The Law of Nations in Political Thought

A Critical Survey from Vitoria to Hegel

Charles Covell

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A Critical Survey from Vitoria to Hegel

Charles Covell
Associate Professor of Jurisprudence
University of Tsukuba, Japan

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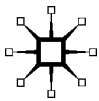

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Preface

This book marks the culmination of the latest part of the study of the theoretical aspects of international law and international relations that I have been engaged in since 1991 at the University of Tsukuba in Japan. For a fuller understanding of the discussion of the law of nations in political thought as provided here, the reader should consult the previous books of mine on Kant and Hobbes as entitled thus: *Kant, Liberalism and the Pursuit of Justice in the International Order* (1994); *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (1998); *Hobbes, Realism and the Tradition of International Law* (2004).

Charles Covell
Tsukuba, Japan
January 2009

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Introduction

The purpose of this volume is to provide a general introduction to the law of nations as this subject figures in political thought. The method adopted is that of the critical survey of the views concerning the law of nations that are to be found set out in the work of representative political thinkers. These are as follows. In Chapter 1, we discuss the Spanish Dominican philosopher Francisco de Vitoria (c.1483–1546), the Spanish Jesuit philosopher Francisco Suarez (1548–1617), the Italian-born jurist Alberico Gentili (1552–1608) and the Dutch jurist and philosopher Hugo Grotius (1583–1645), and with the latter being contrasted in passing with his fellow Dutch jurist Cornelius van Bynkershoek (1673–1743). The thinkers considered in Chapter 2 are the English philosopher Thomas Hobbes (1588–1679) and the German jurist and philosopher Samuel Pufendorf (1632–94), and with brief reference being made to the Dutch-born philosopher Benedict de Spinoza (1632–77). As for Chapter 3, the thinkers discussed are the German jurist and philosopher Christian Wolff (1679–1754) and the Swiss jurist Emmerich de Vattel (1714–67). In Chapter 4, the focus lies with the British philosophers John Locke (1632–1704), David Hume (1711–76) and Jeremy Bentham (1748–1832), and with there being included consideration of the principal successors to Bentham in his own particular tradition in jurisprudence: the English legal philosopher John Austin (1790–1859), the Austrian jurist Hans Kelsen (1881–1973) and the English jurist H.L.A. Hart (1907–1992). Finally in Chapter 5, there is some discussion of the international thought of the French cleric and diplomat Charles Francois Irénée Castel de Saint-Pierre, Abbé de Tiron (1658–1743), but with the central attention being directed towards the Swiss-born philosopher Jean-Jacques Rousseau (1712–78) and the German philosophers Immanuel Kant (1724–1804) and Georg Wilhelm Friedrich Hegel (1770–1831).[1]

The line of thinkers from Vitoria to Hegel belong to the modern tradition in European political thought, and when they are treated of as writers on the law of nations, as they are here, then their reflections on this subject are to be taken as being bound up with the emergence and consolidation of the distinctively modern system of the law of nations or international law. The origins of the modern international law system are associated with, and to be explained through reference to, certain decisive events and certain underlying processes of change that occurred in Europe, and within international society in general terms, during and after the period of the late fifteenth and sixteenth centuries. To begin with, there was the formation of the modern states system that, following the social and political upheavals brought about with the Renaissance and Reformation, came to be established in Europe with the Peace of Westphalia that concluded the Thirty Years' War (1618–48). This was the system where states were understood to be sovereign, as in the respect that they were exempt from subordination to external and superior political authority, and hence a system where, as in line with the relevant concept of sovereignty, states were rendered formally exempt from the sort of comprehensive jurisdictional authorities that had earlier been claimed and exercised as through the pre-eminent political institutional structures of the Middle Ages: the Holy Roman Empire and the Roman Catholic Church.

The forming of the modern states system went together with the progressive secularization of law, politics and society in Europe. One consequence of this was that the law of nations, as the law obtaining within the international sphere, came to be thought of as having a conceptual and normative status that did not presuppose adherence to the Christian religion or, indeed, to any particular religious standpoint. This was reflected in the expounding of the law of nations as law that applied to the lands and peoples falling outside the confines of European Christendom, as in response to the overseas expansion of the European powers into Africa, the Americas and the Far East: and with this being exemplified, notably, in the concern of Vitoria with the jurisprudential aspects of the position of the Spanish as in relation to the native American Indian peoples. The effects of the European expansion were to include the growth in trade and commerce among nations and peoples, as in accordance with such principles as that of the freedom of the seas. This enlargement in international trade and commerce was to lead to new political structures, as so with those to do with the practices of colonial domination that Bentham and Kant were so forcefully to denounce. It was to lead also to the advent of what

Kant, famously, was able to envisage as a cosmopolitan society where all the nations and peoples of the world would be united as through, among other things, the bonds of trade and commercial interdependence.

All of these various developments within the realm of international politics, as here described, went together with the articulation of the view of the law of nations as a body of laws with a universal reach and application, and that, as such, governed, and applied to, the external relations among states and their rulers and as where states were recognized to comprise separate and independent, and hence sovereign, political entities. This, and as consistent with the argument of the present volume, is the specifically modern sense of the law of nations and the one that, as both ideal and working presupposition, is to be found informing what stands as the now existing system of public international law.

i. Aquinas

To appreciate the character of the modern law of nations and the lines of theorizing to do with it as carried forward by Vitoria and his successors up to Hegel, it is essential to understand the sense of the law applying in the international sphere that was particular to the pre-modern period. In this connection, two concepts are of critical importance: the concept of natural law and the concept of the just war. The foundations of the pre-modern tradition of natural law were laid in the classical age by the Greek thinkers Plato (c.428–348/7 BC) and Aristotle (384–322 BC), the Stoic philosophers and the Roman law theorists; whereas the basic contours of just war theorizing in its Christian form and tradition were set out by the early Church father and theologian St Augustine of Hippo (354–430). However, the concepts of natural law and the just war were to receive their classic formulation in the thirteenth century with the work of the thinker who, for the purposes of the discussion here, provides the key point of reference: the Dominican theologian and philosopher St Thomas Aquinas (1224/5–74).

The pre-modern tradition of natural law theorizing involved a quite specific view as concerning the individual and the relation of individual men to state and society. Thus the state was understood to be based in, and to be established in accordance with, a normative order that was identified with and derivable from the objectively given order of nature as such. In line with this, it was assumed that association in the state and subjection to the legal and political order that the state maintained were natural to men as rational beings. As for the state itself,

this was characterized as a moral, or ethical, form of association among men, and with its justification being held to lie in its advancing the common good of its members and, through this, the setting of the conditions for the realization by individual men of the ends of the good life as within the framework of an organized political community. In addition, the state was taken to be prior to the individuals forming it as in regard to the order of nature, and as in regard to the normative order directed towards the ends of the good life within political community that derived from the natural order. It followed from this, as an implication, that the state was to be considered as exercising a direct and naturally sanctioned authority as to its members that was independent of any voluntary act or acts on their part such as presupposed their actual consent and agreement. The various ideas concerning the individual, state and society, as bound up with pre-modern natural law theorizing, were integral to the thought of Aristotle and are to be found present in the argument of his *Politics*.[2] So likewise are they present in the writings of Aquinas on law, the state and civil government, as is so with the exposition of the principles of law that comes in his monumental work the *Summa Theologiae* (c.1265–73).[3]

Aquinas identified and treated of four distinct forms of law: eternal law (*lex aeterna*), natural law (*lex naturalis*), human law (*lex humana*) and divine law (*lex divina*). The eternal law was understood by Aquinas to embody God's conception of the final end of the entire created universe, and hence to stand as the ultimate metaphysical ground of all other forms of law.[4] The natural law, as Aquinas explained it, was a law of universal reason that comprised the part of the eternal law that was transparent to human reason and that, as such, reflected the degree of involvement in the eternal law which was proper to men as rational beings.[5] The human law was the law brought into being by men for their government within the conditions of social order. Hence the human law comprised the sphere of positive law (*ius positivum*). There were two forms of human law as recognized by Aquinas: the civil law (*ius civile*), and with this being the law laid down in states for the common good as through the stipulations of rulers; and the law of nations (*ius gentium*), and with this being the law that pertained to the general norms of just conduct such as those of justice in buying and selling which, as established through natural reason, were followed on a common basis by all men as the condition for their mutual society.[6] The divine law was the law contained in the word of God as revealed through the Scriptures, and, as such, it supplemented the natural law in directing human beings as to the meaning and implications of the eternal law.[7]

For Aquinas, the principles of human association in political society and the state, and the principles of the common good as maintained through this form of association, stood as universal principles that were comprehended within the natural law. In particular terms, the natural law was taken by Aquinas to embody the first principles of practical reason, and with these principles relating to the basic human goods and to the naturally determined inclinations of human beings to pursue such goods and to avoid what was opposed to them. Thus the natural law had application to the inclination to self-preservation that human beings had in common with all other existing substances. In this context, the natural law pertained to the practical principles directed towards the maintenance of human life as such. In addition, the natural law applied to the inclinations that human beings shared with other animals, such as the inclination of men and women to join together and to produce and nurture offspring. Finally, the natural law applied to the inclinations to pursue goods, such as the knowledge of God and association within society, which were exclusive to human beings as the bearers of a fully rational nature. Here, the relevant practical principles, as given in the natural law, included the principles that required men to avoid ignorance and to refrain from doing harm to one another.[8]

In Aquinas' account of it, then, the natural law pointed to association within society as a basic human good, while pointing also to the practical principles that related to the inclination of men to pursue this good. Thus, for Aquinas, the natural law constituted the underlying normative foundation for the state and the underlying ground of justification for the subjection of men to the rulers established in states. Specifically, it was the natural law, and so indirectly the eternal law of which the natural law was a manifestation, that Aquinas saw as grounding the laws as stipulated by rulers for the advancing of the common good within the condition of political society. So, for example, the natural law stood as the basis for the derivation of human laws: and with the precepts of the law of nations being derived as in the manner of conclusions deduced from natural law principles as their premises, and with the precepts of the civil law being derived as in the manner of determinate constructions being placed on natural law principles as in their aspect as general directions for human conduct.[9]

Again, the justice of human laws was held by Aquinas to depend on their conformity with, or the lack of substantial divergence from, the principles of natural law. Central to this is the argument that Aquinas set out as to the links between the form of the rule of law obtaining in

the state and the core principles of justice, as a matter of their direct and conceptually guaranteed connection. Here, Aquinas picked out three conditions as establishing the justice of human laws, which conditions related to the end, the authority and the form of laws. Accordingly, laws were to be aimed at the common good as their end; they were to be enacted as in line with the actual authorities belonging to the rulers who stipulated them; and the laws were to be enacted in a form such that the burdens imposed through them were to fall in a fair and equitable proportion as between the members of the communities where they were in force. It followed that laws that promoted ends running counter to the common good, laws that were enacted without proper authority and laws that were applied contrary to equity stood as laws that were tainted with injustice and hence as laws which, as Aquinas put it, were not laws but rather outrages against law. However, it also followed, for Aquinas, that when the conditions of end, authority and form were adequately fulfilled, then the laws concerned were to be thought of as being in agreement with the eternal law as the ground for natural law, and hence as carrying an obligation of compliance with their terms which was strictly binding in conscience. Thus it was that the natural law underwrote the duty of obedience that fell on men with regard to the laws laid down by their rulers.[10]

As we have seen, Aquinas maintained that the law of nations was human law, and hence a form of positive law, and that it was distinct from natural law even though it was derived from the latter. As to its substance, the law of nations, as Aquinas explained it, comprised only general principles of just conduct, as with those to do with commercial transactions, which were observed in common among men as an essential basis for social order. However, there was nothing about this account of the law of nations that involved the modern view of the law of nations as the law that applied to the external relations among states and rulers. The context where Aquinas considered law as something applying to the external relations of states and rulers in the international sphere was rather with the discussion of the law concerning justice in war.

In the exposition of the principles of justice in war, Aquinas based himself largely on Augustine, who had before him set out the core ideas integral to classic just war theorizing. Thus Augustine had held that state rulers were to have the power to wage war, so as to preserve the natural order conducive to peace; that war was to be waged in response to wrong-doing, and with a view to the punishing of outrages or the recovery of things unjustly seized; and that war was to be waged as a matter of necessity and then always to the end of restoring the

condition of peace. These ideas are to be found given expression to by Augustine, most notably in his late fourth-century polemic *Contra Faustum Manichaeum*,[11] and they are to be found present in the statement of the principles of the just war that Aquinas provided as part of his discussion of the effects of charity in the *Summa Theologiae*.[12]

According to Aquinas, war was permissible, but only subject to conditions that determined its justice or lawfulness. The conditions that Aquinas was in this matter concerned with were ones falling within the part of just war doctrine that is referred to as the *ius ad bellum*, and with the principles relating to this stating the conditions for the justice of war as in the recourse to the waging of it. The *ius ad bellum* conditions were fundamental within just war theorizing, although they were closely bound up with the conditions pertaining to the part of just war doctrine known as the *ius in bello*, and with the principles to do with this stating the conditions for justice as in the actual conduct of war by the belligerent parties.

The first condition that Aquinas picked out for justice in war was that of lawful authority. This concerned the authority of the sovereign ruler on whose command war was waged. For Aquinas, the authority to wage war was an authority exclusive to sovereign rulers. Hence private individuals were not authorized to wage war, given that they were able to secure redress for wrongs through reliance on their political superiors. It fell to sovereign rulers to exercise the authority to wage war in that they were entrusted with the care of the states subject to their jurisdiction; and with this requiring that rulers should apply force not only to defend states against domestic crime and disorder, but also to defend states against external attacks and as in line with the position of Augustine that the right of war served to maintain the natural order of peace. The second condition for justice in war was that a just cause for war was required. Essential to this was the principle that war was to be waged against parties guilty of wrong-doing and as according to their deserts, and with Aquinas citing Augustine as to punishment and recovery being the causes at issue with wars waged on account of wrongs perpetrated. The third condition was that of right intention, as where the parties waging war were required to act such that they intended thereby to promote the good and to avoid evil. This Aquinas explained with reference to the as stated view of Augustine that wars were to be waged to secure peace, and to suppress evil and to uphold what was good. It followed from this that wars could be contrary to justice by reason of flawed intention, as was so, and as Aquinas here quoted Augustine, when wars were entered into from the desire to

injure people, the pursuit of cruel revenge or the lust for the domination of others. The crucial consideration for Aquinas, as it had been for Augustine, was that parties waging a just war were to have peace as their aim and were to conduct themselves in war, as with mindfulness of the end of peace, such that they might bring their enemies back to the condition of peace.[13]

ii. Natural law, the just war and the law of nations

In regard to the question of Aquinas on natural law and the just war as in relation to the modern system of the law of nations, it is to be observed, to begin with, that the natural law conceptualization, as he formulated this, was something that stood as being eminently serviceable for the development of international law. Thus the natural law, as Aquinas accounted for it, was a law based in principles of human reason that were universal and directed towards what were understood to be universally applicable principles of justice and political morality. This aspect of universality, as attaching to natural law, was such as to point to the possibility of a system of law, as in line with the ideal of international law, which was capable of being projected as exercising a jurisdiction with a universal reach and application. Again, Aquinas took the natural law to stand as the normative basis for the laws enacted by state rulers, and with it in this forming the containing normative framework for the practice of states and rulers. Here, too, the natural law concept pointed to the possibility of a system of international law: as in the sense that there was implied the possibility of a law, as per the international law ideal, that would set normative constraints and limitations on states, and on the rights and powers of their rulers, and that would carry with it a binding normative force for states and rulers which remained independent of their own will, consent and agreement to be bound. Finally, it is to be noted that the natural law standpoint in jurisprudence, as adopted by Aquinas, assumed the inter-connectedness of considerations of law and those of justice and political morality, as witness his argument on the connections between justice and the rule of law maintained within the state. In this respect, the natural law standpoint in jurisprudence was one that allowed for the identifying, and the critical elaboration, of the sort of general principles of justice and political morality that, as we shall see, are presupposed within international law as ranking among its internal normative component parts.

Moving to the subject of the just war, it is clear how the tradition of just war theorizing, in the form that Aquinas advanced it, served to set

the framework for the modern law of nations and for its development. For fundamental to the tradition was the idea that the relations between states and rulers were not only dictated by power factors, but were also regulated through law such that the exercise of power by states and rulers, as in regard to one another, always stood in need of some legal basis and justification. This meant, among much else, that law applied to the relations between states and rulers in the sense that war itself was assumed to involve the enforcement of law and, through this, the maintenance of an order of justice among states in the international sphere. The order of justice at issue here was understood to comprise an objective normative order that went beyond the partialities of states and rulers, as to their own particular respective interests, and to point to an objectively valid determination of the rights of states as in reference to a unitary and self-sufficient system of the rule of law. Hence as a notable aspect of this ideal of law in its application to the international sphere, there was the central premise of classical just war theorizing that wars were never to be thought of being just on both sides as to their essential cause.

The connection between just war theorizing and the emergence of the modern law of nations is underlined with the specification by Aquinas of the *ius ad bellum* principles, as concerning the justice of war as to the conditions for the waging of it. Thus the principle of lawful authority was such that the right of war was presented as a monopoly right or power of states, and with this carrying the implication that, as for the purposes of the law regulating it, war in the strict and proper sense was public war. In this, the principle of lawful authority implied also the possession by states and rulers of the sort of privileges of status and capacities, as in relation to war, which have come to be essential to their juridical position as the subjects of international law. The principle of just cause underlined the applicability of law to war, and with this being so for the reason, among others, that, as in line with the premises of international law, there was presupposed a distinction between the lawful and unlawful exercise of power by states and rulers. With the principle of right intention, it was brought out that war had peace as its object and, further, that the maintenance of peace was the object of the law that regulated war. In addition, the principle of right intention confirmed that the law on war was to include constraints and limitations applicable to parties in the prosecution of war, as so with the prohibition on the desire to harm people or to dominate them. Here, the right intention principle, as Aquinas following Augustine specified it, pointed to the necessity of the *ius in bello* principles concerning the

justice of war as to the manner of conducting it. This was true with the two main principles that were recognized to belong to the *ius in bello* category: the principle of proportion, such as provided that the application of the means of war was not to involve excessive and gratuitous harm and destruction, and the principle of discrimination, such as provided that the non-combatant parties to war were to enjoy immunities and protections in respect of the suffering of unnecessary hardships and in respect of the direct and intentional harming or killing of them.[14]

The concept of natural law is of crucial importance in discussion of the thinkers considered in this volume, as in their status as writers on the law of nations. In regard to this matter, the thinker who stands out is Grotius, as given that there is reflected in his work a significant break with Aquinas and the forming of a distinctively modern secular conception of natural law. This was the conception where natural law continued to be the law of universal reason, but where it was expounded as the law that defined the basic rights of individual men and the conditions of social order within which such rights might be secured and realized. The right under natural law that Grotius took to be fundamental was the right of self-defence or self-preservation, and with the other rights conferred in natural law being identified by him in terms of the basic personal, property and contractual rights of men and in terms of the obligations corresponding to these rights. In addition, he set out the principles relating to law-making, adjudication and law enforcement as pertaining to the civil state that were essential for the giving of effect to the natural rights of men as within political society. This rights-based conception of natural law applied directly to the state and its formation. For Grotius saw the state as originating with the exercise and transfer of rights as taking place through a transaction having the character of a pact or covenant, which view of state formation served to place him within the contractualist tradition in modern political thought.

Grotius set much of the underlying conceptual framework for the form of natural law theorizing that was to be developed by Hobbes, Pufendorf, Locke, Wolff and Vattel. This was so not least in respect of the law obtaining in the international sphere, albeit that the various thinkers diverged here as to the position in this of the natural law itself. Thus it was allowed by Grotius that the law of nature had application to states and rulers, as was so with such natural law principles as those of self-defence and good faith in agreements. However, he presented the law of nations proper as being a form of positive or voluntary law, which was based in natural law but still separate from it. In

contrast to this, Hobbes and Pufendorf rejected the possibility of a positive or voluntary law of nations, and instead argued that the law of nations consisted in nothing more than the law of nature in its application to states and rulers. In this, Hobbes and Pufendorf were able to confirm the universality and direct binding normative force for states and rulers of certain of the core principles of the law of nations. Nevertheless, they failed to differentiate as between the natural law, as it applied to individual men, and the natural law as it applied to states and rulers, and, as a result, they were led to deny juridical perfection to the law that held within the international sphere. It was to be left to Wolff and Vattel, and as their signal achievement, to construct a system of natural law jurisprudence where the natural law was carried over into the law of nations, and with it being taken to possess juridical authenticity in its international application, but where the law of nations at the same time was understood to comprehend within itself a positive or voluntary law component. As for Hume, Bentham, Kant and Hegel, they are notable in that they endorsed, explicitly or implicitly, the greater part of the essential principles of the law of nations that had come to be expounded in terms of the natural law conceptualization, even though, as we shall argue, they were in different respects to bring into question with their work the idea of natural law as such.

As concerning the concept of the just war, this was to be of immense significance for each of the thinkers whom we treat of, and with the principles for justice in war being central to their accounts of the substantive law of nations. This is so, most evidently, with Vitoria, Suarez, Gentili, Grotius, Wolff and Vattel, who focused directly on just war considerations. However, it is true also for Hobbes and Pufendorf, whose positions on the law of nations remained consistent with the terms of just war theorizing.

The just war principles that were to be foundational for the law of nations, as expounded by the writers as cited, were the *ius ad bellum* principles that, as we have explained, Aquinas specified as lawful authority, just cause and right intention. Thus the principle of lawful authority stands as the point of reference for what was to be the designation of the right of war as a right of sovereignty, and hence as a monopoly right of states and rulers, and the classification of war proper as public war: that is, war as waged on the command of sovereign rulers. The attention given to the principle of just cause was to result in the focusing on injuries received as the occasion for war and, more particularly, in the focusing on self-defence, the recovery of property and the punishment of wrongdoing as basic among the lawful justifications for war. A further result was

the exclusion of certain purported causes for war as unjust, as so with those to do with projects for the imposing of the Christian religion or for the enforcement of the jurisdictional claims of the Catholic Church and the Holy Roman Empire. In addition, it was to come to be maintained that wars might be considered as just on both sides as to their legal effects, if not as to the essential justice of their actual cause, and with this meaning that the rights conferred under the law of war were to be thought of as applying equally to all belligerent parties. The principle of right intention was everywhere implicit in what were to be the detailed specifications of the legal constraints and limitations that were to be observed in the conduct of war by the parties to it. This was so with the development of *ius in bello* principles, such as the principle of discrimination in regard to the immunities and protections due to non-combatant parties and to parties such as prisoners of war. It was so likewise with the rules relating to good faith in the agreements entered into by belligerent parties, and with the rules that related to justice in the formal treaty agreements by means of which wars were to be concluded.

The just war doctrine, in its classic form, was to continue to set the context for reflection on the law of nations even when there were major shifts in thinking about war and the law relating to it, as was so with Saint-Pierre, Rousseau, Bentham and Kant. For these thinkers, the extension of the rule of law to the international sphere was understood to require more than that war should be regulated through law. It required also that war should be abandoned altogether as a means for the enforcement of law and for the securing of rights and justice among states. Thus it was that the four thinkers as named were to associate the cause of international law with the ideal of perpetual peace and, in accordance with this, to associate the condition of lasting international peace with the presence of institutional machinery adequate for the maintenance of such a peace as based in law.

In the event, the line of thinkers from Vitoria to Hegel went beyond the confines of just war theorizing, to assist in the formulation of a system of international jurisprudence that comprehended not only the elements of the law of war but also the elements of the law of peace. As a case in point, there is the discussion of the principles pertaining to the state. Here, the thinkers contributed to the progressive determination of the concept of the modern state, and with the concept so determined being that of the state as it is recognizable both from the standpoint of modern political theory in general and, as in more particular terms, from the standpoint of modern public international law. Thus the state came to be conceptualized as a form of association based

in the consent of its members, and as securing their rights, and as subject to a constitutional order that described the official rights and powers of government that were specific to states. The institutions of state government were representative institutions. Also, government in the state was essentially limited government. This was so in the respect that the rights and powers of government were understood to be defined through laws, directed towards the application of laws and, as such, bound by the restrictions imposed through laws: and with this meaning, among other things, that government remained qualified, as to its rights and powers, by such rights of the individual subjects of the state as were implicit or expressly stipulated in the laws. As to the substance of the rights and powers of state government, these were the formally separate rights and powers as related to the maintenance of the laws: the power of law-making, the judicial power, and the power concerned with the administration and enforcement of the laws as so with matters of crime and punishment and matters of the general regulation of the social order. In addition, there were the rights and powers of government concerning states in their relations with one another, and with these being the rights and powers to do with war and peace.

The concept of the state, as this is set out above, is one that is to be found present, to a lesser or greater degree, in the work of all the thinkers addressed in this volume. There were of course some notable divergences in viewpoints as to the proper conceptualization of the state. Thus, for example, Grotius and Wolff were prepared to allow that rulership within the state might be based in a right of patrimony; whereas Vattel and Kant regarded the patrimonial principle for rulership as being contrary to the principle of representation that they considered to be fundamental to state government.

Despite this, there was a broad convergence among the thinkers that the state comprised an association among men that was based in the constitutional order to which we have made reference. This was a position that was defended most notably by Kant, as with his famous argument that the legitimate form of the state was the state whose government was based in the principles of the republican constitution. There was also a broad convergence among the thinkers that the rights and powers of government conferred through the constitutional order of the state were rights and powers of sovereignty, and with these forming an authority structure that possessed the absolutism and exclusivity appropriate to states as sovereign persons, or entities, both with regard to matters within their internal jurisdiction and with regard to all outside political agencies and authorities. The sovereignty that thus belonged to

states, as in its constitutional form, was such that states were understood to be free and independent, and with this freedom and independence being such that it was secured to states as by the law that had application to them in the international sphere. As from the standpoint of the law so applying to states, it was taken to follow, among much else, that states were not only free and independent, but also equal as one to another and with their sovereignty being inseparable from their equality. It was also taken to follow that states, as sovereign, were to be considered as rightfully free from all external interference in their constitution and government, which principle of non-interference was to be ranked by Vattel and Kant as a substantive principle of international law. Still further, it was taken to follow that international law, as the law applying to states in the international sphere, remained subject to the limitation that it was not to be supported by the institutions of government pertaining to the constitutional order as specific to states. Thus it was that the elaboration of the law of nations went together with the rejection of the ideal and possibility of international government.

Passing beyond the institution of the state, the thinkers from Vitoria to Hegel also expounded a broad range of principles of the law of nations in its status as the law providing for peace among nations and states. In this connection, there were identified certain general principles that are presupposed in international law, such as the principle of peace itself as the end of the law of nations. Other such principles included those of equality, both among men and among nations and states, and reciprocity as in regard to the rights and obligations as binding on men and on states and nations as the subjects of the law applying to them. As well as these general principles, certain subject-matters of jurisprudential enquiry in the area of the law of nations were marked out, and significantly developed, as to the exposition of their core principles. Among these we may mention the law of embassies and the law of treaties. Again, there was the law relating to international dispute settlement procedures, as say with the discussion of Wolff and Vattel on the procedures of mediation, arbitration and international conferences. One additional subject-matter in international jurisprudence of great importance was that of the law of the sea, and with particular reference to the law as it was held to provide for the principle of the freedom of the seas. This led, in its turn, to the consideration of the principle of freedom of trade and commerce among men and among nations and states, and with this pointing towards the emergence of an international law of trade and commerce.

Still further, there was the formulation of principles pertaining to what we may take to be the general desiderata that are implicit in and

bound up with the idea of the law of nations. This was so, for example, with Bentham and Kant, who were to call, among other things, for the elimination of armed forces, the ending of secrecy in international relations and the termination of the practices of colonial rule and administration as preconditions for the establishing of an international law propitious for peace. There was also the call on their part for the introduction of institutional machinery within the international sphere to supplement the law of nations, and to incline states and rulers to refrain from war through the provision of peaceful procedures for the resolution of their disputes. As a final case, there was the matter of the rights of men, as where these involved qualification of the authority of states and governments and, as such, carrying with them real consequences for the substance of international law. The rights of this kind that are to be reckoned with here include the following: the natural right of self-defence; the right of men, as affirmed by Locke and Vattel, to resist tyrannical rulers; the rights of men as citizens within states, as with the rights that belonged to men under the rule of law and as in consequence of their subjection to it; the rights of men, as forming peoples, as relating to the principle that government was to be based in their own consent, which rights were an implied point of reference as to the rejection of patrimonial rulership, as by Vattel and Kant, and as to the opposition of Bentham and Kant to colonialism; and the more abstract rights that men enjoyed within the international community, such as the rights to travel to and to reside in foreign lands that Vitoria associated with the natural society and fellowship of men, that Pufendorf listed among the common duties of humanity, and that Kant explained in terms of the ideal of cosmopolitan law.

iii. Modern international law and international relations theory

The elaboration of the law of nations on the part of the thinkers whom we consider was such that it looked forward to, and received its confirmation through, the system of public international law that belongs to the as now on-going era of the United Nations. The principles that are central to the modern international law system are various and may be found present in the following essential source materials: the Charter of the United Nations (1945); the Statute of the International Court of Justice (1945); the Universal Declaration of Human Rights (1948); the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); the Vienna Convention on Diplomatic Relations (1961);

the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Vienna Convention on the Law of Treaties (1969); the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970); the Convention on the Law of the Sea (1982); the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (1993).[15]

The part of modern international law that relates to matters of war confirms the direction of the lines of theorizing as to the law of war as followed by Vitoria and his successors through to Hegel. Thus there is underlined the primacy of self-defence among the lawful causes of war, as with the principle essential to international law that states retain the inherent right of individual or collective defence in the circumstances of a direct armed attack on themselves.[16] It is also underlined that states and the parties to war remain subject to law as in the conduct of war. This is reflected in the now substantial body of international humanitarian law that is centred around the Geneva Conventions: as is so especially with the legal immunities and protections for non-combatant civilians, and for parties such as prisoners of war, as relating to the prohibitions on such things as the deliberate killing and torture of these, the denial to them of due process of law, and the unlawful deportation, transfer and confinement of civilians or their being taken as hostages.[17]

There is also confirmation of the earlier lines of thought as to the law of nations with the part of the modern international law system that is focused on the ends of peace, as distinct from the conduct of war. This is clear from consideration of the seven basic principles that are set out in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. First, there is the principle that states are to refrain from the threat or use of force against the territorial integrity or political independence of other states. Hence it follows, among other things, that acts of aggression by states are to be prohibited, while states are required to negotiate in good faith to reach agreement on general and complete disarmament. Second, there is the principle that states are to settle their international disputes through peaceful means, as consistent with the preservation of international peace and security and justice. The procedures for international dispute settlement are to comprise negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional

agencies or arrangements and other peaceful means as based in the free choice of the states concerned.

Third, there is the principle that states are not to intervene or interfere in matters falling within the domestic jurisdiction of states. Thus it is provided that states have no right to intervene directly or indirectly, and for whatever reason, in the internal or external affairs of one another: and with armed intervention, and all other forms of interference or threats against the person of states and their political, economic and cultural order, constituting the violation of international law. In consequence of the principle of non-interference, it follows, for example, that states have an inalienable right to decide on their own political, economic, social and cultural systems, and in freedom from interference by other states in this. Fourth, there is the principle that states are subject to a duty to co-operate with one another. This duty holds regardless of differences among states as to their political, economic and social systems, and so as to maintain international peace and security, and to advance international economic stability and progress and the general welfare of nations and international co-operation, without discrimination as arising from such differences.

The fifth of the principles of international law is the principle of the equal rights and self-determination of peoples, and with this principle providing that all peoples have the right to determine freely, and without external interference, their own political status and to pursue their own course of economic, social and cultural development. The principle of self-determination stands opposed to the practice of colonialism, and, consistent with this, it is held that the subjecting of peoples to alien subjugation, domination and exploitation involves the violation of the principle and the denial of their fundamental human rights. As to the appropriate institutional forms for the self-determination of peoples, these are declared to include the establishing of a sovereign and independent state, the free association or integration with an existing independent state or the emergence into some other political status as determined by the peoples concerned.

The sixth principle of international law is that of the sovereign equality of states. With this, it is held that states have equal rights and duties, and that they are equal as members of the international community, irrespective of the differences between them as to do with economic, social, political and other factors. As to the aspects of the sovereign equality of states, it is provided that states are equal in juridical terms, that states possess the rights essential to full sovereignty, that states are bound to respect the personality of one another and that states are to be inviolable as to

their territorial integrity and political independence. It is provided also, as among the aspects of sovereign equality, that states may freely choose and develop their respective systems of political, social, economic and cultural organization, and that states remain bound by their international obligations. The seventh principle of international law is that states are to fulfil in good faith the obligations that they assume, and with these being the obligations bound up with the United Nations Charter, the obligations arising under general international law and the obligations arising under international agreements that are valid under the generally recognized principles and rules of international law.

The seven principles as set out comprise the essential and fundamental framework of modern public international law. Thus, for example, the principle of the sovereignty and equality of states stands as the basic constitutional principle of international law; whereas the principle requiring the fulfilment by states of their international obligations relates directly to the rule *pacta sunt servanda* that underlies the law of treaties and that, as such, stands as the precondition for the possibility of international law: the rule that agreements are binding on the parties to them and are to be performed by them in good faith.[18] Beyond these framework principles of international law, there are others that pertain to some of its core substantive component parts. To be included here are the principles relating to the law of embassies, as so with the principles defining the inviolability, and the rights and immunities, of diplomatic agents.[19] Also to be included are the principles that relate to the law of the seas, as is so with the principle of the freedom of the high seas and the connected principle that renders invalid the claims of states to subject any part of the high seas to their sovereignty.[20] In addition to the principles of the law, there is the presence of the substructure of institutional bodies that function to secure the maintenance, application and enforcement of the system of international law. Of these institutions, the one that is foundational is the United Nations Organization, and with its specific organs including the General Assembly, the Security Council, the Economic and Social Council and such bodies as the International Court of Justice and the Secretariat. As to the functions of the United Nations, these include, centrally, the maintenance of peace and collective security, and with this concerning the taking of appropriate measures as in response to the acts of states that involve threats to the peace, breaches of the peace and acts of aggression.[21]

The system of international law of the United Nations era is also distinguished through its inclusion of principles that concern the situa-

tion of individual men within states and the basis of their relationship with the institutions of state government. Such principles are present and appealed to, above all, with the international law of human rights. For human rights are assumed to be universal rights, and as based in such considerations as the innate freedom and equality of human beings, and with it following that they are rights that involve the necessity of institutional restrictions on states and governments as to the exercise of their rights and powers.

This is most evident with the rights falling within the category of civil and political rights, and particularly so with the rights to do with the maintenance of the rule of law and such as are bound up with the principles of due process and procedural justice which are fundamental to the structure of legal order. The key provisions of international human rights law, in this connection, are as follows: the prohibiting of torture, and cruel and inhuman and degrading treatment or punishment; the right of individuals to be recognized as having personality before the law; the equality of individuals under the law, and their right to the equal protection of the laws and in freedom from discrimination; the right to effective judicial remedies for the violation of basic rights granted under state constitutions and the laws; the exclusion of arbitrary arrest, detention or exile; the equal right of individuals to a fair and public hearing as conducted by independent and impartial tribunals, as regarding their rights and obligations and such criminal charges as may be brought against them; the right to the presumption of innocence, and the exclusion of retroactively effective laws and penalties.[22]

The international law of human rights also comprehends, as falling within the sphere of civil and political rights, such basic personal rights and freedoms of individuals as the following: the right of freedom of movement and residence within states; the right to marry and to start a family; the right to the ownership of property; the right to freedom of thought, conscience and religion; the right to freedom of opinion and expression; the right to freedom of peaceful assembly and association; the right of democratic participation in the process of government, and as in accordance with the principles of regular elections and universal and equal suffrage.[23] If these various rights set restrictions to the rights and powers of states and governments, there are in addition the human rights, as belonging to the category of the so-called social, economic and cultural rights, that presuppose, for their being given effect to, the preparedness of states and governments to exercise public administrative powers on, as it were, an active and interventionist basis. The rights at issue here are as follows: the right to social security; the right to work

and protection against unemployment; the right to rest and leisure; the right to a standard of living adequate for the maintenance of health and well-being; the right to education; the right to free participation in the cultural life of the community.[24]

The modern system of public international law is a defining point of reference for the discussion of the writers on the law of nations whom we consider. However, the concern in this volume is not with modern international law as such. The concern is with the law of nations in the context of political thought. The particular value of situating the law of nations in the political thought context lies in its enlargement of the understanding of international law as a subject-matter of enquiry. This is so less in regard to the elucidation of issues of hard international law, and rather more in regard to the identifying of the normative foundations of the now existing international law system. Here, it is to be emphasized that the identification of such normative foundations serves to counter the positivism that infects much of the analysis and exposition of technical international law. The positivist view of international law is touched on in Chapter 4 as in relation to Bentham, Austin, Kelsen and Hart, and as where the positivist approach, as to its method in jurisprudence, is explained as being one in which law is taken to be distinct from morals and in which the examination of law is separated off from any critical reference to the first-order normative principles of justice and political morality. As it happens, the international law system possesses a substantive normative dimension that is unintelligible save through the appeal to, and application of, precisely the sort of concepts of justice and political morality which positivism excludes as a matter of its juristic method. This is true, most obviously, with such normatively consequential components of international law as the law on human rights and the law concerning the basic principles to do with peace, state sovereignty, the equal rights and self-determination of peoples, and the faith of treaties. In connection with this, it may be observed that the natural law tradition of theorizing, as directed towards the law of nations, is well placed, as the positivist tradition is not, to pick out and explain the normative conceptions that are present and embodied in these various parts of international law. So too it is to be observed that the tradition of natural law, as in relation to international jurisprudence, is something that will have to be accounted for, ultimately, from the standpoint of political thought.

Leaving to one side the question of the normative dimension of international law, there remains the consideration that the situating of the law of nations in the context of political thought points to the necessity of bringing it within the scope of a set of enquiries as where

political thought has its own international application. These are the enquiries to do with international politics or international relations, and with the theoretical reflection on this as in the form of the theory of international relations. The general subject of international relations theory has, in recent years, come to be linked closely with the mainstream tradition in political thought, as witness the identifying and discussion of issue areas belonging to what is called international political theory. The present volume may be seen as a contribution to international political theory as much as it is a contribution to the theory of international law, save that the focusing on the law of nations confers on it a distinctly jurisprudential character.[25]

The law of nations focus adopted here is instructive for the international relations theorists, and it provides correctives of its own for the lines of enquiry as opened up in the orthodox international relations theory. As a case of this, there is the well known classification of the three traditions in international thought and practice, as made and argued for by the international relations authorities Martin Wight and Hedley Bull: the realist tradition, the rationalist or internationalist tradition and the revolutionist or universalist tradition. As Bull described it, the realist tradition in international thought and practice is associated with Hobbes. It is the tradition where states are seen as central to international politics, and where international relations are viewed as essentially conflictual and with war among states being the activity that typifies the nature of international politics. In this condition, states are assumed to be at liberty to pursue their goals or objects without regard for moral and legal restrictions, and hence without being subject to the constraints of law and morality.

As against this, there was what Bull identified as the universalist tradition in international thought and practice, which tradition he associated with Kant. In Bull's account of it, the universalist tradition is one where the essential nature of international politics is taken to lie not in the conflicts among states, but in the relationships among all men within the community of mankind. In line with this, there are certain principles of international morality specific to the universalist viewpoint, and these are directed not to the terms of co-existence and co-operation among states, but rather towards the overthrow of the system of states as such and its replacement with a fully cosmopolitan form of society. The internationalist tradition, for Bull, was the tradition associated with the work of Grotius. In this tradition, he maintained, it is accepted that states and their sovereign rulers stand as the central elements in international politics. It is also allowed that states act in furtherance of their own particular

goals and objectives. However, the internationalist tradition diverges from the realist tradition in that it is assumed that the relations between states are not conflictual as to their essential nature. On the contrary, it is assumed that states enter into relations with one another only within the framework of an international society, as where this involves such restrictions on their conduct as are set through commonly accepted rules and institutions. The latter embody the principles of law and morality that serve to define the conditions of co-existence and co-operation among states as in the society that they form together.[26]

As to the three traditions in international thought and practice, it is to be recognized that attention to Grotius on the law of nations supports the reading of him as a representative of the internationalist tradition in the sense that Bull understood this. This is so given that, with Grotius, it was plainly the law of nations that was to be thought of as serving to set the rules and principles for the co-existence and co-operation of states and sovereign rulers. On the other hand, the examination of the law of nations as it comes in the work of Kant defeats the reading of him as a universalist thinker on international politics as along the lines that Bull proposed. For, as we shall discover, Kant affirmed the legitimacy of states, as institutions, and he saw the law as applying in the international sphere as something that worked to secure and guarantee the rights of states which were essential for their freedom and independence.

The realist tradition as Bull characterized it, and more generally as it figures in the history of international thought and practice, is of particular significance, as regarding our discussion of the law of nations, because it challenges and directly opposes itself to the project of international law as such. In consideration of this, it is to be underlined that the realist tradition is one where it has been claimed, as so with Bull, that the sphere of international politics is conflictual, and also, and in a stronger sense, that it is anarchic in the respect that the separate states are understood to stand subject to no common international legal order and to no common institutions of international government. In this anarchic situation, it is supposed that the separate states and their rulers are to use the power at their disposal to secure their interests, and to do this without regard for the normative restrictions such as are to be found imposed through the established principles of justice and political morality. Thus it is that, in the realist tradition, war is seen as the defining condition of international politics, and with power considerations, such as the balance of power, being crucial for peace; and thus it is also that, for realism, states and rulers are seen as

being dependent for their security on their capacity to act for, or rather to help, themselves, and with the so-called self-help capabilities of states, rather than any objective structure of law, standing as the essential precondition for international security.[27]

It is commonplace for the realist tradition to be taken as being represented by certain of the political thinkers picked out for study in this volume: Hobbes primarily, but also Hume, Rousseau and Hegel. As we shall argue, however, the realist view of international politics does not hold for the thinkers with whom it is associated, and with this being so in part for the reason that it does not square with the fact of their evident preparedness to acknowledge the law of nations as applying to states and rulers. Thus Hume accepted the law of nations as applicable to states and rulers in the sphere of their mutual external relations. So too did Hobbes and Hegel: and with the former construing the law of nations as natural law in its application to states and rulers, and with the latter recognizing the fact of international law and, more generally, endorsing the fully normative character of the form of legal-political order that was maintained by and within states as the subjects of international law. In the respect that Hobbes and Hegel allowed for the existence and authenticity of international law, then it may also be suggested that they are not, as to fundamentals, to be read as being straightforwardly opposed to the tradition in international politics in which international law occupies a central and prominent position. This is the liberal tradition in international thought and practice.

The tradition of liberal internationalism is bound up with, and derivative from, liberalism as a tradition in political philosophy, and with the latter in general having been focused less on international subject-matters than on the internal domestic political institutions of law, state and government. In contrast to realism, the approach adopted in liberalism, in both its internal domestic political and its international applications, is such as where primacy has been assigned not to power factors but to normative considerations. These considerations have characteristically been formulated in universalist terms, and expressed in terms of rights and the universally valid principles of justice and political morality which are held to be foundational for rights. It is because of this emphasis on rights and on justice and political morality, as normative considerations, that liberalism has always had law as one of its leading and essential thematic preoccupations. Thus it is that thinkers in the liberal tradition, as when addressing themselves to the internal domestic political organization of states, have been concerned with the ideal of state government as representative government conforming with the limiting principles of

constitutionalism and the rule of law and, in this, being directed towards the protection of the rights of individual citizens. As for the tradition of liberal internationalism, this has had as its concern the core substantive principles of international law and the related general principles of international order. Hence the defining principles of liberal internationalism may be taken to include the following: the faith of treaties; disarmament in the international sphere; the sovereignty and equality of states, and with this involving some guarantee of states being free from outside interference as to their internal constitution and government; the equal rights and self-determination of peoples; anti-colonialism; the freedom of trade and commerce; the exclusion of secret diplomacy; the exclusion of offensive alliances among states; the necessity of legal constraints and limitations on war, both as to the grounds for war and as to the conducting of it; the necessity for institutional structures for the maintenance of peace, and with this involving international institutions with machinery and procedures adequate for the peaceful resolution of disputes among states; the necessity for a regime of human rights with international standing and acceptance.[28]

The principles of liberal internationalism are all to be found enshrined in the now existing system of public international law, much as in the form that we have reviewed it. Indeed, this international law system is itself to be read and interpreted as nothing less than a concrete expression and embodiment of liberalism, as a tradition in international thought and practice and with its own particular standpoint on international questions. That all of this holds is underlined through attention to the general principles of international law, as so, for example, with non-interference, self-determination, the sovereign equality of states and the binding force of international obligations. It is underlined also through attention to the part of international law as where there is most clearly reflected the inter-connectedness of liberalism in its internal domestic political and international modes and applications: the international law of human rights. Thus there are with this affirmed, as from the perspective of international law, the rights and liberties that, as within the liberal tradition, are characteristically taken to be held by individuals and to define the terms of their relationship with the state and the institutions of state government: the rights secured to men as subjects of the rule of law and the rights and freedoms as relating to such matters as property, religion and conscience, opinion and expression, peaceful assembly and association, and democratic participation in the processes of state government. In addition, there are the social, economic and cultural rights. These are the rights that would appear to involve the claims to be made by indi-

viduals against states and governments as to the public administrative provision of substantive benefits, services and facilities, as in regard to areas such as social security, employment, health care and education. Here, the schedule of social, economic and cultural rights pertains to the fabric of modern welfare states, and the rights concerned are characteristically endorsed as such, as within much liberal theory of recent decades, as in accordance with the there favoured principles of distributive justice.[29]

The political thinkers from Vitoria to Hegel are to be understood as having contributed to liberalism both in its international application and in its application to the internal domestic political order of states. This is true not least, and in fact notably so, with the thinkers for whom the natural law conceptualization was crucial in regard to state law and the law of nations. For this conceptualization provided for the integration of law proper with the normative principles of justice and political morality, and it confirmed the universality of the latter principles, as in accordance with the standpoints specific to the liberal tradition. As to liberalism in its international application, it is to be observed again that the thinkers we discuss all allowed that states and rulers were subject to law in the sphere of their mutual external relations, as it is to be observed also that the law of nations, as the relevant form of law, was accepted by the thinkers to contain the principles, such as sovereignty and the faith of treaties, that are central to liberal internationalism. As to the liberal principles of internal domestic political order, it is to be emphasized that the thinkers, including the ones who broke with the natural law position, made affirmation of general, or rather universal, principles of justice and political morality that involved recognition, albeit as in different forms, of various basic rights that pertained to individuals as relative to the institutions of state and government. To be sure, there was lacking the sense of the rights of the sort that now fall within the class of social, economic and cultural rights; as there was lacking also any very developed sense of states and governments possessing the sort of comprehensive public administrative functions and competences that are essential in institutional terms to the proper realization of such rights. Even so, there was with all the thinkers, and as in line with the premises of liberal theory, the clear acknowledgement of a broad range of the rights that in the present human rights classification are identified as civil and political rights, and with this being so, most especially, as with the rights that are secured to individuals as in accordance with the rule of law and as under state government based in, and limited through, a constitutional order.

