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The end of the Cold War: an epochal event in the history of international law?

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The purpose of this paper is to assess whether the end of the Cold war constitutes an epochal event in the history of international and whether it heralded a new epoch in that history. For this, we look at the period through the perspective of three grand narratives in the historiography of international law: the hegemonic, the Eurocentric and the state-centric. The latter appears to be the most relevant for our purposes. The post-Cold War years constitute another gradual step away from a system premised on the sovereign state. The balance between state sovereignty and international community is slowly shifting further. The post-Cold War Age – if one wants to consider an ‘age’ that has not ended yet just that – can best be called a third sub-period in the ‘Age of Mankind’, the ‘Age of Universal International Law’ or the ‘Age of the International Community’ after the Interbellum and the Cold War Age.

1) Periodisation in the history of international law

Periodisation is at the best of times an occupational hazard of the historian. It is an exercise in generalisation and forces the historian to make stark choices. The historian has to single out these trends and events that sustain claims to the internal consistency of the historical epoch; he or she has to underplay those that contradict that consistency. Furthermore, the historian has to highlight the discontinuities with the epochs before and after. Often, the temptation is there to elevate a single event to an epochal event, a historical caesura that marks the beginning and end of an epoch. Each of these choices lays the historian open to criticism of subjectivity, of being driven by ideological motives that are rooted rather in the historian than in history. But it is
exactly this subjectivity that makes periodisation an interesting object for historical study itself. If it does not have much to offer in terms of reconstructing the past, it says a lot about the basic assumptions that move the authors of the reconstructions and about the place they attribute themselves in the chain of history.

The difficulties inherent to historical periodisation are compounded when one is dealing with contemporary history, with an epoch that has not ended yet. While many accept that the end of the Cold War heralded the beginnings of a new era in international relations and international law, no one would claim that this epoch has come to and end by 2010. In that sense, the post-Cold War years do not constitute a historical epoch yet, but can at best be considered the beginnings of a new epoch. It is not clear what this ‘epoch’ will lead to and what will follow. While this diminishes the danger of reducing the epoch to an era of transition from one epoch to another, it enhances the danger of seeing it as the logical accomplishment of a long historical evolution, as the end of at least one ‘history’, like Francis Fukuyama has so famously done is his historical rendering of the end of the Cold War.¹ The years since the end of the Cold War can only be assessed for the break they made or not with the previous period, and for the place they take at the end of existing grand narratives of the history of international law. Whereas assessment of past epochs can be both backwards and forwards looking, this assessment can only be the former.

In the introduction to his monumental survey of the history of international law since the Late Middle Ages, the German diplomat and scholar Wilhelm Grewe complained about the fact that little or no consent exists on periodisation in the historiography of international law.² Whereas that is true on the level of a detailed subdivision of international law’s history since the Late Middle Ages, most individual periodisations are based on a very few foundational assumptions that are shared among historians of international law and international lawyers alike. In all, one can discern three main types of periodisation in the historiography of

international law since the Late Middle Ages. These are not mutually exclusive and can be combined in a single narrative.

The first type, the ‘hegemonic approach,’ is the one proposed by Grewe in his *Epochs of International Law*. It has been adopted by several other, leading German historians of international law including Stephan Verosta, Wolfgang Preiser and Karl-Heinz Ziegler. For Grewe and his followers, the determinant factor for each period is the predominant power of that day and age. Grewe considers this the best way to write a history that connects international relations with law and legal theory with state practice as he holds that ‘both are forms of expression of the same power, which characterise the political style of an epoch just as much as its social, economic and legal organisation.’ As such, he hopes to overcome the biases of a historiography that he finds one-sidedly focused on the historical jurisprudence of international law and does not take enough account of state practice and the political context of international law. The period since the end of the Middle Ages is subdivided in the Spanish Age (1494-1648), the French Age (1648-1815), the British Age (1815-1919), the Age of the Anglo-American condominium (1919-1944) and the Age of American-Soviet rivalry (1945-1989). To the English translation of the book from 2000, an epilogue on the years since 1989 was added by Grewe and Byers.

The second type, the ‘Eurocentric approach,’ is based on the assumption that modern international law originated from Europe and then expanded over the world to become a universal system of law. Recently, another German historian of international law, Heinhard Steiger, proposed a periodisation on the basis of this idea. Steiger subdivides the history of international law since the Late Middle Ages in the Ages of Christianity (1300-1800), of Civilised

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Nations (19th century-1918) and of Mankind (since 1919). He tentatively indicates that we move towards the Age of the World Citizen. According to Steiger, modern international law originated in Christian Europe. Until the end of the 18th century, Christianity formed the ‘major intellectual foundation of legal order.’ The French Revolution disrupted the connection between the legal and religious orders but international law remained very much a European or Western affair. It was the legal order of the civilised nations, organised in states, to the exclusion of uncivilised peoples which did not know that level and form of political organisation. Only after World War I, and then even more so after World War II, a global legal order emerged based on the idea of unity of all peoples, of all mankind. Grewe’s writings show these two approaches not to be mutually exclusive. He himself acknowledges a scarlet thread of the expansion of the European law of nations into a global international law through the history of international law.

