customary international law differently from other countries. In terms of the formation of customary law, such a power can by its abstention prevent the emerging rule from becoming part of custom. It is disputed how nearly unanimous the acceptance of a rule must be for it to meet the requirement of Article 38 of the Statute of the International Court of Justice that it be "general practice."[31] Abstention by a hegemonic power does seem to be enough to keep it from being general. For example, the dissenters from the ruling in *The Paquete Habana* that fishing boats were exempt from capture said that "[i]t is difficult to conceive of a law of the sea of universal obligation to which Great Britain has not acceded."[32] By the same token, a customary rule against executing those who commit crimes while under eighteen cannot be confirmed if it is not joined in by the United States—not to mention its sympathizers, such as Iran and Iraq. This implies that, whereas a lesser state might find itself bound by custom even if it failed to sign a treaty that had gained overwhelming assent, a hegemon could safely abstain. If a custom has crystallized, the hegemon can disregard it more safely than a treaty rule and have its action hailed as creative.[33] Bolton finds it even easier to dispose of customary international law than treaties:

> Customary international law changes under this definition when state practice changes, which led former Attorney General Bill Barr to opine: "Well, as I understand it, what you're saying is the only way to change international law is to break it." This telling remark shows the incoherence of treating "customary international law" as law.[34]

[25] For similar views by Sen. Jesse Helms, see Sean D. Murphy, Contemporary Practice of the United States, 94 AJIL 348, 352 (2000) (quoting statement of Senator Helms, Jan. 20, 2000).

[26] 130 U.S. 581 (1889).

[27] *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987).

[28] LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 305 (2d ed. 1996).

[29] Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AJIL 313, 318 (2001).

[30] FREDERICK OF PRUSSIA, THE REFUTATION OF MACHIAVELLI'S *PRINCE* OR ANTI-MACHIAVEL, ch. 6 (Paul Sonnino trans., Ohio Univ. Press 1985). Frederick wrote the book in French in 1740.

[31] Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1985 BRIT. Y.B. INT'L L. 1. Relations between power and customary law are explored in MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES (1999).

[32] 175 U.S. 677, 719 (1900) (Fuller, C.J., dissenting).

[33] Paul B. Stephan, *Creative Destruction—Idiosyncratic Claims of International Law and the Helms-Burton Legislation*, 27 STETSON L. REV. 1341 (1998).

[34] Bolton, *supra* note 4, at 6 (citation omitted).

Attorney General Barr will be remembered as the author of the policy of extraterritorial abductions in lieu of extradition, which led to the kidnapping involved in *United States v. Alvarez-Machain*.[35]

VI. CONCLUSION

This brief survey sketches what HIL might become if international relations move in that direction. Hegemony can obviously vary in degree, ranging from empire to first among equals. The process of adapting present international law to a move toward hegemony would be technically manageable but would highlight features of the hegemonic order that many would find unattractive. Moreover, it would force people who do find the idea of American hegemony attractive to confront its implications in a concrete way.

Just a few years before Britain plunged into World War I and lost its imperial version of hegemony, its most popular poet wrote some lines about publicists and hegemony that are worth recalling when one ponders the relations between states, law, and power:

> If, drunk with sight of power, we loose
> Wild tongues that have not Thee in awe,
> Such boastings as the Gentiles use,
> Or lesser breeds without the Law—
> Lord God of Hosts, be with us yet,
> Lest we forget—lest we forget!
>
> For heathen heart that puts her trust
> In reeking tube and iron shard,
> All valiant dust that builds on dust,
> And, guarding, calls not Thee to guard,
> For frantic boast and foolish word—
> Thy mercy on Thy People, Lord![36]

DETLEV F. VAGTS

[35] 504 U.S. 655 (1992).

[36] Rudyard Kipling, "Recessional" (1897).