Bentham and Kant rank as the supreme representatives of the liberal tradition in international thought and practice, and this is how they

are read in the argument of the relevant chapters of this volume. For as we shall see, it is in the work of these two thinkers that we find articulated in a most direct form the principles of international law and international order associated with the liberal internationalist standpoint, as through their respective statements of the conditions required for perpetual peace. In addition, it is in the work of Kant that the principles of liberalism in its international application are brought most fully into alignment with the principles of liberalism as applying to the internal domestic political organization of states, and with this being in accordance with the rights-based character of the liberal conception of justice and political morality. Thus Kant argued that a lasting peace based in law as within the international sphere presupposed, as a condition for its coming about, the adoption by states of a form of lawful republican constitution that would serve to secure the rights of men as citizens. In connection with this, it is to be accepted that Bentham and Kant stood opposed to one another on a question pertaining to rights that is critical for liberal theory. For Kant expounded an ethics, and a set of principles of justice and political morality deriving from this, as where the rights of individuals were presented as possessing an absolute normative priority; whereas Bentham expounded an ethics of utilitarianism in which the rights of individuals were assumed to be subordinate in normative terms as relative to considerations of collective welfare and happiness. Despite this, however, it is to be underlined that Bentham and Kant stand squarely together as in the respect that they broke with the terms of the natural law conceptualization as to the principles and the authority of the law of nations, as in the form that this had been adhered to and advanced by their predecessors. The breaking with the natural law conceptualization of the law of nations, as effected by Bentham and Kant, involved the looking forward on their part to the opening up of new lines of theorizing in jurisprudence and political thought. Although lying beyond the concerns of this volume, these new lines of theorizing were, as it should be observed here, to provide much of the conceptual framework as within which the principles of international law, and the principles of liberal internationalism associated with it, were to be elaborated during the nineteenth and twentieth centuries and then through to the present time.[30]

1
Vitoria, Suarez, Gentili and Grotius

The four writers treated of in this chapter are of seminal importance for the founding of the system of international law in its modern form and tradition. Vitoria and Suarez addressed themselves to the subject of the law of nations, as in general accordance with the terms of the conceptualization of natural law as expounded by Aquinas, and they set out what they took to be the substance of the law of nations primarily through consideration of the principles relating to justice in war. Gentili and Grotius followed Vitoria and Suarez in focusing attention on established just war theorizing as the basis for the presentation of the substantive elements of the law of nations. However, they moved beyond Vitoria and Suarez in the range and comprehensiveness of their treatment of the law of nations, and of the subject-matters pertaining to it, and, crucially, they went against Aquinas and his particular form of natural law philosophy as this had been adhered to and drawn on by the Spanish writers. With Gentili, natural law arguments were largely absent from, or of little or no theoretical consequence for, the elaboration of the law of nations; whereas Grotius formulated, and applied to international law issues, the distinctively modern and secular conceptualization of natural law doctrine which, as we have noted, was to provide so much of the conceptual context and framework for the work of the line of writers on the law of nations discussed in the subsequent chapters of this volume.

The works of Vitoria to do with the law of nations considered here are the notes of certain of his university courses, known as readings or relections, that were made by his students and that were published some few years after his death. These are the relection on civil power thought to date from 1528, *De Potestate Civili*, and the two relections delivered in 1539 concerning the native Indian inhabitants of the

newly discovered lands of the Americas and the rights of the Spanish in respect of them: *De Indis Noviter Inventis* and *De Jure Belli*.[1] Regarding Suarez, there are the chapters on the law of nations from Book 2 of his treatise on law and God as law-maker, *De Legibus, ac Deo Legislatore* (1612), and the exposition of the principles of the law of war contained in *De Charitate*, with this being the part devoted to charity of his posthumously published treatise on the theological virtues of faith, hope and charity: *De Triplici Virtute Theologica, Fide, Spe, et Charitate* (1621).[2] The works of Gentili discussed, as bearing on the law of nations, are the treatise on the law of embassies, *De Legationibus Libri Tres* (1585), the treatise on the law of war, *De Jure Belli Libri Tres* (1598), and the pleas and opinions that he prepared following his appointment in 1605 as counsel to the Spanish Embassy in England and that were to be published in a compilation form five years after his death as *Hispanicae Advocationis Libri Duo* (1613).[3] As for the works of Grotius, these are the treatise on the law of prize written around 1604, *De Jure Praedae Commentarius*, and the treatise on the law of war and peace on which rests his greatness as a writer on international law: *De Jure Belli ac Pacis Libri Tres* (1625).[4]

i. Vitoria

The contribution of Vitoria, as to the founding of the modern law of nations, lay in his articulating of a general conception of the law that he took to obtain in the international sphere and in his efforts to explain the practical meaning and implications of the principles of this body of international law. The general conception of international law was presented by Vitoria in *De Potestate Civili*. In its main essentials, the view of civil power set out in this relection accorded with the standpoint of Aquinas as to the state and the character of its authority. Thus Vitoria maintained that the civil power exercised through the state was just and legitimate, that it was ordained by God and based in nature such that it was not conditional on the consent of men, and that, as in line with the natural law as underwritten by God, it was a power directed towards the common good of men as within the form of human association constituted by states. The concern of the civil power was with laws. For Vitoria, the laws and constitutional order established by the rulers of states carried with them a binding normative force, and, as he argued, the civil laws were binding for the rulers who created them through their voluntary acts, as in the manner of parties being bound by the terms of the pacts and agreements that they

entered into through their own free will. It was in connection with the matter of the subjection of state rulers to legal constraints and limitations that Vitoria proceeded to speak of international law. This law, he claimed, had the full force of law proper; it was established through the whole world considered as forming a single state entity; it was inviolable save on pain of the committing of mortal sin; and as to its most fundamental provisions, it possessed a strict normative application to states which overrode any refusal on their part to be bound by it.

> [I]nternational law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.[5]

The sense of international law that is here conveyed is that of international law as a form of law with a universal reach and application. It is this universalist conception of international law that informs the discussion by Vitoria of the substance of the law, as in the context of the practical issue in international politics on which he came to be particularly focused. The issue in question was the position of Spain as in relation to the Americas and to the native American Indian peoples. The aspects of this issue that were central for Vitoria were to do with the basis in law for the presence of the Spanish in the Americas and with the jurisprudential merits of the claims in justification, as advanced by the Spanish, for the forcible conquest of the Indians, as in line with the rights of war, and for the exercise of rights of dominion over them and their lands and possessions.

The key work on the Spanish in relation to the American Indians was the relection *De Indis Noviter Inventis*. In Section 1, Vitoria considered the legal status of the Indians prior to the coming of the Spanish. Here, he argued that the Indians had held legitimate rights of ownership as to their lands and property under both public law and private law. Further, there had been established native rulers exercising legitimate rights of civil dominion over the Indian peoples. In Vitoria's view, the rights of the Indians as to the ownership of their lands, and as to their

self-government, were authentic rights, and they were not negated on account of such grounds as the unbelief of the Indians or their supposed unsoundness of mind.[6]

For Vitoria, the negating of the rights of Indians, and their subjection to the power of the Spanish, required some proper ground or title such as to justify the Spanish in making war on the Indians and in exercising rulership over them. In Section 2 of *De Indis*, he examined, and rejected, certain of the titles as appealed to by the Spanish to make good their rights of war and dominion as to the Indians. These included the following: the title based in the status of the King of Spain as the Holy Roman Emperor, who, allegedly, exercised lordship over the whole world and to whom the Indians were therefore bound in subjection; the title based in the claim that the Pope exercised temporal authority throughout the world, and such that he was competent to confer on the Kings of Spain full sovereignty over the Indians and their lands; the title based in the assertion of the Spanish of rights of discovery over the Americas; the title based in the refusal of the Indians to accept the Christian faith after it had been expounded to them; and the title based in the supposed consent of the Indians to Spanish rulership. As Vitoria explained the matter, these various titles were uniformly illegitimate: in some cases, there was substantial falsehood, as so with the kind of universal political authorities assigned to the Holy Roman Emperor and to the Pope, and in the case of all of the titles reviewed there was in fact no lawful justification established through them for the Spanish to make war on the Indians or to seize their lands and possessions.[7]

In Section 3 of *De Indis*, Vitoria went on to examine, and to confirm, what he identified as the legitimate titles justifying the activities of the Spanish in the Americas. These were not titles that supported the Spanish as to the rights of war and dominion as such. Rather, they were titles that served to establish lawful justification for the presence of the Spanish in the Americas, and for their interaction with the Indian peoples, and that gave rise to rights of war and dominion in an indirect and secondary sense.

The first legitimate title that Vitoria picked out was that of the natural society and fellowship among men. This was a principle of the law of nations, and of natural law, that related to the right of the visitors to foreign lands to humane treatment. According to Vitoria, the principle provided, primarily, that the Spanish had the right to travel to the lands of the Indians, and to reside there, subject to the condition that the Indians suffered no harm through this. The prin-

ciple of the natural society and fellowship among men contained, and gave rise to, a number of other rights. One of these was the right of freedom of trade and commerce. By this, the Spanish were entitled to conduct trade and commerce among the Indians, as through the importing of goods that the Indians lacked and through the exporting of precious metals, such as gold and silver, that the Indians possessed in great quantity. There was in addition the right of common use. This established the entitlement of the Spanish to have access to, and the use of, such things in the Americas as were common both to the Indians and to themselves as foreign visitors, and with these including the gold in the land and the pearls from the seas and rivers. Further, there were the civil and domicile rights as secured through the law of nations to the children of Spanish parents who were born in the Indian lands. The rights of the Spanish, as comprehended within the principle of the natural society and fellowship among men, were such that the obstruction by the Indians of their proper exercise provided the Spanish with lawful grounds for war. Thus in the first place, the Spanish were permitted to wage war against the Indians for the purposes of self-defence. In the case of the Indians persisting in their hostility, the Spanish were entitled to subjugate the Indians and to seize their property, as through force of arms, and then to treat the Indians as enemies and hence liable to have enforced against them all the rights of war, such as their reduction to captivity and the overthrow of their rulers.[8]

The second legitimate title supporting the Spanish presence in the Americas was based in the right of Christians to preach and declare the Christian Gospel among the barbarians. As Vitoria explained it, this right was such that the Pope might entrust it to the Spanish and forbid it to others, as was properly so, he maintained, with regard to the American lands and the native Indian peoples. Vitoria emphasized that where the Indians allowed the Spanish to preach the Gospel freely and without hindrance, then the non-acceptance of the Christian faith by the Indians did not in and of itself constitute a lawful ground for the Spanish to make war on them and to assert dominion rights over their lands. In the event, however, that the Indian peoples, or their rulers, acted to prevent the Spanish from preaching the Gospel, then here, Vitoria argued, the Spanish might lawfully wage war on the Indians to ensure their freedom to do this; as they were likewise entitled to wage war against those Indians who attempted to hinder any of their own number from conversion to the Christian faith or to subject converts to punishment. Related to these considerations, there were the third and fourth legitimate titles that Vitoria identified. Thus the third legitimate

title provided that the Spanish might exercise the rights of war against the rulers of the Indians, and to the point of overthrowing them, in cases where the rulers in questions used force or fear to compel Indian converts to Christianity to return to heathen practices. As to the fourth legitimate title, this was based in the consideration that where a large number of Indians had been converted to Christianity and by whatever means, the Pope might then, and with or without a formal request from them, authorize the removal of their remaining non-believing rulers in favour of Christian rulers.[9]

A fifth legitimate title supporting Spanish actions that Vitoria pointed to concerned the tyranny of the Indian rulers as to their own subjects and the existence of such tyrannical laws as those permitting human sacrifices and cannibalism. With this, he argued, there was justification for the Spanish exercising the rights of war in order to protect the native Indians as innocents. As a sixth legitimate title, it was suggested by Vitoria that the Spanish dominion over the Indians might be said to derive from the consent of the latter, as though the Indians, both the peoples and the rulers, were moved to accept the King of Spain as their sovereign and as in recognition of the wise and humane government of the Spanish. There was a seventh legitimate title as arising from the intervention of the Spanish in the wars that took place among the Indians, and as where the Spanish acquired dominion over Indian possessions as a reward for their support for the Indian parties with right on their side. Finally, Vitoria introduced an eighth legitimate title, albeit one that he referred to as doubtful. This related to a line of argument to the effect that the Spanish were to undertake the administration of the Indian lands, and so exercise sovereign rights over the native inhabitants, as in the interests of the Indians themselves as given the limited condition of their social, cultural and political development.[10]

The central concern of Vitoria with the legitimate titles of the Spanish as to the Americas and the American Indian peoples lay with the justification for their resort to war in establishing rights of dominion over these. In this way, the argument of *De Indis* led directly to the discussion of the principles of the law of war in the following relection *De Jure Belli*. This discussion addressed itself to the foundational principles of the law of war, and essentially so the *ius ad bellum* principles as these had been explored by Aquinas and designated by him as lawful authority, just cause and right intention. Thus it was that Vitoria examined the lawfulness of war as such, the lawful authority to wage war, the just cause of war, and, as corresponding to matters of right

intention, the lawful means of war, or, as he put it, the kind and the extent of the force applied in war that was to be considered lawful. With this said, however, it is to be emphasized that Vitoria advanced beyond Aquinas as to completeness in the exposition of the principles of the law of war, and particularly so with his account of the lawful means of war.

The positions that Vitoria took on the basic principles of justice in war at issue were as follows. Concerning the lawfulness of war, Vitoria held that it was lawful for Christians to wage war with respect both to defensive war and to offensive war, and with war being lawful for the defence of the person and property, the recovery of things unjustly taken, the punishing of wrongs and the achieving of future peace and security. As to lawful authority in war, Vitoria accepted that private individuals were permitted to wage war for the defence of themselves and their property. The same was true of states, except that states had the authority to declare and wage war not only for the purposes of self-defence, but also, and here in contrast to private individuals, in order to recover property and to punish wrong-doing. The authority belonging to states in the waging of war was an authority that belonged to rulers as the representatives of states. As to the just causes for war, Vitoria insisted, as he had done in *De Indis*, that difference in religion, as with the refusal to accept the Christian faith, provided no just cause for war. Similarly, there was no just cause for war to be found in considerations to do with the enlargement of empire or with the personal glory and self-interest of rulers. In Vitoria's view, there was only one just cause for war, and this consisted in the fact of a wrong received. With the question of the lawful means of war, or the kind and the extent of the force that was permissible in war, Vitoria argued that all was lawful in war that was required for the defence of the state. Thus, for Vitoria, it was lawful to take back all property that had been lost to the enemy, to recover out of enemy property the costs of the war and the damages resulting from it, to adopt appropriate measures against the enemy, such as the destruction of military installations, in order to provide for peace and security, and to subject the enemy to punishments for the wrongs of his as committed.[11]

Following the statement of the basic principles of justice in war, Vitoria proceeded in the remainder of *De Jure Belli* to the fuller elaboration of certain of the principles as set out. In connection with the matter of war as to its justification, he argued that it was essential for a just war that a careful examination was made of the justice and causes of the war and that all the opposing arguments were attended to. He

also argued that subjects who were convinced as to the injustice of a war, or who were against it in conscience, were not bound to participate in it even if this went against the command of the ruler. Of particular note, here, is that Vitoria accepted the possibility of doubt about the justification for war, as where both parties to it had evident and credible reasons for their actions. He did not go on to conclude from this that wars could be just on both sides as to the matter of the substance of right and justice. However, he emphasized that one or other of the parties might be ignorant of fact or of law concerning a given war. This had the effect that for the side with true justice as to its cause the war in question was just in and of itself; while for the other side the war remained just in the sense that it was free from sin through its good faith and as on account of its deep-rooted ignorance providing complete excuse. In such a case, the subjects of the rulers who were parties to the conflict were, as on both sides, to be thought of as acting in good faith, and thus as doing what was lawful when they fought.

The greater part of the elaboration of the principles of justice in war was devoted to the subject of the lawful means of war. This involved Vitoria in detailed discussion of the main aspects of what stands as the central *ius in bello* principle of discrimination: and with this as relating, in specific terms, to the immunities and protections in law and in justice for members of enemy states who were the innocent parties to war, that is, non-combatant parties, and to the parties who were guilty as through their active participation in war as combatant parties. Vitoria recognized that it was in principle lawful for the innocent to be killed in a just war. Nevertheless, he insisted that the deliberate killing of the innocent was never lawful as in and of itself. Thus it was not permitted, even in wars against heathens, to kill children and women, unless the women in question were guilty as parties to war; and it was prohibited to kill foreigners and guests residing in enemy territory or priests and members of religious orders except where these took part in actual combat. As against this, Vitoria accepted that it was lawful for innocent parties to be killed knowingly as the collateral effect, and thus as the indirect and unintended result, of legitimate acts of war such as the attacking of enemy fortresses and cities. Even so, it was not right to kill the innocent in these circumstances except as a matter of necessity, as was so when there existed no other means available for conducting the just war concerned.

For Vitoria, it was lawful in a just war to take away the goods of innocent parties that might be useful for the enemy, such as armaments, ships and other instruments of war. It was also lawful to take the money of innocent parties and to destroy their food crops and livestock, when

this was required to weaken the war effort of the enemy. However, the despoliation of the innocent population was not to be undertaken if the war could be carried on successfully without doing so. In cases where the enemy powers would not restore things wrongfully seized in war, then the injured parties were permitted to recover the measure of what was due from guilty and innocent parties alike. Parallel to these considerations, Vitoria held that it was lawful for innocent parties to be taken into captivity in the course of a just war, albeit that Christian subjects were not to be reduced to slavery. Further, it was lawful to kill enemy hostages taken during truces or on the conclusion of wars as when the enemy broke faith and went against the relevant agreements, but only if the hostages concerned were guilty parties who had borne arms. Where children and women, or other innocent parties, were held as hostages, it was not lawful for them to be killed.

In respect of the position of guilty parties in war and of the rights of belligerents waging a just war in relation to them, Vitoria claimed that it was lawful for combatant parties to kill, on an indiscriminate basis, all those who resisted with force as in the heat of conflict and for so long as the conflict itself remained unresolved. It was also lawful, after the achieving of victory, for the victorious party to a just war to kill the guilty among the enemy as for the purpose of punishing the perpetrators of the wrong that had given rise to the war in question. Vitoria argued that it was not necessarily lawful to kill all the guilty parties with a view to punishing wrong-doing. On the other hand, he pointed out that it was sometimes lawful, and expedient, to kill all the guilty, as was so when peace and security were not to be obtained save through the complete destruction of the enemy. Even so, Vitoria here underlined that punishment was to be proportionate to the offence, and that, in the majority of cases, the ordinary members of the armed forces of the enemy were not to be killed after their defeat, as where they posed no further threat and it was clear that they had acted in good faith. According to Vitoria, there was nothing in absolute terms to exclude the killing of those of the enemy who surrendered or were captured in a just war, assuming these to be guilty parties. As against this, however, it was accepted under the law of nations that captives, following victory and with all danger past, were not to be killed, although it was also recognized that those who surrendered might in some circumstances be put to death.

Further to the rights of the victor as in relation to the enemy, Vitoria held that in principle everything that was captured in a just war belonged to the victorious party to the degree that afforded compensation for the things wrongfully taken by the enemy and for the costs of the war. In

expanding on this, he went on to argue that the movable properties of the enemy belonged to the victor, even where their value exceeded what was necessary to cover the war costs. As to immovable property, he maintained that it was lawful for the victor to seize and hold the land, fortresses and cities of the enemy, for the purposes of both compensation and self-defence. In addition to this, it was lawful, within limits, for the victor to seize enemy territory by way of punishment. It was also considered lawful by Vitoria for the victor to impose tributes on the conquered enemy, so as to obtain damages and to inflict punishment, and lawful, subject to qualification, for the victor to depose the rulers of the enemy state and appoint new rulers or to retain the rulership for himself.[12]

The place of Vitoria within the tradition of international law is notable in part by reason of his identification of core substantive principles that belong to the law of nations. With the appeal in *De Indis* to the natural society and fellowship among men, Vitoria gave recognition, albeit tentative and provisional recognition, to a range of matters to do with the law of nations that relate to such central component principles of it as freedom of trade and commerce and the freedom of the seas. As concerning the discussion of the law of war in *De Jure Belli*, he pointed to the primacy of self-defence as the lawful basis for war, as through, for example, his focusing on wrongs received as the occasion for war and his denial of legitimacy to wars waged with religion as their cause and justification. Again, he looked forward to much modern thinking about war, as a general activity of states, in his upholding of the rights of conscience of subjects as a check to the command powers of rulers; as he looked forward also to much modern thinking about the law of war as such in his allowing that lawfulness might attach to the actions of the different parties to war, and irrespective of the justice of the cause for it. Most important of all, he set out in detail what he held to be the rights and duties of belligerent powers and their agents regarding non-combatant parties in war, as to their immunities and protections as innocent parties, as well as the rights and duties of belligerents as regarding combatant or guilty parties. With some of the principles as here stated, such as those affirming rights in the killing of hostages and prisoners of war, he was plainly set against what would go on to become the orthodox view for the law of nations. However, there are other principles that he picked out, most notably those stating restrictions as to the deliberate killing of non-combatant parties, that stand as principles that are fundamental as within the now existing international humanitarian law.

In the event, the outstanding claim to be made for Vitoria and his place in the international law tradition is less to do with what he had to say

about substantive principles of the law of nations than with his universalist conception of international law as such. This, as we have seen, was the conception where the law of nations was understood to have universal reach and application as to all the nations and peoples of the world. In this connection, it is to be emphasized that in discussion of the American Indians, Vitoria presented the law of nations as a body of law that in no sense presupposed the acceptance of the Christian faith, or indeed the acceptance of any particular religious standpoint, as the condition for subjecthood under it and hence for the enjoyment by nations and peoples of its various benefits and protections. Nor was it a body of law that Vitoria took to presuppose the jurisdictional authority of the European-based political institutional structures associated with the Christian religion, such as the Roman Catholic Church or the Holy Roman Empire, as its underlying organizational foundation. On the contrary, the law of nations was something that he thought of as comprising a legal framework that extended to the American Indians and that applied to them in the securing of their rights and standing, as it applied also to the Spanish, on the basis of full reciprocity. Thus it was that, with Vitoria, the discoveries in the Americas and the overseas territorial projection of Spanish power went together with the formulation of a jurisprudence that looked towards, and provided for, the universalization of the law of nations.

It is clear that Vitoria did not think of the American Indian peoples as constituting state entities with a formal independence founded in full sovereign rights and powers. To the extent that this is so, it is clear also that Vitoria did not consider the reciprocally applicable rights and standing of the Indians and the Spanish, as under the law of nations, to involve anything approximating to the equality of states that belongs to the modern notion of state sovereignty. In fact, Vitoria insisted that the Spanish held what were extensive legal and political rights as in relation to the Indians. So, for example, there are the notable inconsistencies as between the second and third sections of *De Indis*, such that arguments to do with religion and consent were at first excluded as providing a basis for Spanish rights, but were then readmitted subsequently as supporting the Spanish position. Then again, there are the specifications of the various rights relating to the natural society and fellowship among men, and relating to the propagation of the Gospel. For the rights at issue here were such as to indicate that, for Vitoria, there existed an evident foundation in law for the Spanish to intervene forcibly in the affairs of the Indian peoples, and to exercise wide-ranging rights of war as to the end of their acquisition of dominion rights over the Indians and their lands.

Despite all this, the crucial and decisive consideration with Vitoria, as to his universalist sense of the law of nations, remains that he saw the basis for the relations among the Spanish and the American Indians as being contained within a determinate body of law that set and defined rights and obligations which were reciprocally binding as between them. Thus as in line with this, Vitoria began *De Indis* with an explanation as to how the Indian peoples and their rulers were to be understood as forming distinct political entities, as in respect of their lands being subject to ownership rights and of themselves as communities being subject to lawful rights of rulership and self-government. He likewise restricted the range of legitimate titles providing justification for the Spanish, as in their activities towards the Indians, in terms such that the political societies established by the Indian peoples were to be taken as possessing if not legal sovereignty in the complete juridical sense, then at least some significant measure of lawful independent standing. Yet further, it is to be underlined that Vitoria was everywhere concerned to demonstrate that where the Spanish resorted to the rights of war, as against the Indians, then these rights were not arbitrary, but were required to be based in principles of proper cause and justification as pertaining to the law of nations. The requirement that the Spanish were to wage war against the Indians only when there existed a just cause for war stood as a requirement that, as in juristic logic, involved a commitment to the position that the Indians were to be recognized as subjects of the law of nations and as possessing rights and personality under it. This was reflected in the acceptance by Vitoria that the Indians were themselves competent to wage lawful war with one another; as it was reflected also in the restrictions that Vitoria placed on what could count as a just cause for the waging of war, as where these restrictions served to ensure the protection of law for the Indians, and for their rights, as relative to the Spanish. It is with the examination by Vitoria of these different aspects of the law of nations that there is to be found the universalism in outlook in jurisprudence that is of the essence of the strongly formative role that he played in the development of international law.

ii. Suarez

As with Vitoria before him, Suarez contributed to the elaborating of the general conception of international law. This contribution comes in the discussion of the law of nations, the *ius gentium*, in Book 2 of *De Legibus, ac Deo Legislatore*. The exposition of the forms of law set out in *De Legibus* was structured around the categories of law as focused on by

Aquinas. Thus there was detailed treatment of the eternal law, as the foundation of all law, the natural law, as the universal and unchanging law based in principles of reason and nature, and human law as comprising the sphere of positive law embodied in civil law and the law of nations. In addition to this, Suarez treated of the subjects of canon law, penal law, the interpretation, repeal and alteration of law, and the law of custom.

Suarez situated the law of nations as falling between the natural law and the civil law, as for the purposes of the analysis of its character. Thus the law of nations stood as a form of law that Suarez took to derive from the natural law, but nevertheless to be quite distinct from it. This was so in the respects, among others, that the principles of the natural law possessed an intrinsic necessity that did not belong to those of the law of nations and that, as opposed to the natural law, the law of nations as part of human law was something brought into being through the free will and consent of men. Again, the law of nations was not immutable as in the manner of the natural law; and, still further, the natural law was common to all peoples through its universal force and acceptance, whereas the law of nations was not followed by all nations and at all times, but only by almost all the nations and as a general rule of practice.[13] Suarez also emphasized the distinction between the law of nations and the civil law, notwithstanding the links between them as parts of human law. With this matter, he maintained that the civil law was law laid down in written form. In contrast, the law of nations had the form of unwritten law and was as such made up of customs: and here not the customs introduced by and binding on particular nations, as with the customary component of civil law, but rather the customs introduced by and hence binding on all nations.

> The precepts of the *ius gentium* differ from those of the civil law in that they are not established in written form; they are established through the customs not of one or two states or provinces, but of all or nearly all nations. For human law is twofold, that is to say, written and unwritten.... It is manifest, moreover, that the *ius gentium* is unwritten, and that it consequently differs in this respect from all written civil law.... Furthermore, unwritten law is made up of customs, and if it has been introduced by the custom of one particular nation and is binding upon the conduct of that nation only, it is also called civil; if, on the other hand, it has been introduced by the customs of all nations and thus is binding upon all, we believe it

> to be the *ius gentium* properly so called. The latter system, then, differs from the natural law because it is based upon custom rather than upon nature, and it is to be distinguished likewise from civil law, in its origin, basis, and universal application....[14]

For Suarez in his explanation of it, the law of nations did not stand only as the form of human law that originated in the customary practice of the different nations. The law of nations was also to be thought of as a separate and autonomous body of law that had application to the conduct of nations as in the sphere of their mutual external relations and, hence, as in the international sphere as such.

In connection with this, it is to be noted that Suarez argued that there were two ways in which a particular matter might be viewed as being subject to the law of nations. First, there was the point of view where the law of nations was taken to be law that all nations and peoples were to observe in their external relations with one another. Second, there was the point of view where the law of nations was taken to be a body of laws that different individual states and kingdoms observed within their own borders, and that acquired the standing of the law of nations because the laws were similar in their form and were accepted on a common basis within the states and kingdoms concerned. With the first specification of it, then, the law of nations was the law that applied to the external relations between nations and peoples. As with the second specification, however, the law of nations was the law commonly adopted and followed as within states and kingdoms. For Suarez, it was the first specification that answered to the essential character of the law of nations, and that served to bring out the essential point of the differentiation of it from the civil law. Thus it was the law as applying to the relations between nations and peoples that, as in the terms that Suarez understood the law of nations, constituted the law that came to be introduced through the customary practice of the nations. The origin of the law of nations in custom was such as to confer on it a binding normative force, as for the purposes of establishing binding obligations, which remained independent of natural law and natural reason. This was so with the obligations as concerning the law of war, the law on slavery and the law of treaties and truces, as the subject-matters to which Suarez made explicit reference as belonging to the law of nations proper.

As to the rational basis of the law of nations, this Suarez explained as consisting in the fact that the human race possessed a certain underlying unity as a species, and so also a moral and political unity gov-

erned by the natural principles of charity and sympathy, that persisted despite the divisions among men that came into being with the creation of separate states and peoples. This moral and political unity of the human race was something that Suarez took to point to the existence of some universal society within the international sphere, and in regard to which all the different nations and states were to be thought of as component parts. To be sure, the separate states were sovereign entities and hence perfect communities as to their own subjects. However, the states as when considered in relation to the human race as a whole were also members of the universal international society. For the states in their separateness were not self-sufficient, but rather, as was evidenced by state practice, they were required to support and interact with one another for reasons of self-interest and moral necessity. It followed from this, Suarez argued, that the communities formed as states stood in need of some system of law for the direction and proper ordering of their mutual association. This normative regulation was provided to a substantial degree by natural reason, but this was not so to an adequate level and in a determinate form as appropriate for all relevant contingencies. Accordingly, it was essential for certain specific rules of law to be brought into being as through the practice of the states concerned, and with this involving a process where the whole human race was to act to introduce laws for itself as through the customary practice of nations and states. This was made possible because the subject-matters contained within the body of law at issue were few in number, directly connected to natural law, and readily derived from the natural law as in a manner such that the derivation was to be thought of as conforming with the order of nature and as securing a universal acceptance on its own terms.

The law so introduced by nations and states through custom for the regulation of their mutual association was distinguished from the law of nations in the second of the two specifications of it that Suarez set out. As he explained it, the law of nations, here, made reference to certain principles, customs and modes of conduct that did not as such and in a direct sense have application to the whole human race, and that did not have as their object the external relations among nations and states. On the contrary, the conventional rules of the law of nations in question were established in the different states through procedures of government as corresponding to their respective judicial systems. Even so, the conventions were such that almost all nations were in agreement in establishing them as laws, and with the conventions resembling one another either as a matter of their shared general

features or as a matter of their common individual particularities. The specific subjects to which Suarez pointed as pertaining to this form of the law of nations were the arrangements for religious practice, the occupation of places by settlement, buildings and fortifications, the use of money, and private contracts as concerning purchase and sale.[15]

Suarez stands out as a forward-looking writer on the law of nations in the respect that while he adhered to the terms of the pre-modern tradition of natural law theorizing, and so assumed the derivation of human law from the law of nature, he nevertheless focused on, and clarified, the characteristics of the law of nations that he took to establish it as a body of law which was distinct from natural law. Thus the law of nations was presented as law that had application to the mutual external relations of nations and states and that, as such, was to be thought of as being introduced through the will and consent of the nations and states as this was expressed in their customary practice. This view of the law of nations was central to, and confirmed through, the appeal that Suarez made to the concept of a universal international society of mankind of which all the nations and states were to be thought of as members and hence as bound by the law generated and maintained through their own observance of it. It was also a view of the law of nations that ran parallel to the explanation that he provided as to the principles of the state and of the civil law as the form of human law established through the institution of government within states. For with this, Suarez argued that the natural law stood as the foundation of the state and of state government, but that the formation of the actual political communities constitutive of states and the establishing therein of their particular institutions of government required and depended on the consent of men. The voluntarist dimension that is present in the thought of Suarez as to the law of nations, and as to the state and the civil law, serves to mark him off from Vitoria and to align him somewhat with Grotius and with what, as we shall see, was the approach of the latter to these subject-matters.[16]

There are two main difficulties with the account that Suarez provided of the law of nations. First, Suarez insisted that the essential character of the law of nations was that of the unwritten law of custom. In this, he fell short of identifying certain features of the law of nations that are recognized to belong to it in its modern form. No doubt, he was correct to emphasize how the law of nations was to be found embodied in the customary practice of nations and states. Despite this, however, he failed to bring out how the principles of the law of nations might also be thought of as being embodied in the formal written agreements entered into

among nations and states, and hence in the law of treaties, and embodied too in the recorded opinions of the writers. Second, Suarez identified the law of nations proper as the law applying to the external relations among nations and peoples, rather the law commonly observed as within the different states and kingdoms. That Suarez made this identification is notable in its marking a shift away from the past and from the sense of the law of nations that is to be found present with Aquinas, and towards the understanding of the law of nations that was to be articulated by Grotius and his successors. Even so, the specification of the law of nations as the law applying to the external relations among nations and peoples, rather than as the law commonly observed within states and kingdoms, went against what was to emerge as the dominant trend in the development of the modern law of nations and that of public international law as such. For as it was to develop in the period that begins with Grotius, the law of nations came to be conceptualized, and to be expounded, as the law whose subjects were taken to be formally constituted juridical entities, such as states or kingdoms, rather than the loose, pre-juridical forms of human association such as nations and peoples.

The focus of concern of Suarez as to substantive issues to do with the law of nations lay with the principles relating to justice in war. Here as in the part of *De Charitate* devoted to war, he was in line with Vitoria, and through him with Aquinas, in his treatment of justice in war in reference to the principles relating to lawful authority, just cause and lawful means in war-making.

For Suarez, the authority to wage war related to the right to declare war. The right of defensive war belonged to all men, as in response to unjust attack. However, this was not so with aggressive war, where by natural law the right to declare war belonged to sovereign rulers and to states exercising a sovereign jurisdiction.[17] In the matter of the just cause of war, Suarez argued such that in principle, and as by natural reason, the justification for war had to relate to some injury received. This might involve the seizure of property or the refusal to restore it, the denial of the common rights of nations, or an affront to honour and reputation. It was also a just cause for war to aim at the punishment of an enemy who had inflicted an injury. The grounds for war as based in natural reason were exhaustive as to the possible just causes for war. Thus it was that Suarez, and here following Vitoria, rejected certain grounds for war as advanced by Christian rulers, which grounds he considered to go beyond the limits of natural reason. So, for example, unbelief, in the sense of the refusal to accept the Christian faith, could provide no valid grounds for war; and nor could war be justified

through claims relating to the Holy Roman Emperor or to the Pope as to their exercise of a temporal dominion.[18]

With the matter of the lawful means of war, Suarez set out a number of principles relating to the commencement of war, the conduct of it prior to victory and the situation following victory. As Suarez explained them, these various principles all bore on the necessity for restraint and moderation on the part of belligerents, and on the necessity for them to act such as to ensure protection for innocent parties as in line with the basic meaning of the *ius in bello* requirements on discrimination. Thus rulers contemplating war were to seek reparations from the offending state and, if they were offered, to accept them rather than proceed to war. After the initiation of war, it was just for the belligerent state to inflict on the enemy all the losses that were required to achieve victory, save that this was not to involve harm to innocent persons such as would constitute an intrinsic evil. On the securing of victory, rulers were permitted to inflict on the vanquished enemy state costs as appropriate for the purposes of just punishment and just restitution for all injuries sustained. In principle, restitution was to be made only by the guilty parties to war, but it was permissible to deprive the innocent of their goods, and even of their liberty, if this was necessary for the obtaining of full compensation. However, innocent persons were not to be killed, and not so even in order to inflict adequate due punishment on the state of which they were members, although it was allowable under certain conditions for the innocent to be killed as by way of collateral damage resulting from acts aimed at bringing about a victorious outcome. Finally, Suarez held that a ruler who obtained victory in a just war was permitted to dispose of the property of the enemy in such a way as to provide for an enduring peace in the future, but with this subject to the condition that the ruler was to spare the lives of the enemy.[19]

Suarez was in close agreement with Vitoria as to the basics of his statement of the principles of the law of war. Thus, for example, he pointed to the primacy of a wrong or injury suffered, and hence of matters relating to self-defence, as essential for war as to the justice of its cause. He also excluded justifications for war that were grounded in considerations of religion. In addition, he set out, as his predecessor had done, the duties of a humanitarian legal character that were owed to the innocent parties to war as to their various immunities and protections.

In all these particulars of the just war doctrine, Suarez was as strongly linked as Vitoria to future developments in modern international law. In this connection, it is to be recognized that Vitoria and Suarez developed

the law of war beyond the point where Aquinas had left it, and to the point where it served to provide a firm foundation for the emergence of an effective law of nations. For Vitoria and Suarez, the form of war that principally concerned them was public war, that is, war as engaged in by states and rulers, and with their principal concern with the law of war being with the law as it applied in the conditions of public war and hence as it applied to states and rulers as in the conducting of public war. In thus describing the regulatory functions of law as to the activities of states and rulers in the matter of war in its public form, the way was left open by Vitoria and Suarez for law to be presented as something that framed and governed the external relations of states and rulers in all their various and public aspects. At the same time, the way was left open for this body of law to acquire, as in line with the intentions of Vitoria and Suarez, the universal character appropriate to itself as the law of nations governing the external relations of states and rulers and such that it would have a reach and application within the international sphere which extended to all nations and peoples. Nevertheless, there remains a major limitation with Vitoria and Suarez on the law of war as in regard to the law of nations considered as a comprehensive system of international jurisprudence. This is that through focusing on war and the body of law concerning it, there was an absence of attention to, and a failure to give adequate account of, the various subject-matters pertaining to the law of nations which fell outside the sphere of war. It was left to Gentili and Grotius to take the just war doctrine further forward in the direction of international law, while overcoming the sort of narrowness of scope that is present with Vitoria and Suarez as to the law of nations and its exposition.

iii. Gentili

The merit of Gentili, as relative to Vitoria and Suarez, lay in the detail and the technical refinement of his treatment of the law of nations. This is evident, for example, with *De Legationibus*. In this work, Gentili identified the law of embassies as a distinct subject-matter of jurisprudential enquiry, and, in doing so, he expounded the basic elements of the law as to the classification of ambassadors as to their status and functions, the rights of ambassadors and the personal qualifications appropriate to them. In Gentili's account of it, ambassadors were the representatives of sovereign rulers, and with the fundamental principle of the law of embassies being that of the inviolability of ambassadors. As in accordance with the principle of inviolability, Gentili set out the

rights of ambassadors, such as the right to security as to their person and property. At the same time, Gentili specified the obligations of ambassadors, as so most notably with those such as were implicit in the limitations that he saw as placed on the immunities of ambassadors as in respect of the laws established in the states where they resided. Thus, for Gentili, ambassadors were subject to the ordinary civil law procedures as regarding obligations arising from the contracts that they made during the time of their official tenure. In addition, ambassadors were subject to the criminal law, and liable to criminal penalties including death, for such offences as involved acts of violence against the sovereign rulers of the states where they were assigned: although Gentili maintained that dismissal rather than criminal punishment was to apply in cases where ambassadors did no more than enter into conspiracies against the sovereign rulers concerned.[20]

The qualities of detail and technical refinement that distinguish Gentili's jurisprudence are also present in *De Jure Belli*. In this work, Gentili provided an exhaustive and wide-ranging discussion of the law of war. The broad range of the discussion is pointed to with the various topics relating to this subject-matter that are addressed in the three books which form the treatise.

In Book 1, Gentili considered the form of war, as pertaining to the law of nations, and in doing so he set out his favoured definition of war as public war and thus as involving the public contestation of armed forces and on the authorization of sovereign rulers. Centrally, Gentili stated and explained the substantive justifications for war, which he classified as divine, natural or human in origin and character. The divine causes for war were the causes attributable to the will of God. These, for Gentili, were limited in application given that, as he argued, war was in general not to be undertaken where its sole object lay with religion and with its maintenance. The category of natural causes for war related essentially to self-defence, and it included necessary self-defence, as directed to the protection of personal and property rights, expedient defence, as directed to the prevention of an anticipated wrong, and defence for the sake of honour as directed to the waging of war for the benefit of third parties. Regarding the human causes for war, these related to war waged in response to the violation of human laws, as where war was directed towards the avenging or punishment of wrong-doing or towards the preservation of rights.

The concern in Book 2 lay with justice in the conduct of war as separate from the question of the just cause of war. Here, Gentili pointed to the general necessity for a formal declaration of war preparatory to

hostilities. He also explained the occasions for, and the limitations on, the use of deception against the enemy in wartime and the status of agreements among belligerent parties, as with truces, safe-conducts and arrangements for the exchange and freeing of prisoners. Again, there was consideration of the immunities and protections due to the parties to war and to the non-combatant parties. So, for example, Gentili held that it was in most cases required in justice and humanity for prisoners of war, and for those of the enemy who surrendered, to be spared and not to be killed. Likewise, he held that women and children were as a general rule not to be put to death; and similarly so persons of advanced years, unless these bore arms, and lunatic persons save in conditions where it was found necessary to act against them in self-defence.

In Book 3, Gentili turned to the principles of justice applying on the conclusion of wars and the return to the condition of peace. In this, he described the rights of the victorious power, in relation to the vanquished enemy, as these concerned such issues as compensation for war losses sustained and the obtaining of proper securities for the future. In addition, he pointed to certain restrictions on these rights, as with the principle that moderation was to be shown by victorious powers in regard to such matters as the sacking and destruction of enemy cities and the treatment of the enemy leaders. For Gentili, the key consideration was that a peace made on the conclusion of a war had to be durable, and with this requiring that the peace was to be just and to exclude the imposing of harsh conditions which rendered it opposed to the interests of the vanquished parties. As for the establishing of peace, this was to come about through the forming of agreements. In recognition of this, Gentili expounded in some detail the principles applying to peace agreements, which agreements he took to stand as contracts made by sovereign rulers and based in good faith.

It is the significant limitation of Gentili in his approach to the law of nations that he fell short of a proper and complete explanation as to what precisely he took the formal character of this law to consist in. To be sure, he began *De Jure Belli* with a general discussion of the question of international law as such, as in its application to war. Here, he identified international law as being part of the divine law. Expanding on this, he recognized the association made by the writers as of the law of nations with the law of nature, and with the law of nations having been pointed to, in this connection, as the law in actual use with all nations, the law established through natural reason among all men and the law uniformly followed on the part of all mankind. Related to

these considerations, he was to observe that the law of nations was supported through the pronouncements of the leading authorities.[21]

However, it has to be said that the natural law to which Gentili referred was left barely determined and that his reference to it did little or nothing to further the conceptualization of the law of nations as to its essential characteristics. In the event, the notable advances made by Gentili as to the law of nations were to do not with conceptual issues, but rather with his elaborating of principles belonging to the substance of the law of nations and principles that have come to be entrenched within modern international law. As to this, the positions taken by Gentili were to some considerable degree continuous with those of Vitoria and Suarez, and particularly so in contexts where the universality of the law of war was at issue. Thus it was that he followed Vitoria in allowing that the justice of a war might be in doubt and with the belligerent parties concerned each claiming justice for themselves. In regard to this, he was to maintain that the rights embodied in the law of war were to be taken as applying to all belligerent parties without exception.[22] Again, he affirmed principles of the sort currently pertaining to international humanitarian law, as he did in regard to prisoners of war and as he did also, and here following both Vitoria and Suarez, in regard to the immunities and protections due to innocent or non-combatant parties during wartime such as women and children and elderly persons.[23]

Nevertheless, there are also contexts where Gentili went beyond Vitoria and Suarez, and where he demonstrated the enlargement in scope of his treatment of the law of nations as relative to his predecessors. The most important case of this is the discussion of agreements for the concluding of war in Book 3 of *De Jure Belli*, as where Gentili set out the rudiments of a statement of the principles of the law of treaties. To repeat, peace agreements, for Gentili, had the form of contracts entered into by sovereign rulers and governed by principles of good faith. In explanation of this, Gentili was to argue, among much else, that sovereign rulers held captive were able to conclude valid peace agreements, and despite the fact of their captivity. In doing so, he looked forward to the principle, as accepted in modern international law, that duress as such should not be taken as negating the strict obligatory force of international treaty agreements. As to the subject-matters appropriate for the peace agreements concluded by sovereign rulers, these Gentili saw as including the laws, liberties and territory of states, their armed forces and their military facilities and installations. However, he did not allow that sovereign rulers were empowered to

conclude peace agreements that provided for the alienation of their own subjects. With this, he gave provisional recognition to something of the sort of limitations on treaties that are set as in accordance with the meaning of the modern principle of the self-determination of peoples. In addition, Gentili held that there were cases where sovereign rulers were to be regarded as bound by the agreements formed by their predecessors: as was so, he maintained, with agreements that were made according to the nature and customs of the states in question and with sovereign rulers who ruled not through election but through succession. Thus it was that Gentili, as through his explanation of state agreements, gave recognition to the principle that sovereign rulers stood in a representative relation as to their subjects and that they were, as such, distinguishable from the states for which they discharged the functions of rulership.[24]

The rules and principles pertaining to the law of nations that Gentili picked out were not such that they went together to comprise a system. The absence of an overall systematic coherence from Gentili's exposition of the law of nations is bound up with, and largely a function of, the relative spareness of his theoretical formulations as regarding natural law. For the sense of natural law that is present with Gentili was not one where the natural law was determined such that it served to form a conceptual framework as within which the elements of the law of nations could be derived and presented with systematic order and organization: and least of all where the elements of the law of nations were to be brought into an internal relationship with the strongly normative principles of justice and political morality which were characteristic of the natural law conceptualization. It is the comparative indifference on Gentili's part to the normative dimensions of the law of nations that points to the markedly positivistic quality of his international jurisprudence. The positivism of Gentili is evident most particularly with the pleas and opinions that were collected together in the volume *Hispanicae Advocationis*. For here Gentili addressed himself not to the first-order philosophical issues of jurisprudence, but rather to the contingent issues belonging to what we should call hard law proper. These issues included those to do with maritime law, such as piracy and commerce, those to do with litigation procedures, such as the rules on the testimony of witnesses, and those to do with property and contract, such as proof of ownership and the sale of goods. As for the general principles relating to the hard law issues as referred to, these for Gentili, and as he explained them, were such that they emerged only within the context of actual cases that were circumstance-specific

and inherently controversial as to their substance.[25] The positivism of Gentili is something that stands out as dividing him from Vitoria and Suarez; and it is this positivism, and as this is brought out with the comparatively non-systematic character of his discussion of the international law subject-matters, that underlines the clear point of contrast as between his own approach to the law of nations and that followed by his immediate successor Grotius.[26]

iv. Grotius

The place that Grotius occupies in the development of the modern law of nations is a central one, and the fact of this is established through recognizing the immense influence of the exposition of the elements of what he identified as the law of war and peace that is contained in his treatise *De Jure Belli ac Pacis*. The law of war and peace, as Grotius expounded it, formed a system of jurisprudence that comprehended the law applying to individual persons and the law applying to the internal domestic political organization of states. It also comprehended what was for Grotius his principal and declared concern. This was the law that had application to states and rulers in the sphere of their mutual external relations.