Over the past decades, the notion of the European origins of modern international law has come under attack from several angles. On the basis of his studies of treaty practice between European and non-European powers during the Early Modern Age, Charles H. Alexandrowicz has argued that the law of nations of that age was not exclusively European but ‘universal’ and that only during the 19th century international law became more exclusively European. More recently, Antony Anghie has claimed that the colonial encounter played a

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central role in the formation of modern international law and of state sovereignty.\(^8\) Whereas I acknowledge both these lines of argument to have merit, it can hardly be contested that between the 16\(^{th}\) and 19\(^{th}\) centuries European powers had by far the greatest impact on the formation of international law, whether they did so in relation to one another, non-European powers or both.\(^9\)

The third type of periodisation, the state-centric, is the most foundational. It underlies the vast majority of grand narratives of the history of international law, either because it is consciously used, because it is implicit or because it is contested. Most historians of international laws, as well as most international lawyers for that matter, accept that modern international law is the result of a continuous historical evolution that first started with the emergence of the sovereign State in Europe. Before the end of the 19\(^{th}\) century, the origins of modern international law were commonly traced back to the 17\(^{th}\) century, to the works of Hugo Grotius (1583-1645) and the Peace Treaties of Westphalia (1648). Since the inception of the 20\(^{th}\) century, the historical narrative of modern international law has come to include the so-called precursors of Grotius of the 16\(^{th}\) century or even the Late Middle Ages (as off 1300).\(^{10}\) This approach has been criticised for being reductionist and for ignoring the historical existence of types of international law that are not based on state sovereignty.\(^{11}\) Some historians, among whom Preiser and Ziegler

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\(^{11}\) Steiger, ‘From the International Law of Christianity’, 180-3.
stand out, have argued that several basic ideas of international law can be traced back way beyond the Middle Ages to classical and even pre-classical Antiquity.\textsuperscript{12}

But these criticisms have not overcome the dominance of the assumption that the history of the discipline becomes only truly relevant to the understanding of current international law from the time the sovereign state first began to emerge and that this happened in Europe, somewhere between the 14\textsuperscript{th} and 16\textsuperscript{th} centuries. This assumption has left its traces on almost all attempts at subdividing the history of modern international law in different historical epochs. Underlying most periodisations of the history of international law from the Late Middle Ages onwards is the story of the emergence (14\textsuperscript{th}-18\textsuperscript{th} century), heyday (19\textsuperscript{th} century) and decline (20\textsuperscript{th} and 21\textsuperscript{st} centuries) of modern international law as a system premised on state sovereignty. This narrative is also highly Eurocentric in the sense that it goes hand in hand with a more general historical narrative of the rise, aegis and decline of Modern Europe, living its heyday in the 19\textsuperscript{th} century.

In this narrative, the 14\textsuperscript{th} to 18\textsuperscript{th} centuries form the formative period of an international legal order based on state sovereignty, that was first accomplished in the ‘classical law of nations’ or the ‘public law of Europe’ of the dynastic states of Europe after Westphalia (1648-1815), then to make place for the ‘international law’ of the 19\textsuperscript{th}-century nation-state and its colonial empires, through which it was spread over the globe. The end of World War I with the Peace Treaty of Versailles (1919) and the foundation of the League of Nation constitutes a fundamental turning point towards a new age in which the state, while still forming the foundational stone of the international legal order, starts to lose its monopoly as the sole subject, author and enforcer of international law and increasingly has to give way to other players, from individual human beings over private organisations to public international organisations.\textsuperscript{13} This

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basic outline is also present underneath the narratives and periodisations of the first two types, such as those of Grewe and Steiger.\textsuperscript{14} It forms a more foundational framework that brings relief to, for instance, Grewe’s periodisation. Underneath the five epochs he discerns between the 15\textsuperscript{th} and the 20\textsuperscript{th} centuries actually lies the threefold division of the formation (Spanish and French Ages), the heyday (British Age) and decline (Anglo-American and American-Soviet Age) of the sovereign state system and its international law. Although Grewe considered these two latter periods to be self-standing epochs, he also acknowledged ‘a certain conceptual continuity’ and did not oppose the idea that the 20\textsuperscript{th} century marked a gradual shift away from state-centric international law.\textsuperscript{15}