It is because Grotius focused, as he did, on the law ordering the relations among states and rulers that he is taken to stand as the originator of the modern tradition of international law. However, Grotius was also, and perhaps first and foremost so, an heir to the tradition of just war theorizing. In consideration of this, it is to be emphasized that the exposition of the law of war and peace that is set out in the three books that comprise *De Jure Belli ac Pacis* is organized, in thematic terms, as in line with the core *ius ad bellum* principles of lawful authority, just cause and right intention that, as we have seen, were specified and focused on by Aquinas as the basic conditions for justice in war and that were accepted as such, as to their essentials, by Vitoria and Suarez for this purpose. Thus in Book 1, Grotius treated of subject-matters pertaining to lawful authority, as with the rights of states and rulers in the initiation of war and with the basis for the sovereign power within states. In Book 2, he treated of subject-matters pertaining to just cause such as property and ownership, promissory agreements and contracts, wrong and punishment, and with the discussion being directed towards the rights to do with the person and property whose violation occasioned and justified the resort to war. In Book 3, he treated of subject-matters pertaining to right intention in war, and with this

extending importantly to consideration of issues relating to the *ius in bello* principle of discrimination. Central among the subject-matters as here addressed were the rights of war, the constraints and limitations on states and rulers in the exercise of the rights of war, and the principles of good faith that were to be observed by belligerent parties so as to preserve the possibility of the restoration of peace among themselves.

If Grotius looked back to the past with his conformity with the terms of the established lines of just war theorizing, he at the same time looked forward to the future through his decisive role in setting the conceptual framework for the modern secular form of natural law theorizing that was to be closely adhered to by later writers on the law of nations. In this connection, it is to be understood that, for Grotius, the law of nature, or the *jus naturale*, was foundational in his statement and explanation of the elements of the law of war and peace and that, as such, it was fully distinguishable from state municipal law, or the *ius civile*, and the law of nations, or the *ius gentium*, as the principal forms of positive or voluntary law. This law of nature was a law of universal reason, and, as Grotius famously explained it in the Prolegomena to *De Jure Belli ac Pacis*, it was a law based directly in the actual condition of human nature, as manifested through the natural inclination of men towards sociability or sociableness. So also was it a law that remained independent of theistic presupposition, in the respect that the validity of the claims made for it was to be thought of as holding even in conditions where there was denial of the existence of God.[27]

As to the substance of the law of nature, this Grotius presented in terms that were to have a profound importance for the future. Thus Grotius understood the law of nature to embody first-order principles of justice and political morality that related to the rights and obligations of individual men. At the same time, the normative principles embodied in the law of nature were understood to describe the minimum conditions of peaceful association such as were necessary for the security of men within political society, and for the protecting of their rights and the enforcement of their obligations therein. According to Grotius, the law of nature was grounded in the right of men to act to defend and preserve themselves. This right of self-defence and self-preservation was foundational; and it was by reference to it that Grotius derived the rights and obligations of individual men, as relating to the person and to property, and the principles relating to the form of social order subject to law and government that was particular to the civil state.

The view that Grotius took of the substance of the law of nature is evident from the specification of the principles of natural law that he

gave in the Prolegomena to *De Jure Praedae*. Thus the first and second of the laws of nature that he there set down stated that men were permitted to defend themselves and permitted to acquire, and to retain, the things that were essential for the maintenance of life. In accordance with these primary laws, Grotius went on to state further laws of nature that set out the principles of just conduct among men which, as such, served to impose normative constraints and limitations on their pursuit of the ends relating to self-defence and self-preservation. Thus the third and fourth laws of nature provided that men were to refrain from doing injury to one another and from seizing one another's property, whereas the fifth and sixth laws of nature provided that evil acts were to be punished and that good acts were to be rewarded. In turn, it was provided with the ninth and twelfth laws of nature that the enforcement of rights among men within political society, and among men and states within the international sphere, was to take place only in accordance with a judicial procedure.[28] There is, in addition to this, the specification of the law of nature that comes in the Prolegomena to *De Jure Belli ac Pacis*. Here, Grotius set out the principles of justice and political morality, as contained in the law of nature, as principles relating to the duties on men to respect one another's personal, property and contractual rights and to fulfil the obligations that were the obverse of these rights, and with this to include the liability to make restitution for losses caused and the application of punishments on men as where these were deserved. It was in such terms that Grotius described the elements of the law applying to the form of normative organization that he considered to arise from, and to have its foundation in, the natural inclination of men to associate together within organized society.

> To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.[29]

The obligation in natural law as requiring men to enforce rights through adjudicative procedures points to how the laws of nature, as Grotius conceived of them, comprehended principles of social order that were to be given effect to as through the framework of law and government established within the state. It is with this the natural law sanction for the state, as Grotius saw it, that there is brought out the

contrast as between the pre-modern natural law tradition and the modern secular natural law tradition. In the case of thinkers such as Aristotle and Aquinas, the state had been taken to originate with, and to be founded in, a normative order that was to be thought of as being identified with, and as being embodied directly in, the order of nature. For the modern natural law thinkers, on the other hand, the origin and foundation of the state, and of the authority that it exercised, were to be explained not only in terms of a normative order based in nature in a direct sense, but also in terms of a normative order that was presented as being based in principles of will and agreement and hence as standing as something which was distinct from the sphere of the natural order as such. This voluntaristic view of the state, and of its authority, was a crucial part of the reformulation of natural law as a law relating to individual rights that Grotius brought about. For as in line with this viewpoint, the state was understood to originate with, and the powers belonging to rulers to be created through, certain acts on the part of men that involved the exercise and transfer of their rights. In regard to this, it is to be emphasized that, as a modern natural law thinker, Grotius saw principles of voluntary agreement as lying at the foundations of the state. Thus in the relevant passages in *De Jure Praedae* and *De Jure Belli ac Pacis*, he referred to the act of agreement establishing political society, and the municipal legal order that it maintained, as that of contract or pacts, and with the binding normative force of this agreement being bound up with what he specified as the principle of the law of nature which required that men were to abide by their pacts.[30]

For Grotius, the law of nature was not only law that set out the first-order principles of just conduct among men and the first-order principles of their association within political society. It was also law that, as part of the law of war and peace, had direct application to states and rulers. So, for example, it was in terms of the principles of justice and political morality as contained within the law of nature that Grotius, in *De Jure Belli ac Pacis*, identified the essential just causes for war as the defence against actual or threatened injury, the recovery of property, and the punishment of wrong-doing. These natural law-grounded justifications for war were taken by Grotius as providing just cause for individual men to exercise the right of private war in the securing of their person and property; but they were also made explicit appeal to by him in his explanation for the just causes for the undertaking of public war on the part of state authorities.[31] Similarly, Grotius was to attempt to set out certain of the rules determining what was permissible to be done in war as from what he referred to as the quite specific standpoint of the law of nature.[32]

In addition to the law of nature, there was the law of nations. This was the body of laws applying to states in the sphere of their mutual external relations and that Grotius saw as coming into being through their mutual consent, and as being directed to the interests of the greater society formed by all states.[33] As law based in the consent of states, the law of nations was a form of positive or voluntary law, and, as such, it was distinguished by Grotius from the law of nature as within his classification of the principal types of law as given in Book 1 of *De Jure Belli ac Pacis*. It was here that the law of nature was presented as a universal law of reason, in the sense that the principles that it stated were to be thought of as being self-evident to men in their natural condition as rational beings. Thus the law of nature was a dictate of right reason, which served to determine the moral necessity, or the moral baseness, of human acts as relative to their agreement, or their disagreement, with the standard of rational nature. As opposed to the law of nature, there was the sphere of law that Grotius presented not as law based in reason as such, but as law whose origin lay in the will. This was the volitional law, the *ius voluntarium*, and with the part of the volitional law that originated in the will of men being the volitional human law: the *ius voluntarium humanum*. One form of volitional human law was municipal law: the law that was brought into being through the will and agency of the sovereign power in the state. The other principal form of volitional human law was the positive or voluntary law of nations. For Grotius, the law of nations stood as a form of volitional human law in that it was law that originated in the will of nations and that derived its binding normative force therefrom. As concerning the evidence for the law of nations in its status as a form of volitional human law, this Grotius maintained was to be found in the customary practice of the nations and in the testimony of the writers who were learned in it.[34]

In the event, the law of nature, as Grotius explained it, was bound up intimately with the law of nations as a form of volitional human law. This was so in the respect that it stood as the underlying normative foundation for the law of nations. Thus it is to be emphasized that, with Grotius, the law of nature included a general principle of just conduct whose observance by nations and states stood as the precondition for the possibility of their being able to generate, through their own will and consent, a body of laws for the regulation of their mutual external relations. The principle of natural law in question is one that we have seen to be central to the account given by Grotius as to the establishing of the separate states. This was the principle of pacts, and with it relating to the general requirement that the terms of voluntary agreements were to be

fulfilled by the parties to them. The principle of pacts was everywhere made appeal to by Grotius in the exposition of the specifically international components of the law of war and peace. This is so most particularly with his statement of the rules of good faith to be observed by the parties to war. Here, Grotius reviewed the forms of good faith among enemies, peace treaties and other instruments for the ending of war, truces, safe conducts and prisoner ransoms in the course of war, and the good faith rules binding on subordinate powers and private persons. These various relations, instruments and procedures as essential for good faith pertained in the main to the law of nations, and, in the terms of Grotius' discussion of them, they were such that they presupposed the natural law principle of pacts in the regard that they were presented as being conditional on the promissory undertakings of belligerent parties for their operationalization.[35]

Beyond this, there is the consideration that, as we have seen, the law of nature included principles of justice and political morality that Grotius took to have direct application to nations and states, as was so with the basic right of war and with the principles relating to the cause and justification for war. With all of this accepted, however, it remains the case that the part of the law of war and peace that Grotius presented as applying essentially to states and rulers, as in their mutual external relations, was the law of nations in its status as a form of volitional human law. Thus a substantial part of *De Jure Belli ac Pacis* was devoted to the exposition of the elements of the positive or voluntary law of nations, and with this the law of nations proper being treated of as something separate and distinguishable from the law of nature as such. This was true, for example, of the law relating to the conditions for public war, and notably so with the principle of sovereign authority and the form and procedures for the declaration of war.[36] Among the other elements of the law of nations that stand out for particular mention are the following: the law of embassies; the law of burial; the law relating to the taking of the goods of subjects in order to meet the just liabilities of rulers; the law relating to the rights belonging to belligerent parties as the effects of public war, and with this comprehending the rights in regard to the killing of enemies, pillage, prisoners of war and the rulership of conquered peoples.[37]

While Grotius holds a central position in the development of international law, he is central also within the development of international relations and of theoretical reflection on it. It is in this connection that Grotius has been read as the representative of a specifically internationalist tradition in international thought and practice. In this tradition, as we

have cited Bull in the characterization of it, states are held to act in furtherance of their own interests and to constitute as through their sovereign rulers the essential reality in international politics. At the same time, however, the relations between states are assumed to take place only within the framework of an international society as based in commonly accepted rules and institutions, and with the latter being understood to embody the principles of law and morality that define the conditions of co-existence and co-operation among states in the society which they form together. This internationalist tradition stands opposed to the realist tradition in international thought and practice, as where the interests and power of states are considered to be fundamental and, as such, to be unrestricted through law and morality. The distance of Grotius from the realist tradition, and his association with the internationalist tradition, are alike reflected through his adherence, as in line with the terms of the presentation of the law of war and peace, to the general and containing tradition of theorizing that most plainly establishes his alignment with the tradition of international law. This is the just war tradition. Thus it was that, for Grotius, war was an inherently law-governed form of relationship among states. This meant, among much else, that war, to be lawful, was to be undertaken only with just cause, as for the enforcement of rights and justice, and then only as a matter of necessity; and also that war was always to be conducted in conformity with the principles of good faith and the rule of law, and to be directed towards the restoration of peace as its own ultimate goal and objective.[38]

Despite the adherence of Grotius to the just war tradition, the fact is that the law of war and peace that he expounded went beyond the terms of just war theorizing itself. For he also gave recognition to principles that were to be worked through by his successor writers on the law of nations and that, through this, were to come to comprise an essential part of the whole substance of the modern system of international law. Even so, there are still some major qualifications to be entered as to claims for the forward-looking modernity of Grotius as with matters of international jurisprudence. So, for example, it is to be emphasized that he fell short of providing an adequate determination of the principles of statehood, as in agreement with what would become established as the dominant conceptualization of the internal institutional form and structure of states as the subjects of the law of nations.

To be sure, Grotius did accept with this matter, as consistent with the subsequent lines of argument in political thought, that the state was

based in consent, in that it originated in pacts, and that its concern lay with giving effect to the rights of the individuals who were associated together within it. He also defined the civil power in the state, as consistent with his own specification of the principles of public war, in terms of the conventional functions of government as with legislation, the issues of war and peace, treaties and the adjudication of disputes; and he explained the sovereignty, as attaching to the civil power, in terms of a power that was not subject to the legal control and limitation of some other external will.[39] As against this, however, Grotius stood somewhat opposed to those of the later developments in theorizing on the state that involved the commitment to the principles of constitutional government and the rule of law. This was so in the matter of the strongly absolutist dimension of his views as to sovereignty. Thus he maintained that sovereignty was not always to be thought of as residing in the people. For as he argued: a people might submit and enslave themselves to a ruler, and with this involving the total transfer of their right of self-government to another; they might renounce the right of self-government for reasons to do with their defence; and some forms of government were established not for the benefit of their subjects, but only for the benefit of rulers.[40] In addition, Grotius was to call into question the specifically representative character of the sovereign power in the state that Gentili had brought out with his discussion of peace treaties and on which thinkers from Hobbes and Pufendorf through to Kant and Hegel were to focus attention. Grotius did this in the respect that he allowed that, in some cases, the sovereign power was to be thought of as being held absolutely as with the right of transfer, and with this meaning that the sovereign power as to the people might be held by the ruler with full proprietary right, that is, in patrimony, and so might be capable of being alienated by the ruler.[41]

With all of this accepted as to Grotius on the state, there remains much to point to as to his affirming of principles that are fully recognizable as in reference to the modern international law system as this was to establish itself after him. In some cases, the principles concerned stood as principles pertaining to international law considered as the law of peace, and were, as such, indicative of the enlargement in scope of the subject-matters treated of by Grotius as coming under the law of nations as relative to the earlier writers. Thus it was that in *De Jure Praedae*, he famously affirmed and justified the legal principle of the freedom of the seas, which principle he explained, and here with a level of jurisprudential detail exceeding anything in Vitoria, as in its relation to the right that he saw as belonging to nations and

peoples to engage in mutual trade and commerce in the international sphere.[42] Then again as in *De Jure Belli ac Pacis*, he followed Gentili in the discussion of treaties and embassies as distinct subject-matters of the law of nations. Thus he set out the principles pertaining to the law of treaties, as understood as public conventions made on the lawful authority of rulers, and to the interpretation of treaties;[43] and he likewise set out the principles pertaining to the law of embassies, as where he affirmed the inviolability of ambassadors and their representative status as in relation to the sovereign power.[44]

Further to the modernity of Grotius as to international law, there is what he wrote on the law relating to war itself. For he here affirmed core substantive principles pertaining to the law of nations while also bringing out, and so affirming, the universality, and hence the non-discriminatory character, of the law applying in the international sphere. In this connection, it is to be emphasized that Grotius did not only restrict the just causes for war to self-defence, recovery of property and punishment of wrong-doing. He also excluded certain purported causes for war as flawed through injustice, and with this being such as to underline how the protections of the law of war and peace extended to nations and peoples, and to their rights, as without regard for considerations to do with religion or material power and in indifference to the asserted rights and powers of any higher institutional authorities. In this, Grotius took up positions on the law of war parallel to those of Vitoria and Suarez. So, for example, he argued that war was not justly to be waged against those who were unwilling to accept the Christian religion, or against those who erred in the interpretation of the divine law.[45] He likewise argued that there was no justice attaching to wars aimed at the conquest of richer lands, wars based in some claimed right of discovery asserted in regard to lands subject to existing occupation, wars supported through the claim to rule others as for their own good and even against their will, or wars grounded in such universal jurisdictional claims as were associated with the Holy Roman Empire and with the Church.[46] Finally, the universality, and non-discriminatory character, of the law of war and peace are underlined with the acceptance by Grotius that justice might attach to both sides to a war, and with this being such as to secure to the parties the full protection of the laws. Thus he maintained that while a war could not be just on both sides as to its essential cause, it was nevertheless possible for neither of the parties to do wrong and with it following from this that a war might be considered just on both sides as with respect to its legal effects.[47]

In addition to this, there are the anticipations of modern international law that come with Grotius' specification of the principles relating to moderation in the exercise by belligerent parties of the lawful rights that he took to belong to them as the effects of public war. As to the latter rights, Grotius allowed to belligerents more or less unlimited rights under the law, as in respect of the killing of enemies, persons residing in enemy territory, women and children, persons held captive, those willing to surrender, those who made unconditional surrender and those taken as hostages in wartime.[48] There were comparably limitless rights in law as with the destruction and the acquisition of enemy property, the treatment of prisoners of war, and the exercise of the powers of civil rulership over conquered peoples.[49]

However, the lawful rights of war were, for Grotius, subject to principles of a moral character that provided for moderation in their application. It is to be emphasized, here, that the principles for moderation in war were moral principles, and that, as Grotius explained them, the principles concerned lacked the strict legal standing that they would be assigned by later writers such as Vattel. Even so, it is evident that the principles of moderation, as to their substance, relate to the *ius in bello* requirement on discrimination; and, as such, the principles relate also in a direct sense to the considerations to do with the immunities and protections due to innocent or non-combatant parties in war and to parties such as prisoners of war that, as we observed in discussion of Vitoria and Gentili, rank among the principles belonging to modern international humanitarian law. Thus Grotius held that there was to be moderation in the killing of enemies, as where acts of killing would be devoid of moral justice: punishment was to be remitted even for enemies deserving of death; care was to be taken to protect the lives of the innocent; children, women (unless guilty of serious offences) and the elderly were to be spared, as were scholars and persons in religious orders, farmers and merchants, prisoners of war, those willing to surrender and those who had surrendered unconditionally, and hostages save where they had committed wrongs.[50] In similar spirit, there was to be moderation with the destruction and capture of enemy property, with the treatment of prisoners of war, and particularly so as to the killing and punishment of them, and with the acquisition and wielding of civil rulership powers over the enemy.[51]

The signal achievement of Grotius as in regard to international law, and what marks him off from Gentili, is very much bound up with the form of his appeal to the natural law in the exposition of the law of war and peace and in the demonstration of its specifically normative

foundations. Vitoria and Suarez had addressed international law matters as in line with the concept of natural law. However, the latter natural law conceptualization, as deriving from the thought of Aquinas, remained importantly distinct from the particular formulation that Grotius provided as to the law of nature. This formulation was that of the law of nature considered as the law stating the fundamental principles of justice and political morality that related to the basic rights of individuals as to their self-defence and self-preservation, as focused on their person, property and contracts, and as the law stating the fundamental principles of social and political order whose actualization within the state was understood to be most conducive to the defence and preservation of men and the enduring maintenance of their rights. The markedly rights-based natural law conceptualization, as here referred to, was of immense influence; and, as we have indicated, it more or less set the normative framework for the discussion of the law of nations on the part of political thinkers such as Hobbes, Pufendorf and Locke, as well as for the work of Wolff and Vattel, in their classic expositions of the elements of the system of the law of nations.

It is because Grotius incorporated principles of natural law within his exposition of the law of war and peace that he is to be set apart from those among his successors who belong to the line of the positivist writers in the tradition of international law. Thus it is that Grotius is to be distinguished from the later Dutch jurist Bynkershoek, who was to base his discussion of issues to do with the law of nations on reasoning about the edicts, decrees and treaties comprising the conventional sources of law: and with this method to be found followed by Bynkershoek to most notable effect as in his *Quaestionum Juris Publici Libri Duo* (1737).[52]

Nevertheless, it is also true that Grotius did recognize the law of nations as a form of positive or voluntary law and that while he emphasized the foundational status of natural law in relation to it, the law of nations and the law of nature were quite crucially distinguished by him as one from the other. The positive or voluntary law of nations, as Grotius understood it, was distinct from the law of nature as by two of its characteristics. First, the origin and foundation of the law of nations were to be explained as lying not in the normative order inherent in nature, but in the will and agreement of states and rulers, and with it being from the will and agreement of states and rulers that the law of nations derived its binding normative force.

Second, the law of nature, for Grotius, was law whose primary and essential sphere of application lay with the external relations between

states and rulers. This was not so with the law of nature. For the latter Grotius saw as the body of law that applied in the first case to individual men, but to states and rulers only in a secondary and derivative sense. Hence the standpoint of the law of nature was such that the principal form of war to which it related was that of private war: that is, war where individual men adopted the means of war in the exercise of the natural right of self-defence. As opposed to the law of nature, the positive or voluntary law of nations was law that Grotius considered to have its primary and essential sphere of application with states and rulers as in their mutual external relations. Indeed, the law of nations was not only law that applied to states and rulers; it was also law that presupposed as the condition for its generation, and as the condition for its applying to men, the association of men in states and their subjection therein to rulers possessing the competences of sovereignty. For the law of nations, as Grotius explained it, was law that served to define, and to regulate, the public rights that belonged to states as the bearers of sovereign power, and as these rights were exercised by states with respect to one another as so, most notably, with the public rights that were bound up with the waging of war by states as on the basis of their sovereign authority. Thus it was that Grotius presented the form of war that pertained specifically to the sphere of the law of nations as being not private war, but public war: that is to say, the law of nations related, as in specific terms, to war waged by states on the authority of the sovereign power, and in accordance with such formal conditions as say, for example, the condition that war was to follow from a declaration of war on the part of the state rulers concerned and so through the exercise of the rights that were particular to public war as its effects.

The characterization that Grotius provided as to the positive or voluntary law of nations, and his differentiation of it from the law of nature, carried one crucial implication for the law of nations as law that applied to states and rulers in the international sphere. This was that the principles of the law of nations were to be regarded as principles that reflected, and that answered to, the defining condition and attributes of states and rulers as in their status as the subjects of the law of nations; and hence that they stood as principles that, in consideration of this, were to be distinguished from the principles of the law of nature as these were understood to apply to individual men in respect of their specifically natural condition and attributes. This implication was of great significance for the development of the theory of the law of nations, and especially so as this was to be carried forward as in line

with the natural law conceptualization as set out and argued for by Grotius. It was also, in a more general sense, an implication that was greatly significant for the eventual delineation of international law in its character as a form of public law that had application to states and rulers and to their situation. As we shall see in Chapter 2, Hobbes and Pufendorf, who adhered to the basic terms of the Grotian conceptualization of natural law, were to hold that the law of nations consisted in nothing more than the law of nature as it applied to states and rulers. However, they were, in consequence of this, to fall short of an adequate explanation as to how the natural law as applying to states and rulers differed from the natural law as it applied to individual men. It was to be left to Wolff and Vattel, as we shall describe in Chapter 3, to explain how the natural law as applying to individual men was to be differentiated from the natural law in its application to states and rulers, and to explain, as Grotius himself had not, how the natural law, as modified to conform with the actual condition and attributes of states and rulers, was to be thought of as something that comprised an integral component part of the law of nations as to its form and substance.

2
Hobbes and Pufendorf

Hobbes and Pufendorf, as the writers considered here, stand as the direct successors to Grotius in the modern secular natural law tradition. This is so particularly with the determination of the substance of the natural law. For in this matter, Hobbes and Pufendorf followed Grotius in explaining the natural law as a law enshrining the basic right of men to act to defend and preserve themselves, and as a law pointing to the basic conditions of social order within which men were to act to secure the ends of their self-defence and self-preservation. The conditions of social order described in the natural law were understood by Hobbes and Pufendorf in terms where these involved, and related to, the institution of the state and the constitutional structure specific to the state in its familiar modern form. At the same time, Hobbes and Pufendorf saw the natural law, as a law of social order, as applying within the international sphere, and with them seeing the natural law in its international application as comprising the core substantive principles of the law of nations. This was the position that Hobbes took on the law of nations in his system of civil philosophy, as this is to be found set out in *The Elements of Law, Natural and Politic* (1640; first published in two parts, 1650) and *De Cive* (1642), and, above all, in his masterpiece in political thought *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (1651).[1] It was also the position that Pufendorf took regarding the law of nations in his system of natural law jurisprudence, as this is to be found expounded in the treatises *De Jure Naturae et Gentium Libri Octo* (1672) and *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1673).[2]

i. Hobbes

The place that Hobbes occupies in the modern secular natural law tradition is a prominent one, and this prominence is attributable to the

radical break that he made with the pre-modern tradition in natural law theorizing of Aristotle and Aquinas. The radicalism of Hobbes's break with the past is reflected in the celebrated argument that he made in *Leviathan* as to what he took to be the natural condition of the association obtaining among men. For Aristotle and Aquinas, the natural condition of association among men was the condition of society as embodied in the civil state. For Hobbes, however, the natural condition of human association was not a condition of society at all. It was rather the condition of universal war, or the condition of the war of all against all. This condition of war was explained by Hobbes in terms such that there was implied an opposition between the condition of nature and the condition of the civil state, or the commonwealth, and with this opposition being something that was to be overcome only by men establishing the civil state through their own will and agreement, or, as Hobbes put it, through their covenants.

In the account that Hobbes gave of the natural state of universal war in *Leviathan*, men were understood to possess a natural equality and a natural freedom as one to another. Thus men were understood to hold on equal terms the right and liberty to do, and to take, whatever was considered by them as necessary for the defence of themselves, and with this being limited only by the extent of their material strength and power. The natural right of self-defence, as so conceived, was the right of war, and with the natural right of self-defence as involving the right of war being, for Hobbes, an inalienable right and a right whose exercise by men was essential given the deficiencies of the natural condition of their mutual association. These deficiencies, as Hobbes listed them, followed from the absence from the natural condition of association among men of the institutional form of normative order that was specific to the civil state. Thus in the natural condition of universal war, there existed no common power for the effective government of men, no guarantee of security for men beyond what they achieved for themselves through their own individual strength and initiative, and no body of laws providing men with determinate rules of just and unjust conduct and with determinate rules relating to the acquisition and possession of property.[3]

With this account of the natural condition of universal war, it is to be emphasized that if Hobbes described the natural condition of the association among men as something free from the form of normative order present in the civil state, it is not the case that he considered that men in the natural condition of their association were free from all normative restrictions as to their conduct and their mutual relations.

For Hobbes maintained that men in their natural condition remained subject to what he identified as the laws of nature, and to the normative restrictions that these laws contained. The laws of nature, as Hobbes explained them, were laws disclosed to the natural reason of men as the universal laws or principles of peaceful association. In this their standing as the laws of peace, the laws of nature were the laws that Hobbes thought of as stating the principles that were to set the normative framework for, and to set the normative constraints and limitations applying to, the exercise by men of the right belonging to them in the natural condition of war to act to the end of ensuring the proper defence of themselves. Despite the surface appearance of one, there was no real contradiction suggested by Hobbes as between the possession by men of the natural right of self-defence and the fact of their subjection to the normative constraints and limitations imposed through the natural law. Thus in Hobbes's terms, the exercise of the right of nature was directed towards the defence of men, whereas the end of self-defence was something that Hobbes indicated that men would achieve for themselves only in consequence of their acting in accordance with the first-order principles of peace as summarized in the laws of nature.[4]

Hobbes laid down nineteen laws of nature in *Leviathan*. In reviewing these laws of nature, it is to be understood that the laws of nature, in Hobbes's sense of them, served to affirm both general principles of social order and general principles of justice and political morality. It is to be understood also that the general principles of social order, and those of justice and political morality, as affirmed in the laws of nature related not only to the terms for peace among men, but also to the basic form of the normative order that was to make for the ideal condition of peace as this was to be realized within the civil state.

The first law of nature referred to by Hobbes in *Leviathan* stated the fundamental law of peace, while also sanctioning the natural right of self-defence. Specifically, it was provided that men were bound to endeavour peace, but subject to the qualification that where peace was unobtainable men were permitted to use the means of war in order to defend themselves. The second law of nature stated the principle of reciprocity as to restrictions on rights, and with it providing that men were to lay aside their natural right to all things on a mutual basis and to rest content with such liberty as they were prepared to allow one to another. For Hobbes, the laying aside of rights, as involving restrictions on the exercise of rights, was something that presupposed acts of agreement or acts of covenant. Accordingly, he presented the third law of nature as the law of covenants, and with this providing that men were

required to perform the terms of the covenants into which they entered. In Hobbes's explanation of it, the faith of covenants ranked as the foundational principle of justice. Thus the essence of justice consisted in the performance of covenants, and with injustice consisting essentially in the failure to perform valid covenants.

The fourth law of nature was the law of gratitude, and it provided that men were to show gratitude for benefits received from others and to avoid ingratitude. The fifth law of nature concerned the duty falling on men to reach mutual accommodations, and it provided that men were to accommodate themselves one to another in their interactions. The sixth law of nature concerned the duty falling on men to pardon offences, and it provided that subject to securities as to the future, men were to pardon those who repented of their offences and were desirous for pardon. The seventh law of nature related to the principles of punishment, and with it providing that in retribution for offences done to them, men were to consider not the extent of their injuries, but the good that would follow from the inflicting of retribution. The eighth law of nature concerned contumely, and it provided that men were to refrain from actions, words, expressions and gestures that indicated hatred or contempt for other persons.

The ninth law of nature was a law directing men to avoid undue pride in their person, and it provided that men were to extend recognition to other men as being their equals by nature. The tenth law of nature was linked to the ninth law in its affirming the natural equality of men. Thus the law directed that men were to avoid arrogance, and with it providing that when men entered into conditions of peace, they were to refrain from reserving to themselves any rights which they were not prepared to allow to have reserved to other men on equal terms. The eleventh law of nature stated the principle of equity as applying to the decision of disputes, and with the law serving to exclude bias from decision-making procedures for the settlement of disputes through its providing that in disputes where men were entrusted to act as arbitrator, they were then required to deal with the parties to the disputes on the basis of equality.

The twelfth, thirteenth and fourteenth laws of nature concerned rights in the use and ownership of things. The twelfth law of nature provided that things that were incapable of being divided were to be enjoyed by men in common use when this was possible, and without limitation when the quantity of the thing in question permitted. This remained subject to the qualification that where things were not capable of being held in common, then they were to be allocated as per the number of

men having a valid claim to them. The thirteenth law of nature provided that where things did not allow for their division or for their common holding, then the entire right to them, or the first possession if use was to alternate, was to be determined through lots. Thus the fourteenth law of nature provided that the allotment of things was either to be through arbitrary allotment, as where allotments were settled by agreement among rival claimants, or it was to be through natural allotment, as where things were allotted on the basis of the right of the first born or on the basis of the right of first possession.

The fifteenth, sixteenth, seventeenth, eighteenth and nineteenth laws of nature that Hobbes laid down in *Leviathan* were to do with the procedural arrangements necessary for the maintenance of peace. The fifteenth law of nature provided that men responsible for the mediation of peace were to be allowed safe conduct. The sixteenth law of nature related to the settlement of disputes concerning matters of fact and matters of right, and it provided that the parties to disputes were to submit their claims of right to independent arbitration. Connected with this, there was the principle that Hobbes stated with the seventeenth law of nature. This was the principle that men were never to act as judge in their own cause and interest. For Hobbes, the integrity of dispute arbitration procedures presupposed that arbitrators were to be counted on to render impartial judgment. Hence the eighteenth law of nature provided that men were never to be accepted as arbitrators in disputes where they had some cause or interest inclining them to be biased in favour of one or other of the parties. Finally, it was necessary for the arbitration of disputes to be fair. Accordingly, the nineteenth law of nature stated that in disputes concerning matters of fact, the arbitrators were required to give equal weight to the arguments of the parties and to base their judgments on the testimony of independent witnesses.[5]

The statement of the nineteen laws of nature in *Leviathan* stands as the definitive statement that Hobbes gave as to the subject. However, it is to be noticed that Hobbes picked out a further law of nature of considerable significance in *The Elements of Law*. This was the law of nature that stated that, as a condition for the maintenance of peace, men were to allow trade and commerce among one another on the basis of non-discrimination.[6]

To repeat, the laws of nature were laws of peace, and as such they possessed the binding normative force particular to laws. Specifically, the laws of nature were claimed by Hobbes to be always binding on men in conscience (*in foro interno*), as in the respect that were always binding

on men as to the desire that they were to be acted on. However, Hobbes also insisted that the laws of nature were not always to be considered as binding in effect (*in foro externo*). Thus the laws of nature were to be thought of as obliging men to act in fulfilment of their requirements only in circumstances where it was safe and prudent for men so to act, and with this being so, for Hobbes, only in circumstances of material security sufficient for men to be assured that there would in fact exist a general conformity with the terms of the first-order principles of peace which the laws of nature set out.[7]

The key prerequisite for the material security necessary for the giving of effect to the laws of nature, as Hobbes identified this, lay in the presence of some common power adequate to enforce the provisions of the laws of nature, and so adequate to compel men to the performing of their obligations as embodied in the natural law. The power at issue here was the sovereign power as established in the civil state or commonwealth. Accordingly, it was the commonwealth that Hobbes saw as the objective institutional structure essential for giving effect to the laws of nature as by the means of power, and through this for the full realization of the terms of peace as laid down in the laws of nature. The relationship presented by Hobbes as between the principles of natural law and the principles pertaining to commonwealths was complex. Thus the institution of the commonwealth was understood to give effect to the laws of nature, while the principles of natural law were understood to point to the form of normative order to be maintained within the commonwealth and to determine the normative constraints and limitations which were to apply to the exercise of the sovereign rights and powers belonging to it. Further, it was the natural law that directed men to the establishing of commonwealths as such, and the natural law that, for Hobbes, contained within itself the principle that was critical for this purpose. This was the principle of covenants: that is, the principle that covenants were to be performed by the parties to them.

In Hobbes's account of it, the commonwealth stood as a form of association among men that was based in agreement or covenant. This was so for the reason that Hobbes thought of the natural condition of the association among men as that of war, and hence as something opposed to the condition of commonwealths considered as the condition of state association. The form of the covenant that Hobbes saw as establishing commonwealths was quite specific. What it involved, in its fundamentals, was an agreement among a multiplicity of men, and as engaging their will and consent, to authorize, establish and subordinate themselves to some person or persons who would exercise the

rights and powers of sovereignty to the end of their common defence, and in relation to which sovereign power they the parties to the agreement would acquire for themselves the status of subjects. The sovereign power stood as the bearer of an artificial personality, and, as such, the sovereign power possessed representative functions and capacities, in relation to subjects, and with these representative functions and capacities being embodied in distinct offices and hence exercised as official powers. The rights and powers of sovereignty comprised an authority structure, and with this being so by virtue of the sovereign power being based in covenants of authorization and hence based in the rights of subjects as the authorizing parties.[8]

The rights and powers of sovereignty were directed towards the end of peace within commonwealths, and it was through their exercise by the sovereign that there were created the power-based security conditions that Hobbes saw as essential for the laws of nature, as setting the terms of peace, to be given effect to. As Hobbes identified them in *Leviathan*, the rights and powers of sovereignty were such as to establish the absolute and exclusive authority of the sovereign with respect to subjects. This was the case, most strongly, with the rights and powers of sovereignty relating to the legislative, judicial and executive authorities such as are central to the constitutional structure of the modern form of state government. Thus it was that the sovereign held the legislative or law-making power. This consisted in the right to prescribe the rules of justice and propriety that were to be observed by subjects, and with the rules so prescribed by the sovereign being the civil laws as the laws particular to commonwealths. In consequence of holding the right of legislation, the sovereign held also the right of judicature. This right pertained to the judicial authority exercised by the sovereign, and it consisted in the right of deciding the controversies among subjects that involved reference to the laws. The executive powers that Hobbes pointed to as being among the rights and powers of sovereignty were powers relating to the business of government and public administration. So, for example, the sovereign held the right of making war and peace, as in respect of other commonwealths, and of maintaining the armed forces necessary for the defence of commonwealths and their subjects. Again, the sovereign held the right to appoint all ministers and public officials within commonwealths, both in peace and wartime. Yet further, it fell to the sovereign to reward subjects and to exercise the rights of punishment as against subjects who were in breach of the laws and the obligations that these imposed.[9]

In regard to the rights and powers of sovereignty, it is to be emphasized that Hobbes took these to be such that the sovereign was to be

thought of as unimpeachable as to its authority. So Hobbes claimed that there was no legitimate basis for subjects to act to depose the sovereign, and no legitimate basis for the sovereign to be charged with injustice or to be rendered liable to punishment. It is to be emphasized also that Hobbes understood the rights and powers of sovereignty to be essential to the sovereign in commonwealths, in that they were held by the sovereign without consideration for the actual constitutional form of sovereignty and hence without consideration for whether it was based in the monarchical, the aristocratic or the democratic form of state constitution.[10] Beyond this, Hobbes thought of the rights and powers of sovereignty as serving to establish the freedom and independence of commonwealths, and in this consistent with the absolute and exclusive form of the authority that belonged to the sovereign as the foundation for the government of commonwealths. In evidence for this, there was the rejection by Hobbes of the possibility of commonwealths and their sovereign rulers being made subordinate to an external and superior political authority. Thus as he insisted, the relinquishing by the sovereign of the rights and powers of sovereignty, or the transfer of these to some other agency, would result only in the dissolution of commonwealths.[11]

For Hobbes then, and to repeat, the sovereign as a power in commonwealths comprised an absolute and exclusive authority. However, the sovereign power, if absolute and exclusive as to its authority, was not, in his explanation of it, an arbitrary or an unlimited power. Crucially as in this connection, there is the sense in Hobbes of the sovereign power as being organized in accordance with the ideal conception of the rule of law and its defining principles. The key consideration here is that, in the terms that Hobbes presented it, the sovereign power was a power embodied in offices, and, as a construct of offices, a power that was validated through laws and that remained subject to such constraints and limitations as were appropriate to it as a power based in law and directed to the maintenance of the rule of law within the condition of commonwealths. Thus it was that the main rights and powers of sovereignty that Hobbes picked out were the right of legislation, the right of adjudication and the executive rights to do with law enforcement. At the same time, the exercise of these various rights and powers on the part of the sovereign was understood by Hobbes to be bounded by the principles of procedural justice such as are integral to the rule of law ideal. The principles of just procedure concerned were affirmed with the laws of nature as Hobbes specified them, as so with those providing for equality under the laws, equity in dispute settlement and

impartiality in the process of arbitration. In turn, the principles of just procedure, as founded in natural law, were everywhere recognized by Hobbes in his elaboration of the principles relating to civil law, crime and criminal responsibility and punishment, as where the emphasis was on the laws of nature, in their relation to the rule of law, as setting a restrictive normative framework having application to the sovereign as to the exercise of its rights and powers.[12]

As a further case where Hobbes saw the sovereign power in commonwealths as non-arbitrary since subject to constraints and limitations set in law, there is the matter of the law that he thought of as applying to commonwealths and to sovereign rulers in the sphere of their mutual external relations. According to Hobbes, the sphere of the mutual external relations of commonwealths and sovereign rulers was that of the state of nature, and so, as for him by definition, the natural state of universal war. That Hobbes took what we may refer to as the international state of nature to be the state of war is confirmed by what he pointed to, in the relevant chapter of *Leviathan*, as the evidence to support his claim that the natural state of men, as prior to the forming of commonwealths, was that of the war of all against all. For Hobbes here cited the condition of permanent war and war-readiness obtaining among the commonwealths as maintained by their sovereign rulers, albeit that he underlined that the security arrangements provided for by sovereign rulers as regarding subjects meant that the relations among commonwealths were not as fraught as those among individual men in the condition of their natural freedom.

> But though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbours; which is a posture of war. But because they uphold thereby, the industry of their subjects; there does not follow from it, that misery, which accompanies the liberty of particular men.[13]

The international state of nature being for Hobbes the natural state of universal war, then, consistent with his characterization of the latter, it followed that the sphere of the mutual external relations of commonwealths and sovereign rulers was to be thought of thus: as something

distinguished by the absence of a common governmental power, by the absence of non-self-help-based forms of security, and by the absence of determinate legal rules of just and unjust conduct and of propriety. It is because Hobbes presented the sphere of international politics in these terms that he is situated by commentators within the realist tradition in international thought and practice. This, as we explained in the Introduction, is the tradition where it is held that the sphere of international politics is anarchic, as on account of the separate states being understood to stand subject to no common international legal order and to no common institutions of international government. It is also the tradition where it is held that, as within the anarchic condition of politics obtaining in the international sphere, the separate states and their rulers are to use the power at their disposal to secure their respective interests and, in doing this, to act without regard for the normative restrictions such as are to be found set through the established principles of law and principles of justice and morality.

Despite its broad acceptance among the international relations authorities, the reading of Hobbes as a realist in his sense of international politics remains a flawed reading. For Hobbes did allow that there existed a framework of laws applying to states as within the international sphere. The law in question was international law, or rather the law of nations, and with this body of law being explained by Hobbes as consisting in the laws of nature in their direct application to commonwealths and to their sovereign rulers. Thus in Chapter 30 of *Leviathan*, Hobbes formally identified the law of nations with the natural law. At the same time, he affirmed that sovereign rulers were to be thought of as having the same natural right to act to preserve the security of commonwealths as individual men had to act to preserve themselves in their person, but that sovereign rulers were nevertheless bound in conscience to act in accordance with the normative requirements as to conduct which were given in the laws of nature.

> Concerning the offices of one sovereign to another, which are comprehended in that law, which is commonly called the *law of nations*, I need not say any thing in this place; because the law of nations, and the law of nature, is the same thing. And every sovereign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring the safety of his own body. And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard of one another, dictateth the same to commonwealths, that is, to the consciences of

> sovereign princes and sovereign assemblies; there being no court of natural justice, but in the conscience only....[14]

ii. Pufendorf

The identification that Hobbes made of the law of nations with the law of nature points to a fundamental contrast between his view of natural law and the view of the subject taken by Spinoza, the seventeenth-century political thinker with whom he is sometimes placed as among the representatives of the realist standpoint in international politics.[15] In Spinoza's account of it, the natural law related strictly to the right of nature, and with this right being, as it had been for Hobbes, a right to do, and to take, whatever was necessary to secure the ends of self-defence and self-preservation as to the extent of the material power of the individual agent concerned. However, Spinoza did not proceed to expound the natural law in terms where this was presented as stating principles of conduct that involved duties and obligations as set in opposition to rights, and that therefore involved the presence of normative constraints and limitations qualifying the exercise of the right of nature. It was thus that Spinoza diverged from Hobbes as in the matter of the natural law in its international application. Certainly, Spinoza followed Hobbes in seeing the sovereign authorities in commonwealths as bearing the right of war, as in consequence of the natural right of self-defence, and in seeing war and enmity as the specifically natural condition of the relations among states and sovereign rulers. Nevertheless, Spinoza would not follow Hobbes in regarding sovereign rulers as being subject to natural law, as in the sense where the laws of nature were understood to establish a normative framework that applied to, and that functioned to regulate, states and sovereign rulers in the sphere of their mutual external relations. Accordingly, there was no attempt by Spinoza to claim the natural law as embodying the substantive principles of the law of nations, as indeed there was no attempt to introduce or to appeal to the concept of international law as such.[16]

In the event, the recognition by Hobbes of the law of nations as contained within the law of nature is notable less because it serves to set him off from Spinoza, and more because it serves to underscore the fact of his alignment with the modern secular natural law thinkers who, starting with Grotius, were central to the establishing of the modern tradition of international law. This is brought out through the detailed consideration of Pufendorf, who, in his system of natural law

jurisprudence, was to expound positions close to those of Hobbes and, in doing so, to provide the general conceptualization of natural law that was to be adopted by the eighteenth-century writers Wolff and Vattel in their statements of the principles of the law of nations.

The core elements of the system of natural law jurisprudence that Pufendorf constructed are to be found in the exposition of the principles of the law of nature and the law of nations that he set out in *De Jure Naturae et Gentium* and *De Officio Hominis et Civis juxta Legem Naturalem*. Essential to the jurisprudential project, as carried through in these works, was the examination by Pufendorf of the principles of natural law that he saw as relating to the conduct of individual men and to their association within political society. In this, Pufendorf distinguished the natural law from the forms of law that remained positive in character: as with the divine law that embodied the will of God, as revealed through the Scriptures, and as with the civil law as the law established through the will of civil rulers and as determining the rights and duties of men as the subjects of the states where it was laid down. As opposed to the divine law and the civil law as the forms of positive law, the natural law was a law based not in will but in reason, and, in being thus possessed of a rational foundation, it stood as a universal law that defined the rights and duties that belonged to men without regard for their status as the members of particular nations and states. As to its substance, Pufendorf followed Grotius and Hobbes in presenting the natural law as the law of self-defence and self-preservation and the law of social order, or, as he put it, the law of sociability. This is reflected in the division that Pufendorf made of the principles of natural law into three distinct categories, as in accordance with the different objects of the substantive duties that the relevant principles provided for. First, there were the duties in natural law that men owed to God. Second, there were the duties in natural law that men owed to themselves. Third, there were the duties in natural law that men owed to one another.[17]

The main duties that Pufendorf saw men as owing to God in natural law were the duties that concerned the forming of proper conceptions as to the nature of God's existence, His attributes and His powers, and that concerned the proper practical honouring of God through suitable forms of worship.[18] The duties that men owed to themselves in natural law were based in what Pufendorf identified as the fundamental duty of men to act to preserve themselves. The duty of self-preservation, as Pufendorf understood it, included the duty falling on men to develop and perfect their intellectual and physical nature.[19] Also included as part of the principle of self-preservation was the natural right of men

to defend themselves, as through the killing or injuring of those who attacked their person or who violated their rights and their property. For Pufendorf, the right of self-defence obtained in the condition of natural liberty, as where men were to be thought of as being situated outside of the civil state, as well as in the condition of the civil state itself. Thus in the condition of natural liberty, men were permitted to defend themselves, as through the pre-empting of potential attackers, the punishing of actual attackers, and the securing of guarantees against further attacks. In the civil state, the right of self-defence was retained by men as a natural right: but with its exercise as involving the application of force being permitted only where it was impossible to appeal to the civil authorities for protection, and with all rights concerning pre-emption, punishments and guarantees being reserved to the civil authorities on a sole and exclusive basis.[20]

The third category of natural law principles that Pufendorf elaborated comprised the principles that stated the duties which men owed to one another. These duties were either absolute or hypothetical in form. The absolute duties in natural law, here, were the duties that men owed to one another universally and by nature in a direct sense, and so prior to and apart from human customs and institutions. The hypothetical duties falling on men under natural law were the duties that men owed to one another not on a universal basis and by nature direct, but only in consequence of the presence of particular human customs and institutions as established and consented to by men as through some specific act or acts on their part.[21]

The first of the absolute duties owed under natural law was the duty falling on men to respect the rights of one another, and hence to refrain from injuring one another in their person and in their rights. For Pufendorf, this duty was the foundation of all social order and of all the rights secured through social order. Thus it was a duty that implied that men were to be guaranteed proper protection for their life, bodily integrity and liberty, and for their rights relating to property and ownership. It was also a duty that gave rise to the rule of justice providing for restitution, as where men were required to make good such harm as they caused to the person and the rights and property of one another.[22]

The second absolute duty in natural law that Pufendorf held was owed by men towards one another was one that had been affirmed by Hobbes, and with this being the duty falling on men to recognize one another in their natural equality. In line with this, men were required to accept one another as equals, as under the laws, and so accept one another as bearers of the rights and obligations as contained in natural

law and positive law on a strict reciprocal basis. Hence there followed the impropriety in natural law of men claiming exemptions from duties imposed through laws that were binding on others, and of reserving for themselves such rights as they would withhold from others.[23]

Third, there were the absolute duties in natural law applying to men in their conduct towards one another that Pufendorf identified as the common duties of humanity. These were the general duties of benevolence through which men provided benefits for one another such as advanced their mutual assistance and co-operation. The duties concerned included the duties relating to the protection of visitors to foreign lands and those relating to the conducting of trade and commerce among men under market conditions. The basis of the common duties of humanity lay in the rule of gratitude, and with this meaning for Pufendorf, as it had for Hobbes, that men were required under natural law to show proper gratitude to persons extending benefits to them.[24]

The last of the absolute duties falling on men in natural law that Pufendorf treated of was the duty of good faith that applied to the parties to agreements. As Pufendorf explained it, the duties of men as concerning respect for rights, natural equality and common humanity were absolute duties, but as such fell short of constituting a complete normative framework for social order. For men to secure the full advantages of participation within society, then it was essential that they should form mutual agreements serving to establish fixed rules and principles to govern their interactions and to mark out their respective rights and duties. The merits of such agreements were self-evident, as with the structuring of the exchange of goods and services among men and with the organization of their individual projects and personal relations so as to limit the occasions for conflict. Thus it was that to set a general normative foundation for voluntary agreements within society, there had to be assumed to hold an absolute duty in natural law to the effect that men were required to fulfil their agreements in good faith.[25]

The faith of agreements was a principle of natural law that Pufendorf thought of as conferring a specific normative status on the duties and obligations that were established in conformity with its terms. Of particular importance here is the distinction that Pufendorf made, in discussion of good faith, as between the duties owed by men as arising from promises and agreements and the duties that were owed by men as common duties of humanity. According to Pufendorf, the common duties of humanity involved what were authentic rights and duties, but which nevertheless remained imperfect rights and duties. For the rights and duties belonging to the sphere of the common duties of

humanity were rights and duties where proper conduct by men relating to them might be requested, and improper conduct relating to them might be condemned for its inhumanity, but where there was no legitimate resort to be had to means of coercion in order to compel men to honour the rights and to fulfil the duties concerned. In contrast to this, the sphere of the promises and agreements of men was the sphere of perfect rights and duties. Thus the rights and duties of men as created through promises and agreements were rights and duties that were appropriately supported by a coercive power, and where it was legitimate to resort to means of coercion so as to compel men to respect the rights and to discharge the duties at issue.[26]

The distinction between imperfect rights and duties and perfect rights and duties, as Pufendorf explained it in connection with promises and agreements, is central to a key argument that he made concerning the faith of agreements. This was that the principle of the faith of agreements stood as the link between the absolute duties in natural law and the hypothetical duties to which men were subject from the standpoint of natural law. As we have noted, the duties given in the hypothetical principles of natural law were the duties that Pufendorf saw as applying to men in consequence of the existence of customs and institutions which were established and consented to by men as through their own acts. For Pufendorf, the institutions that provided the context for the application to men of the hypothetical duties as set through natural law were institutions that were founded in acts of agreement among men, and hence institutions which presupposed for their introduction the acceptance by men of the binding normative force of the principle of the faith of agreements. There were three such institutions founded in agreements that Pufendorf treated of in *De Jure Naturae et Gentium*, and with these being the institutions of language, property and ownership, and government in the civil state.[27]

The discussion by Pufendorf of the institution of the civil state is crucial in assessing his place in relation to the tradition of international law. The basic justification for the institution of the state that Pufendorf set out is one that runs substantially along the lines of the form of the justification for the state as argued for by Hobbes. Thus Pufendorf held that the state was necessary for the perfecting of the rights and duties that belonged to men under natural law, and with this being so because the state stood as the institution that possessed the means of coercive power adequate to secure general respect for the rights of men, and a general fulfilment by men of their duties, as these rights and duties were implicit in the terms of the natural law. The security that Pufendorf saw the state as providing

for men, as to their rights and duties, was the critical factor in the state overcoming the limitations of what he presented as the natural condition of the society that obtained among men in their relations with one another.

The natural condition of the society of men was for Pufendorf, as it had been for Hobbes, a condition of society that stood in opposition to the condition of society particular to the civil state. Pufendorf did not agree with Hobbes that the natural condition of the relations among men was the state of war as such. For he considered that men in this condition were bound together through nature in the form of the kinship as given in their common humanity. However, he did recognize and make reference to, as among his premises for argument, the aspects of the natural condition of men that Hobbes had pointed to in making good his claim that this as the state of nature involved a state of war. In specific terms, the state of nature, as Pufendorf characterized it, was the state of natural liberty and natural equality, where men were free from superior authority and permitted to act to exercise their right to defend and preserve themselves, in their person and their rights, as in line with their own determinations and with their own individual strength and power. The state of nature was further distinguished by the absence of a common power discharging the functions of government, as with the adjudication of disputes about rights, the prescribing of the rules applying in adjudications and the imposition of sanctions in the enforcement of adjudicative decisions. The consequence of the absence of a common power, as Pufendorf explained this, was not a state of war among men. It was rather that the natural state of men stood as a condition of society where there existed no effective institutional context for the rights and duties as set and implied in natural law, and hence no effective institutional context for the realizing by men of the ends to which they were directed in natural law as relating to their self-preservation and their participation in social order.[28]

The institutional context that Pufendorf considered to allow for the full realization of the ends of self-preservation and social order, and so for the overcoming by men of the natural condition of their society, was that embodied in the civil state. According to Pufendorf, the causal factors in the development of the state related to the concern of men for protection from harm and for the advantages of social existence.[29] However, the foundation for the state, and for the institution of government, lay in the agreement of men. For by nature men were free and equal and so situated apart from all superior authority, and with it following from this that the subordinating of men to government

within the state required some explicit act of agreement by which the state, as an institution, was brought into being. The state stood as a unified association of men for common ends, and its forming involved the subjection of the men as associated to a common power such as to ensure that men would respect their mutual rights and thereby act in furtherance of the common interest. Thus, for Pufendorf, the agreement basing the state was an agreement directed both to the establishing of the state, as a form of association, and to the determination of the person or persons on whom the institutional powers belonging to the state were to be conferred. The state, as instituted through agreement, comprised a distinct legal person with its own rights, and with a capacity for independent will and agency to be exercised by the person or persons having the governmental powers essential to rulership in the state and, as such, possessing the rights and powers of sovereignty.[30]

As to the rights and powers of the sovereign ruler, these in Pufendorf's specification of them were, in their fundamentals, the same as the sovereign rights and powers that Hobbes had identified. Thus the sovereign ruler held the legislative power in the state, as the power exercised in the enactment of the civil laws as the laws determining the rights and the property of subjects. The sovereign ruler also held the power of enforcing the laws, as with the punishment of those breaking the laws, and the adjudicative power as exercised through the application of the laws in the settlement of disputes. Yet further, the sovereign ruler held the powers of war and peace as to other states, in addition to the powers necessary for state administration such as those relating to taxes and public appointments.[31] The rights and powers of sovereignty were essential to rulership in the state, and they remained the same, as sovereign rights and powers, without regard as to whether government was based in the monarchical, the aristocratic or the democratic form of state constitution.[32]

There were certain defining characteristics that Pufendorf took to belong to the governmental authority structure bearing the sovereign rights and powers of rulership in the state, and these, as he elaborated them, served to mark out the state as a sovereign and independent form of association. Thus the government authority had the characteristic of supremacy in that the state acted through its own will and judgment, and without subjection to any external power claiming superiority in relation to it. Again, the government authority had the characteristic of non-accountability, and with this such that the state was not required to answer to any external agencies for the exercise of its sovereign rights and powers or to be made liable for punishment in connection with this. As a final case, the government authority had

the characteristic that it was exempt from subjection to civil law, as in the respect that the civil law could have no binding application as to the sovereign given the status of the sovereign, as the legislative power, as the final source and origin of the civil law.[33]

The various characteristics of sovereignty as referred to are such as to bring out how, for Pufendorf, it was the legislative power, as the power relating to civil law, that stood as foundational among the rights and powers of sovereignty which belonged to government in the state. The civil law, as Pufendorf explained it, was set apart from natural law in that it was law that proceeded from the will of the sovereign ruler, and hence law that presupposed the existence of the state as an institution established through agreement. However, the civil law remained based in natural law, and with its binding normative force for men deriving from the principles of natural law to which it gave effect. Here, the distinction of the civil law, as a specific mode of legal regulation, lay in its giving determinate form to the rights and duties of men, as pointed to in natural law, and in its involving a determinate institutional structure that comprehended effective judicial and law enforcement procedures for its own maintenance and application. Thus it was that, in Pufendorf's account of it, the civil law, and the rights of adjudication and punishment associated with it, served to buttress the natural law with the sanction of coercive power and as so, through this, ensuring that within the state the rights and duties provided for in natural law were rendered explicit and enforceable as perfect rights and duties.[34]

The matter of the supremacy, non-accountability and exemption from civil law as belonging to the sovereign power of government in the state bore directly on the matter of the function that Pufendorf saw the state as discharging, with the maintenance of the rule of law, in bringing perfection to the rights and duties described in the natural law. This perfecting of the rights and duties under natural law of course involved the subjection of men to the rights and powers of the sovereign ruler: and with these being rights and powers that, for Pufendorf, were absolute in precisely the sense implicit in the attribution to the sovereign ruler of supremacy, non-accountability and exemption from civil law as the essential characteristics of sovereignty. The issue concerning Pufendorf that presents itself here is to do with how, and in what form, states that were sovereign in the respects that he picked out were to be understood as relating to one another in the international sphere as under the constraints and limitations set through law. In consideration of this, it is to be recognized that Pufendorf allowed for the existence of an authentic legal framework applying to states and rulers

in their mutual external relations, as through his specification of the rights belonging to the sovereign power in the state that concerned war and peace and the forming of treaties.

In regard to these rights of sovereignty, Pufendorf set down the basic principles, at the level of hypothetical natural law, that he held were to govern the relations among states and rulers in the sphere of international politics. Thus in line with the substance of the established just war doctrine, he here insisted that the waging of war by states required just cause, and with the accepted just causes including self-defence, the recovery of things owed, and the obtaining of restitution for rights violations and guarantees for future security. So likewise did he insist, as again in line with mainstream just war doctrine, that the rights of war and peace relating to the state were monopoly rights vested in the sovereign ruler, and with the right of initiating war and the right of concluding peace agreements belonging to the sovereign on a sole and exclusive basis.[35] There is also the statement of the principles relating to the law of treaties, understood as the law governing the agreements formed by sovereign rulers. With this, Pufendorf gave attention both to state treaties that specified rights and duties set directly in natural law, as with treaties providing for diplomatic rights, and to the state treaties that he saw as specifying rights and duties which were not as such contained within natural law.[36]

In principle, the rights of sovereignty to do with war and peace and with treaties, as Pufendorf expounded them, pertained to the law of nations as the form of international law that regulated states and rulers in their mutual external relations. This, certainly, was how it had been for Grotius in *De Jure Belli ac Pacis*. Yet as opposed to Grotius, Pufendorf did not present the law of war and peace, and the law of treaties, as belonging to the law of nations proper. For in his presentation of them, the rights of war and peace and the rights concerning treaties, as rights of sovereignty, were rights that were exercised in the context of the institutional order particular to the state. Accordingly, these stood as rights that were to be thought of as originating through agreement, and as holding only within the state as an institution founded in agreement. However, it is to be emphasized that the explanation that Pufendorf gave of the matter was such that the sphere of the mutual external relations of states and rulers, as where international law had its application, was understood to be the sphere of the state of nature. In being so, it was the sphere of a natural form of society that was by definition devoid of institutions and of the agreements necessary for the creating of institutions.[37]

Given that Pufendorf saw states and their rulers as co-existing in a natural condition of society, then it followed, for him, that the law that was to regulate states and rulers in the sphere of their mutual external relations could not be law having the status of law that proceeded from agreement or that involved, as the basis for its application, institutional structures which presupposed agreements. In other words, the law applying to states and rulers in the international sphere was law that, from Pufendorf's standpoint, could be thought of only as pertaining to the absolute natural law (the hypothetical natural law requiring institutions and agreements for it to be capable of having application): and with the natural law as in its absolute form being, as to its substance, the law that he expounded as describing the first-order principles of self-preservation and social order among men. Thus it was that when Pufendorf addressed the matter of the status of the law of nations, as the form of international law that applied to states and rulers, he confirmed the view of Hobbes such as to the effect that the law of nations consisted in the same principles of natural law that applied to individual men outside of states, and as prior to the institutional agreements which served to found states. This position, as to the identity of the law of nations and natural law, was the one that Pufendorf set out in *De Jure Naturae et Gentium*, as where he was explicit in his reference to Hobbes, and where (as opposing himself to the position of Grotius) he was insistent in his denial that there was a positive or voluntary law of nations with the force of law proper.[38]

iii. Hobbes and Pufendorf: natural law and international law

Hobbes and Pufendorf hold an important place in the tradition of the modern law of nations, and they are to be viewed as having contributed meaningfully to its general development. To account for this, it is to be understood that Hobbes and Pufendorf played a crucial part in the determination of the concept of the state and its essential principles, and that, in doing so, they went beyond anything in Vitoria, Suarez, Gentili and Grotius as to the detail and systematic coherence of their specification of the institutional attributes of states that defined the position of states as the primary subjects of the law applying within the international sphere. The efforts of Hobbes and Pufendorf with the conceptualizing of the principles of statehood were most notable with the principles pertaining to the internal domestic political organization of states. Here, the state was recognized as being based in the principles

of representative government. Thus the sovereign ruler was taken to represent the interests of subjects and in accordance with their authorization, and with the rights and powers, as belonging to the sovereign ruler, being taken to be vested in offices and to be exercised as official rights and powers as within the framework of a constitutional order. As to the structure of the constitutional order of the state, this, for Hobbes and Pufendorf, was taken to comprehend the rights and powers to do with legislation, adjudication and the executive tasks of administration, as essential competences of state government and as organized within offices as rights and powers of sovereignty. As to the object of the rights and powers of sovereignty, this was presented by Hobbes and Pufendorf in terms where the ruler, as a representative person, was concerned with the peace and security of subjects, but with this concern standing as a public concern and hence one defined as a matter of laws and as something to be attended to, as by the ruler, as through the maintenance of the rule of law. The law-directedness of the concern of the ruler was fundamental, and so it was that, with Hobbes and Pufendorf, there was present the recognition of law as involving constraints and limitations on the ruler as in the exercise of sovereign rights and powers.

In addition to treating of the internal domestic political order of states, Hobbes and Pufendorf focused attention on the situation of states in their external aspect and so in the sphere of their mutual external relations. Here, it was explained how states held sovereign rights and powers, and hence monopoly rights and powers, with respect to war and peace and to treaties. Of more fundamental account still, it was brought out how states possessed a distinct legal person status that was defined through their being subject to sovereign rulership, and how the legal personality belonging to states as sovereign entities was such that states were to be thought of as being free and independent, as in relation to one another, and free and independent by reason of their sovereignty.

Thus it was that Hobbes and Pufendorf insisted that states that were sovereign stood exempt from subordination to all external political authority structures, and with Pufendorf pointing to how supremacy and non-accountability were bound up with sovereignty as among the essential characteristics of states and the governments of states. Hobbes was with this matter to take up an extreme view as to the situation of states in the international sphere. For he presented states as free and independent entities, and hence as sovereign entities, as standing to one another in a condition of nature understood to be the natural condition of universal war. However, the key consideration with this, for

our purposes, is not the assumption on Hobbes's part as to the inherent belligerency of states and sovereign rulers in the context of interstate relations; and it is to be underlined that this was not at all the position taken by Pufendorf, who otherwise accepted the Hobbesian starting-point that states were related to one another as though in an international state of nature. What is key is the consideration that for Hobbes, and for Pufendorf also, the sovereign rights and powers of states, even when organized through the constitutional form of sovereignty, were such as to exclude the possibility of states being made subject to institutions of international government. In this, Hobbes and Pufendorf served to contribute to the casting of the image of international law as law that remained unsupported by institutional agencies bearing the rights and powers proper to government, and hence as law that applied to states, as its subjects, whose attributes of sovereignty, as under it, rendered it defective in the matter of its application and enforceability and, through this defectiveness, as something deeply problematic as a form of law as such.

To the extent that the sense of international law as problematic as a form of law is present in Hobbes and Pufendorf, then it is to be emphasized that this did not involve any denial by them of the reality of law as obtaining in the international sphere. On the contrary, Hobbes and Pufendorf clearly affirmed the existence of the law of nations, which, as we have seen, they identified as the laws of nature in their application to states and their sovereign rulers.

In this specification of the law of nations, Hobbes and Pufendorf were faithful to the past as to substantive law, in that they confirmed with their conceptualization of natural law the central principles of the established just war doctrine. Thus lawful authority was endorsed as a condition for justice in war, as with the right of war being presented as a monopoly right as vested in the person of the sovereign ruler. As to just cause, this Pufendorf explained in reference to the classic principles of self-defence, the recovery of property and restitution for rights violations and guarantees of security; while, for Hobbes, the right of war, as it figured in the first law of nature stated in *Leviathan*, was defined as the right of self-defence and was effectively limited to self-defence, as to cause, as through the normative considerations to do with the conditions for peace which were set out in the other laws of nature. As concerning right intention as a condition for justice in war, this was implicit in the natural law formulations provided by Hobbes and Pufendorf, since, with both writers, the natural law stated the framework principles for a peace based in a just order of mutual relations

with which it was obligatory for men, and by extension obligatory for states and rulers, to conform in their conduct. So, for example, Hobbes made an indirect appeal to considerations of right intention, as applying in war, with those of the laws of nature where he emphasized the endeavouring of peace, the preparedness to pardon and the forward-directed justification for punishments as obligations set in natural law and hence as preconditions for the maintenance of peace.

Beyond this, it is to be observed that the laws of nature that Hobbes and Pufendorf picked out served to affirm principles that, in their application to states and sovereign rulers, belong to the conventional system of the law of nations and that, as they looked forward rather than back to the past, stand as principles which have become central to the substance of international law in its modern form and tradition. This is true not least of Hobbes in what he said of natural law in *Leviathan*, as in regard to the following substantive principles of international law as referred to: the principles of peace and self-defence contained in the first law of nature, of which principles that of self-defence is fundamental in international law as to states and their inherent rights; the principle of the faith of covenants given in the third law of nature, and with this principle being basic for the law of treaties; the principles of natural law concerning the idea of equality as expressed in the ninth, tenth and eleventh laws of nature, which principles relate in their international application to the core principle of the sovereignty and equality of states as the foundation for international law; the principles to do with the ownership of things as set out with the twelfth, thirteenth and fourteenth laws of nature, and with these principles relating in the context of states and rulers to such principles as those of territorial rights and territorial jurisdiction; the principle of safe conduct for those mediating peace as stated in the fifteenth law of nature, and with this principle pointing in the direction of the law governing embassies and diplomatic relations; the principles regarding the arbitration of disputes as elaborated in the sixteenth, seventeenth, eighteenth and nineteenth laws of nature, and with these principles being now contained in the parts of international law that concern, and provide for, peaceful procedures of international dispute settlement, and up to and including formal adjudication, among states and governments.

Hobbes was also to confirm, as through his statement of the laws of nature, certain principles that, if not substantive principles of international law as such, are nevertheless principles to do with conditions for peaceful association which may, as they apply to states and rulers, be thought of as being presupposed in the concept of international

law. Thus there is the principle of reciprocity in limitations on rights stated in the second law of nature in *Leviathan*, and the principles to do with gratitude, mutual accommodation, pardons, punishments and contumely as stated in the fourth, fifth, sixth, seventh and eighth laws of nature. These are principles that, in their international application, are such that they point to a framework for the maintenance of minimum social order among states and rulers, and as so setting the conditions for international society these principles connect up with the principle that Hobbes endorsed in *The Elements of Law* as to freedom of trade and commerce as a foundation for peace. The freedom of trade and commerce stands as a prominent concern of international law, and in allowing for it as pertaining to the law of nations Hobbes was to be followed by Pufendorf, who, as we have seen, included it among the common duties of humanity that he took to pertain to the sphere of the absolute natural law. As to Pufendorf on the law of nations as this was presented from the perspective of the absolute natural law, it is necessary only to note in passing that the terms of the laws of nature, as he expounded them, related to the substantive principles of international law as here cited: the rights and duties of men in natural law as concerning self-preservation, as relating to the principle of the inherent right of states to defend themselves; the duties of men under natural law as concerning mutual respect for their person and rights and as concerning mutual respect for their natural equality, as relating to the principle of the sovereignty and equality of states; the natural law principle of good faith in agreements, as relating to the principle of the faith of agreements entered into by states and governments.

Apart from the substantive principles of the law of nations that Hobbes and Pufendorf affirmed as through their reference to natural law, there is the matter of the status that they assigned to international law as through its being conceptualized as consisting in the laws of nature as applied to states and sovereign rulers. With this, it is to be underlined that the natural law conceptualization of the law of nations, as this was carried through by Hobbes and Pufendorf, served to fulfil certain of the claims and aspirations that we have associated with the ideal of international law. Thus Hobbes and Pufendorf thought of the laws of nature as laws that were disclosed directly to human reason, and hence as laws which possessed a universal reach and application. This aspect of universality as belonging to natural law, as when it is considered as per Hobbes and Pufendorf as embodying the substance of the law of nations, is something that meets the claim and aspiration that international law should carry with it a universal jurisdiction as comprehending the diversity of the

states and peoples within the international sphere. Again, the natural law conceptualization, as advanced by Hobbes and Pufendorf, meets the claim and aspiration that international law should, in principle, possess a binding normative force which stands independent of the will and agreement of states and governments to be bound by it. As in line with this, the natural law, for Hobbes and Pufendorf, was understood to be law that, as in its form as the law of nations, was to be thought of as binding directly on the rulers within states and as imposing significant normative constraints and limitations on them as to the exercise of their sovereign rights and powers as with respect to one another.

If it is true that Hobbes and Pufendorf gave recognition to the reality of international law as with their identification of the law of nations with the natural law, then it is to be emphasized that there remain significant defects with the concept of international law for which they argued. The first defect to point to in the account that Hobbes and Pufendorf gave of international law lies in their exclusion of positive law, as law based in principles of will and agreement, from the province of the law applying to states and rulers in the international sphere. Here, Hobbes and Pufendorf stand in sharp contrast to Grotius. To be sure, Grotius identified certain first-order principles of natural law, such as those relating to self-defence, property rights and good faith in agreements, as principles that he took to form part of the law of war and peace as it applied to individual men and to states and rulers. However, Grotius also maintained that the law of war and peace, as it applied to states and rulers, comprehended the law of nations proper, and with the latter being classified by him as the form of positive or voluntary law which was founded in the will and consent of states and rulers and which, on this account, was to be distinguished from the law of nature as such. In this matter, Grotius was very much more in line than Hobbes and Pufendorf with the direction to be taken in the subsequent development of international law. For modern international law has developed such that it includes within itself certain core elements of positive law, and with the positive law of nations being expounded as the law that is to be found given in such of the conventional sources of the law as state custom and the treaty agreements formed by states and rulers.

The neglect by Hobbes and Pufendorf of the elements of positive law contained in the law applying to states and rulers is bound up with an additional defect in their approach to international law, and one where the question of the status and position of states and rulers as the

subjects of international law presents itself as being of critical importance. Here again, the contrast with Grotius is instructive. According to Grotius, the positive or voluntary law of nations was law that originated in the will and consent of states and rulers, and law that he saw as having an exclusive application to states and rulers as its own quite particular subjects. As opposed to this, there was the law of nature. The latter, for Grotius, was law that applied to states and rulers, but law that had a uniform application to individual men and to states and rulers, and, in this, without regard for its effects as law for men remaining fundamentally distinct from the effects which it involved for states and rulers. As Grotius had done, Hobbes and Pufendorf thought of the natural law as applying both to individual men and to states and rulers in the international sphere. However, it is to be underlined that with Hobbes and Pufendorf, as in contrast to how it had been with Grotius, there was no appeal made to a positive law of nations that was to be thought of as having application to states and rulers on some particular and exclusive basis. Thus it was that Hobbes and Pufendorf promoted a concept of international law where the principles of international law were left unrelated to the actual situation of states and rulers, and where, as the result of this, the juridical integrity of international law was left radically undermined as in respect of the rights and duties which the law was intended to define and to give effect to.

The principles of the natural law, as in the form that Hobbes and Pufendorf expounded them, were such as to direct that men were to establish, and to subject themselves to, states and state institutional structures. This was so for the reason that states and state institutions were considered by Hobbes and Pufendorf to be necessary to ensure the enforceability of natural law, and thereby to make possible the full realization of the conditions of peace and social order as pointed to in the natural law. Thus in the argument of Hobbes, the presence of commonwealths as subject to sovereign rulers was crucial if the framework principles of natural law were to be supported by a coercive power sufficient for the obligations as set through the natural law to be capable of adequate enforcement, and hence for them to be binding on men in effect and not only at the level of conscience. As regarding the position of Pufendorf, the presence of states and state institutions was essential if the rights and duties of men, as defined in the natural law, were to be raised up such as for them to acquire the juridical standing of perfect rights and duties. For perfect rights and duties were understood by Pufendorf to be rights and duties that were enforceable through the exercise of coercive power, where this power was conditional on

the introduction of some institutional structure based in acts of will and agreement. Hence, for Pufendorf, it was the state that served to perfect the rights and duties of men, given that, as he explained the matter, states provided for the institutional procedures relating to law-making, adjudication and executive functions that permitted the effective enforcement as relative to men of the rights and duties as described in the natural law.

Just as Hobbes and Pufendorf saw the situation of individual men prior to the forming of states as one where men were bound by natural law, so likewise was the situation of states and rulers in the international sphere presented by them as one where states and rulers stood subject to the principles of the natural law. Nevertheless, Hobbes and Pufendorf did recognize that there was a clear point of distinction as between the situation of individual men in relation to natural law and the situation of states and rulers. This was that in contrast to how it was for individual men, there existed no requirement, as set in the terms of the natural law, to the effect that states and rulers were to subordinate themselves to institutional authority structures that possessed the coercive power machinery as adequate for the meaningful enforcement of the rights and duties which applied to them.

Here, it is to be recalled that Hobbes and Pufendorf insisted that states were related to one another in the international sphere as in a natural condition of society, and that the condition of their society was for this reason something that remained exclusive of all institutional framework structures based in will and agreement. For Hobbes, the relinquishing by rulers of the rights and powers of sovereignty, as in favour of some external and superior political authority, was excluded from consideration as destructive of states; and there is nothing about his arguments regarding the principles of commonwealths to indicate that he admitted the desirability in prudence, or the formal possibility in logic, of sovereign rulers covenanting together to establish institutions of government with rights and powers of an international reach and application. With Pufendorf, institutional structures involved principles of natural law as in its hypothetical form. However, there were for Pufendorf no hypothetical principles of natural law applying in the international sphere, and as relative to institutions as there established, such as would be demanded for the bringing of juridical perfection to the rights and duties belonging to states and rulers under natural law. Indeed, the hypothetical principles of natural law that Pufendorf treated of as particular to the institution of the state were such as to underwrite the supremacy and non-accountability of states, and with this being so in terms that served to secure states, as by

definition, against their subjection to institutions bearing governmental powers and authorities.

The view that Hobbes and Pufendorf took as to the position of states and sovereign rulers as within international society is one where there was implied what presents itself as the inherent limitation of international law as a distinct form of legal order. This is the limitation of international law that is to do with its status as law that is unsupported by institutions of government, and with this coming down to the absence from the regime of international law, as the law applying to states, of centralized institutions of law-making, adjudication and executive implementation of the laws and of centralized arrangements for the imposing of sanctions in cases of the non-fulfilment of obligations. Even so, it is to be observed that while Hobbes and Pufendorf properly pointed to the limitation of international law as a form of law, the account that they gave of this was such as to lead them to the improper, and unwarranted, conclusion as to the imperfection, and hence the juridical inadequacy, of international law as in regard to the rights and duties to which it related. That Hobbes and Pufendorf concluded this is understandable. For Hobbes and Pufendorf saw states and rulers as subject only to natural law, and thus as standing outside all institutional frameworks based in will and agreement: and such as might, as for Hobbes, render natural law obligations effectively binding, or such as might, as for Pufendorf, transform the mode of natural law binding on states and rulers from the absolute natural law to the hypothetical natural law. However, the conclusion here serves only to underscore the ultimate failure of Hobbes and Pufendorf in their contribution to the determination of the concept of international law. In specific terms, it is brought out that Hobbes and Pufendorf failed to determine the concept of international law such that the principles of international law were explained as according with the actual condition of states and rulers and their defining juridical attributes and characteristics, but with the juridical integrity of international law and the juridical perfection of the rights and duties as affirmed through international law being nevertheless vindicated and carried through to a full theoretical realization. This failing was to be avoided, and a more satisfactory concept of international law to be determined, in the work of Wolff and Vattel.

3
Wolff and Vattel

The work of Wolff and Vattel from the middle decades of the eighteenth century marks the culmination of the modern secular natural law tradition, as this tradition provided the as then dominant conceptualization of the law of nations. As with Grotius, Hobbes and Pufendorf before them, Wolff and Vattel thought of the law of nature as a universal law of reason, and one that was focused on self-defence and self-preservation and on the principles of the form of social order appropriate for securing the ends of self-defence and self-preservation. It was as such that Wolff and Vattel took the natural law to apply to individual men, as in the condition of nature obtaining prior to the establishing of political society through contractual agreement, and then to base the framework of civil laws and state governmental institutions which defined the terms of organized association among men within political society. In addition, Wolff and Vattel took the natural law to have application in the international sphere, and with it there to regulate the mutual external relations of nations and states, and to define their rights, interests and obligations, as sufficient to establish among nations and states the condition of a form of society subject to the rule of law. Where Wolff and Vattel are to be placed with Grotius, and to be set apart from Hobbes and Pufendorf, is in the respect that they presented the law applying to nations and states in the international sphere as a body of law that comprised not only the law of nature, but also what they considered to stand as the positive law of nations. This is so with the exposition by Wolff of the elements of the law of nations, as in accordance with his favoured scientific method, in the treatise *Jus Gentium Methodo Scientifica Pertractatum* (1749).[1] It is so also with the exposition of the law of nations that Vattel provided in the work that was to become one of the single most influential treatises in the history of modern international law: *Le Droit des Gens, ou Principes de*

la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains (1758).[2]

i. Wolff

In the system of the law of nations expounded in the *Jus Gentium Methodo Scientifica Pertractatum*, Wolff began with an identification of what he saw as four distinct component parts of the law of nations. First, there was the necessary law of nations, the *ius gentium necessarium*, which stood as the law of nature as applied directly to nations and states. The necessary law of nations was strictly binding in conscience and absolutely immutable in its form, and in consequence of this it had universal application to all nations and states in the sense that nations and states were not at liberty to exempt themselves, or one another, from the obligations that the law imposed.[3] Second, there was the voluntary law of nations: the *ius gentium voluntarium*. This Wolff explained as a form of law that derived from the necessary law of nations, and that accordingly possessed both a universal validity and a strict binding normative force for nations and states. However, the voluntary law was also law that embodied the modifications, or adaptations, of the necessary law of nations that were required in order to render the latter consistent with the situation of nations and states as regarding their common interests. Third, there was the stipulative law of nations, the *ius gentium pactitium*, and with this comprising the law contained in the formal treaties, or stipulations, as set by nations and states through their acts of agreement. Fourth, there was the customary law of nations: the *ius gentium consuetudinarium*. This part of the law of nations consisted in the law as created by nations and states through their long established practices.[4]

The voluntary law of nations, as Wolff referred to it, is not to be confused with the voluntary law of nations as this figures in Grotius' classification of the elements of the law of war and peace, and the avoiding of such confusion is essential if the conceptualization of the law of nations that Wolff presented is to be properly understood. As Grotius explained it, the voluntary law of nations was the law generated through the will and consent of nations and states, and, as such, it was the law pertaining to the parts of the law of nations that Wolff designated as the stipulative and the customary law of nations. With Wolff, the matter of the voluntary law of nations is much more complex. On the one hand, Wolff distinguished the voluntary law of nations from the law of nations in its stipulative and customary forms. For in contrast to the

latter, the voluntary law of nations was something that Wolff saw as deriving from the necessary law of nations and, on account of this derivation, as having its foundation in the natural law. On the other hand, Wolff placed the voluntary law of nations together with the stipulative and customary law as belonging to what he termed the positive law of nations: the *ius gentium positivum*. This, for Wolff, was the general division of the law of nations where the consent of nations and states was engaged and presupposed. Thus the voluntary law of nations was based in the presumed consent of the nations and states, the stipulative law of nations was based in their express consent and the customary law of nations was based in their tacit consent.[5]

The voluntary law of nations as Wolff understood it, then, was a law founded in natural law but one that nevertheless involved the consent of nations and states. In explanation of the status attaching to the voluntary law of nations, Wolff argued that the source of this law, and the focus of its application, were to be thought of as lying in a particular form of association obtaining among nations and states in the international sphere. This association of states Wolff called the *civitas maxima*, and with this being specified by him as a supreme state of which all nations and states were to be considered to have membership or citizenship.[6]

According to Wolff, the different nations and states were to be regarded as having been brought together by nature, and through their own agreement, to form a single state and, in this, parallel to the way in which individual men were brought together to form the separate nations and states. There was a defining substantive purpose pertaining to the supreme state, and this consisted in the advancement of the common good of the nations and states through the means of their combined powers. The supreme state as so formed by the nations and states possessed certain of the principal institutional features of the civil state. Thus the supreme state maintained its own system of laws, and in connection with this it held the right and power of law-making. The laws of the supreme state were binding on all nations and states, and with the binding normative force of the laws being made good through a general right belonging to the supreme state to coerce such nations and states as failed to act in compliance with their lawful obligations. The presence of this right of coercion carried with it the implication that the nations and states, as comprising the supreme state, exercised a collective sovereign jurisdiction in respect of individual nations and states. Hence the supreme state had its own government, and with this being democratic in character as in line with the collective form

of the sovereignty which was vested in the supreme state and in the combined body of the nations and states associated within it.[7]

The supreme state, as Wolff described it, was understood further to embody the will of the associating nations and states, and to be subject to a ruler who gave effect to this will. Consistent with the democratic character of the government of the supreme state, the united will of the nations and states was to be determined through reference to the will of the majority of nations and states, as this was embodied in the law of nations as followed by the more civilized nations and states. As to the ruler of the supreme state, his office lay in elaborating in accordance with nature, and through the proper application of reason, the law that was to express the will of the nations and states in the appropriate majoritarian sense. This law was to be accepted by the nations and states as binding on themselves, albeit that it was not in all respects identical with the law of nature as such. For Wolff, the idea of the ruler of the supreme state was a fiction. However, it was a fiction that Wolff considered to make it possible to account for the adaptations that had to be introduced with the necessary law of nations, such as to leave this law in agreement with the substantive purpose of the supreme state as this related to the common good and interests of the nations and states. The law that resulted from the adaptations made of the necessary law of nations stood as the voluntary law of nations. Thus it was that Wolff took the voluntary law of nations as law whose origins were to be explained in terms of the fiction of its being law stipulated by the ruler of the supreme state, and so, in conformity with the meaning of this fiction, as law that was to be thought of as originating in the will of nations and states. Nevertheless, the underlying foundation of the voluntary law of nations lay in nature, rather than in the will of nations and states as such, given that, as Wolff insisted, it was from the necessary law of nations that the voluntary law was derived.[8]

The intention that Wolff had in formulating the concept of the *civitas maxima* was to explain how nations and states were to be understood as being subject universally and inescapably, or rather as a matter of strict necessity in reason, to a system of authentic law founded in a normative order as embodied in the law of nature. At the same time, the concept of the *civitas maxima* was intended to explain how the universal law of nature, as normatively compelling for nations and states, presupposed the will and consent of nations and states for its application as law to their actual circumstances in the international sphere, and, in addition, how it was that in being so applied the natural law was required to be adapted,

as to its substance, so as to accord with the particular status and attributes which defined nations and states and their situation. The voluntary law of nations was the form of law that Wolff endeavoured to account for with the concept of the *civitas maxima*, and this he presented as the law of nature that, as to its application, stood as specific to nations and states and to their condition. Granted that the voluntary law of nations, for Wolff, was the law of nations pertaining to the *civitas maxima*, then this part of the law of nations, as in his characterization of it, is properly to be regarded as comprising the principles of natural law applying in the international sphere that remained as relative, or hypothetical, to some institutional framework in the sort of respects which Pufendorf expressly (and Hobbes by implication) had ruled out of consideration. As for Vattel, he was to reject pointedly the idea of the Wolffian *civitas maxima* as in regard to the explanation of the foundations of the law of nations. In this, Vattel moved much further from Pufendorf, and from Hobbes, than Wolff had done in the bringing out of how the law of nations involved a system of law that incorporated principles of natural law as applicable to nations and states, but with this so only as in accordance with the particularities of their own defining status and attributes.

ii. Vattel

Vattel planned *Le Droit des Gens* as a translation and popular version of Wolff's *Jus Gentium Methodo Scientifica Pertractatum*. In the event, *Le Droit des Gens* provided its own relatively original account of the law of nations, and the treatise went on to be received as an authoritative statement of the principles of public international law as observed by the states and rulers of Europe. The relative originality of *Le Droit des Gens*, as an exposition of the law of nations, is something that Vattel fully understood, as is evident from what he had to say about his approach to its subject in the Preface to the work. For Vattel here situated himself in relation to the earlier writers in terms such as to underline that he believed that he had overcome their respective failings in the project of elaborating what he referred to as the natural law of nations. The latter, as he explained it, stood not as the natural law as this applied to individual men, and then extended, as in that form, to have application to nations and states within the international sphere. The natural law of nations stood rather as a special science, and one that concerned the natural law as in its determinate application to the distinct subject-matter of nations and states, and their sovereign rulers, and as to their conduct and affairs.

According to Vattel as in his review of the condition of the relevant jurisprudence, the modern writers on the law of nations, as belonging to the natural law school, had correctly seen the law of nature as applying to nations and states, but had still fallen short of identifying the principles of the natural law of nations proper. In this connection, Vattel noted that Grotius had distinguished the law of nations, as law based in the common consent of nations and states, from the law of nature itself. However, the natural law that Grotius had taken as applying to nations and states was nothing more than the natural law as it applied to individual men, and with this having the implication, as fatal in Vattel's terms, that the law of nature as thus conceived could give rise to no obligations compelling for sovereign rulers which were external and so enforceable against them. Hobbes was picked out by Vattel as the first writer to provide a distinct if imperfect concept of the law of nations, and as such he was commended for his defining of the law of nations as the natural law as applied to nations and states. The error of Hobbes lay in his failure to recognize that the natural law underwent significant change in its international application: a failure that, for Vattel, had resulted in Hobbes concluding that there was a strict and exact relation of identity as between the natural law and the law of nations. As regarding Wolff, it was held by Vattel to have been his achievement to construct an authentic system of the natural law of nations, where the natural law was seen as applying to nations and states but in this as changed and modified as relative to the form that it assumed as when it stood as the law to which individual men were subject. Despite this, Vattel was emphatic as to his clear disagreements with Wolff on certain substantial points to do with the natural law of nations, and with this being so quite particularly, as we have indicated, with the issue of the concept of the *civitas maxima*.[9]

In *Le Droit des Gens*, Vattel based himself on Wolff in much of his exposition of the law of nations, as he did so, crucially, in the following of the four-part division of the elements of the law of nations as adopted by Wolff. First, there was the necessary law of nations, which comprised the law of nature in its strict binding application to nations and states and to their rulers.[10] Second, there was the voluntary law of nations. This was the law that resulted from the modifications made to the law of nature in its strict binding form, as in the context of the natural law as it applied to nations and states, and to sovereign rulers, in their actual circumstances.[11] Third, there was the law of treaties, or the conventional law of nations, and, fourth, there was the customary law of nations or international custom. The voluntary law of nations

was based in the presumed consent of nations and states, the conventional law of nations in their express consent and the customary law of nations in their tacit consent. In so presupposing the consent and agreement of the nations and states, as the condition for their establishment, the voluntary, conventional and customary forms of the law of nations comprised the sphere of the positive law of nations.[12]

If Vattel followed the division of the elements of the law of nations favoured by Wolff, he nevertheless broke with his predecessor in the explanation that he gave of the voluntary law of nations and the basis for its determination. It is in this matter that Vattel opposed himself to the concept of the *civitas maxima*: and so opposing himself also to Wolff's implication that there might exist some form of supreme international state possessing rights and powers of government analogous to those present within the civil state, and to which the separate nations and states were to be thought of as being subordinate. For Vattel, no such supreme state was to be conceived of. This was so for the reason, as he articulated in the Preface to *Le Droit des Gens*, that the form of association particular to the state, as organized around a law-making authority with coercive powers, was not to be found obtaining among nations and states, as in their standing as entities which were, and which claimed to be, fully independent of one another.[13]

In the view of Vattel, the principles of the voluntary law of nations were not to be determined through the assumption of a structure of international government as subversive of the independence of nations and states. The determination of the principles of the voluntary law of nations was to proceed rather through reference to the purpose of the form of the natural society that Vattel took as holding among nations and states, and through reference to the general laws that he considered to be present in that form of society. Thus and in specific terms, the separate nations and states were to be considered as possessing by natural sanction the status and attributes of free and independent persons, and hence as being situated in the same condition of mutual relationship as the one where individual men stood to one another in the condition of nature which preceded the instituting of political society. In the natural condition of their co-existence, the nations and states, as with the individuals who comprised them, were the subjects of the obligations and rights set through the law of nature. It was this law, and the obligations and rights contained in it, that embodied the foundation of what Vattel saw as the universal society established by nature among all men, and the foundation of what he saw as the universal society established by nature among the separate nations and

states. The two forms of natural society, as here delineated, were directly connected one to the other, as through the law that founded them and that served to describe their respective ends. So it was that Vattel maintained that men were united in a natural society where they were bound to assist one another to the end of perfecting themselves and their condition, and with this so in the same manner that the nations and states were to be thought of as being bound to render mutual assistance to one another in the realizing of their own perfection, and that of their condition, as the ultimate end of the natural society which they formed together.[14]

There was no substantially new line of departure opened up by Vattel as relative to Wolff with the idea of the natural society of nations and states as such. For in the *Jus Gentium Methodo Scientifica Pertractatum*, Wolff wrote of nations and states as forming a natural condition of society that was continuous with the society which nature had caused to be established among individual men. He wrote also of how the common good particular to the natural society of nations and states lay in the nations and states rendering assistance to one another, and with this being to the end of advancing their own perfection and that of their mutual condition. Nevertheless, it is to be emphasized that the complete realization of the ends constitutive of the common good of nations and states was something that Wolff thought of as requiring that the separate nations and states should move beyond the natural condition of their society, and that they should come to associate together within the condition of the structured institutional framework as set through the *civitas maxima*.[15]

As against this position, Vattel insisted that the ends of the natural society formed among nations and states were described in certain general laws that he took to be given as its foundations. These general laws, as Vattel explained them in *Le Droit des Gens*, were not only laws underlying the natural society of nations and states. They were also laws by whose terms there was excluded the possibility of the separate nations and states being thought of as standing in subjection to the authority of an institutional body, as with that of the institutional structure associated with the idea the *civitas maxima*, such as where this was to exercise the rights and powers of government as within the international sphere. The first of the general laws founding the natural society of nations and states that Vattel identified was the law providing that nations and states were to contribute to the welfare and development of one another, to the extent that this was in their power and consistent with the pursuit of their own individual welfare and

development. The second general law related to the natural freedom and independence of nations and states, and it provided that nations and states were to exercise their natural liberty as consistent with the requirements of peace and hence to act with proper respect for the rights which belonged to one another by nature. As a further general law of the natural society of nations and states, there was the law that related to the principle of the equality of nations and states. In explanation of this law, Vattel held that in consequence of individual men being equals by nature, and thus the bearers of the same naturally sanctioned obligations and rights, it followed that nations and states, as when considered as free persons or entities co-existing in the condition of nature, were also to be thought of as being equals by nature and hence as subject through nature to the same obligations and rights.[16]

For Vattel, then, the natural society obtaining among nations and states stood as a form of society founded in general laws which served to underwrite the freedom, independence and equality of nations and states. The principle that nations and states were to be recognized as free, independent and equal entities was of the first importance. For it was this principle that formed the basis for the derivation of the modifications to the strictness of the law of nature, as these modifications were taken by Vattel to be crucial for the establishing of a system of law that would have its proper application in the regulating of the relations among nations and states in the actual condition of their society as within the international sphere. In other words, it was the natural society of the nations and states as such, and understood as a society of free, independent and equal nations and states, which set the foundation for the voluntary law of nations. Thus as Vattel presented it, the voluntary law of nations was essentially the law of nature as modified to form a body of rules and principles that accorded with, and that gave concrete effect and realization to, the general laws that provided that the perfection of nations and states, and the perfection of their condition, demanded the advancing of their mutual welfare and development together with the maintenance of their mutual freedom, independence and equality.