2) The end of the Cold War and the hegemonic approach

One expects the end of the Cold War and the collapse of the Soviet Empire to stand out as epochal events in Grewe’s hegemonic approach to the history of international law. In the German edition of his survey of the historical of international law, which appeared in 1984, Grewe defined the four decades since the end of World War II as the Age of American-Soviet rivalry and the rise of the Third World.\textsuperscript{16}

Each of the five epochs Grewe discerns in the history of international law since 1494 starts at the end of a war that marks the decline of the dominant power of the previous age and the emergence of the new power. Each period also starts with a new peace ordering and the articulation of a new international legal order. The post-1945 epoch is unique in the sense that it

\textsuperscript{14} Grewe, ‘Was its klassisches, was ist modernes Völkerrecht’, 117-8; Steiger, ‘From the International Law of Christianity’, 190-2.

\textsuperscript{15} Grewe, \textit{Epochs of International Law}, 639-40.

is not dominated by one power or a ‘condominium’ of powers, but by the rivalry between the two leading powers, the United States and the Soviet Union. This rivalry put significant brakes on their power to mould international legal order and prevented the United Nations of truly embodying world legal order. It also left room for the newly independent Third World countries to have their weight felt on the international legal scene.\footnote{Grewe, Epochs of International Law, 639-41. Antonio Cassese to a large extent shares the same power analysis in his historical introduction to his international law textbook: Antonio Cassese, International Law, Oxford 2001, 35-44.}

The demise of the Soviet Empire in Central and Eastern Europe and in Central Asia (1989-1991) made an end to the bipolarity of world order that had existed since the late 1940s. Hence, it of necessity marks the end of the epoch which for Grewe had started in 1945. In the logic of Grewe’s thought, now the American Age would begin. But interestingly, in the epilogue on the English translation to Grewe’s book, Grewe and Byers refrain from this conclusion. While they acknowledge it to be undeniably true that the United States is the sole superpower today and has by far the greatest influence of all states in and on the international legal order, Grewe and Byers state that the impact on the international order of the United States cannot be compared to that of Spain, France and Britain in their age. They attribute this to two factors. First, they hold that power has no longer the relevance it had before. Military power has lost much of its use, both because of the devastating power of nuclear weapons and because of legal constraints. But also in the economic or cultural fields, American power does not go uncontested. Second, American dominance also finds itself in a dynamic tension with what the authors describe as a ‘new communitarian approach’ or ‘growing trends towards a stronger international community.’ Although the authors warn against too elevated expectations, they see this ‘communitarian approach’ as a real brake on the freedom of action of states, including the predominant one. But this assessment does not yet bring Grewe to the point of breaking with his own hegemonic approach as far as the post-Cold War Age is concerned. In his own words, ‘[i]t
remains to be seen which trend will prevail, American predominance or the communitarian approach.\textsuperscript{18}

Regardless of Grewe’s own qualms with the hegemonic approach for the post-Cold War Age, it remains an interesting perspective to look at the end of the Cold War itself. This is certainly true from a contemporary point of view, that is contemporary to the ‘epochal’ years 1989-1991 themselves. President George H.W. Bush is often quoted in relation to the end of the Cold War for his reference to a ‘new world order,’ which he most famously made in a speech on 11 September 1990 at a joint session of the U.S. Congress. Moreover, he has frequently been upbraided for having achieved little in bringing about that new world order.\textsuperscript{19} But this is at least a partial injustice to the president who presided over the victorious and peaceful ending of the Cold War.

The Cold War ended where it had begun, in Europe. The events that led to its end were the successful breaking away of Moscow’s central and eastern European allies from the communist block (1989), the unification of Germany (1990) and the collapse of the communist regime in Moscow and of the Soviet Union itself (1991). Even if to almost all witnesses, from policy makers over policy watchers to the wider public, these events appeared sudden and unexpected, American political leaders were quick to assess these events as a victory of the West over the communist world, and to act accordingly. The potential power vacuum the communist empire threatened to leave was readily filled, not by the formation of a new international system but by the absorption of the former communist countries of Europe, and even Russia, into the pre-existing Western part of the formerly bipolar international legal order. The most dramatic example of this American and Western victory was German unification. After having entertained some vague thoughts about a confederation between the two Germanies, the