The explanation that Vattel gave as concerning the derivation of the voluntary law of nations from the natural law was closely bound up with the classification that he set out in *Le Droit des Gens* as to the different types of obligations and rights. This classification was based in a distinction between perfect obligations and rights and imperfect obligations and rights that ran along the lines of the one that Pufendorf argued for in *De Jure Naturae et Gentium*. According to Vattel, obligations were either

internal or external as to their form and character. Thus obligations were internal when they were binding on men in conscience, and when they were derived from rules and principles relating to the duties of men that were laid down in natural law. External obligations were obligations that involved rights that were held by other parties. For Vattel, the category of external obligations was divided into perfect obligations and imperfect obligations, and with the rights corresponding to these being divided up into perfect rights and imperfect rights. In this very much following Pufendorf in the analysis of obligations and rights, Vattel characterized perfect rights as rights where there existed a right to compel the performance of the obligations to which they related. As for imperfect rights, these were rights whose corresponding obligations were not capable of being so enforced. Perfect obligations were obligations where there was present a right to enforce the fulfilment of their terms, whereas imperfect obligations were obligations where there was present no right of enforcement as to their subjects, but only a right to request that the terms of the obligations were to be fulfilled.[17]

This classification of obligations and rights had with Vattel a direct bearing on the matter of the voluntary law of nations in its derivation from natural law as follows. Thus as he explained it, the standpoint of the voluntary law of nations was one where the separate nations and states were to be considered to be beyond accountability to one another for the intrinsic justice of their conduct, as this related to the question of what was owed in strict conscience as in accordance with the law of nature. For nations and states were to be thought of as being at liberty to determine for themselves what was required of them as before conscience in the fulfilling of their natural obligations. In consequence of this, nations and states were also to be thought of as possessing a perfect equality in rights as in their relations as one to another.

To be sure, Vattel accepted that there were significant limitations placed on the liberty of nations and states. This was so, however, only in the sense that he held that nations and states were bound to account to one another for transgressions as to obligations and rights that were perfect external obligations and rights, and that, as such, were capable of enforcement as between their bearers. Hence the voluntary law of nations was not understood by Vattel to comprehend the law of nature in its entirety. Rather, the voluntary law of nations was understood to relate to the obligations and rights of nations and states that were external and perfect obligations and rights, and where the conditions for their enforcement, as obligations and rights, stood as consistent

with the liberty and equality which belonged to nations and states by nature. As concerning the justification for the voluntary law of nations, and for the modifications of natural law that it embodied, this Vattel presented as being based in the consideration that the means of force and coercion were not properly to be applied by, and as against, nations and states in circumstances where this worked to subvert their natural liberty, independence and equality. It was to this voluntary law of nations, as so explained, that the various nations and states were to be presumed to have consented, as a set of rules and principles whose observance by nations and states was an essential precondition for the maintenance and advancement of the ends of the natural society which they formed together.[18]

The view of the law applying to nations and states as the law of nature modified, so as to be consistent with the liberty, independence and equality of nations and states, is one that is to be found informing much of the statement of the substantive law of nations that Vattel provided in *Le Droit des Gens*. Of particular importance, in this connection, are the subject-matters of the law of nations where Vattel drew an explicit distinction between principles pertaining to the necessary law of nations and principles belonging to the voluntary law of nations, and where, in doing so, he brought out most clearly that it was the voluntary law of nations that stood out as the law which had application to nations and states in their actual condition and circumstances. There are three such subject-matters to which reference is made here: the law relating to international commerce, the law relating to international dispute settlements and the law relating to the conduct of war.

As regarding the law of international commerce, Vattel held that nations and states were to be thought of as bearing a fundamental right as based directly in natural law, and as being subject to a fundamental obligation also based directly in natural law, to engage in commerce in order to satisfy their mutual needs and interests. However, the various rights and obligations involved in international commerce, as these had a direct foundation in natural law, remained imperfect rights and obligations. Hence they were not rights and obligations that were eligible to be enforced as between nations and states. As Vattel proceeded to explain it, nations and states possessed the attribute of natural liberty. As a result of this, nations and states were free to determine for themselves whether, and if so to what extent and on what conditions, they would enter into commercial relations with one another; as they were free also to make the determination of this as in accordance with proper judgments as to their general security needs and

interests. The freedom of nations and states to establish for themselves the terms of their trade and commerce with one another was, for Vattel, the essential principle of the voluntary law of nations as in its relation to the law of international commerce. Thus it was that the voluntary law of nations stood distinct from the necessary law of nations, as in the respect that it provided that commercial relations among nations and states were to be regulated by the law of treaties. This meant that commercial rights and obligations as between nations and states could become perfect, and hence enforceable, only when they were stipulated in treaty agreements entered into by consenting nations and states and thereby created as rights and obligations with the standing of conventional law. It was in line with these considerations that Vattel understood the principle of freedom of commerce among nations and states as a principle founded in natural law, but yet as a principle that applied to nations and states only within the framework set by the voluntary law of nations as this served to define, and to maintain, the liberty, independence and equality of the separate nations and states.[19]

Concerning the law relating to international dispute settlements, this Vattel explained in the following terms. In the disputes arising between nations and states as centred on disagreements about rights or about injuries received, the nations and states involved were bound under natural law, and hence bound from the standpoint of the necessary law of nations, to seek the peaceful settlement of their differences. However, there were circumstances where, as Vattel recognized, it was legitimate for nations and states to move away from the peaceful settlement of disputes, and to act to secure their rights and interests through the resort to force of arms. This was so where the rights at issue in disputes were beyond doubt and where the rights were essential rights; as it was so also where one or other of the parties to disputes to do with doubtful or inessential rights were resistant to the option of peaceful dispute settlement procedures. In addition, it was open to nations and states to resort to armed force direct, and without the attempt at peaceful settlement, in cases where it was believed that adversary nations and states would not act in good faith, that the pursuit of a peaceful settlement would be unsuccessful, or that the delay occasioned through seeking a peaceful settlement would be detrimental to security. The key consideration in this for Vattel was that, as from the standpoint of the voluntary law of nations, it was to be assumed as falling to the different nations and states to decide for themselves, and as in accordance with the deliverances of conscience, as to whether they were in a position to submit disputes for peaceful settlement or whether

their position was such as to compel them to dispense with procedures for peaceful settlement and to make an immediate application of armed force. The right of nations and states to make an independent decision on these matters was something that Vattel saw as being founded in the liberty belonging to them by nature, and with the natural liberty of nations and states being the critical factor in determining the substantive principles of the voluntary law of nations regarding international dispute settlements as these derived from modifications to the natural law as such.[20]

With the law of nations in its relation to war, Vattel presented the natural law, as this formed the necessary law of nations, as underwriting the right of nations and states to wage war in defence of their individual rights and interests, and, at the same time, as restricting the occasions for the proper exercise of the right to those where there existed some accepted just cause for war. Even so, it is to be observed that if Vattel based the right of war as such in natural law, he also argued that it was not open to nations and states to act to enforce the terms of the natural law in relation to one another as in its full rigour. To the contrary, Vattel emphasized that when nations and states resorted to war, then it was required that they were to conform with the rules and principles pertaining to the voluntary law of nations which worked to preserve an equality of rights as between the belligerent parties. One practical aspect of this, for Vattel, was that the necessary law of nations was such that it presupposed that wars between nations and states were never to be viewed as just on both sides, but that, in contrast, the voluntary law of nations was such that it provided that wars between nations and states were to be considered as being just on both sides as to the legal effects of war. So, for example, Vattel claimed that it was a rule of war belonging to the voluntary law of nations that where the relevant instruments of war were held to be permissible, then these were to be regarded as being allowed to belligerent nations and states on an equal basis and without reference back to the intrinsic justice of the wars concerned as to cause. Thus it was that the voluntary law of nations was understood by Vattel as involving the modification of the principles of the law governing war as the means for securing the rights and interests of nations and states as sanctioned in natural law, and with this modification being such that the law of war was thereby rendered consistent with the equality of nations and states which ranked among the fundamental principles of natural law as applying to nations and states.[21]

The account of the voluntary law of nations that Vattel set out underlines the significant advance that he, and Wolff also, made on Hobbes

and Pufendorf in the determination of the concept of international law. For Hobbes and Pufendorf, of course, the law of nations consisted simply in the natural law in its direct application to states and their rulers. This natural law conceptualization of the law of nations was virtuous in that it confirmed that the law applying in the international sphere was to be thought of as having a universal reach and application. So also did it confirm that this body of law was to be thought of as having a binding normative force for states and rulers that was not conditional on their will and agreement to be bound by it.

Nevertheless, the natural law conceptualization of the law of nations as argued for by Hobbes and Pufendorf remained defective. For as we have seen (and as Vattel himself pointed to in reference to Hobbes in the Preface to *Le Droit des Gens)*, Hobbes and Pufendorf made no proper differentiation as between the natural law as it applied to individual men and the natural law as it applied to states and rulers in its standing as the law of nations. In consequence of this, Hobbes and Pufendorf failed to identify the particularities of the law of nations, as a form of law with its own distinct mode of application to states and rulers, as its subjects, and in accordance with their defining status and attributes. Then again, Hobbes and Pufendorf so specified the law of nations as in terms of natural law that the law of nations was, for them, left dissociated from any framework institutional structure as engaging the will and agreement of states and rulers. Here, the concern of Hobbes and Pufendorf lay with demonstrating that states and rulers stood placed beyond the possibility of their being legitimately subordinated to institutions of international government, and with this so for the reason that states, as sovereign and independent entities, were on account of their sovereignty and independence to be considered as exempt from all such subordination to external political authorities. However, the exclusion of international government was such as to lead Hobbes and Pufendorf to the position that the law of nations, as for them bereft of institutional support and devoid of institutional character, remained a form of law that was lacking in juridical authenticity as law and steeped in juridical imperfection as regarding the rights and duties which it involved and to which it gave rise.

In contrast to how it had been with Hobbes and Pufendorf, there was with Wolff and Vattel a clear differentiation made as between the natural law as it applied to individual men and the natural law as it had application to nations and states and to their rulers. It was in this connection that Wolff and Vattel picked out the voluntary law of nations as something separate and distinguishable from the pure form of natural law as

embodied in the necessary law of nations. Thus the voluntary law of nations was held to comprise principles of natural law, and to possess the universality and binding normative force proper to natural law, but with the natural law specific to the voluntary law of nations being the natural law adapted or modified so as to answer to the actual condition of nations and states, and that of their rulers, and hence the natural law in a form where its sphere of reference and application lay with nations and states and their rulers as its particular and exclusive subjects.

In a further departure from their predecessors, Wolff and Vattel were prepared to recognize that the law applying in the international sphere, as in the form of the voluntary law of nations, involved a framework institutional structure for the co-existence of nations and states which presupposed the presence of their own will and agreement. According to Wolff, the institutional structure as associated with the voluntary law of nations was that described in the ideal conception of international government that he referred to as the *civitas maxima*, and with this embodying rights and powers corresponding to those exercised through the institution of state government.

Vattel, however, ruled out the idea of the *civitas maxima* as pointing to a proper foundation for the law of nations, and it was his insistence on this matter that, above all else, emboldened him to claim that he, and not Wolff, had brought final realization to the project of a natural law of nations. That Vattel opposed himself to the *civitas maxima* was so for the reason, and one as would have been endorsed by Hobbes and Pufendorf, that a form of international government such as Wolff proposed with the *civitas maxima* was not to be reconciled with the sovereignty and independence of nations and states. Even so, Vattel did not draw from what he saw as the inappropriateness of international government any conclusion to the effect that the law of nations was inherently defective as a form of legal order. With Vattel, the framework institutional structure for the co-existence of nations and states was that provided by the voluntary law of nations as such. This in his terms was a form of the law of nations where the law not only applied to nations and states as its particular and exclusive subjects, but where the law also confirmed and accorded with the liberty, independence and equality which were essential to the status and attributes of the nations and states as sovereign entities with the standing of subjects under the law. It was, in addition, a form of the law of nations where, as from the viewpoint of Vattel, the law was understood to enjoy a full juridical authenticity, and where there was understood to exist a full juridical perfection attaching to the rights and obligations of nations

and states which the law served to define and for which it rendered available the legitimate means for their effective enforcement. The advance that this marked on Hobbes and Pufendorf in the determination of the concept of international law was immense, and with the full measure of it coming in the scope of the exposition of the substantive law of nations which Vattel, as basing himself on Wolff, was to provide.

iii. Wolff and Vattel and the substantive law of nations

The substantive law of nations, as Wolff set it out in the *Jus Gentium Methodo Scientifica Pertractatum*, was organized under nine heads as in accordance with the chapter structure of the treatise. In Chapter 1, there were expounded the duties and rights of nations and states as considered in and of themselves. Here, the subject-matters discussed included the duty and rights of nations and states as relating to the end of self-preservation, the principles of state government and state sovereignty, the freedom of the seas, and the status of citizens as in connection with such aspects of this as naturalization, domicile and exile. In Chapter 2, Wolff turned to the duties and rights of nations and states in their relations with one another, and with his including under this head such subject-matters as the duties of humanity owed by nations and states, the principles of trade and commerce, the principles of precedence and status among nations and states, the duty of non-interference in the internal affairs of nations and states, and the principles of justice among nations and states as with their rights of self-defence and mutual punishment. In Chapter 3, he addressed himself to the duties and rights of nations and states in matters of ownership, and in this focusing on the principles of sovereign rights and jurisdiction in respect of state territory. The concern of Chapter 4 lay with treaties, and other related agreements, among nations and states, and with Wolff elaborating the principles involved in the public treaties entered into by sovereigns and including among these the underlying principles of the law of nations affirming the sanctity of treaties and the sanctity of good faith in agreements.

In Chapter 5, Wolff considered the procedures for settling disputes among nations and states, and here described the procedures specific to compromise, mediation, arbitration and international conferences and explained the basis of the rights of retaliation and reprisal as pertaining to nations and states. In Chapter 6, he discussed the principles of the law of war, and with these including the principles relating to the form of public war as waged on sovereign authority, the right of

war as a right of sovereignty, the just causes of war, the proper objects of war, the status of neutral powers, the rules on declarations of war and the position of the armed forces. In Chapter 7, he proceeded to set out the law concerning the conduct of nations and states at war. Under this head, he expounded the rights of nations and states against the person and property of the enemy in a just war, and here confirming the basic immunities and protections due to non-combatant parties and to parties such as prisoners of war; as he expounded also the principles to do with such matters as the rights of victors, the use of spies, and truces and arrangements for safe passage. In Chapter 8, there were set out the principles governing peace treaties, and with the aspects of peace treaties considered including the making of peace as a right of sovereignty, the effects of peace treaties and the consequences of their breach. The law of embassies was addressed in Chapter 9, and under this head Wolff elaborated the principles relating to such aspects of embassies as the rights of ambassadors, their representative character and the security and sanctity essential to their person.

The account of the substantive law of nations given by Vattel in *Le Droit des Gens* broadly paralleled that of Wolff's, although there were certain notable original departures on Vattel's part and his exposition was organized under only four main heads as corresponding to the four books that comprise the treatise. In Book 1, Vattel set out the law of nations as concerning nations and states considered in and of themselves. With this head, Vattel addressed himself to the issues of state sovereignty, the rights and obligations belonging to sovereign rulers, the forms of state constitution, the principles of constitutional government and the distinct forms of statehood. Also provided here was a specification of what Vattel picked out as the basic objects of state government: first, the material needs of the nation, as with the promoting of agricultural production, the encouragement of trade and commerce and the maintaining of the currency; second, the welfare and contentment of the nation, as with the advancing of education and the arts and sciences, the preservation of piety and religion, and the maintenance of the system of justice and public administration; third, the security of the nation, as with the fortifying of it against external attacks. In addition, there was discussion of such matters as citizenship, the holding of property in its public, common and private forms, and the principles relating to the freedom of the seas.

In Book 2 of *Le Droit des Gens*, Vattel moved to consider the law of nations as it concerned the nations and states in their relations with one another. Included under this head were the subjects to do with

inter-state relations: as so, for example, the common duties of humanity, the principles of international trade and commerce and the effects of the territorial domain of nations and states as in regard to such aspects of it as ownership and jurisdiction. A large part of Book 2 was devoted to the law of treaties. With this matter, Vattel examined the law as it related to the form of public treaties, the dissolution and renewal of treaties, the agreements among nations and states other than treaties, the principle of the faith of treaties, the provision of securities for the observance of treaties, and the rules governing the interpretation of treaties. Finally, Vattel reviewed the dispute settlement procedures available to nations and states, and, as with Wolff, focusing here on the procedures for compromise, mediation, arbitration and international conferences together with the rights belonging to nations and states to act in retaliation and reprisal.

The subject of Book 3 of *Le Droit des Gens* was the law of war, and under this head Vattel set out the law of nations as it concerned the standard and conventional aspects of war as a means for the securing of justice among nations and states. Thus there was consideration given, among much else, to the form of public war, the right of war as a right of sovereignty, the just causes of war, the form for declarations of war, the status of enemies in wartime and that of their allies, the status of neutral powers, and the rights of nations and states in the waging of just war as against the person and the property of the enemy. Also included for consideration were the issues of the faith owed to enemies as among belligerent parties, the law governing acquisitions made through conquest, the position of private individuals, the principles concerning the granting of safe conduct and the ransom of prisoners of war, and the law of nations as it applied in the condition of civil war. In Book 4, Vattel focused on the law of nations in regard to the restoration of peace among belligerents and to embassies. As to the restoration of peace, he stressed the underlying obligation on nations and states to seek peace and identified the special characteristics of peace treaties following hostilities. As to the law of embassies, he emphasized the necessity of embassies, as for the maintenance of proper relations among sovereign rulers, together with the right of embassies as an essential right of sovereignty. He also expounded the law of nations as it served to determine the rights and immunities of ambassadors as public ministers.

It is evident from the above summaries how comprehensive in their range were the statements of the substantive law of nations provided by Wolff and Vattel, as relative to Hobbes and Pufendorf. To be sure, Wolff and Vattel affirmed the general principles of the law of nations

to which Hobbes and Pufendorf had pointed with their conceptualization of the law of nations as in terms of the undifferentiated natural law. So, for example, there is present with Wolff and Vattel, as there had been with Hobbes and Pufendorf, the recognition of such fundamental principles of the law of nations as the right of self-defence, the sovereignty and equality of states and the faith of agreements. Despite this, Wolff and Vattel did not confine themselves to the enunciation of fundamental principles, and they moved far beyond their predecessors as to the detail in the whole subject-matter which they took to fall within the compass of the law of nations. For Wolff and Vattel, of course, this subject-matter was cast in the idiom of natural law in that it was expounded as the law of nations in its voluntary form. In the event, however, this voluntary law of nations, as it received its exposition, stood not only as the law of nature modified such as to have a particular and exclusive, and so fully differentiated, application to states and to sovereign rulers; it stood also as a body of law that in its substance was directed towards the particular, and defining, substantive concerns of states and sovereign rulers as to the proper regulation of their mutual external relations in the international sphere. Thus it is that the law of nations, as set out by Wolff and Vattel as the voluntary law of nations, had the essential character of being the public law of nations, and with their closely linked systems of the law of nations effectively demarcating what are identifiable as the leading categories of the now current system of international law: such as state sovereignty, state territory, war and the use of force, diplomatic relations and treaties and international agreements.

In the comprehensiveness of the treatment of the law of nations, Wolff and Vattel present themselves for consideration as the successors to Grotius, and thus as writers who are to be situated in relation to a jurisprudential past the contours of which were shaped decisively by Grotius. It is true that Wolff and Vattel differed from Grotius with the issue of the voluntary law of nations and its status as a form of law. This issue was certainly crucial both as to substance and as to juristic method. For the voluntary law of nations, in the view of it of Wolff and Vattel but not in the view of it of Grotius, stood as the law of nature as modified to accord with the conditions specific to the international context for its application. Hence, for Wolff and Vattel, the voluntary law of nations stood as a form of the law of nations that was to be determined, and expounded, through reflection on natural law principles, rather than, as Grotius had implied, through reference to the conventional sources of law as based in the will and agreement of nations and states.

Notwithstanding the issue of the voluntary law of nations, there remain key respects where Wolff and Vattel are to be placed with Grotius, and where it is the context set by Grotius that brings out most sharply the developments in the law of nations which are reflected in their work. To begin with, there is the question of the law of nature. For with this, Wolff and Vattel followed Grotius in presenting the natural law as a law of self-defence and self-preservation and as a law of social order as appropriate for the ends of self-defence and self-preservation. This was so albeit that Wolff and Vattel, in contrast to Grotius, saw the natural law primarily in its international aspect and, here, as a law sanctioning the right of nations and states to defend and preserve themselves and as constituting a form of international society in which nations and states would be brought to assist one another as subject to law. Then again, there is the question of the just war doctrine and the uniform alignment of Grotius, Wolff and Vattel with the tradition of just war theorizing. In this connection, it is to be noted that Wolff and Vattel followed Grotius in thinking of war, when lawful, as the proper means available to states and rulers for the securing of their rights and so also for the enforcement of justice among nations and states. It is to be noted further that Wolff and Vattel confirmed the same essential principles of justice in war that Grotius had focused on for special attention, as in line with his adherence to the terms of the classical just war doctrine which we have associated with Aquinas. Thus Wolff and Vattel recognized the principle of lawful authority, as with their emphasis on public war as war sanctioned by sovereign rulers. Regarding the principle of just cause, they identified self-defence, the recovery of property and the punishment of wrong-doing as the leading just causes and objects of war. As to the principles associated with the idea of right intention in war, Wolff and Vattel recognized, as Grotius had done before them, the necessity of such principles as those to do with good faith in agreements among enemies and in the concluding of peace treaties.[22]

Beyond this, there is the common underlying organizational role played by the essential just war principles in the overall design and structure of the law of nations systems as formulated by Grotius, Wolff and Vattel. As we explained in Chapter 1, Grotius set out his system of the law of war and peace such that its organization accorded with the core just war principles, and with this being to the effect that the body of international law that he expounded stood subject to analysis as an elaboration of the meaning and implications of the fundamental principles of justice in war. Thus in Book 1 of *De Jure Belli ac Pacis*, Grotius considered lawful authority in war in terms that brought him to treat

of the principles of statehood and sovereignty. In Book 2, the consideration of just cause in war brought him to examine the principles governing property and ownership, promissory agreements and contracts, wrong and punishment. In Book 3, Grotius addressed the subject-matters pertaining to right intention in war and pertaining to the *ius in bello* principle of discrimination, and with these including the rights of war and the proper limitations on their exercise together with the principles of good faith binding on belligerent parties as appropriate for the restoration of peace. The various heads of the law of war and peace as referred to, and to which can be added others such as embassies and treaties, were all to figure prominently in the statements of the law of nations provided by Wolff and Vattel. The continuity here as between Grotius, Wolff and Vattel in the specification of the substantive elements of the law of nations is impressive, and this underlines the full implication of Wolff and Vattel in just war theorizing in the modern form of it as associated with Grotius. At the same time, it is to be emphasized that it is in reference to the jurisprudential context set by Grotius that the new lines of development that were opened up by Wolff and Vattel in the treatment of the law of nations will become clear.

Of the developments with the law of nations carried forward in the work of Wolff and Vattel, as relative to Grotius, one that stands out is the significant enlargement in the scope of those subject-matters coming under the law of nations which belong to the sphere of peace rather than that of war. As an example, there is the treatment provided by Wolff and Vattel as to the domestic law and international law dimensions of trade and commerce.[23] A further development concerns the greater rigour in juristic logic that is present with Wolff and Vattel in their discussion of certain of the subject-matters belonging to the law of nations as applying to war and to its conduct. As a case of this, there is the treatment by Wolff and Vattel of the rules and principles of war relating to the province of international humanitarian law, and with particular reference to the position of non-combatant parties and prisoners of war and to their immunities and protections during wartime. For Grotius, the law of nations provided that the rights of belligerents waging a lawful war were unlimited such that, to all intents and purposes, they permitted the killing of all persons present in enemy territory, and with this including women and children, prisoners and those offering to surrender themselves. The limitations on these rights that Grotius recognized were the rules and principles directing belligerents to show moderation in their exercise, as broadly in line with the

standard just war requirements on discrimination. However, the rules and principles for moderation in war in question, as Grotius presented them, stood as normative rules and principles that possessed a moral character rather than a legal standing proper. In marked contrast to this, Wolff and Vattel insisted that there were immunities and protections belonging to non-combatant parties and to prisoners of war during wartime that had strict legal force and effect. Thus it was that, for Wolff and Vattel, the immunities and protections due to non-combatant parties and prisoners of war were such that, as from the standpoint of the law of nations, it was never to be accepted as permissible to kill children, the sick and infirm, prisoners of war and enemy persons prepared to surrender on unconditional terms.[24]

The most notable among the developments to do with the law of nations that are reflected in the work of Wolff and Vattel concern their understanding of the institutional foundations of the law of nations. In this matter, it is inevitable that attention will fasten on Wolff and his specification of the *civitas maxima*, as a supreme state comprehending the separate nations and states. It is inevitable also that this supreme association of nations and states will be regarded as having been intended by Wolff as something which was to constitute an institution or organization for international government. For after all, Wolff was prepared to write of the *civitas maxima* as having, and exercising, institutional rights and powers of government, such as those of law-making, law enforcement and rulership. Nevertheless, it is misleading to read Wolff on the *civitas maxima* as setting out a practical blueprint for full international government, or as setting out a practical blueprint for international institutional machinery of the sort that is present with writers such as Rousseau and Kant or of the sort that is familiar from the contemporary international legal order as founded in the United Nations Organization. In the final analysis, the *civitas maxima* was an ideal conception, and as such it was appealed to by Wolff in the fulfilment of the essentially explanatory purpose of disclosing the theoretical basis and grounds for the determination of the law of nations in its voluntary form. Indeed, the status of the *civitas maxima*, as a purely ideal conception in this sense, is confirmed through the more or less total absence of any reference to it by Wolff in his exposition of the substantive elements of the law of nations.

The critical contribution to the understanding of the institutional foundations of the law of nations is in fact to be reckoned as coming not with Wolff, but with Vattel. Specifically, it comes with what Vattel had to say about the institution of the state as a sovereign entity, and

with this being, as we have observed, in express rejection of what he saw as the claim of Wolff that nations and states were to be thought of as placed in subordination to a *civitas maxima*. For Vattel, the voluntary law of nations comprised the natural law in its application to nations and states that were to be recognized as being free, independent and equal by nature. The insistence of Vattel that nations and states were free, independent and equal under natural law underlines his commitment to the principle that, as from the standpoint of the law of nations, the separate nations and states ranked as sovereign nations and states. This was so for the reason that the freedom, independence and equality that Vattel took to belong to nations and states, and to dictate the modifications to natural law contained in the voluntary law of nations, were the core elements of the sovereignty that he considered to be exercised by nations and states as under the terms of the law of nations. In accordance with this, it was, as Vattel insisted in *Le Droit des Gens*, the key qualification for nations and states possessing full membership of the natural society of nations, and hence for their possessing full status as the subjects of the law of nations, that they were to stand as sovereign and independent persons or entities and, as such, to govern themselves through their own authority and their own laws.

> Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State*. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together in a society established by nature and subject to the Law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.[25]

Vattel did not only point to the sovereignty and independence of nations and states; he also made a detailed determination of the concept of the state and its essential principles. Here and as it is clear from the relevant chapters of *Le Droit des Gens*, Vattel was in broad agreement with the view on the state as taken by Hobbes and Pufendorf. This was the view where the state was seen as based in the rights and powers of sovereignty, as with the rights of legislation, adjudication and executive regulation, and where the sovereign ruler was understood to be a representative person whose defining rights and powers were limited by law and vested in offices which formed the

institutional framework of a representative constitutional order. In general conformity with this, Vattel wrote of nations and states as comprising distinct political associations that were subject to a public authority, and with the public authority bearing the rights and powers of sovereignty and the individual or individuals holding the public authority standing as the sovereign ruler. The nations and states so formed were founded in principles of self-government and were thus sovereign and independent, and with the law of nations applying to free and independent nations and states as moral persons or entities in its character as the law of sovereigns.[26] The concern of nations and states, as sovereign entities, lay with their preservation and their perfection, and the basic rights and obligations of nations and states as regarding themselves were thus directed towards the ends of self-preservation and self-perfection.[27]

The public authority in nations and states was, for Vattel, a constituted authority, and as such it was based in a fundamental law that stood as the formal state constitution. The fundamental law of state constitutions belonged to the sphere of the public law, and it differed from the civil laws in being directed not to the rights and duties of citizens, but to the organization of the whole body of political societies, to the form of their government and to the manner in which the public authority was exercised. As Vattel explained it, nations and states possessed certain core rights regarding their own constitution and government. Crucially in this connection, nations and states possessed the right to determine and draw up for themselves the forms of their constitution, and to regulate all matters relating to their government, in freedom from interference in this from all other agencies. It was open to nations and states to reform their institutions of government and to change the law of their constitution, although this was to be undertaken only with great caution. However, it was to be left to the individual nations and states to decide for themselves all internal disputes relating to constitutional issues and to the conduct of government and public administration. In consequence, there were to be no rights conceded to foreign powers to interfere in the internal domestic political organization of nations and states unless requested to do this, and with it following that acts of forcible external interference were to be taken as involving an injury to the nations and states as so affected. This principle of non-interference was in general a strict one in its force and application, save that Vattel took it to be subject to qualifications of its strictness in certain exceptional circumstances as where some measure of intervention of a humanitarian character was to be accepted as per-

missible. Thus foreign powers were permitted to interfere in the internal business of nations and states, and of their established sovereign rulers, in order to give material support to peoples suffering from oppressive rulers, to the different parties to on-going civil wars and to peoples afflicted by extreme forms of religious persecution.[28]

As to the person of the sovereign ruler of nations and states, Vattel argued that the sovereign embodied a public authority which belonged originally to the whole body of political society and which was to be exercised only for the common good of the members of political society. Hence the sovereign was a representative person, as in relation to nations and states, and the bearer of their rights and obligations. Consistent with this representative character, the sovereign was subject to legal constraints and limitations, and so, for Vattel, the sovereign stood as a public authority that remained based in the principles of the rule of law and those of limited constitutional government. Accordingly, the sovereign was bound to maintain the fundamental law of the state constitution. Certainly, the sovereign possessed a power to change the civil laws. Nevertheless, the sovereign was still required to observe such civil laws as were established and remained in force. The contexts where the sovereign was subject to the laws included administrative acts, matters relating to property law and family law and matters relating to the laws on morality and public order, but with the sovereign being exempt from liabilities under the civil penal laws. In line with this sense of the rule of law and limited constitutional government, it was affirmed by Vattel that it was allowable for the people to resist and depose a sovereign ruler who acted tyrannically, as through his attacking the state constitution or undermining the welfare of the nation.[29] It was also affirmed by Vattel, as in the chapter of *Le Droit des Gens* devoted to justice and public administration, that there was to be an effective separation of the institutional powers pertaining to the sovereign as this concerned the legislative, judicial and executive authorities in the state. Thus the sovereign was to frame good laws, to extend justice to all citizens, and to ensure the proper observance of the laws. This required particularly, as with the judicial process, that the sovereign was to appoint the judges but to refrain from interfering with their decisions, and that the sovereign was to enforce court decisions, and to punish offenders, as in accordance with his general administrative responsibilities for the execution of the laws.[30]

It is to be underlined that Vattel played a critical part in the conceptualization of the state, and of the defining principles of state sovereignty, as considered from the perspective of the evolving modern

system of international law. As in relation to Hobbes and Pufendorf, there is of course an evident continuity present in Vattel as with their position on statehood. For all this, however, Vattel went beyond these of his predecessors in providing a determinate international law formulation for the principle of the sovereignty and equality of states. In addition, Vattel affirmed the principle that nations and states were to be free from the interference of external powers in matters affecting their constitution and government, and, as here in marked contrast to Hobbes and Pufendorf, he raised this principle of non-interference to the status of a principle of the law of nations and one that stood as a formal corollary of the principle that nations and states were to be recognized as sovereign entities.

As regarding Wolff, he looked forward to Vattel in picking out the principle of non-interference as something essential to state sovereignty, as he picked out also such other principles of statehood and sovereignty as the representative character of rulers and the equality of nations and states as under natural law.[31] Nevertheless, the treatment provided by Wolff as to the principles of the state, and of its sovereignty, is not only palpably inferior to that provided by Vattel. It is also a treatment that Vattel set himself to move beyond in his own discussion of the subject, and one where it is evident that he was much at odds with the earlier writer. This is so particularly with the question as to whether it was proper to think of the state and its sovereign rulership as being based in patrimonial principles. On this question Wolff, as with Grotius before him, was explicit that it was indeed proper to allow for the patrimonial conception of statehood, and with his arguing in the context of patrimonial kingship that the sovereignty over the state might be held in the absolute ownership, and hence in the patrimony, of the ruler.[32] Vattel was entirely outraged by this, as he indicated in the Preface to *Le Droit des Gens*.[33] As to his reasons, these, as he presented them in the chapter on the subject, point to his viewing the patrimonial conception of statehood as being contrary to the public law status of state association, to the representative character of sovereign rulership, and to the foundation of the state in the rights of the people and in their consent. So, for example, Vattel claimed that the order of succession in hereditary kingdoms was alterable through state legislation, and was not determined as in accordance with the law relating to the inheritance of private property. In similar vein, he insisted that the state could not be a patrimony of the ruler, since a patrimony existed for the benefit of the owner whereas the ruler was appointed for the good of the state; as he insisted further that the sovereignty

over the state was not legitimately to be alienated by the ruler to an external power, unless the right to do this was expressly conferred by the people.[34]

The rejection of patrimony as the basis for sovereign rulership in the state, and the commitment to the constitutional form of state government, were such as to link Vattel directly to a future in international law theorizing that was to include at its most immediate Rousseau and, above all, Kant. That this is so testifies powerfully to the seminal importance within the history of international law of the elaboration by Vattel of the principles of state sovereignty, as with the freedom and independence of nations and states and as with the equality of nations and states as co-existing legal persons or entities.[35]

With that said, it is vital to recognize that the form of sovereignty that Vattel saw as belonging to nations and states was a sovereignty underwritten by natural law, and a sovereignty that presupposed natural law as the basis for its own validation and application. Thus it was the natural law that, in Vattel's terms, defined and conferred proper normative status on the attributes of liberty, independence and equality that were essential to the sovereignty specific to nations and states. So likewise it was the natural law that sanctioned nations and states to act in line with, and to bring realization to, the fact of their liberty, independence and equality, as through the exercise by their rulers of the rights and powers pertaining to sovereignty. The effect of this was for there to be maintained with Vattel, and in his account of state sovereignty as in relation to the law of nations, the sense of the law of nations, as founded in natural law, as a form of law which had a binding normative force for nations and states without regard for their will and agreement to be bound by it, and which, as such, worked to impose compelling normative constraints and limitations on sovereign rulers as to the exercise of their rights and powers with respect to one another. This sense of the law of nations is, as we have argued, central to the natural law conceptualization of international law, and it is in reference to this conceptualization in its full meaning and implications that the elaboration by Vattel of the principles of state sovereignty is to be understood. In the matter of the natural law framework for state sovereignty, there is one thing further that is to be emphasized. This is that Vattel considered that the sovereign rights and powers, as belonging to nations and states, were to be exercised only within the context of the form of international society that he saw as established by nature and thus as setting the terms of the mutual association of nations and states as co-existing sovereign entities.

As we have seen, the natural society obtaining among nations and states was, for Vattel, constituted through the first-order laws of nature, and these natural laws, as in his presentation of them, were such that they defined not only the essential principles of the sovereignty of nations and states, but also the essential ends of the natural society of nations and states towards which their sovereign rights and powers were to be directed. To be sure, the natural law was taken by Vattel to direct nations and states to defend and preserve, and so to perfect, themselves as sovereign entities and in their freedom, independence and equality. Hence there followed the right of nations and states to wage war, as a right of sovereignty, in addition to the modifications to natural law as contained in the voluntary law of nations as in regard to the sovereign attributes of nations and states. At the same time, Vattel took the natural law to direct nations and states to act to promote the welfare of one another, and with this requirement in natural law serving, as in his terms, to base the various duties and obligations of nations and states that established the conditions for actual society among themselves. The duties and obligations at issue here were of course imperfect, and so they were bounded by the sovereign privileges of nations and states as to the circumstances for their being given effect to. However, it remains the case that Vattel was prepared to allow for qualifications to the absolutism of the sovereign rights and powers of nations and states, such as with his recognized exceptions to the principle of non-interference, and with these qualifications to state sovereignty being a reflection of his commitment to the jurisprudential ideal of an international society structured around natural law. To the extent that Vattel thought of the society of nations and states, as founded in natural law principles, as the context for nations and states in the possession and exercise of their sovereignty, then to this extent it is to be concluded that his elaboration of the principles of state sovereignty involved nothing inherently subversive for the natural law conceptualization of international law. The subversion was to come with the writers such as Bentham, Kant and Hegel to whom we turn in the following chapters.

4
Locke, Hume and Bentham

In the present chapter, we are concerned with the British political thinkers Locke, Hume and Bentham in relation to international law. Locke is presented as linked together with Hobbes and Pufendorf as an exponent of the natural law conceptualization of the law of nations, and with the focus of discussion being his *Two Treatises of Government* or, more particularly, the argument set out in the *Second Treatise: An Essay concerning the True Original, Extent, and End of Civil Government* (1690).[1] Hume is presented as a thinker who appealed to the concept of natural law in explanation of the law of nations, but who nevertheless developed positions in ethics and political thought that were deeply subversive of the premises and procedures of established natural law theorizing. The principal work of Hume's that is discussed is *A Treatise of Human Nature* (1739–40), but with reference being made also to his *Essays, Moral, Political and Literary* (1741–42) and *An Enquiry concerning the Principles of Morals* (1751).[2] Bentham addressed the question of international law in some detail, and he is presented here as a writer where natural law concepts dropped entirely out of consideration in the exposition of international law and where international law, as a subject, came to be placed within the framework of a systematically positivist jurisprudence. The works of Bentham's that are drawn on are as follows: *A Fragment on Government* (1776); *An Introduction to the Principles of Morals and Legislation* (1780; first published 1789); the analysis of law substantially completed by 1782 as a continuation of the *Introduction to the Principles of Morals and Legislation*, but published in its authoritative form only in 1970 as *Of Laws in General*; the four essays on international law drafted between 1786 and 1789 and the critique of the declarations of rights as promulgated during the French Revolution, which were published posthumously in 1843 under

the respective titles of *Principles of International Law* and *Anarchical Fallacies*.[3]

i. Locke

Locke stands within the modern secular natural law tradition of Grotius, Hobbes and Pufendorf, and as a secular natural law thinker he assumed a fundamental distinction between the natural condition of the association among men and the condition of their association within political society. As Locke explained it in the *Second Treatise of Government*, the state of nature was a condition where men enjoyed a perfect freedom, as to their conduct, and a condition of equality where power and jurisdiction among men remained reciprocal and to the exclusion of their natural subordination or subjection one to another. Nevertheless, the state of nature was not a state of licence, for within it men were bound in obligation under the law of nature as the law of reason. For Locke, the natural law provided that men were not to injure one another in their life, health, freedom and possessions, and in this aspect it was a law that related to the self-preservation of individual men and to their mutual preservation. Annexed to the law of nature was the power to execute the law, and this, in Locke's account of it, was a power that belonged to all men by nature and that was to be applied by them as the right of punishment in the context of transgressions of the law of nature, and as here directed towards the ends of securing reparations or imposing restraints in respect of transgressors.[4]

The power of execution as to the law of nature was a natural right, and Locke insisted that the exercise of this natural right of punishment was the only occasion for the lawful application of force by men as among themselves. The insistence of Locke that the application of force required a basis in law is underlined with the distinction that he drew, and here going against Hobbes, as between the state of nature and the state of war. The state of nature was a condition where men were associated together under law, but in the absence of a common political superior with authority to judge as between them. The state of war, however, was a condition contrary to law in its involving the application of force without right. Hence it was a state that might obtain among men even within a condition of political society with established common adjudicative authorities.[5]

The law of nature was understood by Locke to define the essential rights and liberties of men. Thus, for example, Locke maintained that the freedom belonging to men as under natural law was inalienable:

and with this being so in the sense that it was not possible for men, even through their own consent and agreement, to place themselves in a condition of slavery or in a condition of subjection to the absolute and arbitrary power of another.[6] Then again, there is the matter of property rights. Here, Locke argued that the right to property was secured to men under natural law, and with his characterizing property such that the idea of it comprehended all the various natural rights of men: that is, the rights of men in their own person, and not only the rights in the material things which came into their possession through their own work and labour.[7]

In addition to this, the law of nature was taken by Locke to direct men to the necessity of their acting to preserve their rights and property through association within the condition of political society. This required men to give up their right to enforce the terms of natural law on a private and unilateral basis, and to vest this right in the collective body of the whole community. Thus it was essential to the condition of political society that men, as there associated, were united together within a form of community having established standing laws and established authorities empowered to decide disputes among men and to punish offences against the laws. The institutional powers of government at issue here as pertaining to political society, or rather to commonwealths, were the legislative power and the executive power, and with the latter including the power of war and peace as a power directed towards the punishment of those external agencies injuring the community from without itself. The condition of political society brought into being through the association of men in subjection to government, as the condition of commonwealths, stood opposed to the natural condition of the society of men by reason of the existence of the common authority for the judgment of controversies which Locke held to be absent from the state of nature.[8]

The principles of political society were elaborated in great detail in the *Second Treatise of Government*, and with Locke considering such matters as the origin of political society, the ends of political society and government, the constitutional forms of government, the legislative and other governmental powers within commonwealths, and the relationship holding between the different powers of government. As to the origin of political society, this Locke argued was to be found only in the consent of men, given that by nature men were free, equal and independent and hence exempt in their natural condition from subjection to political power. This consent had the form of an original compact, whose object was to lie with the establishing by the men

party to it of a single political community under one government. In Locke's account of it, the consent of the majority of men was sufficient to establish a unitary political community, and it was consistent with the principle of government through consent for political societies to be thought of as being based not in the actual or express consent of men, but only in their tacit consent.[9]

As to the ends of political society and government, these related to the union of men for the mutual preservation of their lives, liberties and possessions, or, as Locke preferred it, their property. For Locke, the end of the preservation by men of their rights and property was to be secured only in the condition of commonwealths as under government. This was so because, as he maintained, the state of nature existing prior to political society was lacking in the following: settled and known laws defining the standards of right and wrong and the common measures for the decision of disputes, known and impartial judges authorized to decide disputes about rights as according to established laws, and a power sufficient to support and enforce decisions in such disputes as to the effect of ensuring the punishing and rectification of all injustice. The deficiencies of the state of nature were to be remedied, and the rights and property of men preserved, through the formation of political societies and the establishing of commonwealths based in governmental structures that embodied the legislative and executive powers. However, the powers essential to political society and its government being directed only towards the preservation of the rights and property of men, then this meant, in Locke's view, that the powers of government were to be restricted to such as were necessary for the overcoming of the deficiencies of the natural condition of society. Thus Locke insisted that government within political society was to proceed through standing laws as promulgated and made known to the people, that government was to involve the application of the laws by impartial judges in the decision of disputes, and that the material force of the community was to be limited in its use by government to the enforcement of the laws and the protection of the community from external attacks and invasions.[10]

Regarding the matter of the constitutional form of government within commonwealths, Locke held that governments could have the form of democracy, oligarchy, or hereditary or elective monarchy and with this being determined on the basis of the location of the legislative power. As distinct from this matter, however, there was the consideration for Locke that the commonwealth as such comprised an independent political community and in this irrespective of the form of its government.[11]

The legislative power, as whose location was determinative of the basic government forms, stood as the supreme power within commonwealths. Even so, Locke emphasized that the legislative power, as the supreme power, was not an absolute power in the sense of its being an arbitrary or unlimited power. First, he took it to follow from the preservation of men and their rights and property standing as the end of political society, as given in natural law, that the legislative power could involve no right to destroy, enslave or impoverish the subjects of commonwealths, as in violation of the duties of natural law. Second, the legislative power was not to exercise rulership through extemporary arbitrary decrees, but was to be bound to dispense justice, and to determine the rights of subjects, through promulgated standing laws as administered by known and authorized judges. Third, the legislative power had no competence to take from the subjects of commonwealths any part of their property without their own consent. Fourth, the legislative power was not permitted to transfer the power of making laws within commonwealths to some other power or agency: and with this being so for the stated reason, as relating to the principle of government through consent, that the legislative power was essentially a power delegated from the people. The limitations applying to the supreme legislative power, and as denying to it the status of an absolute power, were seen by Locke as establishing that the legislative power was held and exercised as a trust as in relation to political society and as in accordance with the normative framework set through the law of nature.[12]

For Locke, the legislative power was only one of the powers of government within commonwealths. Complementing the legislative power, there was the executive power, as the power charged with the enforcement of the laws. Locke argued that there was to be a strict separation of the legislative power and the executive power, and with this to ensure that the persons empowered to make the laws would not be able to exempt themselves from obedience to the laws and to bend the laws to secure their private interests. Further, the executive power was to be established on a permanent basis, but with this not being so with the legislative power. In addition to the legislative power and the executive power, there was a third power of government as identified by Locke. This was the so-called federative power, which power comprehended the powers exercised by governments in the sphere of the mutual external relations of the separate commonwealths, as in regard to war and peace, leagues and alliances and other like transactions involving foreign parties. The executive power and federative power were distinct as powers, and this for the reason, among others, that the

federative power, as directed towards foreign relations rather than the domestic conduct of subjects, was not so capable of limitation by antecedently established positive laws as was the case with the executive power. However, the two powers were not properly to be separated, and were not practicably to be assigned to different persons as to their exercise.[13]

In the matter of the relationship between the different powers of government within commonwealths, Locke maintained that the legislative power was supreme within the structure of constituted government, but that it nevertheless had the character of a fiduciary power as established to act for certain set ends. Hence there remained with the people a supreme power to remove, or to alter, the existing legislative authorities when these acted contrary to their trust. With that said, Locke was firm that the legislative power held a clear supremacy as to the executive power, since it was through the legislative power that the laws were made to apply within society and that the authorities were conferred as relating to the execution of the laws on the occasion of their being transgressed.[14]

The form of political power specific to commonwealths, as a power based in consent and directed towards the making and enforcement of laws, was importantly distinguished by Locke from a form of power which he called despotical power. The latter was an absolute and arbitrary power, and central to it was the power to take away at will the life of those men subject to it. In Locke's view, despotical power had no basis in nature or in compacts among men, and it could arise, and be exercised, only in consequence of the forfeiture of rights, as when an aggressor forfeited his own life through placing himself in a state of war with another.[15] The main context where Locke considered despotical power was the discussion of the rights of conquest as arising through war. Here, Locke insisted that conquest in war could not serve to establish government within political society proper, since government originated only in the consent of the people. He allowed that there were rights of conquest legitimately belonging to the victor in war as in respect of vanquished parties. This was not so with the conqueror waging an unjust war, who as such acquired no rights at all. However, it was certainly so with the victor in a just war, who could exercise a despotical power, and the rights essential to this, in regard to the vanquished as an unjust aggressor. The power of the victor in a just war was real and absolute, in that the lives of those of the vanquished who had engaged in or consented to the use of unjust force were in principle forfeit to the victor. Even so, this power was not such as to extend

to the victor in a just war the right to seize and appropriate the property and possessions of the aggressor parties other than for the purposes of due reparations, and it was not a power that gave rise to any rights of conquest applying to the lives, or the property and possessions, of the parties who were non-belligerents.[16]

The last two chapters of the *Second Treatise of Government* were devoted by Locke to the themes of government fallen into tyranny and the dissolution of government. For Locke, tyranny was distinct from usurpation. The latter involved the exercise of the rightful powers of government by unauthorized persons. In contrast, tyranny involved the exercise by rulers of powers beyond right, and where rulers made their will, rather than the law, their standard and where they acted to satisfy their private interests rather than to secure the interests of the people. Hence it was legitimate for tyrannical rulers to be opposed, as in conditions where the rulers in exceeding their lawful powers acted in forcible violation of the rights of their subjects.[17] As regarding the dissolution of government, this Locke distinguished from the dissolution of political society as such, which, as he argued, was generally the outcome of the invasion and conquest of commonwealths through foreign powers. The dissolution of government was a matter internal to commonwealths, and Locke maintained that it could take place in one or other of two forms. First, government in commonwealths was dissolved when the ruler effected an improper alteration to the legislative power: as when, for example, the ruler prevented the legislative power from assembling, or interfered with the method of election to it, and as when the ruler neglected to execute the laws as laid down by the legislative power. The second form of the dissolution of government was where the legislative power, or the ruler, stood in breach of the trust of the people, as relating to the ends of political society, and acted to invade the rights and property of subjects and thereby to make an arbitrary disposition of their lives, liberties and fortunes. Here, the legislative power, or ruler, acted in tyranny, and was to be viewed as standing in a state of war in relation to subjects and, in consequence of this, was to be thought of as liable to being opposed through the people as acting in their own self-defence and as in the exercise of the right of resistance to tyrannical power which belonged to them.[18]

Locke did not address the subject of the law of nations directly in the *Second Treatise of Government*. However, the subject was plainly inescapable for Locke, as in the terms of the argument of the work. For he recognized that individual commonwealths were distinct persons or bodies, as in relation to one another, and that their governments possessed the

federative powers, such as the powers of war and peace and of leagues and alliances, which were a function of the fact of the distinctness of the various commonwealths. The federative power, as Locke explained it, was a natural power, and with it answering to the right and power belonging to men by nature, and as prior to their forming of political society, and with it pertaining to the commonwealths as persons or bodies that were to be thought of as standing to one another as though in the state of nature.[19] The explanation that Locke in this gave of the federative power underlines how he accepted that states and rulers were subject to law in the sphere of their mutual external relations, as in the respect that, as with Hobbes and Pufendorf before him, he took the natural law to comprise the substance of the law which had application to states and rulers in the international sphere. For the subjection of states and rulers to the law of nature followed by way of implication from the claim that states and rulers stood to one another in the natural condition of society. Indeed, it was this claim, as in terms recalling Hobbes as to the natural society among states and rulers confirming the fact of the natural society among individual men, that Locke was to advance in the chapter of the *Second Treatise of Government* providing the characterization of the state of nature and thus in the context of his elaboration of the laws of nature as the laws obtaining therein.

> 'Tis often asked as a mighty Objection, *Where are*, or ever were, there any *Men in such a State of Nature*? To which it may suffice as an answer at present; That since all *Princes* and Rulers of *Independent* Governments all through the World, are in a State of Nature, 'tis plain the World never was, nor ever will be, without Numbers of Men in that State.[20]

The principles of natural law that Locke saw as applying to individual men are readily presented as principles possessing an international application. In this, it is to be recognized that the natural law principles at issue are to be understood as forming, and as pertaining to, what is intelligible as an essential framework of international law with full normative effect for states and rulers. It is to be recognized also that, for Locke, the natural law principles provided the only normative framework for regulating the relations among states and rulers, given that, as in common with Hobbes and Pufendorf, he excluded from consideration the possibility of states and rulers subjecting themselves to institutions of international government. To begin with in the matter of natural law in its international application, the law of nature, as

Locke elaborated it, served to guarantee the freedom, equality and exemption from subordination to higher power that he took to belong to men in the state of nature, and with this freedom, equality and exemption from subordination to higher power, as considered in application to states and rulers, relating directly in conceptual terms to the principles of state sovereignty as foundational within international law. Again, the law of nature for Locke was such as to underwrite the rights of men as in regard to their life, liberty, health and property. Here, it may be said that the natural rights of men as to liberty and property, as picked out by Locke, correspond, in the international law context, to the rights of states and governments in such areas as the independence of states and their territorial integrity and jurisdiction. Yet further, the law of nature guaranteed to men the right to defend themselves in their person and property: a right corresponding to the inherent right of self-defence as pertaining to states under international law. So also did Locke hold that the law of nature underwrote the binding normative force of promises and agreements among men, and with this natural law requirement corresponding to the principle of the faith of agreements between states and governments as basing the law of treaties.[21]

In addition to all this, there is the consideration that the law of nature, as Locke specified it, was such that it provided that the natural law was to govern and determine the resort to and exercise of force. Here, the distinction that Locke drew as between the state of nature and the state of war is crucial. To repeat, the state of nature, for Locke, was a condition of society that remained subject to natural law, and where there was present a right belonging to all men to enforce the law as against one another and, through this, to defend their rights under law and to punish those who breached the terms of the law. As for the state of war, this was a state obtaining among men that was the negation of all law and right: as in the sense that it was a state where force was applied not to secure rights and punish wrong-doing as according to law, but where it was applied contrary to, and beyond the limits of, law and with its object and outcome being the violation of rights. The distinction between the state of nature and the state of war is notable, in the matter of Locke on the law of nations, in that the principle pointed to with it conforms with the principle, as pivotal to modern international law, to the effect that the application of force by states and rulers, to be legitimate, requires a legal basis and justification. At the same time, the distinction underlines the adherence of Locke to the classic just war doctrine, where the contrast between the lawful and unlawful use of force is central: and more particularly so, with this,

the fact of his alignment with Grotius in regard to their common emphasis on the necessity of legal frameworks for the exercise by states of their war-making capabilities. As to the just war context, this, it is to be noted, serves to bring out how it is that, in reference to standard international relations theory, Locke may be linked with Grotius as the exponent of the view of international politics where states and governments are understood to accept, and to follow, common rules of law and common institutions for the organization of their mutual external relations.[22]

If Locke is to be put with Grotius as to their shared positions on the character of international politics, he is nevertheless to be set apart from his predecessor in certain key respects that relate to the question of the law of nations. Thus as against Grotius in his work, Locke did not speak to the substance of the positive law of nations, and, as in common with Hobbes and Pufendorf, it was left unclear by him as to how the natural law was to be differentiated as between its application to individual men and its application to states and rulers. Of greater account, it is to be emphasized that there is present with Locke, as there is not with Grotius, an unequivocal commitment to the principles to do with limited constitutional government and the rule of law, and to the principles to do with individual rights, which belong to the fabric of current international law and with this including where international law is bound up with the principles pertaining to the internal domestic political organization of states.

In the matter of limited constitutional government and the rule of law, the contrast between Grotius and Locke is very sharp. For Grotius allowed that it was possible for men to submit and enslave themselves to a ruler with absolute power, as he allowed also for the legitimacy of rulership based in rights of patrimony. As against this, Locke held that political power was opposed to anything smacking of despotism and tyranny. He likewise held that all government as within political society was founded in the consent of the people, and that it was essentially representative in being directed towards the ends relating to the preservation of the lives of its subjects and the protection of their rights and property. In line with these the ends of government as within political society, it followed, for Locke, that government was to be limited, as in accordance with the principles of the rule of law, and to be constitutional as with respect to the organization of its component powers. Thus it was that government was to be constituted as through the legislative and executive powers; and with the powers of government being limited such that they were to be exercised, and to bear down on the people, only

when having the formal character, as proper to the rule of law, of the enactment of standing laws as promulgated and made known to the people, the application of the laws by impartial judges, and the execution of the laws through the enforcing of the adjudications to which they gave rise. To be sure, Locke departed from the conventional designation of the constitutional powers of government, as so with his writing of the legislative, executive and federative powers but to the exclusion of the judicial power as a distinct power of government. Despite this, it is plain that Locke remained faithful to the principles of constitutionalism, and faithful also to the rule of law ideal, as through his insistence that the legislative and executive powers of government were separate powers and that the legislative power stood supreme, in relation to the executive power, as in its status as the source and origin of all the powers involved in the execution and enforcement of the laws.

In the matter of Locke and individual rights, it is to be observed that Locke affirmed the natural law standing of such of the basic rights of individuals as those to life, liberty and possessions, and that, in doing this, he pointed to principles to do with rights that are now to be found in current international humanitarian law and the international law of human rights. This is so with the rights secured to men as under constitutional government and the rule of law as Locke understood this. It is so also with what Locke had to say in the contexts of slavery, the right of conquest and the right of resistance. As to slavery, this he held was not to be reconciled with the inalienable freedom of men as guaranteed by the law of nature. With the right of conquest, he denied that the right of conquest served to establish rights of government, since this went against the right of men to be governed only through their consent. So also did he deny that the rights of the victor in a just war involved rights over the lives, liberty and property of those members of the vanquished state who had not been party to the war: and with all of this being in line with the spirit of the international humanitarian law principles as to the rights of non-combatant parties in war. As for the right of resistance, the crucial consideration is that Locke maintained that the people within political society were entitled to resist rulers who acted in violation of the rights pertaining to life, liberty and property. For Hobbes, of course, all such rights of resistance were to be excluded as incompatible with the sovereign rights and powers as specific to the rulers of commonwealths. For Locke, however, the right of resistance belonging to the people was such that it followed from the power of government in political society being a

fiduciary power, as held in trust as relative to the rights of the people, and with this involving precisely the sort of rights-based qualifications as to the sovereignty of states which are associated with the terms of international human rights law.

ii. Hume

The direction of the mainstream natural law theorizing as followed by Locke, and by Grotius, Hobbes and Pufendorf before him, was to be challenged decisively by Hume and with large implications for the understanding of the law of nations. Essential to the natural law standpoint was the view of natural law as a law based in, and determined through, the exercise of universal reason and as a law forming principles of justice and political morality that constituted an objective normative order embodied directly in nature. As opposed to this view, Hume held to the position that he set out in Book 3 of the *Treatise of Human Nature*. This was that morality pertained to human agency and was as such governed by the passions rather than by reason, and, further, that the determinations, or distinctions, to do with morality were not derived from reason as in the manner that reason was applied in determining the internal relation among ideas or the existence of matters of empirical fact. So far from morality having its sanction in reason or in the natural order as rendered intelligible to reason, Hume insisted, the distinctions relating to morality were derived from a moral sense, and with this meaning, for him, that moral distinctions were to be taken as proceeding not from rational judgment but from the feelings and sentiments of men.[23]

In line with this position, Hume set out a complex moral psychology so as to explain the foundation, rationale and normative force of the first principles of justice and political morality. Thus Hume maintained that the original foundation of the principles of justice and political morality was a naturalistic foundation that involved considerations to do with the pure self-interest of men. As to the specifically normative status of the principles of justice and political morality, this, Hume argued, arose from their coming to be established at the level of artifice, or rather as conventions, and with the purpose or rationale of the conventions of justice and political morality relating to their public utility: that is, to their contribution to the advancement of the public interest. As to the normative force for men of the principles of justice and political morality as principles based in public utility, this depended on the inculcation among men of the sympathetic dispositions as directing them towards the promoting of public interests, and with this result-

ing, in Hume's account of it, from such factors as education and the influence of established human conventions.[24]

It was in these terms, conventionalist and utilitarian, that Hume addressed himself in the *Treatise of Human Nature* to what he took to be the central substantive issue of justice as this concerned property and the three fundamental rules of justice that he saw as being focused on property: the stable possession of property; the transference of property through consent; the performance of promises.

Hume allowed that it was proper to speak of the fundamental rules of justice as the laws of nature; although, in doing so, he indicated that this designation was not to be taken as depriving the rules of justice of their character as artificial conventions.[25] The conventionalist status that Hume assigned to the rules of justice is clear from his detailed elaboration of them in the *Treatise of Human Nature*, as where it was brought out not only that the rules of justice stood as conventional rules, but also that the giving of concrete effect to the rules presupposed the context set by the actually existing conventions specific to political society. Thus Hume argued that the effecting of stability in the possession of property went beyond the natural condition of present possession, and to require the provision of the conventional rules on property holdings, as consequent on the formation of political society, that he identified as occupation, prescription, accession and succession.[26] The rule of justice as to the transference of property through consent, as Hume explained it, promoted stability in possessions in political society through removing violence and arbitrariness from alterations to property holdings. At the same time, the rule promoted the diverse good purposes bound up with the participation by men in the processes of mutual exchange and commerce.[27] The essential procedural form for the transference of property through consent was that of promissory agreement. Hence there followed the identification of the obligation to perform promises as a fundamental rule of justice. In Hume's view, promises were not intelligible by nature, as prior to the human conventions establishing them, and they were incapable of giving rise to a normatively compelling obligation as to performance, considered as a moral obligation, apart from the said human conventions. On the contrary, promises, for Hume, were constructs founded in, and rationalized through reference to, the needs and advantages of political society. As to the binding normative force of promises for men, this derived primitively from natural self-interest and then derived, in its specifically moral character, from what Hume saw as a combination of the sense of the public interest, the impact of education and the contrivances of politicians.[28]

The analysis that Hume gave of promises as conventions is critical in understanding the respects in which he diverged from the secular natural law thinkers on the issue of the basis and justification for government within the civil state. Hobbes, Pufendorf and Locke held that men were directed, as by the laws of nature, to act to defend and preserve themselves through the establishing of institutions of state government, and with this to provide for the securing of the person and the rights of subjects as through the effective maintenance and enforcement of the order of justice as pointed to in the laws of nature. In this, Hume broadly followed his predecessors. Thus he argued that civil government was to execute the rules of justice to the end of securing men against one another as within political society, and with the instituting of government being justified through its serving the interests of men and, as here, much in line with the general idea of self-preservation as appealed to by the earlier natural law thinkers.[29]

As to the origin of civil government, this, for Hobbes, Pufendorf and Locke, was understood to lie in a contractual agreement among men: which agreement was presented as formed among men within the natural condition of society and as marking their transition from the state of nature to the civil state proper. Hume accepted that civil government required the consent of men for its establishment. However, he squarely rejected the position that civil government originated in a contract. He did so for the reason, as consistent with his analysis of promises as conventions, that the obligation of allegiance falling on men under government was not to be thought of as having the form of the obligation as arising from promissory agreements. In Hume's account of it, the argument that government derived from an original contract was not one that could be supported by the empirical evidence relating to the real circumstances of governments and their subjects. More crucially still, for Hume, the practice of promising was a conventional practice that presupposed the existence of political society and the institution of government, as for the securing of observance of the law of nature relating to the obligation of promises which founded promising in its status as a conventional practice. In consequence of this, the obligation of allegiance to government was not something that could be understood as being itself the outcome of promises. As concerning the actual basis for the obligation of allegiance to government, this consisted, as independent of contract and promises, in the interests of men as to do with the security and protection enjoyed within political society. The interests of men were the ground of both the natural and the moral obligation owed by men to government and, as such, they set the conditions and limitations for that

obligation. Despite the foundational position of the interests of men as to the obligation of allegiance under civil government, this nevertheless remained separate from, and non-determinative of, the matter of the principles relating to the tenure of government and hence to the objects of allegiance. The latter principles were identified and explained by Hume as the principles of long possession, present possession, conquest, succession and positive law.[30]

Following the discussion of the obligation of allegiance to civil government in the *Treatise of Human Nature*, Hume turned to consider the subject of the law of nations. The latter, as he explained it, was the law pertaining to the duties and obligations that arose in consequence of the formation of separate political societies and that had application to the commerce among the separate nations and states. Hume noted that political writers had taken nations and states to bear a distinct individual personality in their relations one to another, and, in line with this, he allowed that there was some sense to what he took to be the implied analogy as between nations and states and private individual men as to their shared need for mutual assistance and their common potential for war and conflict. Even so, Hume insisted that nations and states were to be distinguished from individual men in the respects that they stood subject to regulation through different principles and that there applied to them the various rules specific to the law of nations. The latter rules included the ones, as cited by Hume, to do with the inviolability of ambassadors, the declaration of war, and the abstention from the use of poisoned weapons.

The rules belonging to the law of nations were supplementary to the laws of nature, as the fundamental rules of justice, but they did not, for Hume, render the laws of nature redundant in their relation to nations and states. Thus it was that he emphasized that the rules of justice on the stability of possessions, the transference of property through consent and the performance of promises were to be thought of as involving duties and obligations for the rulers of nations and states, as much as for the individual men who were their subjects. As for the rationale and justification for the laws of nature in their application to nations and states, this lay, as with the laws of nature in their application to individual men, in considerations of interest, as to do with the securing of peace, commerce and mutual assistance as within the international sphere. As Hume put it:

> [O]ne may safely affirm, that the three fundamental rules of justice, the stability of possession, its transference by consent, and the

> performance of promises, are duties of princes, as well as of subjects. The same interest produces the same effect in both cases. Where possession has no stability, there must be perpetual war. Where property is not transferr'd by consent, there can be no commerce. Where promises are not observ'd, there can be no leagues nor alliances. The advantages, therefore, of peace, commerce, and mutual succour, make us extend to different kingdoms the same notions of justice, which take place among individuals.[31]

If Hume saw the laws of nature as applying at once to nations and states and to individual men, he also argued that there were differences in the particular modes of application of the laws of nature to nations and states and to individual men, and with this carrying the implication that the rulers of nations and states were subject to a less strict system of moral constraints and limitations than was the case with individual men. This did not mean that there were differences as to the extent of the duties and obligations falling on rulers as under natural law. So, for example, rulers were to be considered as obligated through the solemn treaties that they formed, and with the advantages following from treaties as inclining rulers to performance being such as to establish the law of nature on promises as applicable to rulers. Nevertheless, Hume did claim that the force of the moral constraints and limitations bearing on rulers as under the laws of nature was weaker than it was for individual men, and that this was so such that there was a broader scope for rulers as to the lawful transgression of the moral code applying to them.

In explanation of this, Hume again pointed to the foundation of the laws of nature in human interests. The experience of individual men, he argued, instructed them as to the necessity of their participation in political society, and this created for them the obligation to conform with the rules of conduct contained in the laws of nature. This natural obligation based in self-interest gave rise, in its turn, to the sense of the moral obligation associated with the laws of nature, as where, as in accordance with the rules of justice, the actions of individual men were evaluated in terms of their relative contribution to the peace of the social order as a whole. As for the rulers of nations and states, the natural obligation of self-interest was likewise present among them in their mutual relations and was likewise conducive to the formation of a properly moral obligation on rulers under the laws of nature, as to the effect that rulers were to be constrained, as on pain otherwise of disapprobation, to refrain from the breaking of treaties. However,

Hume observed that while the considerations of advantage and even of necessity would encourage nations and states to enter into relations of mutual intercourse, the advantage and necessity were not of the same order as those obtaining among individual men and compelling them to associate together within political society. Hence it followed, for Hume, that the natural obligation on nations and states to comply with the rules of justice being weaker than that for individual men, then the related moral obligation on nations and states to do justice was correspondingly weaker as well. In consequence of this, there was greater indulgence to be given to rulers who practised deception than would be extended to individual men.[32]

In assessing Hume on the law of nations, it is to be conceded that a certain realist dimension is present in his political thought: as witness his sense of how the activities of nations and states, and their rulers, were determined by interests and power factors, rather than by law as such. For example, Hume identified conquest as one of the principles of rulership, and he underlined, in refutation of the claim that civil government arose through an original contract, that governments came into being through war and that force and violence drove on the process of the rise and dissolution of nations and states.[33] Again, he presented the balance of power as a pervasive and underlying principle of the relations among nations and states, and one that he saw as evidenced in classical Graeco-Roman times.[34] Yet further, there is, as we have noted, the acceptance in the *Treatise of Human Nature* that the interests of nations and states could permissibly qualify, and even negate, the obligations owed by rulers under the laws of nature. This was a position that Hume was to restate in the *Enquiry concerning the Principles of Morals*, as where he was explicit that reasons of state might, in emergencies, allow for the dispensing with of the rules of justice and for the setting aside of treaties and alliances by the contracting parties as when the observance of these would be substantially prejudicial to their interests.[35]

With the realist dimension of Hume allowed for, it still remains clear that he understood, and affirmed, that law had proper and authentic application in the international sphere. That this is so is reflected in part by his recognition of the presence of the rules to do with embassies and the conduct of war, as pertaining to the law of nations, that he saw as arising from the existence of separate political societies. It is reflected above all through his recognition of the laws of nature as forming the normative framework for the relations among nations and states and their rulers. For, here, Hume was able to identify, as in line

with the standard natural law conceptualization of the law of nations, certain of the fundamental principles of international law, such as with those to do with territorial possessions, trade and commerce and the law of treaties. To be sure, there is less detail to be found with Hume as to the substance of the law of nations, as in comparison with Hobbes, Pufendorf and Locke. At the same time, however, it is to be noticed that Hume went beyond the latter thinkers in his efforts to establish a line of differentiation as between the laws of nature in their international application, as to nations and states and to rulers, and the laws of nature in the form that they applied to individual men: albeit that the line of differentiation was to do with the relative force of the laws of nature, rather than to do with the defining juridical attributes and characteristics of nations and states and rulers as subjects of the law of nations.

As to the significance of the account that Hume provided of the law of nations through reference to the laws of nature, this lies not in the bare fact of his adherence to the terms of the natural law conceptualization of international law. It lies rather in the implications for the law of nations, and for the understanding of it, that are carried in the transformation that Hume brought about with the concept of natural law as such. In this connection, it is to be emphasized that the laws of nature were taken by Hume not as laws comprising a normative order based in nature, but as laws that were required to be established as a matter of human convention and that possessed binding normative force and practical application for men only through the presence of conventions giving effect to them. So also is it to be emphasized that, for Hume, the rationale and foundation for the principles of justice and political morality as pertaining to the laws of nature, and for the conventions embodying them, lay in public utility and thus in instrumental considerations to do with the promoting of the public interests within political society.

It is because Hume saw the laws of nature as based in human convention that he was not able to follow Hobbes, Pufendorf and Locke in writing of nations and states and rulers as co-existing in the natural condition of society, and as being there subject to laws that, as laws of nature, were to be thought of as binding on nations and states and rulers as without regard for their will and agreement. Here, the convention-directed analysis of the laws of nature was such that, in the matter of the law of nations, it pointed towards the necessity of the abandonment of the natural law standpoint on the law of nations. So also did it point to the necessity of the acceptance of a positivist mode of inter-

national jurisprudence, and as with the will and agreement of nations and states and rulers being regarded as finally determinative of the laws applying to them. At the same time, it is because Hume saw the laws of nature as based in public utility and public interests, as in the instrumentalist terms that he did, that he implied – subversively – a diminishing of the strictness of the binding normative force as was attached to the standard natural law principles and to the rights and obligations that the principles contained. With this, there was also pointed to by Hume, as in relation to the law of nations, the inevitability of the theoretical elaboration of a fully utilitarian explanation of the rationale and justification for the law having application to nations and states and rulers in the international sphere. In all these various respects, Hume looked forward to Bentham, who was to reject the concept of natural law as such and who was to consider international law as in accordance with the terms of what was a formally constructed system of positivist-utilitarian jurisprudence.

iii. Bentham

Bentham was much influenced by Hume and he took up and developed certain of the leading arguments of his predecessor. One case where Bentham did so was in his rejection of claims to the effect that law and government, and the obligation to government in the state, were to be explained in terms of the idea of an original contract as marking the distinction between the natural condition of society and the condition of political society. As Bentham set out his position in the *Fragment on Government* and *Anarchical Fallacies*, the condition of political society was based more in a habit of obedience among its members than in an original contract, and there remained a fundamental incoherence about the idea of an original contract such that it failed in its explanatory purposes. For contracts presupposed the existence of government for their proper enforcement, and for their acquiring a binding effect, and with it following for Bentham that government itself could not come into being through contracts. More crucial still, the idea of the original contract involved the principle of promissory obligation as the principle for the obligation to government; but, as in Bentham's view, promissory obligation had no independent normative standing, as a principle, but remained as such conditional on considerations of utility as these related to the sense of the general advantage for men of the practice of promissory undertakings.[36]

Here, Bentham followed Hume in appealing to public utility as the ground of justification for political society and its institutional structures, save that with Bentham the concept of utility was adopted and transformed such that it became the basis for the programmatic normative theory which is classical utilitarianism. Central to this theory was the formal principle of utility itself, which Bentham specified as a principle of collective welfare and advantage as in terms of the greatest happiness of the greatest number and the general happiness of the whole community. It was in this its collective aspect that the principle of utility was proposed and applied by Bentham, and famously so in the *Introduction to the Principles of Morals and Legislation*, as a practical criterion for the assessment of the virtue of human actions and for the appraisal and formulation of laws and legislative policies.[37]

It is with Bentham that there comes the decisive repudiation of the idiom of natural law theorizing, and it is this feature of his work that serves to set him apart from Hume. The repudiating of the natural law standpoint by Bentham is very much of a piece with what is the positivist thrust of his legal and political thought. To grasp how this is so, it is essential to understand the particular method for the examination of legal phenomena that Bentham applied and that identifies his as a fully positivist jurisprudence. In the natural law tradition, it had been assumed that the spheres of law and morals were directly interconnected. Thus the law was taken to comprehend, as part of its substance, the general normative principles of justice and political morality such as were contained in the laws of nature, and with the general natural law principles being taken to stand, for the purposes of juristic method, as the normative foundation for the proper descriptive statement and explanation, and for the proper evaluation, of the forms of law and legal order as were actually established.

For his part, Bentham would not accept the assumption of a substantial unity as between the spheres of law and morals or the assumption, for methodological purposes, as to the inter-connectedness of the descriptive-explanatory concerns of jurisprudence and the concerns of jurisprudence with the evaluation of the law as through reference to general principles of justice and political morality. Accordingly, he distinguished, as a crucial principle of juristic method, as between jurisprudence in its form as an expository enterprise and jurisprudence in its form as a censorial enterprise. From the standpoint of expository jurisprudence, the jurist was an expositor, and, as such, the jurist was to focus on the facts to do with law and their analysis: that is, the demonstration of the law as it was or the historical reconstruction of

the law as it had existed in the past. As for the standpoint of censorial jurisprudence, the jurist was with this the censor, and, as such, the jurist was to focus on the reasons underlying law and on the practical tasks of ascertaining the law as it ought to be: and particularly as these tasks were related to the determination of the appropriate principles of legislation.[38]

It is evident that, for Bentham, the normative considerations that were to be brought into play with censorial jurisprudence were those relating to the principle of utility. Thus it was utilitarian normative considerations that he took to figure centrally in the practical organization of the law and legal institutions and in the addressing of issues of morals and legislation as to their formal evaluation. As concerning the expository form of jurisprudence, this, in Bentham's account and practice of it, was to have its focus on a particular analytical model of law that is indicative of his positivism in jurisprudential enquiries and that it is customary to refer to as the imperative analysis of law. Fundamental to this imperative analysis was the explanation of law not as something embodied in an antecedently given normative order, as was so within natural law theorizing, but rather as something that was created through the acts of volition of its authors. Hence the law as obtaining in the condition of the state was understood by Bentham as comprising a normative order that was established, and maintained in being, through the will or volition of the sovereign and that was directed towards the conduct of the individuals who stood subject to the power of the sovereign. This was the model of law that Bentham set out most notably in *Of Laws in General*, as is clear from the following portion of the definition of law with which the work opens:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power....[39]

It was in terms of this imperative view of law that Bentham proceeded in *Of Laws in General* to identify, and to explain, what he took to be the essential features of law: the source of law, the subjects of law, the objects of law, the extent of law, the aspects of law, the force of law, the mode of the expression of law, and the remedial appendages of law.[40]

The will-based definition of law proposed by Bentham was held by him to possess a highly broad application. Thus the definition was to

stand regardless of such matters as to whether law was set through the immediate conception of the sovereign or only through its adoption, whether law was public or private in nature, whether the sovereign was an individual or a body, or whether law was embodied in the form of statute or that of custom. Bentham allowed that the concept of law that he argued for related to legislation and the legislative power. However, he insisted that his preferred concept of law was not restricted in its sense to the law to do with the activity of the making of laws as carried on through the exercise of the legislative power, and that, to the contrary, the concept comprehended legal formulations that did not involve legislation proper. Among the latter were domestic orders, temporary orders of administration, judicial orders, monarchical orders, laws issued by magistrates, laws issuing from the executive power, and laws set by bodies like corporate towns and corporations through legislative powers as deriving from the sovereign. Beyond this, Bentham insisted also that the term law was more appropriate for his subjects of concern than such related terms as command, commandment, order, injunction, decree, precept, statute, ordinance and edict, constitution, regulation, establishment, institution and mandate. As to these various terms, Bentham accepted that the term mandate was well suited for the discussion of legal phenomena, save that, as he emphasized, the term failed to bring out that laws proceeded from the will of the sovereign as their source.[41]

The claim that laws were to be taken as proceeding from the will of the sovereign in some or other state, as their source, was critical as in Bentham's analytical exposition of the elements of law and legal institutions.[42] However, the state sovereign-based view of law that Bentham adopted in *Of Laws in General* was not such that he was led to deny the reality of international law, or to neglect to attend to it. Thus in the *Introduction to the Principles of Morals and Legislation*, Bentham picked out a distinct branch of jurisprudence that he called international jurisprudence. The object of international jurisprudence lay with the mutual transactions between the sovereigns of the different states; and the form of the law that applied to these transactions was something that Bentham famously referred to as the law belonging to international jurisprudence, rather than as the law of nations, and with this being international law in its modern sense and application.[43]

In addition to this, there are the four essays on the different aspects of international law dating from the second half of the 1780s and that were to receive posthumous publication as the *Principles of International Law*. Here, Bentham treated of the following subject-matters as pertain-

ing to international jurisprudence: the objects of international law; the subjects of international law; the law of war; the plan for a universal and perpetual peace. As for the objects of international law, these were presented from the standpoint of utilitarianism. Thus the essential end that Bentham projected for international law, and the end that sovereign rulers were to promote, stood, as he put it, as the common and equal utility of all nations. The central issue that Bentham focused on as arising from this was to do with the relation, or the balance or equilibrium, as between the concern of sovereign rulers to advance the greatest happiness of the subject members of their respective states and the concerns to do with the advancement of the collective welfare of the nations as in accordance with the utilitarian end of international law. For Bentham, there was no ultimate conflict between the welfare of the individual states and the collective welfare of all the nations, and it was in line with his sense as to the harmony of the various interests involved that he set down the specific objects of international law for particular nations and states.

As Bentham set down the objects of international law, the first such object for individual nations was general utility, as this consisted in their refraining from doing injury to other nations save on proper grounds to do with their own well-being; the second object of international law for individual nations was general utility, as this consisted in their advancing the greatest good possible for other nations except as limited for proper reasons to do with their own well-being; the third object of international law for individual nations was general utility, as this consisted in their receiving no injuries from other nations save on proper grounds to do with the well-being of those nations; the fourth object of international law for individual nations was general utility, as this consisted in their receiving the greatest possible benefits from other nations as limited for proper reasons to do with the well-being of those nations. The first and second objects of international law related to the duties of nations, and the third and fourth objects of international law related to their rights. The fifth object of international law was that, in the case of war, nations were to make such arrangements in the conducting of it that the least possible evil would result as consistent with the attainment of the good that was being aimed at.

The various objects of international law were considered by Bentham as conducing to the greatest happiness of all nations, and in accordance with this there followed certain basic principles that he pointed to as being suitable for adoption as part of international law. These included principles to do with the prevention of positive international

offences and hence with the encouraging of positively useful actions among nations. Thus positive international crimes were present with the actions and arrangements whereby individual nations did more harm to other nations whose interests were affected than they were able to do good for themselves. Similarly, negative international offences were present where individual nations refused to render positive services to other states, as when the rendering of the services would produce more good to the other nations than it produced harm for the refusing nations. Bentham also envisaged international law as including the principles to do with the maintenance of the laws of war, and with these to stand as the adjectival laws that related to the laws of peace as comprising the substantive law of the international code.[44]

As to the issue of the subjects of international law, Bentham treated of the form of dominion exercised by states through the law-making or mandating, or as he preferred the imperative, rights and powers of sovereign rulers and the form of the jurisdiction that states exercised through their adjudicative rights and powers. The principles of dominion and jurisdiction were considered by Bentham most particularly as in relation to the determination of the principles applying to the status of the subjects of state law. The examination of this was complex in its details. However, it is to be noted that, in concluding his discussion, Bentham set out in summary form his view of the principles of subjecthood as based in a distinction between permanent membership of a political community, as established through lineage, birth or naturalization, and occasional membership as established through fixed residence or through travel. He also set out his position on the jurisdiction of states in respect of foreign nationals, which jurisdiction was to be exercised for the sake of the states themselves, for the sake of the states of the foreign nationals concerned, for the sake of other states, or for the sake of mankind at large. For the same reasons, jurisdiction might be exercised by states in respect of their own subjects for offences committed in foreign states. Bentham recognized that states might be restrained from punishing offences committed outside their sovereign dominion, on account of the problems to do with the obtaining of evidence and the possibility of giving umbrage to the foreign states involved. Even so, he allowed that states might well proceed to punish such offences in consideration of the interests of their own citizens or those of the foreign nationals or the foreign states injured through the offences.[45]

In discussion of the law of war, Bentham stated what he took to be the principles of the law of war as regarding the causes and con-

sequences of war. In Bentham's account of it, war related to the disputes among states where, as in contrast to disputes among private individuals, there was established no common superior with a judicial power, and where a state that was aggrieved through an injury inflicted by some other state was faced with the options of accepting the injury concerned, attempting to persuade the other state to agree to the appointment of a common judge, or having recourse to war.

The causes or occasions for war were identified by Bentham in terms of the offences at issue, and as follows. First, there were the offences caused by the citizens of states towards one another as focused on the interests of the citizens, and with these including injuries in general and occasional injuries resulting from rivalries in commerce. Second, there were the offences given by the citizens of states towards one another, as brought about by the interests or pretensions of sovereigns. The cases involving such offences included the following: disputes regarding rights of succession; disputes regarding boundaries; disputes arising from violations of territory; enterprises of conquest; attempts at establishing monopolies in commerce; fears centred on possible conquests; disputes concerning new discoveries; involvements in the internal difficulties of states; disputes to do with religion; the interests of ministers. For Bentham, the remedies for the wars brought about through such causes were to be found in preventive measures as directed towards the causes themselves. So, for example: wars occasioned through commercial rivalries among citizens were to be prevented through general freedom of commerce; wars caused through enterprises of conquest, attempted commercial monopolies and fears about possible conquests were to be prevented through defensive confederations and, in the case of commercial monopolies, through conventions limiting the maintenance of armed forces; wars caused through disputes about new discoveries were to be prevented through agreements regarding discoveries; and wars resulting from religious conflict were to be prevented through the advance of toleration.

Bentham distinguished between what he called wars waged in good faith, wars of passion and wars of ambition, insolence or rapine as types of war. With all these types of war, states that were aggrieved through injury from other states were to have recourse to war only subject to conditions and as depending on circumstantial contingencies. If states occasioning injuries did not act in bad faith and this was an evident fact, then, Bentham argued, it could never be to the advantage of aggrieved states to resort to war, irrespective of the relative strength of the aggressor states and the nature of the injuries received. Where states inflicted

injuries in bad faith, then the aggrieved states were properly to resort to war in circumstances where the injuries concerned were preparatory to further attacks; but they were to refrain from war in circumstances where the injuries concerned were limited as to their objects. In cases where states believed themselves to be the victims of unjust aggression but where there was no appearance of bad faith on the part of the aggressor states, then the aggrieved states were bound in prudence to submit to the injuries at issue rather than to resort to war and experience all its resulting calamities. It is clear from this that, for Bentham, the evils of war necessitated restraint on the part of states, and in line with his sense of this he maintained that in order to mitigate the evils of wars once initiated, it would be proper to appoint foreign war residents to belligerent states to provide for the security of prisoners of war and to prevent breaches of the law of war.[46]

The most important, and by far the longest, part of the *Principles of International Law* was its Essay 4, where Bentham expounded his plan for a universal and perpetual peace in the international sphere. The two fundamental premises of the plan, as Bentham formulated them, were the reduction and fixing of the forces of the states belonging to the European system and the emancipation of the overseas dependencies of the European states. The substance of the plan was given in fourteen propositions, and with the principles laid down in these propositions being directed specifically towards Britain and France, but with their having a general application as serving the common welfare of all the civilized nations.

Proposition 1 stated that it was not in the interests of Britain for it to have any foreign dependencies whatsoever. In explanation of this, Bentham argued that the possession of colonies increased the chances of war and that colonies were seldom, if ever, sources of profit for the colonial power given the demands that they imposed on the national capital. Hence Bentham held that Britain was to give up all existing colonies and to found no new colonies. The advantages in this for the colonial power were to consist in saving the expense of maintaining civil and military establishments, avoiding the danger of war, sparing the costs of defending the colonies, eliminating corrupt practices in the civil and military administration, and simplifying the whole apparatus of government and so achieving greater competence for it. The advantages for the colonies themselves were to be found in the diminishing of the risks for them of bad government. Proposition 2 stated that it was not in the interests of Britain for it to have any treaties of alliance, whether offensive or defensive, as with any other powers.

This, Bentham explained, would guard Britain against the danger of wars arising from such treaties and, more particularly, against the danger of wars resulting from the guaranteeing of foreign constitutions.

With Proposition 3, it was stated that it was not in the interests of Britain for it to have treaties with other powers for the purposes of securing advantages in trade, as which were to the exclusion of any other nations. Bentham summarized the substantive measures following from this general principle as follows: no treaties granting commercial preferences were to be made; no wars were to be entered into in order to compel such treaties; no alliances were to be formed for the sake of purchasing commercial preferences; no encouragements were to be given to particular branches of trade through the prohibition of rival manufactures, the taxation of rival manufactures and bounties on favoured trades; no treaties were to be formed with a view to ensuring commercial preferences. With Proposition 4, it was stated that it was not in the interests of Britain for it to maintain naval forces beyond what were required for the defence of its commerce against pirates: the only rationale for such naval forces being to do with improper purposes such as the defence of colonies and the waging of war in connection with the compelling of trade or the forming of commercial treaties. In turn, it was stated in Proposition 5 that it was not in the interests of Britain for it to keep in place regulations preparatory for the future increase or maintenance of its naval forces. Propositions 6 to 10 corresponded respectively to Propositions 1 to 5, as to their provisions, but with application to France and its situation. With Proposition 11, it was affirmed that the agreement of Britain and France to the terms of Propositions 1 to 10 would serve to remove the principal obstacles standing in the way of the establishment of a plan for the general and permanent pacification of all Europe.[47]

The provisions as contained in Propositions 12, 13 and 14 were additional to the basic terms of the general and permanent peace set out in the first eleven propositions; and they were such as to describe what Bentham considered to be principles applying to the relations among states that were essential for the preservation of that condition of international peace. Thus it was provided with Proposition 12 that in order to keep the peace, there were to be formed general and perpetual treaties for the limiting of the number of troops to be maintained by the states concerned. Bentham recognized the difficulties with such agreements as where a number of state parties were involved. However, he insisted that it would be meritorious for an individual state to take the initiative through reducing and fixing the size of its armed forces,

and, as he suggested in the case of France, it would also be advantageous for a state, and not against its interests, for it to complement its disarmament with the emancipation of its colonies.[48]

The terms of Proposition 13 provided that the general and permanent pacification among European states was to be facilitated through the establishment of a common court of judicature, which was to be charged with the decision of the disputes between states but without its possessing coercive powers in relation to this. For Bentham, the establishing of such a common tribunal for international adjudication, or what he also referred to as an international congress or diet, would be virtuous in removing the necessity for war as the means for resolving differences of opinion among states. The common tribunal, or congress or diet, would also be in the interests of states and involve no change to their situation, and with there being precedents for it as with such actual institutional structures as the Armed Neutrality, the American Confederation, the German Diet and the Swiss League.

As for the preconditions for the adjudicative body as envisaged, these, in Bentham's explanation of the matter, were primarily to do with the enlightenment of the peoples of the European nations, and as so principally through their overcoming the prejudices and jealousies that made for war. As to practicalities, Bentham proposed that the adjudicative body was to be instituted through the various states sending representative deputies. The proceedings of the adjudicative body were to be public. The powers of the adjudicative body were to be three in number: first, the power to report its opinions; second, the power to cause that its opinions be circulated within the dominions of the member states, and with this being such as to appeal to public opinion and to have public opinion function as a constraint on governments; third, the power to place non-compliant states under the general ban of Europe. At one point in discussion of the third power, Bentham allowed that there might be arrangements for the states to provide force contingents to ensure the proper execution of the decisions of the adjudicative body: and unaccountably so, in fact, given that he had earlier expressly underlined that the common tribunal was to have no coercive powers. Nevertheless, the crucial consideration, here, is that, for Bentham, the need for such an enforcement capability was to be overcome on a permanent basis as through the introduction, as part of the instrument instituting the common tribunal, of a clause guaranteeing the freedom of the press in all states such as to ensure the widest and most unrestricted public access to its adjudicative decisions.[49]

The subject of Proposition 14 was secret diplomacy and in the application of this to the case of Britain, and with the proposition providing, as to its specifics, that secrecy in the operations of the foreign department was not to be tolerated as being at once useless and repugnant to the interests of liberty and peace. In amplification of this, Bentham stated the principles, first, that the negotiations conducted by the British government with foreign parties were not to be kept secret from the general public, or from Parliament and after enquiries were raised in Parliament; and second that with secrecy in preliminary negotiations allowed for, there was never to be secrecy maintained with regard to treaties actually concluded. As Bentham explained it, secrecy diminished political accountability with negotiations and treaties that might have war as their result, and secrecy was in fact required only with negotiations that were likely to lead to war: there being, as he argued, no cause for secrecy in connection with negotiations aimed at such matters as the formation of commercial treaties. For Bentham, the case for governments in Britain abandoning secret diplomacy and maintaining public transparency in their diplomatic undertakings was overwhelming. Given that secret diplomacy was virtuous only with foreign policy directed towards war, it followed, as he claimed, that there could be no necessity attaching to it as for a state such as Britain. For there existed no proper rationale for Britain to wage wars as such: wars aimed at conquest were contrary to justice and to common sense, whereas wars aimed at enlarging the scope of trade and commerce were self-defeating as to their purpose. To the extent that the British government preserved the veil of secrecy in its diplomacy, then this, Bentham insisted, did no more than cloak the folly and wickedness of ministers; and to the extent that secrecy was argued to be vital in the conduct of war, then this argument worked only on the assumption, such as he denied, that war could be advantageous for the states which waged it.[50]

In regard to the concerns of this volume, the account given by Bentham of the essential principles of international law is notable for two reasons. First, there is the modernity of the principles of international law as stated as to their substance, and with this modernity being such as to connect Bentham with what in the Introduction we made reference to as the liberal tradition in international thought and practice. Second, there is the fact of the absence from the account of international law of all reference to natural law as providing the normative foundation for the law applying in the international sphere.

As to the modernity and liberal orientation of the principles of international law as endorsed by Bentham, it is to be observed that there

are hints of this in what he said in explanation of international law as to its objects and subjects and as to the law of war. This is so with his specification of the causes of war, and with his specification of the measures for the prevention of war, as relative to its leading causes, such as the maintenance of freedom of commerce, defensive confederations and limitations on armaments. However, the modernity and liberalism of Bentham become most plain with the set of principles that he held were to be adopted by states in the establishing of the international law framework for a universal and perpetual peace. Here, Bentham looked forward to the international law system of the United Nations era with the principles set out in Propositions 1 to 11 of his international peace plan. This is so, for example, with his call for the termination by Britain and France of their colonial dependencies: albeit that he based his call for this more in considerations to do with the economic self-interest of the colonial powers than in considerations to do with what, for us, would be recognizable as legal-political principles relating to the equal rights and self-determination of subject peoples. Likewise, Bentham looked forward to the future, in spirit if not in every detail and particular, with his call for Britain and France to refrain from offensive and defensive treaty alliances, to desist from treaties intended to exclude states from trade and commerce, and to limit armed forces to those essential for the defence of commercial interests. For freedom of trade and commerce and voluntary limitations on armed forces, and restrictions on treaty alliances of an offensive character, all pertain to principles that form part of the general desiderata that are bound up with the current system of international law as the law of peace, even when these are not necessarily principles that have been transformed into determinate binding obligations under international law.

It is with the principles set forth in Propositions 12 to 14 of the plan for a universal and perpetual peace that Bentham's forward-looking links with present international law, and his commitments to liberal positions in international politics, are at their most evident. This is true with his claim that a permanent peace in the international sphere required the forming of general and perpetual treaties providing for limitations on the armed forces to be maintained by states. It is true also with his call for permanent international peace to be facilitated through the establishing of a common court of adjudication for the peaceful resolution of international disputes, as in view of the central importance, since the early twentieth century, of international institutions, judicial and otherwise, as essential supports for the international law system.

In the matter of the common court of international adjudication, the modernity of Bentham consists not only in his emphasis on the necessity for appropriate institutional machinery in the international sphere, such as to ensure the refraining by states from resort to war and their agreeing to go by peaceful means of dispute settlement. It consists also in the acceptance by Bentham that the institutional machinery to be established in the international sphere was to have peace maintenance as its aim, but that it was in this not to have the form, or the attributes, of a structure of international government. For Bentham, the institutional structure that was to function in the international sphere was strictly a judicial institution, and it was to have no coercive powers, such as belonged to the sovereign authorities within states, but was to act primarily through the issuing and publication of its decisions. Certainly, Bentham appeared to concede that the international judicial body might have a sanction-imposing power, as relating to the placing of delinquent states under a general ban. However, it remains the case that he envisaged the crucial sanction in the causing of states and governments to conform with the decisions of the international court, and hence to abide by international law, as lying with the power of public opinion. Here, the emphasis of Bentham was on the possibilities for political development as within states and societies, and with this involving the coming of enlightenment among peoples, and the coming of greater openness and transparency in the operations of government and administration, to the end of popular pressure working to constrain state governments to preserve the international peace. It was in line with this that Bentham in Proposition 14 of the peace plan insisted that secret diplomacy was to be excluded as contrary to liberty and peace. If Bentham excluded secret diplomacy on the grounds of logic, in that secrecy was appropriate only with diplomatic initiatives whose ends went against the principles of international law, he also underlined throughout his discussion of the issue that this exclusion was essential for the ensuring of the end of the full political control and accountability of governments in foreign policy contexts.

As to the question of the absence from Bentham in his account of international law of reference to natural law, it is to be understood that this relates to the two central and distinguishing features of his jurisprudence: the appeal that Bentham made to the principle of utility, and hence his adoption of utilitarian formulations, in explaining the normative dimensions of international law; the positivism of the approach to law and jurisprudence that he followed, and here particularly so the

model of law as based in and proceeding from the will of sovereign powers that was the main outcome of this positivist jurisprudence in its concrete analytical application.