architect of the unification process, Chancellor Helmut Kohl, with the full support of President Bush, absorbed the East German territories into the Federal Republic of Germany, even making use of a provision in the Federal Republic’s Fundamental Law to that extent (Article 23). In order to achieve the acquiescence of Moscow and Paris to German unification, Kohl did not have to make any compromise on the extent of Western victory. To the contrary, his main concession – to France – was rendering full support to the strengthening of one of the linchpins of the Western fabric from the Cold War, Western European integration, by speeding up the transformation of the European Communities into the European Union and the introduction of a single European currency. Later, the former European allies of the Soviet Union, and the three Baltic republics which after the Russian invasion of 1939 had become part of the Soviet Union, joined the main Western regional organisations, NATO and the European Union. As far as Europe, the main battlefield of the Cold War, was concerned, the unification of east and west that followed the collapse of communism was not a merger between two partners, nor the birth of a new legal order but the expansion of the Western legal order to the former communist block. That this was the successful outcome of a consequential strategy on the part of the dominant power’s leaders is a matter of debate, but that is was the desired outcome is certain. Rather than Bush’s new world order quote, the more relevant one is the remark Secretary of State James Baker dotted down in 1989 and which found its way into a speech Bush gave at Mainz on 31 May 1989: ‘Something we wanted for 40 yrs * Eur that’s whole and free.’

With the expansion of the regional institutional framework of the West over Central and Eastern Europe came the export of its interpretation, conceptions, rules and foundational values of international order and international law. In the Charter of Paris for a New Europe of 21 November 1991, the expanding West defined the new legal order of Europe, and thus itself. The Charter laid down democracy, the rule of law, economic liberty and the respect for human rights


21 See http://usa.usembassy.de/etexts/ga6-890531.htm.
as the fundaments of the international legal order of Europe. A year later, the European Community made the recognition of new States in the broader European area, including the Soviet Union, conditional upon, among others, their acceptance of these values as expressed in the UN Charter, the Final Act of the Helsinki Conference on Security and Co-operation in Europe (1975) and the Charter of Paris as well as respect for minority rights. Successful implementation of the European Community’s guideline was largely limited to the territories west of the Caucasus, and even then, and hardly any attempts were made at promoting these guidelines into rules of general international law.

In parts of the Former Yugoslavia, the Caucasus and at several places outside Europe, the vacuum the fall of the Soviet Empire left was not filled in by the West – or at least not immediately –, but by reviving nationalist or religious forces that had been on the ground before but now got the opportunity to rise. These had little influence on the international legal order but were rather marginalised by it.

Under the hegemonic approach, the end of the Cold War only partly constituted an epochal event. The bipolar system of power of the Cold War disappeared and, at least as far as the Atlantic and European subsystems of international law are concerned, bipolarity made place for American dominated unipolarity. But the caesura of 1989 was different from that of 1648, 1815, 1919 or 1945 in that no new international legal order was created. What happened was that the international system of the victorious pole expanded over the other pole.

3) The post-Cold War Age and the hegemonic and Eurocentric approach


24 Some good surveys on recent developments in international law are to be found in the series of ‘Centennial Essays’ which appeared in the American Journal of International Law, 100 (2006). For this and the next paragraph, I base myself largely on these, the ‘Epilogue’ in Grewe, Epochs of
In the historical narrative of international law under the Eurocentric approach, the 20th century is marked by the transition from a European to a universal legal order. Through the decolonisation of the 1940s to 1970s and the accession of the former European colonies in Asia and Africa to the United Nations, that transition was completed before the end of the Cold War. In this respect, the Eurocentric narrative has little to add to the question whether the end of the Cold War constitutes an epochal event. But there is another dimension to the Eurocentric historical narrative for the 20th century, that of the extent of the impact of the European and Western powers on international law. In this perspective, the hegemonic and the Eurocentric narratives approach one another in their rendering of the history of international law in the 20th century. The question of the European or Western character of 20th-century international law becomes that of the extent of the dominance of the Western powers, in particular the United States after 1945.

The end of the Cold War saw the demise of the United States’ competitor to world domination and left the United States the most powerful state on earth. But that leaves the question open Grewe himself raised. To what extent could the United States and its Western allies dominate and mould world order? In 2000, Grewe himself spoke of a tension between American dominance and a new communitarian approach but left it unresolved which of the two trends would prove the stronger. Can we now, yet another decade later, add something more to the debate? For that, we need to address three questions.