With the utilitarian formulations that Bentham adopted, it is to be observed that in the sense that utility was intended by him to provide the normative foundation and justification for the principles of international law, then it is to be concluded that this endeavour on his part amounted to a significant failure. For the utilitarian formulations fell far short, as relative to the standard natural law conceptualizations, of providing an adequate vindication in normative terms of the system of law that was to apply to states and rulers. Thus, for example, it was in treating of the objects of international law that Bentham affirmed that the object of international law lay with the common and equal utility of all nations. However, he here did little to explain in concrete form, as per his avowed concern with the issue, as to how this declared object of international law was to be reconciled with the responsibilities of the sovereign powers, as within the separate states, to promote the greatest welfare and happiness of their respective domestic subject populations. Accordingly, it has to be said that if Bentham attempted, as he did, to specify the rights and duties of states, as in line with a sense of the balance as between utility considerations in their international application and utility considerations as applying within the domestic jurisdictions of states, then the fact remains that the specification of rights and duties, as in terms of the balance of utilities, barely went beyond the level of formal verbal definitions. As to the actual rights and duties of states themselves, in their substance and in their relations with the presupposed utilitarian normative framework, these were left more or less entirely indeterminate.

It is to be recognized that Bentham assumed a general utilitarian foundation and justification for international law in his discussion of the subjects of international law, the law of war and the plan for a universal and perpetual peace among states. Even so, there was no real and sustained effort on Bentham's part to establish how precisely utilitarian considerations were to serve to provide convincing normative-theoretical support for the actual substantive principles of international law which he picked out. This was importantly true of the principles of international law identified as essential for the institution of a permanent international peace, as where, for example, the criterion of utility did not yield any self-evident normative warrant for Bentham's own preferences with the issues of decolonization, disarmament, international adjudication and the exclusion of secret diplomacy.

In the broader connection with Bentham and the normative dimension of international law, it is to be emphasized that his favoured utilitarian formulations sorted ill with the viewpoints specific to the form of liberal internationalism that we have associated with the terms of his plan for international peace. This is so for a reason that goes directly to the contrast between natural law and utilitarianism in their standing as general normative theories. The liberal tradition in international thought and practice is one where there is an unambiguous affirmation made as to the normative primacy of the rights of individuals, as relative to the institutions of state government. Hence there follow the close linkages as between liberal internationalism and the international law relating to human rights, as rights that are independent of the agency of state governments, and also the more underlying continuity as between liberal internationalism and the modern tradition of natural law theorizing as a tradition in which the normative absolutism of the rights of individuals stands underlined. However, the utilitarian tradition in ethics, politics and jurisprudence is one where the rights of individuals are left deprived of an absolute normative status and an overriding normative force. For the logic of the principle of utility is such as to permit the subordinating of individual rights to the welfare and interests of collectivities, whether the collectivities of the separate states and political societies or the higher collectivities as pertaining to international society in its totality.

In the event, the diminishing of the normative force of the rights of individuals that it would appear that Bentham allowed for, as through his utilitarian formulations, was confirmed with the thrust of the critique that he made of the doctrine of individual rights, as these were understood within the tradition of natural law and natural rights, in his treatise *Anarchical Fallacies*. For here, Bentham insisted that it was meaningless to talk of natural rights. This was so, as he argued, because rights were legal rights, as distinct from natural rights, in the sense that all rights were created through positive law and were therefore entirely contingent on, and subsequent to, the establishing of organized government as the source and authority for positive laws. Thus it was that Bentham opposed himself to the natural rights doctrine as with the memorable assertion, as so subversive of modern conceptions of individual human rights, to the effect that natural and imprescriptible rights amounted to nothing more than nonsense upon stilts.[51]

As with the positivism of Bentham as in his jurisprudence and the particular model of law bound up with it, this was something that carried profound implications not only for the premises of natural law

theorizing, but also for the idea of international law itself. For the classic natural law thinkers, there had been no final line of separation as between law and the principles of justice and political morality, and with the law proper, whether the civil law domestic to states or the law of nations applying to states and rulers in the international sphere, being taken to comprehend the principles of justice and political morality as contained in the first-order laws of nature. In its status as part of the law applying in the international sphere, the natural law stood as law that was distinct from the positive law of nations in the respect that it was to be thought of as law that was binding on states and rulers without regard for their will, consent and agreement to be bound, and hence as law which possessed the universality and binding normative force as appropriate to the idea of international law as such.

Bentham went against, and decisively challenged, the natural law conceptualization in jurisprudence. Thus he separated off questions of law from questions of justice and political morality, as in line with his distinction between expository jurisprudence and jurisprudence in its censorial form. In doing so, he constructed a model of law where the law was to be expounded in terms of its positively determinable constituent elements, but without this involving direct reference to normative considerations of justice and political morality as such. This positivist model of law was the imperative model: and with this being the model where law was understood to be established through the will of some or other sovereign power and to be capable of positive determination through attending to the acts of sovereign will by which it came into being. The model of law as based in acts of sovereign will was of course highly subversive of the possibility of international law. To be sure, Bentham himself accepted the reality of international law, and, as we have seen, he had no difficulty in setting out what he took to be its essential principles. Even so, there was still implied in the imperative model of law that international law fell short of being law, in the complete sense, by reason of the absence from the international sphere of some sovereign power through whose will the body of law to apply therein might come to be established and maintained as to its enforcement. In the event, this implication was to be drawn out by Austin, as in the influential presentation of the positivist jurisprudence deriving from Bentham that he provided with the so-called command theory of law which he set out in his lectures in jurisprudence as published as *The Province of Jurisprudence Determined* (1832).[52]

The command theory of law, as expounded by Austin, marks a crucial point of departure from the tradition of natural law theorizing as where

the principles of civil law and the law of nations were formulated within the natural law conceptual framework. Thus it was that, for Austin, the proper province of jurisprudence lay strictly with positive law, and to the exclusion of natural law, and with the rules of positive law that applied to individual men being taken to comprise the commands that were set by a sovereign and supported with coercive sanctions for the purposes of their enforcement. As regarding the person of the sovereign, this Austin took to be the person that enjoyed the habitual obedience of subjects as their determinate political superior, and that, in doing so, served to establish a political society which was independent in the respect, among others, that the sovereign concerned was not as such in a condition of obedience to some superior political power.

It was in conformity with the terms of the command theory of law that Austin was led to deny that international law, as the law supposed to regulate the relations between independent political societies, was to be accepted as possessing the standing of positive law in the proper signification of this. For positive law, as Austin defined it, was the law set and enforced by some sovereign with the standing of a political superior. However, as he insisted, there was no such political superior to which independent political societies were subject, and, as a result of this, there was no proper authority to set and enforce international law and hence to fulfil for it the conditions necessary for its inclusion among the categories of authentic positive law. Accordingly, the rules of international law were to be thought of not as rules of positive law, but as rules that pertained to what Austin called positive morality: that is, the rules set and enforced through general opinion, rather than through the acts of political superiors. This meant that the rules of positive morality that, for Austin, were improperly referred to as international law stood, in fact, as the rules of positive international morality. In the designating of international law as the rules of positive international morality, Austin preserved something of the sense, as essential to the modern natural law tradition, of the general principles of justice and political morality as having application to the domain of international politics. Nevertheless, it is to be underlined that if Austin preserved the claims of justice and political morality within the international context, then he did this only at the cost of denying the status of law to the rules and principles through which justice and political morality in that context were to be determined. The effect of this was that Austin with his positivist jurisprudence provided for and pointed towards, and here going entirely against the idealism of the modern natural law thinkers, the final and ultimate dissociation of law and morals within the international sphere.[53]

The dissociation of law and morals, as carried forward by Austin, was central for positivist jurisprudence as it related to international law. In the event, this dissociation of law and morals was to be confirmed by the legal positivist thinkers of the twentieth century who, opposing themselves to Austin, were prepared to allow that international law possessed an authentic standing as law. Thus Kelsen affirmed the reality of international law, as through his claim that the international legal order was continuous with the municipal law systems obtaining within the individual states. However, the defence by Kelsen of international law was conducted in line with the terms of his so-called pure theory of law. The latter, it is to be emphasized, was a positivist jurisprudence where the different parts of law, international and municipal, were understood to comprise a normative order that was distinct in logic, and as to its substance, from the forms of normative order which were constituted and pointed to through the general principles of justice and political morality.[54] There is also Hart, who stands as the leading exponent of legal positivism in the Anglo-Saxon tradition in jurisprudence as after Bentham and Austin as its founders. As with Kelsen, Hart defended the reality of international law as an authentic form of law, and he is notable in that he did this in explicit disagreement with the arguments of Austin, as in rejection of international law, that related to the analysis of law as consisting of sovereign commands and with his insisting that the rules of international law, as rules of law, were to be distinguished from rules of morality. If in the latter respect Hart broke with Austin, for whom international law was of course nothing more than the sum of positive international morality, it remains the case that the position that Hart took regarding international law everywhere reflected his own strict adherence to what he endorsed as one of the core tenets of the form of positivist jurisprudence deriving from Bentham and Austin. This was the absence of any necessary or conceptually guaranteed connection as between law and principles of justice and morality, both as concerning the substantive content of established law and as concerning the conditions for its recognition as law as such.[55]

The positivist viewpoint on international law, as present with Kelsen and Hart, goes to underline the remoteness for the now existing international legal order of the mainstream natural law conceptualizations that were jettisoned by Bentham and Austin. In more particular terms, there is underlined how deeply problematic has become the matter of the juridical status of the standards and principles, as possessing a normative character, that are recognized to relate to, and to be substantive considerations for, the international law system. To be sure, the current

state of the international legal order is one where normative principles of justice and political morality are very much in play. Indeed, it is the fact of the diversity of such principles that does much to make for the attraction of some version of value-free positivism as the theoretical basis for the identification, and exposition, of objectively determinable rules of international law. Even so, it has to be said that positivism renders the normative principles of justice and political morality relating to international law unsupported from within jurisprudence itself, as given that positivist jurisprudential enquiries would appear to fail to provide for critically established principles of justice and political morality as first-order normative principles for the basing of international law: save in the respect that positivist jurisprudence characteristically makes the assumption of an underlying utilitarianism whose applicability as a normative theory, for the purposes of international law, is in general terms left unexplained. It is with this that there is brought out the defining role played by the emergence of positivist jurisprudence as in the subverting of the foundations of the philosophical consensus on international law, as this was set by the line of the modern secular natural law thinkers. So also is there here brought out the cardinal importance in this process of subversion of the modern secular natural law tradition of Bentham himself, as the originator of the positivist school in jurisprudence. In the event, the modern secular natural law tradition, with its distinctive conceptualization of international law, was to be subverted not only by Bentham and his successors. As we shall find in the following chapter, the tradition was also to be subverted by writers addressing the subject of the law of nations whose work ran counter, in both spirit and substance, to the elements of positivism and utilitarianism which were central to Bentham's jurisprudential project and legacies.

5
Rousseau, Kant and Hegel

With this chapter the focus is on Rousseau, Kant and Hegel, and, as we have indicated, these writers are to be placed with Bentham as subverters of the conceptualization of the law of nations as developed by the modern secular natural law thinkers. The works of Rousseau referred to include his principal essays in international thought: *The State of War*, as dating from 1755–56, the *Abstract of Saint-Pierre's Project for Perpetual Peace*, as written in 1756 and published in 1761, and the *Judgement of Saint-Pierre's Project for Perpetual Peace*, likewise written in 1756 but not published until 1782. Also treated of is Rousseau's influential work in political theory *The Social Contract* (1762).[1] With Kant, there is consideration given to his great treatise in metaphysical philosophy, the *Critique of Pure Reason* (1781; 2nd edition, 1787), and to his seminal treatises in ethics: the *Fundamental Principles of the Metaphysic of Morals* (1785) and the *Critique of Practical Reason* (1788). There is also examined in some detail the second part of Kant's third major work on ethics, *The Metaphysics of Morals*, which contains the main substance of his political thought: *The Metaphysical Elements of Justice* (1797). In addition, the two works containing the main substance of Kant's arguments on international law and international politics figure prominently in the discussion of the chapter, and with these being the *Idea for a Universal History with a Cosmopolitan Purpose* (1784) and, most especially, the celebrated essay *Perpetual Peace* (1795; 2nd edition, 1796).[2] As for Hegel, there is reference made to his lectures on world history, as posthumously published as *The Philosophy of History*, but with the work of his that is singled out for close attention being his major treatise in political philosophy: the *Elements of the Philosophy of Right* (1821).[3]

i. Rousseau

In his international thought, Rousseau followed Hobbes in the regard that he held that the natural condition of the relations among states was that of war. There are, however, two key respects in which Rousseau is to be set apart from Hobbes in his approach to international politics. First, Rousseau did not consider that war was the natural condition of the relations among individual men, and with individual men being understood to be peaceful, rather than belligerent, by nature. Thus for Rousseau, as in contrast to Hobbes, war in the proper sense was something specific and exclusive to states as in their mutual external relations, and something that obtained as a condition of affairs only in consequence of the forming and existence of states as independent political societies as such.[4] Second, Rousseau diverged from Hobbes in that he did not appeal to natural law in explanation of the terms of peace that were to apply to states and rulers. Instead, Rousseau looked to institutional structures to set the terms of peace among states and rulers in the international sphere. This is evident from the thrust of the review that Rousseau made of the proposals for perpetual peace of the Abbé de Saint-Pierre, as these had been first published in different printings and versions in 1712, 1713 and 1717 and subsequently published in abridged form in editions appearing in 1729 and 1738 under the title *Abrégé du Projet de Paix Perpétuelle*.[5]

Saint-Pierre was concerned with the conditions for lasting peace in Europe. In this connection, he proposed that the sovereign rulers of the European states were, as through entering into a fundamental treaty agreement, to renounce war as the means for settling disputes and to establish a confederal union, or grand alliance, for the maintenance of a perpetual peace among themselves. The grand alliance of sovereigns was to be an institution of international government, and, as such, it was to be based in a general assembly comprising representatives from the member states. The general assembly body was to exercise law-making and regulatory powers; and, crucially, it was to be authorized to mediate disputes among member states and, where this failed, to settle the disputes in question through the issuing of binding judgments in arbitration. This dispute settlement procedure was to be supported by an international army to be supplied by the member states of the grand alliance, and this military force was to be used to sanction sovereign rulers who refused to comply with the regulations of the grand alliance or with the arbitral judgments of the general assembly, or who otherwise acted contrary to the terms of the grand alliance or engaged in preparations for war. The grand alliance was presented by

Saint-Pierre as a permanent and indissoluble union of states, and with the consequence that the grand alliance was to act to coerce sovereign rulers who sought to secede from it.[6]

In the *Abstract of Saint-Pierre's Project for Perpetual Peace*, Rousseau endorsed Saint-Pierre's proposals for a lasting peace established through a confederation of states. He accepted that the states of Europe were to be found freely associated together in a community based in a single religion, common moral standards, a uniform system of international law and shared commercial interests. However, he also underlined that despite these bonds, the essential condition of the relations among the separate states remained that of war. The solution for this condition was to be a form of political union under a federal government, and this, as Rousseau described it, was to possess the functions and powers, and the compulsory character, that Saint-Pierre had assigned to his projected grand alliance. Thus the federation was to possess the powers to enact binding laws and ordinances, to coerce states to obedience to its determinations, and to prevent member states from withdrawing from it at their pleasure. The introduction of this federation, Rousseau claimed in the *Abstract*, would promote lasting peace in Europe and would thereby work to the advantage of sovereign rulers.[7] In the *Judgement of Saint-Pierre's Project for Perpetual Peace*, however, Rousseau went on to insist that Saint-Pierre's peace proposals were utopian. This was so for the reason that the envisaged federal system of international government ran counter to the actual will of sovereign rulers and would inevitably provoke their resistance to it. No doubt, federal government was in the true interests of sovereign rulers; but, as he argued, this was unpersuasive for sovereign rulers for whom their interests appeared to lie in the preservation of their absolute independence and exemption from the constraints and limitations of law. In view of this, it followed for Rousseau that a federal form of government to advance peace among European states would be instituted not through the agreement of sovereign rulers, but only through the means of force and violence. Hence it was Rousseau's firm conclusion, at the end of the *Judgement*, that the instituting of an international federation for peace, as consistent with the projections of Saint-Pierre, would involve the revolutionary dislocation of international politics and that it would in consequence more probably do greater damage than good for the existing European political order.[8]

It is instructive for the general theory of international law and international relations that Rousseau emphasized the fact of the resistance of states and rulers to institutions of international government. For in

doing so, he identified the will of states and rulers as an impediment to the establishing of the institutional frameworks essential for the full realization of an adequate system of international law. However, the true significance of this lies less in Rousseau's sense of the opposition of states and rulers in regard to international government, and more in his affirming of the latter while at the same time contributing to the determination of the concept of the state itself as in accordance with the principles of the rule of law and limited constitutional government.

Critical, here, is the theory of popular sovereignty that Rousseau expounded in *The Social Contract*, as where sovereignty was understood to consist in a law-making power that belonged to the whole body of the people forming the state and that was exercised as through the general will of the people. As Rousseau explained it in specific terms, the general will was brought into being through the social contract that he saw as effecting the transition made by men from their natural condition to the condition of political society. Essential to this contract was the alienation by individuals to the community of the rights and freedom belonging to them in the condition of nature, and their submission to the direction of the general will as embodied in the community and by which the community acted as a single person or entity. The form of association established with the social contract was the republic or body politic. In its passive condition, the body politic was the state, in its active role it was a sovereign, and in relation to other like associations it was a power. The individuals associated together in the state, when considered as a collective whole, were the people; and when considered as individuals they were at once citizens, in that they shared in the sovereign power as based in the general will, and subjects, in that they were bound in obedience to the sovereign power and to the laws enacted through it.[9]

For Rousseau, the social contract founding political society involved men attaining to the specifically civil form of freedom, and their renunciation of natural freedom. In the condition of nature as prior to political society, men were free in that they held an absolute right to take what they desired and were capable of holding, but with this natural liberty being limited by the extent of their physical power and with their holdings being only possessions based in force or in rights of first occupation. In political society, the freedom of men presupposed their dependence on, and subjection to, laws and with the laws setting the framework for their civil rights and liberties. For it was of the essence of civil freedom that it was not liberty that was limited by the physical power of the individuals having and exercising it, but a liberty that was

limited rather by the general will of the community and hence by the laws that derived from the general will. Thus it was that the holdings of individuals as within political society were not mere possessions based in force or in first occupation rights, but personal property that stood secured to men through an authentic lawful entitlement.[10]

The determinations of the freedom of men in the state were set through laws, and so were set through the people as a united citizen-body in the exercise of their law-making power as the defining power of sovereignty. As concerning the sovereign power belonging to the people, it is to be emphasized that Rousseau insisted that this sovereignty was inalienable and that the people, as a collective sovereign acting through their general will, were capable of being represented by no one other than themselves.[11]

It is to be emphasized also that Rousseau presented the general will as being directed towards laws considered as something possessing the generality, or universality, as appropriate to the character of the will with which sovereignty was exercised by the people. In Rousseau's explanation of it, the laws established through the general will were laws that applied to the whole people, and that had reference to all the subjects of the state, as in a collective sense, and to their actions as in an abstract sense. As for particular objects of will, such as specific individuals or specific actions, these could not be a concern for the laws, but only for the commands standing as acts of government. Here, Rousseau committed himself to the view that it was the laws, rather than government, that set the fundamental terms of association among men within political society, and with this carrying the implication that the acts of government were required to have some basis and justification in the laws. Thus it was that Rousseau maintained that legitimate government was republican as in the sense of republican government being government based in the rule of law, and as where republicanism involved the government in the state, and whatever its constitutional form, functioning as the agent of the people in their status as sovereign. Not only did Rousseau see government as serving the people as through its subordination to the laws; but consistent with his theory of popular sovereignty, and with the ideal of republicanism associated with it, he saw the people comprising the state as the servant of no other will or authority, as given that the laws that applied to them, as subjects, were laws of which they as sovereign were the authors.[12] In line with the terms of this constitutionalist argument, Rousseau was to claim that government had a representative standing in relation to the people as bearers of the powers of sovereignty, and that the executive powers of government, as distinct from the sovereign

law-making power, were never to belong to the people so as to make for the proper separation of official powers within the state.[13]

The theory of popular sovereignty that Rousseau expounded in *The Social Contract* stands as a signal contribution to modern political thought. For the theory served to identify, and to provide its own explanation for, the principles essential to the state and those essential to the rule of law and limited constitutional government. Even so, Rousseau fell short of bringing his determination of the concept of the state into a systematic relation with the terms of his international thought. It is evident from the argument of *The Social Contract* that, for Rousseau, states stood as sovereign persons or entities, as from the standpoint of the law-making capacities of the citizen-bodies comprising them, and that states, as in their ideal form, were to exercise their sovereignty in accordance with the institutional principles of a republican constitutionalism adequate to ensuring government subject to the rule of law. It is no less evident that this commitment to republican constitutionalism on Rousseau's part was such that it significantly qualified the position that was core to his view of international politics. This was the position that states, as sovereign authorities, were conflictual in their mutual external relations, as to the point of their coexisting in a natural condition of war, and resistant to subordination to the sort of institutions of international government as which held out the only real prospect of lasting peace. The belligerency of states and their recalcitrance as to external legal and political authority were understood by Rousseau to be fundamentals, as given in the character of statehood and following as effects from the principles of sovereignty that pertained to statehood. However, there was no sense with Rousseau as to the possibility of these fundamentals being affected by factors concerning the internal domestic political organization of states: as with those to do with the adoption by states of the principles of constitutionalism and the rule of law as relating to their government and sovereignty. Here, Rousseau is to be contrasted with Kant, who was to regard the conformity by states with the principles of the republican constitution as bearing directly on their preparedness to maintain the international peace and to accept institutional arrangements to buttress the law as applying in the international sphere.

ii. Kant: law, state and government

Kant was a systematic thinker, and his philosophy stands as a unified body of thought. The arguments that he set out regarding law and

politics in their international application formed an integral part of the exposition of the first principles of law, state and government that comprised his political philosophy. In expounding the principles of law, state and government, Kant appealed to the abstract principles of human practical reason whose analysis was central to his ethics. In turn, Kant's arguments about human practical reason followed from, and complemented, the arguments as focused on human reason and understanding in their theoretical employment that he developed in the *Critique of Pure Reason*.

The concern of Kant in the *Critique of Pure Reason* lay with human reason and understanding as these were directed towards establishing knowledge of nature and, through this, with the underwriting of the objective validity of the form of knowledge associated with the scientific understanding of the natural order. In regard to this concern, Kant maintained that the human experience of the natural order as formed through the intuition of sensory data, and as organized through the conceptual structure pertaining to certain fundamental categories of the understanding, was such that the natural order was of necessity experienced as an order governed by the rules and principles essential to the natural sciences. So, crucially, the natural order was necessarily experienced as an order comprising objects with an enduring identity and existence, and where the interactions among objects were subject to regular laws of cause and effect.

The view of the natural order that Kant argued for in the *Critique of Pure Reason* brought him to consideration of human agency, as in relation to nature, and so to consideration of the idea of human freedom. According to Kant, the idea of freedom, as so also with the ideas of God and immortality, ranked as what he called an idea of pure reason and was, as such, an idea that involved only the illusion of knowledge and where reflection on it led only to the generating of mutually contradictory arguments and counter-arguments. As to the idea of freedom, Kant pointed to how it resulted in the contradiction between freedom, as relating to the sense of an unconditioned causality, and determinism, as where it was assumed that all events occurring in nature remained subject to the necessary laws of causal connection. The contradiction, here, appeared to undermine the possibility of human morality, as through its removing adequate theoretical support and justification for the idea of free agency that was essential for the moral consciousness. Thus, for Kant, the principles of the understanding provided that the human agent, as part of the natural order, was to be thought of as inescapably bound under the natural laws of cause and

effect. Against this, there was the idea of freedom as compelling for the human agent, and as enabling the agent to think of himself as the author of his own actions and hence as standing apart from the natural order and in exemption from the laws of causal necessity as there having application.[14]

It was the conclusion of Kant that the contradiction between freedom and determinism was to be overcome, and the reality of human freedom vindicated, through appeal to the perspective constituted through reason in its practical, rather than theoretical, form. Kant's examination of practical reason came in the *Fundamental Principles of the Metaphysic of Morals* and the *Critique of Practical Reason*. In these works, Kant set out to demonstrate the objectivity of human morality, by bringing out the rational structure of practical deliberation, and to demonstrate that reason, in its practical form, stood as an independent, or autonomous, source of moral values and moral principles. Central to this endeavour was the analysis of what Kant saw as the imperative structure of practical reasoning, and with the distinction informing that analysis as between what he identified as two different imperative forms: hypothetical imperatives and the categorical imperative. As Kant explained the matter, hypothetical imperatives were imperatives that set out, or commanded, a course of action that was represented as the means to some other end. The categorical imperative, however, was an imperative that set out, or commanded, a course of action that was represented as necessary without regard to any extrinsic end, and hence as possessing an objective necessity in its own right.[15]

For Kant, the categorical imperative described the essential formal structure of practical reason as it related to specifically moral subject-matters and so embodied the foundation of morality itself. The main substantive formulations of the categorical imperative that Kant provided are to be found set out in the *Fundamental Principles of the Metaphysic of Morals*. The first of these was the principle of practical reason to the effect that the human agent was to act only in accordance with maxims of conduct that were capable of being willed as universal laws. The procedural principle of universalizability, as the condition for binding laws of conduct, was closely linked to the principle of practical reason that Kant laid down with the second formulation of the categorical imperative. Here, Kant identified as an ultimate criterion of value the absolute and intrinsic worth of rational nature as an end in itself, and with the practical principle that derived from this being that the agent was always to act such as to treat humanity, whether in his own person or in that of any other, as an end and never as a means only.

The latter principle gave rise to the further practical principle deriving from the categorical imperative. This principle was one given in the idea that the will of each rational being stood as a universally legislative will, and with the principle providing that the agent was to adopt only such maxims of conduct that it was possible for him to regard as universal laws whose origin and authority lay in his own will. The idea of the agent as the bearer of a universally legislative will brought Kant to expound the conception of an ideal moral community that he called the kingdom of ends. This he presented as a realm where the terms of the moral law were properly fulfilled by all rational beings. The conception of the kingdom of ends gave rise to the practical principle that the agent, as a rational being, was to exercise the capacity for moral legislation on the premise that he belonged to this kingdom as a member and as a sharer in its sovereign law-making power. Hence there followed, as a general principle of practical reason, that a rational being was always to think of himself as promulgating laws, either as the member of or as the sovereign within a kingdom of ends as rendered possible through the freedom of the will.[16]

In line with these various formulations of the categorical imperative, Kant identified as the supreme principle of morality what he called the autonomy of the will. By this Kant meant the idea of the will as unconditioned by any cause or causes external to itself, and with this involving the idea of the will of the agent who remained bound in obedience only to such restrictions on conduct as were set through laws where his own will and reason stood as their source. The autonomy of the will ranked supreme as a principle of morality, for Kant, in that it was understood to be a principle given in, and required by, the very conception of the categorical imperative itself. Thus in Kant's explanation of it, the autonomy of the will was a condition essential to the possibility of there being a procedure of practical reason capable of resulting in the promulgation of universal laws of conduct, and at the same time the autonomy of the will was explained as a principle of morality that was itself commanded through the categorical imperative.[17]

The reference that Kant made to the autonomy of the will, as the supreme principle of morality, is crucially significant in that it points to the fundamental contrast between his own ethics and certain of the other leading traditions in ethical thought: as so with those traditions where principles to do with the idea of a normative order given in nature, or with the idea of a normative order established through the will of God, were taken to found the moral law.[18] The discussion of the autonomy of the will is of crucial significance in the further and

related respect that it led Kant to address, and to propose a solution for, the contradiction between freedom and determinism. Here, Kant argued that the conditions for the exercise of practical reason were such that the agent could conceive of himself and of his actions only in accordance with the idea or presupposition of freedom. That is to say, the agent was required through practical reason, and as by the terms of the categorical imperative, to conceive of himself as subject to the laws of freedom, whose origin and determining ground lay in his own autonomous will and reason, and, in this regard, as standing exempt from subordination to the laws of cause and effect that applied to him in his status as part of the natural order.[19]

Kant believed that the principles of practical reason bound up with the idea of the categorical imperative underwrote the substance of conventional morality, and it is evident how this is so. For example, the principle of universalizability directed that human beings were to be considered as equals under the moral law, and with the idea of the categorical imperative here confirming the connection between justice and equality. Then again, the principle that the human being was entitled to respect as an end in himself answers to the sense of the inviolability of the human being, as the bearer of a distinct moral personality and of the rights and freedoms essential to this, which is presupposed with the most basic prohibitions associated with ordinary morals, such as the prohibitions on murder, theft, lying and deception, and arbitrary force and violence against the person. It was very much as an ethics affirming human rights and freedom and human equality, as running along these lines, that Kant's analysis of practical reason, and the idea of the categorical imperative central to it, set the conceptual framework for the exposition of the first principles of law, state and government that he was to provide in *The Metaphysical Elements of Justice*. In the preliminary section of the work as entitled 'Introduction to the Elements of Justice', Kant set out the general normative principles of justice and political morality that followed from the idea of the categorical imperative. In the main section as entitled 'The General Theory of Justice', Kant set out the principles relating to law and the institutions of state and government essential for law, and with his focusing on what he identified as the three forms or parts of public law: state or municipal law, the *ius civitatis*; the law of nations, the *ius gentium*; and the world or cosmopolitan law, the *ius cosmopoliticum*. In discussion of municipal law, Kant addressed such issues as the constitutional order of the state, the basis of its sovereignty and the rights and powers of civil government; and in discussion of the law of nations and cosmopolitan

law, he addressed the leading issues to do with the international legal order.

The normative foundation for the institutions of law, state and government that Kant identified in *The Metaphysical Elements of Justice*, and that he took as the point of departure in their analysis, lay in what he called the universal principle of justice. This principle provided that all acts of men were to be counted as just, or rightful, that in themselves or in their maxims were such that the freedom of the will of each individual could co-exist together with the freedom of everyone else as in accordance with universal laws. The universal principle of justice conforms, as in its essential meaning, with the principle of universalizability that Kant presented as the first formulation of the categorical imperative. However, Kant here went beyond the terms of the categorical imperative in the respect that the universal principle of justice was explained as a principle that was conditional on the presence of external means to compel men to comply with what justice demanded. The idea of justice was therefore bound up with that of the authorization to use coercive force against individuals who violated justice and the rights relating to it. Thus in specific terms, Kant insisted that justice was to be understood as depending on the principle of the possibility of a general use of external coercion that could be made consistent with the freedom of all under universal laws as a containing framework.[20]

For Kant, the use of external coercion in the enforcement of laws of just conduct necessitated a coercive power, and where such a power, to be legitimate, presupposed the formation of political society as its institutional context. As Kant explained it, the essence of political association proper was to be found in the public law, and with this being the body of laws that demanded public promulgation in order to establish a juridical condition of relationship among men. The promulgation of a system of public law depended on the persons subject to it being united under a formal constitution. A multitude of men, as brought together in a society based in public laws and a constitution, were to be thought of as forming a civil society. The latter viewed as a whole in relation to its members was the civil state, and with the civil state having such designations as those of a commonwealth, as regarding the common interests of its members, and a power as regarding all other like powers. Kant contrasted civil society, as a juridical condition of society, with the state of nature, as where men co-existed prior to the founding of political society. The state of nature was not as such a state of war. It remained, however, a condition of society where men were liable to suffer harm as by one

another, as with men acting in line with their partial judgments as to what was good for them. Thus it was required in justice that men should enter into a form of society where there was instituted a power of public lawful external coercion. This was the condition of civil society, as where the rights of men were given recognition in laws and secured to them through the agency of an external power. The requirement of justice for men to enter civil society was strict, for there could be no justice in the state of nature as given the absence from it of authorized judges to make lawful determinations of disputes concerning rights. Hence Kant insisted that it was permissible for men to employ violent means to compel one another to participate in the juridical order specific to civil society.[21]

The juridical order of civil society found its concrete institutional embodiment in the civil state, as through the legislative, executive and judicial authorities that comprised the basis of the state constitution and the system of state government. Of the three state authorities, the legislative authority was understood by Kant to be foundational in that it stood as the sovereign authority in the state, and with his here following Rousseau in maintaining that the sovereign legislative authority in the state belonged to the united general will of the people who formed its citizen-body.[22]

In Kant's account of it, the sovereign legislative authority as vested in the people was such that it could be exercised in the civil state only through specific agencies of government. This required a constitutional order, describing the official structure of the legislative, executive and judicial authorities, so as to provide for the institutionalization of the sovereignty of the people and their subjection to laws deriving from their own will. The constitutional order thus served to establish a determinate relationship between a supreme political authority and the people, and with the people as the sovereign legislative power, in their collective aspect as the citizen-body, being thereby subject as individuals to their own legislative sovereignty as this was exercised in the state through the supreme political authority as under the state constitution. The relationship between the supreme political authority and the people as an aggregate of individuals was hierarchical in form, as a relationship between one with the right of command and one who owed the commander the duty of obedience. For Kant, the people could establish the state and submit themselves to a supreme political authority under a constitution only through some voluntary act of their own. This act was that of the original contract, the idea of which was essential in explaining the principles of justice bound up with the situation

of men as citizens under institutions of law, state and government. Thus the idea of the original contract related to the transition to be made by men from the state of nature to the condition of the civil state; and, in doing so, it related to the abandoning by men of their natural freedom and to their acquiring, as within the civil state, of the freedom specific to citizens as a freedom based in laws established by themselves, as a citizen-body, as through their own sovereign legislative will.[23]

The constitutional order of the state was understood by Kant to possess a complex internal structure that presupposed the separation of official powers. In this connection, Kant held that the executive power was to be separate from the people as the bearers of the sovereign legislative power, and with this being so in terms that indicated his commitment to the principles of the rule of law. Thus the state ruler, as the bearer of the executive power, was to govern only in conformity with laws deriving from the will of the people, but was to have no power to make laws given that a combining of executive and legislative powers in the person of the ruler would make for despotic government. Likewise, the people, as bearers of the sovereign law-making authority, were not to assume the executive powers of rulership, since this would run counter to the principle that the ruler was subject to law and hence subject to the sovereign will of the people as an independent source of law.[24]

The rights exercised by the supreme political authority in the state as to the command of citizens were sovereign rights, which followed as the juridical effects of the union of men under the civil constitution. Here, Kant argued that the people as subject to a lawful civil constitution owed an absolute and unconditional duty of obedience to the political authorities in the state and to its laws and constitution. Thus the people united under a civil constitution could not be thought of as possessing a right to resist the political authorities, or to engage in sedition or revolution or to use coercive force against their rulers. As for the concrete rights of sovereign command, these, for Kant, included the right of supreme proprietorship as to land and property, the right of taxation, the right to administer the national economy, the national finances and the police force, and the right of inspection as to all political, religious and other like associations. There were also rights of sovereign command as to the allocation of offices of profit in the state and the awarding of honours, and as to the punishment of crimes and the pardoning of criminals.[25]

It is evident that the rights of sovereign command that Kant identified were such as to establish that the supreme political authority in the

state, as through which the rights were exercised, was to be understood as an absolute and exclusive authority. In this respect, the specification of the rights of sovereign command that Kant provided agrees closely with what Hobbes had specified to be the rights and powers of sovereignty. With that said, it must be emphasized that, for Hobbes, the end and justification of the state as in the exercise of its sovereign powers lay primarily in its providing for the peace and security of its subjects. For Kant, however, the end and justification for the state, and for its authority, lay more in its contribution to the full realization by men of their rights and freedom as citizens, and with this being in line with the ethical principles of practical reason given in the idea of the categorical imperative and in line with the institutional principles essential to the rule of law and to limited constitutional government. That Kant conceived of the state, and of its end and justification, in this way explains why it was that, in common with Rousseau, he maintained that the state was as the ideal to be based in the republican form of civil constitution.

In *The Metaphysical Elements of Justice*, Kant commended the civil constitution of the true republic as the most fully legitimate form of constitution and as the constitution that most fully conformed with the terms of the original contract founding the state as such. As he explained, the republican constitution was the constitution where the principle of freedom was presupposed as the precondition for the exercise of coercive power by the state as against the people. Thus it was the constitution where law was autonomous, in the sense of its being independent of the will of any particular person or persons; as it was so likewise the constitution that, in preserving the rule of law, served to provide for the representative system of government, as where the rights of citizens were upheld by the state in their own name and protected through their own representatives or deputies.[26]

The account of the republican constitution in *The Metaphysical Elements of Justice* confirmed the claims that Kant made for it in *Perpetual Peace*, as under the terms of what, as we shall see, was the first of the three so-called definitive articles of perpetual peace. This article provided that states were to adopt the republican form of civil constitution as a condition for the maintenance of international peace on a lasting basis. In explanation of the article, Kant argued that the republican constitution was based in, and gave effect to, the principles of freedom, dependence and equality. By freedom in this context, Kant meant that under the republican constitution all members of the state would exercise the freedom that was theirs by right, and with this being the freedom where individuals were to be bound only by such laws

as those to which they were able to give their consent. By dependence, Kant meant that under the republican constitution all members of the state would be the subjects of a unitary law-making authority. By equality, Kant meant that individuals would enjoy equality of treatment under the laws maintained in the state, as where the freedom of individuals was to be restricted only through the constraints as imposed through obligations laid down in laws which were reciprocally binding on all citizens.

In writing of the republican form of state constitution, Kant did not intend by this to refer to some actually existing type or form of state constitution. He was concerned rather with the first principles of constitutional government as such and as relating to the idea of the original contract. Thus Kant distinguished between two principles for the classification of states. First, there was the form of sovereignty, which, for Kant, related to the person or persons holding and exercising the supreme power of rulership in the state considered as a matter of specific constitutional structure. Kant identified three possible forms of sovereignty: autocracy or monarchy, as where rulership was vested in the single person of the prince; aristocracy, as where rulership was vested in a nobility; and democracy, as where rulership was vested in the people as a whole. Second, there was the classification of states by the form of their government. This, as Kant put it, related to the way in which the state was governed but without regard for the issue of the person or persons who happened to bear the rights and powers of rulership therein: and so it related to the way in which power was exercised as in accordance with the terms of the established state constitution. In line with this, Kant characterized the republican form of government in terms where it was taken to stand as the form of government based in the representative principle, and in the other principles essential to the possibility of government limited by the rule of law. As such, the republican form of government was distinguished from what Kant called the despotic form of government, as in the respect that in the true republic the executive power of government was maintained in separation from the legislative power.

The merit of the republican constitution as to the separation of the legislative and executive powers, Kant argued, consisted in its providing that the executive power of the ruler in the state would be limited by the laws, and so remain a power which was representative of the people. In contrast to this, the despotic form of government involved a negation of the principle of representative government as subject to the rule of law. For with a despotism, as in Kant's sense of it, the laws of the state were made and executed by the same power, and with the result being that the

way lay open for the ruler bearing the executive powers in the state to act apart from all legal constraints and limitations. Thus it was that a despotism gave rise to the possibility that the laws of the state would stand not as an expression of the will of the people, but merely as an instrument of the private will of the ruler.

It was the notable position of Kant that the democratic form of rulership would lead to the despotic form of government. As Kant pointed out, democracy provided for the participation of the people in the executive powers of rulership; but in doing so, it collapsed the separation of legislative and executive powers given that, as he so assumed, it was the general will of the citizen-body which stood as the sovereign legislative power in the state. The democratic form of rulership was for this reason opposed to what Kant took to be the ideal of individual freedom as secured under a system of representative government as limited by laws and based in consent. The situation of the individual citizen in a democracy was in fact one of subjection to decisions taken by the whole citizen-body as through the application of executive powers, but with there being no assurance that these decisions would accord with, and so be limited through, laws that proceeded from the will of the citizen-body in its legislative capacity. Hence there was no assurance in a democracy that executive decisions, as concerning individual citizens, would follow from laws based in some prior act of consent on their part as sharers in the sovereign legislative power in the state. The executive powers in a democracy being therefore unlimited, and with this such as to leave the lawful rights and freedom of individual citizens without effective guarantee, democracy served only, as Kant put it, to place the general will as the principle of freedom in opposition to itself. In consideration of these the declared defects of democracy, it is no surprise that Kant should have come down in favour of monarchy as among the actually existing state constitutions. Thus as he claimed in *Perpetual Peace*, it was the monarchical constitution, as exemplified with the rule of Frederick the Great in Prussia, that, in its according with the true character of representative government, was the one most likely to give effect to the principles essential to the ideal of the republican constitution and so to allow itself to undergo progressive reform such as to bring about the full realization of its inherent potentialities for republicanism.[27]

iii. Kant: peace and the international legal order

The discussion of the republican form of civil constitution is the main substantive point of connection between Kant's exposition of the

principles of law, state and government, as applied to the internal domestic political organization of states, and his exposition of the principles of the international legal order, as this was provided in *Perpetual Peace*. The argument of *Perpetual Peace* is set out in the form of an imaginary treaty between states, where there are laid down the conditions that Kant took to be necessary for the realization of an enduring peace in the international sphere. The concern of the treaty lay with law as the basis for an international order committed to peace, and with this peace being presented as depending on the acceptance by men and states of an interlocking system of public law which was to stand as what we may refer to as the law of peace. The treaty of perpetual peace was divided into two sections. In the first section, Kant laid down six preliminary articles of perpetual peace between states. These articles expressed what Kant understood to be the fundamental principles of the law of nations. In the second section, Kant laid down the three definitive articles of perpetual peace to which we have already made reference, and with these articles relating to the constitutional structures that he held were to found municipal law, the law of nations and the cosmopolitan law as the three essential parts of public law.

Kant characterized the principles given in the six preliminary articles of perpetual peace as prohibitive laws, or *leges prohibitivae*, and hence as carrying the binding normative force appropriate to law. The principles stated in the first, fifth and sixth preliminary articles had the standing of strict prohibitive laws, in the sense that their terms were to have immediate effect and application. The principles stated in the second, third and fourth preliminary articles were prohibitive laws that allowed for some latitude, and thus also for delay, in their application as determined by circumstances. As to the prohibitive legal status of the six preliminary articles as pertaining to the law of nations, it is to be observed that the articles state principles that stand as substantive principles of current international law or that stand as substantive principles of international order which are conditional as for the extension of the rule of law to the international sphere.

The first preliminary article provided that no conclusion of a peace was to be taken as valid if it was made with the secret reservation for a future war, which condition was essential, for Kant, if agreements to end wars were to result in peace, rather than in mere truces or suspensions of hostilities. The principle stated in the article related to the faith of treaties, and with this principle being embodied, of course, in the fundamental rule of international law that treaties are binding on the parties to them and are to be performed by the parties in good faith.

The second preliminary article provided that no independently existing state, whether large or small, was to be acquired by another state through inheritance, exchange, purchase or gift. As Kant explained it, the exclusion of the transactions as referred to followed because the state, as distinct from the land that it occupied, was not a possession or *patrimonium*. It was rather an association of men that no agency other than itself could dispose of without a violation of the terms of the original contract on which the state was founded. The principle set out in the article related directly to Kant's contractualist view of the state, as an association based in consent and as securing the rights and freedom of its members as citizens, and also to his commitment to republican constitutionalism as where the ruler was the representative of the citizen-body as bearers of the sovereign legislative power. In addition, the article, as to the terms of its explanation, linked the form of state government, and alterations to this, to considerations of consent such as served to give expression to something of the meaning of the principle of the self-determination of peoples as this now belongs to international law.

The third preliminary article provided that standing armies were to be abolished on a gradual basis. As such, it expressed the general principle of international order as to the effect that lasting international peace requires states to relinquish the means to wage aggressive war against one another. The fourth preliminary article provided that no national debt was to be contracted by states in connection with their external policies. In this, the article, in its meaning and implications, pointed towards the principle of conditionality, as the principle of international relations as where restrictions are placed on the extending of credit to states as in line with the uses to which it is to be put.

The fifth preliminary article provided that no state was to interfere forcibly in the constitution and government of another state. The principle of non-interference laid down in the article was overriding, in that there could be no justification, as to do with matters of scandal or offence, for the forcible external interference in the affairs of states as concerning their constitution and government. The exception to this that Kant noticed was the case of external powers intervening in a civil war in a state that had split into two parts, in order to support one or other of the warring parties where this had formed a separate state and claimed authority over the whole of the original state. Here, it was legitimate for external powers to intervene. Even so, Kant held that until such time as the civil conflict in question had been decided, such interference by external powers would involve a violation of the right

to independence of the people among whom the conflict was taking place, and with this involving an undermining of all states as to the reality of their independence. The principle as set down in the article stands as a principle of the law of nations that is to be taken as one that results from the possession by states of the rights and attributes of sovereignty. In this, the article relates in its meaning and implications to the principle that states are subject to a duty of non-interference, or non-intervention, in the area of the domestic jurisdiction exercised by other states, as so with their constitution and governmental arrangements, and with this following as the consequence of the sovereignty and equality of states considered as the foundational constitutional principle of international law.

The sixth preliminary article provided that states at war were to refrain from acts of hostility such as the use of assassins and poisoners, breaches of agreements and the instigation of treason in enemy states. The acts to be prohibited were acts of hostility that undermined the confidences among states essential for the possibility of war being ended and a return made to the condition of peace. In the absence of such inter-state confidences, Kant insisted, war would be concluded only through the total destruction of one or other of the belligerent states. The idea essential to the article was that the conduct of war on the part of states was to be subject to constraints and limitations, as to the means of war, that were to have the force of law. As such, the article in its meaning and implications relates, as to the current international law context, to the principles of international humanitarian law and the law of war.[28]

The particular significance of the sixth preliminary article, as to discussion of the law of nations, is how it connects the argument of *Perpetual Peace* to that of *The Metaphysical Elements of Justice*. For in the latter work, Kant's exposition of the law of nations was given over almost wholly to the law of nations as it concerned the waging of war by states. That this was so followed from Kant's specification of the situation of states as related to one another as though in the state of nature, and with the natural condition of the relations among states being the condition of war. In this condition, Kant claimed, states were to exercise the natural right of war so as to secure their rights and interests, and with there being no possibility of states determining these through adjudicative procedures given that the international state of nature stood as an essentially non-juridical form of society.

Kant examined the lawful rights of states in the waging of war under six heads. First, there was the right of states to wage war in relation to

their own subjects, and with it being provided that states were to wage war only with the consent of the representatives of the citizen-body. Second, there was the right of states to wage war as in regard to other states, and with this relating to considerations of just cause as based in the offences to states that gave occasion for war. For Kant, the principal offence justifying war was an actual injury to the state, as through the first aggression of some other state or states. However, it was also allowed that the perceived threat to the future security of states might justify their exercise of the right to wage preventive war, as so, for example, in response to states engaging in preparations for military activities. In addition, the increase in the power of a state, as through its territorial acquisitions, might give rise to a right of war against it, as was so with the right of states to act to preserve the balance of power.