First, did the Western model at the end of the Cold War expand outside Europe to encompass the whole world? In other words, did the end of the Cold War make the Western tenets of international order – democracy, rule of law, respect for human and minority rights and free trade – into the hallmarks of a ‘new world order,’ as many hoped and expected in the early 1990s? Although reality could never live up to Fukuyama’s idealism, the 1990s had a certain momentum towards the spreading of the Western order, or elements of it, over new parts of the world. In the early 1990s, democracy made headway in Central and Eastern Europe, Latin

America and some African and Asian countries. In Africa, a regional system of human rights protection was set up, culminating in the foundation of the African Court of Human and Peoples’ Rights (2006). In 1994, the Council of the Arab League adopted the Arab Charter on Human Rights. In Africa, the Americas and Asia, regional cooperation was enhanced through the foundation of the African Union (2001), the different American free trade zones and the strengthening of ASEAN. But maybe the West’s biggest success lay in the founding of the World Trade Organisation (1995) with its institutions for dispute settlement. Through this organisation, free trade – with all its qualifications – has certainly gained a lot of ground towards becoming a real tenet of world legal order. But important though these steps were, they do not allow for the conclusion that the Western order became truly and effectively universal. Today, many regimes persist that are not democratic, in name or reality, and where respect for human rights and the rule of law are flimsy or non-existent. Europe’s attempt at making respect for Western values a condition for state recognition was never carried through outside Europe, or even in the margins of Europe. The end of bipolarity did not make the order of the remaining pole in all its aspects into the new world order.

Second, is ‘unipolar’ after 20 years still a good qualification for world order? The end of the Cold War left the United States the sole superpower, giving the world a ‘unipolar moment.’ But did this last? The relative economic, military and cultural power of the US was and still is by far the greatest of any leading power since the fall of the Roman Empire. But the impediments to using that power effectively to dominate the world are also greater than ever before in history. Today, the interdependency between states is far greater, not only in the sphere of the economy, but also of culture, the environment and of the international dimension to ordinary people’s lives. Even a rising world power such as China is as much a partner and objective ally to the US to address crucial problems as it is a competitor. The devastating potential of today’s military arsenal hampers its full use, while even regional wars against minor powers or even non-state actors are enormously costly in terms of money as well as diplomatic and political credit. Moreover, over the last decade, and particularly since the financial crisis of 2008, the relative economic power of the US has declined. Against this relative decline in power, stands the rise of new economic great powers outside the Western world such as China, India, South Korea,
Indonesia or Brazil. The US’s traditional allies, Western Europe and Japan, which in the 1980s and 1990s were still considered its main potential challengers, are also in decline. The gradual rearrangement of positions has found its clearest expression in the rise of the G20 (first convened in 1999). Whereas in the 1990s, it still seemed to suffice to expand the G7 into a G8 by adding Russia, now a growing part of the debate needs to be transferred from this ‘Western’ club (including Japan) to the global G20. In conclusion, we can say that over the last twenty years, the world has commenced to move away from the ‘unipolar moment’ of the early 1990s. Whether this will lead to a multipolar world or a new bipolarity opposing the two leading powers and their allies, is a matter for the future.

Third, to what extent does the United States dominate the actual workings of international law, its formation and its enforcement? In the context of this paper, I will not try to address this question in a comprehensive way but will limit myself to one aspect of international law and the world’s legal order. Because the relative preponderance of the United States is nowhere as great as it is in relation to military power, I will focus on use of force.

When President Bush spoke in September 1990 about a ‘new world order,’ he did so in the context of the Kuwait Crisis. Bush called the Iraqi aggression on Kuwait ‘the first assault on the new world that we seek’ but also ‘a rare opportunity toward an historic period of cooperation.’ The First Gulf War indeed became a joint effort of a large part of the international community to stop the aggression of one sovereign state against another and it put, for the first time since the Korean War, the United Nations Security Council centre-stage in a big military conflict.

During the Cold War, the security organ of the organised world community had been prevented of playing any significant role in the management of important conflicts because of superpower rivalry and the almost systematic use of the veto in the Security Council by the superpowers – and particularly the Soviet Union – to protect themselves and their allies against majority votes. Now, with the end of the Cold War, it was felt and hoped that the Security Council

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would finally be able to assume a bigger role. The Kuwait Crisis seemed to prove these expectations rights. The attempt at revitalising the Security Council was an effort to revitalise a mechanism that the United States and its main Western allies had desired back in 1944-1945 and that the Cold War adversary had prevented from functioning properly; it fitted the pattern of expanding the Western order.

As of the early 1990s, the United Nations Security Council has come to play a vastly greater role in the management of armed conflicts than before, and this in three different ways. *Primo*, the Security Council expanded its factual competencies from international conflicts to a much wider range of armed conflicts such as internal conflicts and conflicts involving non-state actors. *Secundo*, a far greater number of peacekeeping operations was mounted since 1990 than in the four decades before. Moreover, over the years, the mandate of UN peacekeepers has grown both in terms of ambition but also of the right to use force. *Tertio*, beginning with the Kuwait Crisis, the Security Council has started to make more use of its powers under Chapter VII, including the imposition of sanctions under Article 41 of the UN Charter and the authorisation of the use of force under Article 42. The Kuwait Crisis was the first instance of authorisation of the use of force in an important armed conflict since the Korean War (1950) but it was followed by several more such as for Somalia, Bosnia-Herzegovina and Haiti. The purposes of these authorisations of the use of force extended from the stopping of aggression over the protection of human rights to the restoration of a democratic regime.

The Council’s authorisation to use force against Iraq gave international sanction to the US-led military coalition to liberate Kuwait. But it also provoked a debate about the implementation of Article 43 of the UN Charter and to provide the Council with designated armed forces.²⁶ This was not to be; today the ‘international community’ can still only act militarily through the armed forces of states willing to contribute. This, together with its veto power and its relative political, economic and military preponderance, put the US safely with the foot on the pedals, including the brakes, of the newly invigorated world organisation. Over the last two years:

decades, acting through the Security Council, the international community has met with success as well as disaster in the management of international conflicts, but in almost all important cases, the role of the United States has been determining.

On the other hand, since the end of the Cold War, the United States has shown a remarkably great preparedness to use force. In fact, this is the strengthening of a trend that already started in the 1980s when the United States got itself involved in several internal conflicts in Third World countries and started to make use of military force to repress state-sponsored terrorism. Whereas in the 1980s, the involvement in Latin-American or African countries was motivated in terms of Cold War battlefields, it now became a matter of safeguarding or restoring international stability, protecting American citizens, human rights, democracy or, since 9/11, fighting international terrorism. Over the past two decades, different American administrations have shown smaller or greater willingness to work with and through the Security Council, regional organisations such as NATO or act alone or with particular allies. In most cases where a Council mandate was lacking, the US did not have to face condemnation because it was protected by its veto and the reluctance of other states to take the US head on by condemning its actions too clearly. In all, the US has not had to use its veto much to protect itself or its allies, but the use of it or even the constant threat comes with rising costs. Whereas during the Cold War, the use of a veto against the majority had the effect of strengthening the coalition because it was used to protect one’s block against the other, now it comes at the price of isolation because it is used to protect a particular interest. In short, over the last two decades, the US has not been seriously hampered in using force as it wanted, but it has become increasingly isolated by doing so. The US can lead the world community in the safeguarding of international peace and security where it wants to go, but it cannot change its direction single-handedly.

Finally, over the last years, a scholarly debate has been raging over the question whether the administration of President George W. Bush (2001-2009) has tried, in the context of its ‘war on terror,’ to change use of force law by extending the interpretation of the right to self-defence, and whether it has been successful at that. More in particular, it is alleged that the US tried to extend the concept of self-defence to the use of force against states that only harbour terrorists and to include preventive self-defence against a non-imminent threat. Whereas President Bush
and other American officials have certainly made such claims, the US had by and large refrained from arguing particular cases under these headings and only a very few states have taken them over. In general, one can say that these claims have not given rise to a consequential American state practice along these lines and that they found no general acceptance with the vast majority of states, or the International Court of Justice for that matter. The changes the US was able to achieve in relation to use of force law are altogether more modest. The interpretation that state support to terrorist non-state actors constitutes an ‘armed attack’ under Article 51 of the UN Charter is now more generally and clearly accepted than it was before, but whether harbouring is enough is unclear. And remarkably, in 2004, the UN High-Level Panel constituted to make recommendations on the revision of the Charter conceded anticipatory self-defence against an imminent attack to fall within the confines of Article 51, thereby taking a surprisingly clear stance in an old and unresolved debate. But this remark has not met with much reaction of the world

27 Protests against claims of preventive defence have been particularly loud and general. Claims regarding states which harbour terrorists have been met with more silence or even acquiescence, but certainly not enough to state that it has become an accepted customary interpretation of Article 51. The International Court of Justice in the Wall Opinion in 2004 and in Armed Activities on the Territory of the Congo (DRCvUganda) in 2005 has refrained from answering that matter. ICJ Reports (2004) 136 para. 139 and (2005) 168, para. 147.


community either way so that even on the question whether Article 51 condones anticipatory self-defence against imminent threats, the jury is still out.

In the grand narrative of the transition of a European towards a universal international legal order, the post-Cold War Era marks another gradual step in the decline of Western domination. The third quarter of 20th century, with the decolonisation and the formation of a truly global world organisation, already saw the achievement of a global world order, but under the domination of two superpowers. The collapse of the Soviet Union created a ‘unipolar moment’ in which the United States and its Western allies might have hoped to impose their vision of world order on the whole globe. At this, they proved only partially successful. The rise of new, non-Western economic powers and the growing interdependency of the world foretell that the Western impact on the world’s legal order will further decline. In this light, the post-Cold War Age is at best a third transitional sub-period in the Age of Universal International Law. Whether this will be a transition towards a truly universal order without a single dominant power or civilisation but with a single, shared value system, or a divided – bipolar? – world order remains to be seen.

4) The post-Cold War Age under the state-centric approach

In the state-centric narrative of the history of international law, the end of World War I forms a watershed, a revolutionary moment. Whereas some authors are more nuanced than others, what often appears is a dialectical opposition between the 19th century as the heyday of the sovereign state and the 20th century as the age of its decline. Whereas this shift away from the sovereign state certainly has a foot in reality, one should be careful not to take this opposition too far. First, the ‘revolution’ of 1919 did not fall from a blue sky. As Koskenniemi and Steiger have stated, the ground for the changes of the early 20th century was already prepared during the late 19th century.30 Second, all too often, the ages of the formation and heyday of state sovereignty are

depicted one-sidedly in terms of the ascendancy of the sovereign state and its accommodation through the weakening of the law. In fact, also in the 17th, 18th and 19th centuries, there were ‘communitarian’ trends in the international legal order that stood in a dynamic tension with the sovereign state, even if these were much weaker than those of the 20th century. The classical law of nations and 19th-century international law were as much attempts at limiting state sovereignty as at accommodating it. Both the pre-1919 and post-1919 legal order were dualistic in the sense that state sovereignty and international community were competing, leading principles. The difference in the balance between the two may have shifted in a very significant way, but still it historically more correct to consider that shift gradual rather than revolutionary.\(^3\)

In the more radical interpretations of the sovereign state system and its international law, that state is the sole subject, author and enforcer of international law. The sovereign state is the sole significant subject of international law. Individuals do not hold any rights or obligations under international law. There is a strict dualism between the intra- and the inter-state legal orders preventing the invocation of international law by individuals on any municipal or international forum. Consensualism and voluntarism reflect the monopoly of the state on the making of international law. States are only bound by rules of international law they have voluntarily consented to, either expressly (treaty law) or tacitly (international customary law). In the absence of any supranational enforcement mechanisms of international law, states are thrown back on their own devices to enforce their rights or protect their interests. For this, they hold the right to resort to force.

At no point in history, did reality completely match this stark portrait of the sovereign state system, but still it offers a handy conceptual framework to catch the changes the 20th century and the post-Cold War Age brought. First, the main evolutions of the 20th century up to 1989 are summarised; then, the main evolutions of the years since 1989 are sketched.

Over the 20th century, the sovereign state lost its monopoly on all three points. First, apart from the states, individuals, multinational companies and non-governmental and governmental international organisations became bearers of rights and obligations under international law. In

\(^{31}\) See for examples of this state centric-narrative and my comments on it, Lesaffer, ‘Grotian Tradition.’
many countries, dualism made place for monism. International human rights treaties bestowed rights upon individuals which in many jurisdictions could be invoked before domestic courts. Some treaties, like the European Convention on Human Rights and Fundamental Freedoms (in force 1953) or the American Convention on Human Rights (in force 1978) granted remedies at the international level. The Versailles Peace Treaty (1919) provided for the international prosecution of the former German Emperor Wilhelm II (1888-1918) for having broken the peace as well as for the individual prosecution of war criminals. After World War II, political and military leaders from the defeated Axis-powers were tried before international tribunals at Nuremberg and Tokyo.

Second, although the doctrines of consensualism and voluntarism were not abandoned, they were dented through the emergence of the concepts of *ius cogens* and *obligationes erga omnes*. Whereas conceptually, the codification of international law in multilateral conventions does not detract from the condition of consent for a rule to be binding upon a state, in reality the actual impact of individual states on the formation of rules they are bound to is far smaller than with bilateral treaties. The now generally accepted role of conventions in the constitution or interpretation of general international customarily law puts further brakes on the freedom of states. By the end of the Cold War, important parts of traditional international law, such as the laws of war, diplomatic law, the law of treaties and the law of the sea had been codified. Moreover, some international institutions, such as the United Nations Security Council and more significantly, the institutions of the European Community, obtained supranational powers in the sense that they could impose majority decisions upon all member states.

Third, the emergence of international institutions for adjudication and international arbitration provided alternatives to self-help. Between the Hague Peace Conferences of 1899/1907 and the adoption of the UN Charter in 1945, the right to use force has been dramatically limited, at least in black letter law. The divisions of the Cold War severely hampered the Security Council in playing a significant role in the management of international armed conflicts, either through the condemnation of use of force or active intervention under Chapter VII of the Charter, and allowed for states to reclaim much of the territory they had lost in the Kellogg-Briand Pact (1928) and the Charter. Over the Cold War, the interpretation of the right to self-
defence was widened so that several other kinds of forcible measures short of war up to
defensive warfare seemed to have become encompassed by it, or at least that states felt in a
position to claim so without risking clear condemnation from the organs of the United Nations and
their main allies.32

Each of these trends was continued and corroborated after the end of the Cold War. First, in the context of human rights protection, since 1998, the European Convention system allows citizens directly to appeal to the European Court of Human Rights in Strasbourg, whereas before they had to pass through the European Commission of Human Rights. The African system now provides the same remedy for the African Court. The main evolution with regards the position of individuals as subjects of international law is in the field of international criminal jurisdiction and individual accountability for war crimes and crimes against humanity. After World War II, the Nuremberg and Tokyo tribunals had inspired hope that a permanent system of international prosecution of war crimes would be set up. The divisions of the Cold War prevented this. In the 1990s, the international community – in part through the Security Council – took up the thread by setting up the Hague and Arusha courts for the conflicts in the Former Yugoslavia and Rwanda. In 1998 in Rome, the Statute of the International Criminal Court was adopted, leading to the foundation of a permanent international criminal court at The Hague. By now, the individual criminal responsibility for crimes of war and crimes against humanity both in the context of international and internal armed conflicts has been established, even if some of the most powerful states have not acceded to the Statute. Moreover, some states have made far reaching claims with regards universal jurisdiction for international crimes and adapted their national legislation to this effect. Furthermore, non-governmental organisations have come to play an significant role in the preparation of new multilateral conventions, such as the Ottawa Convention against antipersonnel landmines (1996) and the Kyoto Treaty on climate change (1997). Transnational companies also have their voice increasingly heard, among others by influencing governments in the negotiation of bi- and multilateral treaties of an economic nature, such as investment treaties. These private corporations also make their influence felt in the

process of dispute settlement within the World Trade Organisation and are direct players on the international legal forum through the increasing use they make of international arbitration.

Second, the acceptance of the existence of *ius cogens* and *obligationes erga omnes* has certainly grown since the end of the Cold War. In the field of codifications, the 1990s and the first decade of the 21st century have seen somewhat less progress than the 1960s to 1980s. Most progress has been made in the sphere of international criminal law, international humanitarian law, environmental law and economic law. In the European Union, majority decisions play a much bigger role than they did in the European Community from before the Treaty of Maastricht (1992). In the 1990s, the Security Council at some instances, like in the setting up of the Arusha Court, voted on resolutions which actually introduced new rules of international law.

Third, as said above, after the Cold War the Security Council started to play a much more active role in the management of armed conflicts, and extended its activities from international to internal armed conflicts. Although vetoes have been rare since the end of the Cold War, the permanent threat that radiates from the mere existence of veto power combined with the dominant position of the United States has certainly hampered the Council in stemming the relaxation of the prohibition to use force through widening the notion of self-defence. Although the United States have not been able to have all its interpretations accepted or even acquiesced to by a significant number of states, the Council has proved powerless to manage the use of force by the United States or its main allies.

**5) Conclusion**

The three types of historical periodisation hold some relevance for assessing whether the end of the Cold War heralded a new epoch in the history of international law. Of the three, the hegemonic approach is the least relevant and the state-centric the most. The fall of the Soviet Empire left the United States the sole superpower. But other than with previous epochal ‘wars,’ the end of the Cold War did not lead to the constitution of a new international order. Rather, when and where the fall of communism left a vacuum, this was filled by expanding the Western
order or by reviving religious or nationalist ideas. In the early 1990s, the United States and the West were at least perceived to have a momentum to mould the world order, but as the main representative of the hegemonic narrative himself concedes, they were only very partially successful. By 2010 the momentum has dwindled and the relative dominance of the West is in decline. Moreover, the growing interdependency of the world makes traditional power less relevant than it was before.

The most accurate assessment of the post-Cold War years appears to be that of yet another gradual step in the decline of Western domination and, even more importantly, of yet another gradual step away from a system premised on the sovereign state. The balance between state sovereignty and international community is slowly shifting further towards the latter. But it is still a dualistic order inasmuch as state sovereignty is still a foundational stone of the international legal order, among others in relation to use of force. The post-Cold War Age – if one wants to consider an ‘age’ that has not ended yet just that – can best be called a third sub-period in the ‘Age of Mankind’, the ‘Age of Universal International Law’ or the ‘Age of the International Community’ after the Interbellum and the Cold War Age. Is this a consequence of the end of bipolarity, or is it just a continuation of an evolution that would have happened regardless? Rather than indulging myself with a bit of counterfactual history, I prefer to conclude by raising another question. To what extent is the demise of the Soviet Union and of bipolarity itself an effect of the rise of international community and the growing interdependency of the world which had already begun before 1989?