Third, there were the rights of belligerent states during war. Here, Kant was concerned primarily with the lawful ends and objects as sought by warring states. Thus no war between states was to be a punitive war. Nor was it permitted for states to wage wars of extermination or wars of subjugation, such as were aimed at the destruction of the enemy state and the destruction of its population or their reduction to slavery. In Kant's view, such wars were in conflict with the principle of the law of nations to the effect that states were to resort to war in order to defend and maintain their existing rights and property, but not in order to make new territorial acquisitions that would threaten other states through the increase in their relative power. Fourth, there were the rights of states on the conclusion of a war. Under this head, Kant insisted that it was not permissible for a victorious state to demand compensation from a vanquished enemy state, such as to meet the costs of war, or to demand that the vanquished enemy state should forfeit its freedom and independence through being reduced to the level of a colony. Fifth, there were the rights of states at peace, and with Kant in this matter accepting the right of states to neutrality and the right of states to form alliances for the purposes of mutual defence against internal and external aggression. Sixth, there were the rights of states with respect to an unjust enemy state. The leading case of an unjust enemy state was a state that acted in violation of the terms of its treaty obligations. For Kant, all states were at liberty to unite against a state guilty of this injustice, and if necessary to compel it to adopt a civil constitution that would incline it to peace.[29]

In his statement of the law of nations relating to war, Kant is to be viewed as the successor to the just war tradition as this stretches from pre-modern times through to Wolff and Vattel. This is evident not least

from his organization of the main subject-matters of the law of war, as where he focused on considerations to do with lawful authority, just cause and right intention, and on considerations to do with the means to be adopted in the prosecuting of war. Nevertheless, there were some notable departures on Kant's part from the terms of orthodox just war theorizing. For example, Kant challenged the premise of just war theorizing as to the impossibility of a war being just on both sides as to its cause: as he did when he insisted that the justice of a war as regard to the rights of the parties would have to depend on its outcome.[30] Then again, Kant expressly rejected the position that war could have punishment as its cause and object, given, as he argued, that punishment presupposed a relationship between a superior and an inferior but with there being no such relationship obtaining as between states.[31]

Beyond this, it is to be emphasized that Kant broke with the just war tradition in a fundamental sense as to do with the view that he took as to the relationship between law and war as such. For the just war thinkers, war was understood to be conformable with law as subject to the relevant standards for its lawfulness. At the same time, war was understood to be the proper and indispensable means for the enforcement of the rule of law within the international sphere, and with the resort to war by states being considered as essential for the preservation, and where necessary the restoration, of a just condition of peace in which the lawful rights and interests of states were adequately secured to them. In contrast to this, Kant was clear that the extension of the rule of law to the international sphere involved more than the conformity of states with the law that applied to them in the exercise of the rights of war. He was clear also that war was not to be thought of as a proper and indispensable means either for the maintenance of the rule of law as between states or for the maintenance of the international peace as under conditions of justice. For Kant and here going strongly against the just war thinkers, the full and complete extension of the rule of law to the international sphere was to involve the final abandonment by states of war, as a means for the enforcing of law and the securing of their rights and interests, in addition to the final establishment by states of a juridical condition of society giving effect to a form of the rule of law which provided for the realization of a just international peace as on a permanent or perpetual basis. As Kant explained it as in the argument of *Perpetual Peace*, the appropriate condition of juridical society was to come about through the formal instituting of peace: and with this requiring a radical transformation in the situation of states as where states, and the individuals comprising them, would opt to

organize their mutual relations as set and defined through law within the framework of constitutional structures.

The lawful constitutions as pertaining to municipal law, the law of nations and cosmopolitan law, as the three parts of public law, were the subject-matters of the three definitive articles of perpetual peace and with the constitutional orders concerned standing together with the substantive law of nations to form the law of peace. With the first definitive article, as we have discussed, Kant laid it down that the civil constitution of states was to be republican in form. The republican constitution was the constitution whose adoption by states was seen by Kant as providing the best prospect for establishing international peace. This was so because in a state subject to the republican constitution, the consent of the citizen-body was necessary in order for the state to declare war, but with such consent being unlikely to be forthcoming given that the citizen-body would itself have to suffer the hardships and deprivations resulting from war.

Kant's argument for the pacific character of states founded in republican constitutionalism is deeply problematic, in that it runs counter to the point of the very distinction between the republican form of government and democracy, as a despotic form of government, which, as we have seen, he was at pains to underline in the explanation of the first definitive article. For if in a democracy, the citizen-body would in Kant's terms have direct control of the executive power, and so exercise despotic rulership, they would also for that reason be favourably placed institutionally to decide against war: and with this being to the effect of making the democratic form of government conducive to the maintenance of peace. This defect notwithstanding, it is still hugely significant that Kant saw the adoption by states of the republican constitution as a condition for their remaining at peace, and that, in doing so, he signalled that international peace depended on a transformation in the internal domestic political organization of states. With this, of course, Kant moved beyond Rousseau, who had endorsed republicanism, while failing to consider the possibility of the republican constitutional order as impacting positively on the prospects for peace in the international sphere. Of greater account still, it is to be emphasized that with his republicanism Kant was able to advance beyond the bare principle, as central to just war theorizing, that justice in war required lawful authority in the waging of war and towards principles to do with the constitutional form of the lawful authority in the state. Here, critically, the form of the civil constitution was presented as a decisive factor in determining whether the lawful authority of states to wage war would

ever have to be exercised at all. If there is confusion with Kant as to how the preferred form of republican constitution was to allow for the consent of citizens to be effective in executive decision-making pertaining to war, then it remains the case that with the argument for the republican constitution he gave expression to the morally compelling position that wars waged by states and governments were properly to be undertaken only with the agreement of citizens as the persons most directly affected by war and its consequences.[32]

With the second definitive article, Kant laid it down that the law of nations was to be founded in a federation of free states, and with the federation to provide for the constitutional foundation for the law of nations as the law applying to the mutual external relations among states in the international sphere and this to the end of the securing and maintenance of a lasting condition of international peace. The federation of free states was to stand as a lawful constitution and hence as an institution that was to bring into being a juridical condition of society. However, the federation was not to involve a form of constitution analogous to the constitution specific to the civil state, and so it was not, as Kant underlined, to embody the legislative, executive and judicial powers, and the right of public lawful external coercion, that, for him, were essential to the form of government obtaining among individual men within the civil state. In this, Kant squarely rejected international government, or the establishing of a world or international state, as the basis for lasting peace among states.

The grounds that Kant set out for rejecting international government and international statehood included those that Rousseau had cited in his objections to Saint-Pierre, such as the resistance of states and rulers to external political authority and external legal constraints and limitations. Kant also argued that the introduction of an international governmental power would inevitably result in its own disintegration and the return of states to the condition of war. In addition to this, Kant insisted that an international government or an international state ran counter to the juridical character of statehood and the juridical character of the law of nations itself. Here, he affirmed not only that states were sovereign entities, and hence free and independent in terms that excluded an international government or an international state, but also that sovereignty was secured and guaranteed for states from the standpoint of the law of nations as the form of public law applying to them and to their mutual external relations.

Thus it was, for example, that Kant pointed to how the idea of an international state involved an internal contradiction. For the con-

dition of statehood embodied a relationship between a superior and an inferior, and with the superior being a law-making power and the inferior being the people as bound by the laws issued through this power. As against this, however, the institution of an international state establishing a relationship of superior to inferior was not to be reconciled with the law of nations in its character as law applying to the relations among separate states that were not, as such, to be associated together within a single political entity. To take a further example, Kant pointed to the absence of any parallel between the situation of individual men, as in respect of the state constitution, and the situation of states as in respect of the law of nations. Specifically, he argued that while individual men were properly to be made subject to a state constitution, as where the laws were supported by a power of external coercion, this was not so for states as in terms of the law of nations as it applied to them. For states possessed their own internal form of lawful constitution, and were for this reason to be thought of as having passed beyond the stage where they might be legitimately compelled to submit to a higher constitutional authority which supported itself with coercive powers.

Kant is to be distinguished from Rousseau, and this despite their shared conviction that lasting peace among states was not to come about through an international government or an international state. Thus in contrast to his predecessor, Kant insisted that international peace was capable of realization as through an institutional arrangement, albeit one that involved nothing of government and statehood in the proper sense. The institution concerned was, of course, the federation of free states that was to base the law of nations. In calling for the federation, as the constitutional foundation for the law of nations, Kant saw himself as breaking with the line of writers represented by the so-called sorry comforters Grotius, Pufendorf and Vattel, whose work, as he claimed, was cited in justification for military aggression at the same time as it was lacking in any legal force and any restraining influence on the actions of states. As to this, it was Kant's position that the federation was necessary for the reason, as here going against the earlier writers, that the rights of states had to be determined through law, rather than through resort to war, and with the form of the rule of law appropriate for the determination of the rights of states to be such that it established a permanent international peace.

In explanation of this position, Kant observed that wars among states were capable of being terminated, but that conventional peace treaties were limited in that they concluded particular wars without

bringing an end to the occurrence of war among states in and of itself. To achieve the latter condition of things, Kant argued, it was necessary that states should institute a juridical framework for the regulation of their mutual external relations. The means for the instituting of this juridical framework, and hence for the realizing of a permanent peace based in law, was to be that of a general agreement among states. The subject of the agreement was to be the association of states that was to establish the juridical framework for states: the federation of free states or, as Kant also called it in this context, the pacific federation (*foedus pacificum*). The general agreement between states for the instituting of the federation was to be a treaty. This was not to be a conventional peace treaty, where this aimed only at ending some particular war, but was instead to be a treaty agreement that aimed at the ending of war as such. For Kant, the agreement instituting the federation was to mark the entry by states into a fully juridical form of relationship. However, the agreement was to have the form of the standard treaty, as in the respect that the agreement was to stand as a voluntary agreement and one that presupposed the freedom and independence of the states, as sovereign entities, that were the parties to it. Indeed, the preservation of the freedom and independence of states, as essential to their sovereignty, was itself to be the aim of the federation, given that, and to repeat the point, states were not considered by Kant to be legitimately made subject to public laws which were enforceable through a coercive power. To this it is to be added that the voluntary character of the federation, as intrinsic to it as an association based in agreement, is further underlined through Kant's insistence that the federation was to come into being only on a gradual basis, as starting with the example of one state with a republican constitution and then enlarging itself through the progressive accession of an increasing number of states.

There was very little said by Kant about the internal institutional structure of the federation of free states or about its institutional functions and powers, apart, that is, from his assertion that it was not to have the sort of legislative, executive and judicial functions and powers as specific to state government. It is possible to see the federation as something of a blueprint for such centralized international institutions of twentieth-century origin as the League of Nations and the United Nations: although wrongly so in fact in the case of the United Nations, given that the various collective security and peace-keeping functions and powers belonging to that institution are not ones that Kant would have been able to assign to his federation. It is also possible to associate the federation with the sort of institutional frameworks for the peace-

ful settlement of disputes among states that are now so much a part of the United Nations era. This certainly is not unreasonable, albeit that Kant, as in contrast to Bentham, did not refer formally to a court of international judicature and that he would have had difficulty in accepting the right of adjudication proper as exercisable other than as one of the rights pertaining to the state and its sovereign authorities. In the event, however, conjectures to do with the intended or actual concrete form of the federation as an international institution are beside the point in the matter of understanding the place and significance of the idea of the federation in Kant's specification of the principles of perpetual peace. For the fundamental truth about the federation was that, with it, Kant gave expression to the view that the precondition for peace in the international sphere was not the existence of international institutions as such, but rather the preparedness of states to conform with the rule of law on a voluntary basis. For the essence of the federation, as the constitutional foundation for the law of nations, lay in the formal treaty or agreement between states as through which it was instituted, and with the terms of the agreement providing not that states were to submit themselves to an international governmental authority, but only that they should undertake to act in accordance with the law of nations in their relations with one another.

The sense that is conveyed by Kant with his argument on the federation of free states as to the basis of the law of nations in the voluntary undertakings of states brings out the extent of his departure from, and of the challenge that he made to, the conceptualization of the law of nations as favoured by the modern natural law thinkers. For the latter, of course, the law of nations was understood to be founded in whole or in part in a normative order given in the order of nature itself, and with the law of nature that comprised that foundational normative order establishing the framework of a natural condition of society among states and, in this, as exerting a normative force that was binding for states without regard to their own will and agreement. With Kant, on the other hand, the law of nations was founded not in the law of nature or in any normative order relating to this, but in a normative order that was constituted and established only through the active will and agreement of states. The embodiment of this normative order lay in the form of association among states that was to be brought into being through their instituting of the federation of free states, and with the federation being a juridical condition of association that, for Kant, stood in absolute opposition to the condition of states in their natural society. This carried with it the implication that the law applying to states, and as binding

through their will and agreement, was law that was to be founded by states as in accordance with the rights and capacities that embodied their freedom and independence as sovereign entities: and with it following that states themselves were to be taken as standing as the final determinants of the principles of law and justice governing their relations within the international sphere. Thus it was that Kant's argument for the federation involved the view of state sovereignty, so much more radical than that of the natural law thinkers such as Hobbes and Vattel, as where there was called into question the possibility of states being thought of as subject to a rule of law possessing a binding normative force that remained independent of their will and agreement to be bound by it.[33]

In the third definitive article of perpetual peace, Kant turned to cosmopolitan law. This was the body of public law that Kant saw as constituting the juridical framework for the relations among men and states, considered in their standing as bearers of the attributes of citizenship in an ideal universal state comprehending all mankind. As Kant explained it, cosmopolitan law was to be restricted to the conditions of universal hospitality, and with this being such as to involve the right of the stranger not to be treated with hostility when he entered into foreign lands. The cosmopolitan right to hospitality did not involve the right of a guest, for the latter right implied a right of settlement and this could exist only where the stranger made some specific agreement with the native inhabitants of the territory into which he entered. The right of the stranger was strictly the right of resort. The latter right was based in the entitlement of all men to present themselves in societies other than their own, which entitlement Kant saw as deriving from the principle that the entire land surface of the earth was subject to an original right of common possession.

For Kant, the cosmopolitan right to hospitality was an authentic legal right, and a right that belonged to all human beings without exception. Thus Kant wrote of cosmopolitan right as being a natural right, and as such a right that presupposed the underlying unity of all the peoples making up the different nations and states of the world. However, cosmopolitan right was also a limited right, in that it meant no more than that the stranger was permitted to attempt to enter into relations with the inhabitants of foreign lands. Despite this limitation, cosmopolitan right stood as a right that Kant thought of as serving to bring the different peoples of the world together as through peaceful forms of mutual intercourse that remained subject to a universally accepted system of law. In this way, he argued, the right of men to hospitality carried with

it the possibility of the whole human race being able to progress towards eventual union under a lawful cosmopolitan constitution.

Given that Kant conceived of cosmopolitan law restrictively, as relating to the right of universal hospitality, it is understandable that his discussion of this law should have led him to denounce what he saw as the abuses of the commercial states of Europe in their dealings with foreign lands and their peoples. The conduct of the European commercial states, he claimed, was itself inhospitable, and so in violation of cosmopolitan law, and with it having resulted in the dire suffering of native peoples as with the subjugation of the Indian peoples and the enslavement of the peoples of the West Indies. This denunciation of the European powers underlines that Kant envisaged cosmopolitan law as a system of law under which all men, and all the nations and peoples of the world, would have formal recognition of their rights and personality without regard to the differences between them as to nationality, race and religion, or to the differences based in their relative levels of economic and political development. However, the condemning of the practices of the European commercial powers should not be confused for a condemnation of international trade and commerce as such. Indeed, Kant linked the principle of freedom of trade and commerce directly to the concept of cosmopolitan law in *The Metaphysical Elements of Justice*, and it would appear from this that he thought of cosmopolitan law as deriving from, and as setting the legal framework for, international trade and commerce, just as much as he thought of it as fulfilling the aspirations of nations and peoples for universal recognition of their juridical rights and personality. Thus the fact of international trade and commerce was for Kant a positive factor for international peace; and it was clearly something that he took as evidence, as along with the other forms of interactions among nations and peoples, to support the judgment in *Perpetual Peace* as to the real advances being made by nations and peoples towards the forming of a universal community among themselves as based in a shared conception of law and, through this, to the setting of a foundation for perpetual peace.[34]

The concept of cosmopolitan law appears to provide some support and justification for the argument of Bull that Kant is to be read as the exponent of what he took to be a specifically universalist tradition in international thought and practice. As we discussed this in the Introduction, Bull held that the Kantian-universalist standpoint in international politics is one where emphasis is placed not on states and their relations as such, as so with the realist and internationalist standpoints, but on the relationships among men as within the whole

community of mankind. Hence the requirements of international morality, as following from this, are understood to point to the overthrow of the system of states and to its replacement, in the international sphere, with a fully cosmopolitan form of society. In the event, this universalist interpretation of Kant is not convincing, and it is certainly not confirmed by what he actually wrote regarding cosmopolitan law or, indeed, as regarding any other of the parts of the law of peace of which he treated. The cosmopolitan law was based in a right of hospitality, and the restrictions placed on it, as with the excluding of rights of settlement, were such that this law worked to preserve the integrity of the juridical relationship holding between states and the peoples forming them. Beyond this, it is to be observed that the cosmopolitan law was intended by Kant to supplement, rather than to supersede, the law of nations, as a system of law based in a federation securing the freedom and independence of states, and the municipal law as the part of public law providing for the association of men under the form of constitution and government specific to the condition of statehood.

If Kant is not to be read as a universalist theorist of international politics in the sense intended by Bull, he is certainly to be read as a representative, and even as the leading representative, of the liberal tradition in international thought and practice. Thus with the law of peace set out in *Perpetual Peace*, Kant affirmed explicitly, or indirectly in anticipation of the future, the substantive principles of international law and international order that are central for liberal internationalism. The liberal internationalist principles affirmed through the preliminary articles of perpetual peace include the following: the principle of the faith of treaties and with this to the exclusion of secrecy in foreign policy; the principle of disarmament as the condition for peace; the principle of government by consent rather than as based in patrimony, and with this implying the principle of the self-determination of peoples; the principle of non-interference in the constitution and government of states, and with this implying the principle of the sovereignty and equality of states; and the principle of war as subject to legal constraints and limitations. As to the definitive articles of perpetual peace and the principles of liberal internationalism, there is the endorsement of the republican form of state constitution, as where Kant affirmed the principles of representative government and the rule of law, the constitutional separation and limitation of governmental powers, and government as directed to the rights and freedoms of citizens. There is the endorsement of the federation of free states as the foundation for the law of nations, and with Kant here affirming the

freedom and independence of states and the necessity of institutional structures to support the international law system defining the rights of states as essential to their freedom and independence. There is also the endorsement of cosmopolitan law, as where Kant affirmed the principle of the universal recognition of the lawful rights and personality of men and states and the principle of freedom of trade and commerce as the condition for peace, and with this being so in terms in which he looked forward, among much else, to the repudiation of colonialism and the emergence of the doctrine of universal human rights.

The principles of the law of peace that Kant identified, and that belong to the liberal internationalist tradition, are to be found present in the work of earlier writers on the law of nations, as is so most notably with Vattel. This is true, for example, with the faith of treaties, non-interference, the sovereignty and equality of states, legal limitations on war and the various principles relating to republican constitutionalism, such as representative government and the rule of law, and to the cosmopolitan law, such as freedom of trade and commerce. The crucial development with Kant is that, in his account of it, the core principles of the law of peace, and hence by implication also the core principles of liberal internationalism, were detached from the containing conceptual framework of natural law. This detaching of the law of peace from the natural law framework followed, as for Kant, from the arguments central to his ethical thought. For there was presupposed with Kant's ethics an absolute divide as between the order of nature, and the laws of cause and effect applying to it, and the moral order as the order of the moral law as epitomized in the form of the categorical imperative and as promulgated in accordance with the principle of the autonomy of the will. The effect of this was to exclude any appeal to nature, and to a natural law, as the foundation for the moral law and the forms of public law deriving from it. Thus it was that Kant through his ethical thought was led, as in line with its deep metaphysical presuppositions, to affirm as with his international thought that the condition of peace was to be instituted and that the forms of public law, as providing for peace, were to be brought into being through the will and agreement of men and states.

Kant stands together with Bentham in the repudiation of natural law, and as to the formulating of the core tenets of liberal internationalism without reliance on the natural law conceptualization. However, Kant stood opposed to the thrust and substance of the positivism and utilitarianism that were integral to Bentham's project in jurisprudence and to his own version of the liberal internationalist position. As we have seen, Bentham adopted a positivist method in jurisprudence as

where the concern with the analytical exposition of law was distinguished, and separated off, from the concern with the evaluation of law through reference to normative principles of justice and political morality. In contrast to this, Kant presented ethics, as focused on the principles of practical reason, as being systematically inter-connected with the determination of the principles of law, state and government and, in this, including the principles of public law such as were central to his international thought. Accordingly, for Kant, the determination of the principles of public law proceeded in line with the terms of the universal principle of justice, as this derived from the principles of practical reason that were bound up with the idea of the categorical imperative. The latter principles were directed towards the ends of human freedom and human equality, and both in themselves and in their applications, as in relation to the institutional forms and structures of law, state and government, these were principles that served to affirm and to underwrite the rights and freedom of individuals as a matter of absolute normative force and priority. Here, Kant set himself firmly against the Benthamite-utilitarian standpoint in ethics, politics and jurisprudence: as where the normative justification for the institutions of law, state and government was conceived of in instrumentalist terms, and with this being such that the rights and freedom of individuals were left in a condition of normative subordination as relative to the ends of collective welfare and happiness. The opposition of Kant to utilitarianism is a crucial and defining part of modern ethical thought. As concerning this, it is because Kant brought out, as utilitarian ethical theory did not, something of the normative absolutism of individual rights and freedom that there is now recognized to be a specifically Kantian formulation of liberalism.[35]

The one further respect where Kant is to be set against Bentham concerns the historical dimension of his international thought. The positivist approach to law and politics favoured by Bentham was basically ahistorical as to its method and its substantive conclusions. Kant, however, saw the law providing for perpetual peace as unfolding, and as having its actualization, only within the historical process.

In the *Idea for a Universal History with a Cosmopolitan Purpose*, Kant argued that nature comprised a teleological, or purposive, order and that the purpose as set in nature for men was such that it directed them towards what he presented as the final end of human history. This end consisted in the realization by men of the perfect form of political constitution, both as the lawful basis for the internal self-government of states and as the lawful basis for the government of the

separate states as to their external relations with one another; and with the realizing of this perfect mode of constitutional organization serving to establish the framework for the attainment by men of a fully cosmopolitan condition of existence. The mechanism by which nature directed men to the achievement of their appointed historical end was that of the mutual conflict and antagonism among men, or, rather, what Kant referred to as the unsocial sociability of men. The latter, for Kant, manifested itself in the inclinations of men for such things as honour, power and property, which self-serving inclinations were such as to lead men through the experience of the resulting conflict and antagonism, and even against their will, to establish a law-governed form of social order within the state as subject to a just civil constitution. In the same way, it was in line with the mechanism of the unsocial sociability of men that nature provided that the separate states, as through their mutual conflict and antagonism, would be brought to establish a lawful constitutional order in the international sphere. Thus Kant pointed to war itself, and to the experience of it, as central to the mechanism by which nature worked to bring states to the stage where they would come to found a pacific federation for the ordering of their mutual external relations.[36]

As in line with the argument of the *Idea for a Universal History*, Kant was to argue in the first supplementary section of *Perpetual Peace* that lasting international peace accorded with the end given in the purposive order of nature, and that nature had arranged it that this end would come about as the consequence of conflict among men. This, for Kant, was the essence of what he termed the guarantee provided by nature for perpetual peace. Again in line with the argument of the earlier work, Kant identified war as the means by which nature drove men to enter into juridical relationships. It was by reference to this arrangement of nature that Kant explained the necessity, and the limits, of civil constitutional law, international law and cosmopolitan law. Thus it was the natural self-seeking inclinations of men, as making for internal disputes among peoples (and for external conflicts between different peoples) that explained how, and why, men would be compelled to establish states as based in the republican form of lawful constitutional order. The arrangement of nature also underwrote international law, in the respect that it worked to ensure that the law of nations would remain a body of laws applying to the relations between independent states, rather than one involving the establishment of an international state. For here, Kant argued, nature itself thwarted the establishing of an international governing power through arranging

that the nations would remain separated by their linguistic and religious differences. Yet at the same time, he was clear that nature also provided that the very conditions of human existence that prevented international government were conditions that, in the longer run, would serve to promote peace among men, and with nature in this providing for a peace that maintained itself through the balance of forces and competition among men and states. Finally, it was nature, as working through the self-serving inclinations of men as expressed through commercial activities, that created the conditions favourable for the spread of cosmopolitan law and hence also for international peace itself.[37]

The claims that Kant made regarding nature as a purposive order, and that lie at the heart of his historical argument about peace, are claims that are not to be thought of as having any bearing on what Kant is to be reckoned to have understood to be the normative foundations of the substantive law and constitutional frameworks which he held were to make for peace among men and states. For Kant, and in the terms of his examination of practical reason as in relation to his ethics and political thought, the normative foundations for the law of peace were to be understood as lying in the principles of justice and political morality as deriving from the more general principles of practical reason that were given in the form of the categorical imperative. The latter, of course, were principles possessing a normative force that was independent from the order of nature as such.

In regard to this, it is to be emphasized that the concept of the purposive order of nature, as a guarantee for perpetual peace in history, is not to be accepted as doing duty for the conception of natural law as in the form that it had been expounded by thinkers such as Grotius, Hobbes, Pufendorf, Wolff and Vattel. In the last resort, Kant's naturalistic historicism marks him out as a transitional thinker. For Kant, no less than Bentham, comes at the end of the natural law tradition of the seventeenth and eighteenth centuries: and where Bentham is linked with the later currents of positivist thought in the social sciences, Kant is to be read as looking forward to the subsequent currents of historical thought as focused on law, politics and society. With Grotius, Hobbes, Pufendorf, Wolff and Vattel, the law applying to states and rulers as international law was understood to be something based in a body of natural law that embodied timeless and universally binding principles of justice and political morality. Kant broke with this tradition through his sense that the law of nations was founded not in a normative order as embodied in nature, but in a normative order which was to be

brought into being through the will and agreement of states. This break is itself underlined in how, as in contrast to the earlier natural law thinkers, Kant adopted an historical approach to the question of international politics and to the question of the law that was to govern the relations between states in the international sphere. For Kant brought out, as his predecessors could not, that the law applying to states in their mutual external relations was to be thought of as law that stood in an essentially dynamic relation to the political order of which it was a part. It is Kant's recognition of the dynamic, historical dimension of the law of peace, as much as the radical voluntarism of the view he took as to its normative foundations, that sets him apart from Grotius, Hobbes, Pufendorf, Wolff and Vattel and that identifies him as a subverter of the natural law tradition to which they belonged. So too does it serve to link him with his great successor in the German philosophical tradition: Hegel.

iv. Hegel

It is with Hegel that there culminates the continuous endeavour to elaborate the principles of the modern state and its constitutional order that we have seen as present with the work of the writers considered in this volume. The specification by Hegel of the principles relating to the state comes in the *Philosophy of Right*, and with the major contribution made here to the determination of the concept of the state being the distinctions drawn as between the family, civil society and the state as forms of political association. The family, civil society and the state stood as the foundational elements of a sphere of social existence that Hegel called ethical life. The latter was the sphere of the objective institutional frameworks which gave effect to the principles of what Hegel termed abstract right, as relating to the person as with property, contract, wrong, crime, justice and punishment, and which answered to what he presented as the subjective conditions of the ordinary moral consciousness of the person, as with purpose and responsibility, intention and welfare, and goodness and conscience.

For Hegel, the family was the primary form of political association and, as such, it was organized around the basic normative principles relating to marriage, common property, blood kinship, the nurture of children and the rights of inheritance. The institution of the family pointed beyond itself to a further form of political association as comprehending the plurality of families, and as thereby determining the conditions for the interactions among their members. This was civil society. As Hegel explained it, civil society was the sphere of social order

where the multiplicity of separate individuals co-existed in relationships of reciprocity and interdependence, and for the mutual satisfaction of their respective interests as through work and through the exchange of their rights in property and contract as within the context of trade and commerce. Thus it was that civil society was seen by Hegel as involving the specifically economic relations obtaining among individuals and the institutional structures and processes essential to them, and with the principal form of the economic relationship at issue with civil society being that of the market economic relationship.

At the same time, civil society involved the institutional structures and processes bound up with law and the administration of justice. Thus Hegel took civil society to presuppose the presence of established laws, as directed to the recognition of the personal rights and interests of individuals, and the maintenance of the judicial machinery as appropriate for the enforcing of laws and the securing of the personal rights and interests which the laws provided for. The form for the administration of justice that Hegel saw as particular to civil society was one organized around the principles of substance and procedure that are fundamental to the rule of law and to its possibility. So, for example: laws were to be capable of being known by their subjects and hence to have formal promulgation; the courts were to bear the status of public authorities and civil society members were to have the right and the duty to stand before them; court adjudications were to follow the rules of evidence and the canons of legal reasoning, and court proceedings were to be open such as to ensure the transparency of the administration of justice as in regard to the affected parties and to society as a whole.

As a further component of civil society, there were what Hegel referred to as the policing agencies and corporations. The policing agencies were public authorities whose concern, for Hegel, lay with penal justice and the regulation of the social and economic order. Hence the functions of the policing agencies were directed towards the prevention of criminal wrong-doing and towards its investigation and prosecution before the courts. In addition, the policing agencies discharged certain administrative functions, as so with the maintenance of public infrastructure and the supervision of the economic market in contexts such as the pricing and fair standardization of essential goods and commodities. It was also the function of the policing agencies to provide for public welfare services to do with health and the relief of poverty, such as the establishing and supervision of hospitals and poorhouse institutions. As for the corporations pertaining to civil society, these were institutional bodies that stood intermediate as between individuals and the state, in which sense

of it the corporations set common ends and interests for their members while remaining subject to the state and its authority. Central among them were trades unions, professional associations, churches and religious bodies and municipal government organizations.

The existence of civil society implied the necessity of the state as the final and supreme form of political association. Hegel explained the necessity of the state in terms such that civil society was to be thought of as incomplete unless brought into a subordinate relationship with the state and the legal-political order specific to the state: albeit that there was no indication that the state was to negate the integrity of civil society as through the subverting of the autonomous structures and processes inherent within it.

As to its particulars, the state was presented by Hegel as an institution that defined and established the hierarchy of public interests common to all individual members of civil society, and as in indifference to their diverse private rights and interests. In doing this, the state served to maintain the structures and processes at the level of public law through which the private rights and interests of individuals, as at play in the civil society sphere, received their ultimate validation. At the same time, the public law structures and processes, as maintained by the state, were, as for Hegel, such that they served to validate, and to co-ordinate, the public authorities that discharged the judicial and policing functions required for civil society, and to validate, as by the formal recognition of them, the various subordinate corporations through which individuals focused their activities within civil society. Thus it was that the state was taken by Hegel to stand as a universal form of political association, and, consistent with this universality, as an institution that bore its own distinct legal personality and that exercised the sovereign rights and powers essential to this personality. The sovereignty belonging to the state possessed both an internal and an external dimension. From the internal standpoint, the sovereignty of the state lay embodied in the constitution of the state, as this made provision for the agencies of executive and legislative power specific to the office of its government. As regarding the standpoint external to the state, sovereignty was embodied in the constitutional rights and powers of the state as concerning war and foreign relations, and hence as concerning the conduct of the state, as in relation to other states, as this was framed through the rules of international law.[38]

In his account of the state, Hegel was as fully committed as Kant to the principles of constitutionalism. However, it is to be emphasized that he did not follow Kant in claiming it to be the virtue of the constitutional form of government that the states that adopted it would thereby be

brought to refrain from the waging of war in the defence of their rights and interests. On the contrary, Hegel insisted that, in the condition of modern political society, war was to be thought of not as an absolute evil but as something necessary to the ethical well-being of the state: as in the sense that war was to be counted as the means through which the people forming the state fulfilled their basic ethical obligation to act to ensure its security and independence.[39]

Even though Hegel viewed war as integral to the concept of the state, he did not for that reason deny that states were to be regarded as subject to law in the international sphere. In fact, Hegel accepted the validity of international law, and he summarized its elements in the *Philosophy of Right*. As Hegel expounded its elements, international law was understood to be law that applied to the external relations between states that were sovereign and independent. The essential form of international law was that of obligation, rather than that of right. This was so because international law was law whose reality, and binding normative force, remained dependent on the will of the separate states to whose relations it applied. It was not law whose reality and binding normative force depended on the will of some constituted authority standing above states, and through whose power the rights of states as implicit in their obligations were to be determined and given effect to.

The substantive obligations of states under international law were established through their mutual agreement. Hence the fundamental principle of international law was the principle that treaties, as the source of the obligations of states, were to be observed. Since, however, international law applied to the relations between states that were sovereign and independent, and since rights under international law depended on the will of states rather than the will of a higher constituted power, the principle of treaties was an obligation that presupposed no effectively enforceable right as corresponding to it. This meant that it was the normal condition of international society for the relations between states as regulated by treaties to alternate with periods of the suspension of such relations. Thus it was that when states were unable to base their relations in treaty agreements, then disputes between them were to be settled by means of war: for states were to act to secure their own welfare, and it was the welfare of states that stood as the ultimate ground of justification for forming treaties or for resorting to war.

Hegel acknowledged that states remained subject to law as to the actual conduct of war. For war was waged by states with a view to bringing war to a conclusion, with the result that war was to be thought of as implying the principle of international law to the effect that war should be con-

ducted by states only in such a way as to preserve the possibility of their returning to the condition of peace. Hence ambassadors were to be respected, and wars waged against the internal institutions of states or on private individuals were to be excluded. Yet notwithstanding Hegel's affirmation that war was subject to law, there was no sense conveyed on his part that international law was to come to stand as a framework for the establishing of a permanent peace among states. For Hegel, international law was essentially a law of peace and a law of war: it was not, as it had been for Kant, a system of law that implied the possibility that it might be founded in a constitution under which states would bind themselves to renounce war for ever, and to settle disputes about their rights by peaceful means.[40]

As with Kant before him, Hegel saw and presented the state as something situated within, and as the outcome of, the historical process. For Kant, the historical process unfolded in accordance with the purposive order of nature, and with the final end of history being projected as the realization of a perpetual peace among men and states. With Hegel, the historical process was described as a rational process that was directed through ideas, or, rather, through mind or spirit, and with the final end of history being understood to consist in the realization of human freedom on a universal basis as within the modern state and its characteristic system of the rule of law and constitutional order. Hegel gave his account of this historical process in the *Philosophy of Right* and more fully in *The Philosophy of History*. Thus the constitutional state in its modern form was distinguished from the Oriental form of political order, and from the state-political orders of the ancient world of Greece and Rome, and it was identified by Hegel as the form of political association distinctive to the Germanic peoples of Europe as among whom it stood as the product of the reason-directed course of human historical development.[41]

The form of historical analysis and explanation that Hegel adopted as to the development of the state is indicative of the decisiveness of his break with the modern secular natural law tradition, and with its defining procedures and conceptual formulations as to the principles of law, state and government. The fact of this break with the natural law tradition on the part of Hegel is underlined through his opposition to the terms of the natural law conceptualization of international law. For in this matter, Hegel made no appeal to natural law at all, and he instead insisted, and as against the natural law doctrine, that international law was wholly dependent for its reality as law, and for its having binding normative force, on the will of the separate states to which it had application. Thus it was that Hegel took the essential principle of international law to

consist in the principle of treaties and the form of obligation as created through treaties. The extreme voluntarism of this view of international law links Hegel directly to Kant for whom, as we have explained, the will and agreement of states was foundational for international law and for its binding normative force. However, the voluntarism of Hegel as to international law was even more rigorous than Kant's own. For Kant saw the will and agreement of states, as underlying international law, as capable of being engaged in the establishing of a federation that would serve to provide the constitutional foundation for the law of nations. As to Hegel, he excluded the possibility of international law involving the subjection of states to some constitutional power or authority; and, in consideration of this, he emphasized, and in explicit challenge to Kant, that the federation as proposed by the latter, in presupposing an agreement among states, remained dependent on the will of states that were sovereign and so remained steeped in the condition of contingency as relative to the particularities of the will of states.[42]

As within mainstream international relations theory, Hegel has been taken as a representative of the realist tradition in international thought and practice. This reading of Hegel is not unintelligible. After all, Hegel was certainly concerned with the institution of the state as the central power and authority in the international sphere; he accepted war as a permanent part of international politics, and the right of war as a defining and indispensable right pertaining to the sovereignty of states; and he maintained that in matters of war, as in matters of peace, states were to act in furtherance of their own welfare and hence their own interests.

However, the reading of Hegel as a realist, in the sense of this familiar from international relations theory, goes against what is to be understood as his deeper purpose as a political philosopher. For Hegel as a political philosopher was concerned primarily not with considerations of interests and power as such. He was concerned rather with considerations of right and hence of justice, and he directed himself to the state because he identified the state, and here as comprehending the family and civil society structures and processes, as the institution that provided for the objective embodiment of the principles of right and justice. In this connection, it is to be observed not only that Hegel saw all the rights and interests pertaining to the family and civil society, and all the rights and powers pertaining to the state, such that they required recognition and validation as through law and through the constitutional order of the state. It is to be observed also that, for Hegel, the state, and with it the family and civil society, stood as the embodiment of ethical life: and with this meaning that the family, civil society and

the state, as the forms of ethical life, were to be thought of as embodying their own defining goods and values as internal to themselves and including those relating to the core normative principles of justice and political morality. Thus it is that Hegel, as the exponent of ethical life, is to be read as going against realism in international relations theory, as through his assigning of primacy to normative considerations in law and politics. So also is Hegel to be read as a thinker who provided a profound challenge to any form of positivism, as where the institutions of law and political order were assumed to be value-neutral as in relation to matters of justice and political morality; as well as a thinker who opposed himself to any form of utilitarianism, as where the institutions of law, state and government were explained as having a justification in terms of their instrumental contribution to the realization of the collective ends which they were assumed to promote.

Beyond this and critical for our concerns in this volume, it is to be underlined that the reading of Hegel as a realist thinker on international relations stands negated in the regard that he affirmed the fact, and the binding normative force, of international law as a law applying to states and to their mutual external relations. It is true that Hegel thought of international law as pertaining to obligations and thus, in his sense of it, as falling short of establishing a condition of right and justice proper. It is also true, and as in consideration of this, that he presented international law in terms where it was understood to comprise a system of law that was lacking in the form of law and judicial and policing machinery specific to civil society, and as lacking in the structure of institutional powers specific to the state and to its constitutional order. In these respects, Hegel served to point to the recognized limitations of international law, as in its character as a law applying to states as sovereign and independent entities, and with these limitations including, most notably, the presence of obligations dissociated from non-self-help-based enforcement capabilities and the absence of centralized law-making and sanctions-imposing agencies and institutions.

In the event, the limitations on international law that Hegel identified were consistent with the terms of the general position regarding international law as developed by earlier thinkers, as is so for example with those as diverse as Hobbes, Vattel and Kant. At the same time, the particular formulation of the principles of international law that Hegel provided was such as to link him with the future and, indeed, with the international system of the present age. For Hegel specified the principles of international law as in line with his exposition of the principles of statehood, and in the present time, as in the past, the principles of

international law are determined, and its limitations set, as in accordance with the principles, position and character of the states that stand as its subjects: and here the right of war for the purposes of self-defence and the sovereignty and equality of states stand as core and fundamental for international law, as they were in Hegel's own account of it.

With this said, there remain significant gaps in what Hegel had to say on international law. It is in touching on these that we are brought to reflect directly on the factors that are now much attended to as qualifying the state-centred view of international law of which Hegel is such a distinguished representative. So, for example, there is the neglect by Hegel of the possibility of institutions functioning in the international sphere to regulate the relations among states, and with this neglect contrasting sharply with the existence of a thick institutional structure operating to meaningful effect within the current international law system. Then again, there is the tying by Hegel of the rights of individuals to the conditions of ethical life, and so thereby making rights dependent on the institutional contexts set by the family, civil society and the state. Here, the sense of individual rights at issue goes against the established regime of international human rights law, as where the rights of individuals are recognized to possess a juridical standing that is transcendent as relative to the actions and determinations of states and their internal domestic legal and political orders. Yet further there is the situating by Hegel of civil society as something presupposing the state to complete it, and his consequent failure to allow for, and as is now accepted, the emergence of a civil society within the international sphere itself and with this involving an application to states and non-state actors of the form of legal structures and processes distinctive to civil society. Finally, there is the matter of the state itself as the subject of international law. For Hegel, as we have explained, the development of the modern constitutional state, as based in principles of universal freedom, stood as the final end of human history. The historical finality of the constitutional state, as Hegel envisaged it, is at present an open question given what are the evident inadequacies of states in the resolving of the contradictions generated in the conditions of modern society in its domestic and international aspects. If it is unclear for us as to how states are to remedy their inadequacies as to the now prevailing conditions, there is surely no doubt that the contradictions confronting states will continue to carry profound implications for the coherence and self-sufficiency of the international law system as a system based in the law of states.

Conclusion

The thinkers considered in this volume laid the foundations for the law of nations in its distinctively modern form and tradition. In doing this, they elaborated some of the core principles that belong to what is the system of public international law of this the era of the United Nations. The conceptualization of the law of nations as relied on by the thinkers as from Vitoria and Suarez through to Wolff and Vattel was the natural law conceptualization. As we have explained it, this conceptualization answered to the aspirations as implicit in the ideal of international law, and most particularly so as to the considerations to do with the universality of the law obtaining in the international sphere and with the sort of binding normative force that this law was to have for the states and rulers subject to it. In addition, the natural law conceptualization of the law of nations, as to its universalism and its normative dimension, conformed with, and gave support to, the principles of international order as these are affirmed in the tradition of international thought and practice with which the international law ideal is closely associated: the tradition of liberal internationalism. The thinkers whom we have taken to represent the standpoint of liberal internationalism, and to give expression to the principles of international law and international order bound up with it, are Bentham and Kant, as is so with regard to their specification of the conditions for a perpetual peace among states as based in law. At the same time, however, Bentham and Kant are taken as thinkers who, despite the differences between them, broke decisively with the terms of the natural law conceptualization of the law of nations, and with it being in this respect proper to regard them as transitional thinkers as for the purposes of the argument concerning the law of nations and political thought offered here.

Bentham and Kant stand as transitional thinkers for the reason, among others, that in breaking with the natural law doctrine of the past, they looked forward to the emergence of various of the lines of theorizing in jurisprudence and political thought that came to establish themselves in the nineteenth and twentieth centuries and that still retain their influence to the present day. As for Bentham, his analytical treatment of law marks the start of the positivist tradition in jurisprudence that, as we have described, was to be carried on by legal theorists such as Austin, Kelsen and Hart. Bentham also as through his ethical utilitarianism did much to set the context for the development of democratic theory, and to set the terms of discussion for the later instrumentalist schools of legal thought as so in the cases of realism and the economic analysis of law. Regarding Kant, it is to be observed, once again, that he provided the framework for what is now accepted to be one of the leading formulations of liberalism. However, he did much more than this, as given that his work indicated the possibilities for future developments along a broad range of theoretical fronts. Thus it is Kant who, under different interpretations of his work, may be considered as a crucial point of reference for the subsequent historical, sociological and anthropological schools of thought as in their application to the subject-matters of law and politics. Similarly, it is an ultimately post-Kantian conceptual perspective in matters of theory that is presupposed with some of the most recent derivative currents of thought, as is so with post-modernism and constructivism as in relation to law and to the social and political sciences in general terms.

It is to be recognized that the natural law mode of theorizing has persisted since the time of Bentham and Kant. Indeed, the survival of natural law, as a tradition in jurisprudence and political thought, is confirmed by the fact that the principles of legal order that were once formulated as principles of natural law are embodied centrally as within the now existing system of international law. Nevertheless, it is also to be emphasized that such natural law theorizing as continues into the present has been consigned to an increasingly competitive position as relative to the theoretical approaches that were followed within the schools of thought for which Bentham and Kant assisted in opening the way.

As a result of this, the core assumptions of the natural law doctrine have themselves been challenged, as to their fundamentals, through the competitor theoretical approaches at issue. Thus it is that the positivism in jurisprudence, as deriving from Bentham, negates natural law doctrine as to the propriety of its incorporation of normative prin-

ciples of justice and political morality within the law as in terms of substance and juristic method; whereas the commitment implicit in natural law doctrine to the universal application of its own containing principles of justice and political morality has been negated through the historical, sociological and anthropological approaches, as where legal and other normative concepts are explained in reference to the contingent circumstances of their origin and embodiment as within time-bound social practices. The challenges posed to natural law may be taken as running parallel to the sort of challenges that are posed to the international law system of the United Nations era. For modern international law involves its own institutional aspirations to universality, as it gives effect also to the universalized principles of normative order specific to liberal internationalism: and this even though it is in these respects qualified, and to some considerable extent undermined, through the enduring presence of such potentially counter-universalist factors as the diversity of religious faith and observance, the discrete cultural and political identities of peoples and communities and the partialities of the material economic interests of individuals, classes and nations. To explain this the situation of international law in the contemporary world, it would be necessary to attend to international law in the context of the approaches in theorizing to do with law and politics to which Bentham and Kant looked forward, and as where appropriate recognition is given to the factors of religion, culture, politics and economics. This, in its turn, would require, among much else, the detailed discussion of the subject of international law as it figures in the work of the political theorists who are the successors to the line of thinkers that passes from Vitoria to Hegel, which discussion, as it is intended, will be carried on in some further study.

Notes and References

Introduction

1. The standard work on the history of the law of nations is that by Arthur Nussbaum: *A Concise History of the Law of Nations*, 2nd edition (New York: Macmillan, 1954). For an illuminating, and detailed, historical account of many of the political thinkers discussed in this volume as in regard to international law issues, see: Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Clarendon Press, 1999).
2. Aristotle, *Politics*, trans. Benjamin Jowett, in *The Complete Works of Aristotle*, The Revised Oxford Translation, ed. Jonathan Barnes, 2 Volumes (Princeton, New Jersey: Princeton University Press, 1984), Volume 2, pp. 1986–2129. See particularly Book 1, Chapters 1–2, for Aristotle on such matters as the state as founded in nature and established to advance the common good, and the state as existing prior to the individuals who comprised it.
3. Aquinas' discussion of law is to be found in Questions 90–97 of the first sub-part of the Second Part of the *Summa Theologiae* that is known as the Prima Secundae. For the original Latin text of this with an English translation by Thomas Gilby, see: *Summa Theologiae*, Blackfriars edition, Volume 28: *Law and Political Theory* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1966). For Aquinas on issues of law and politics generally, see: John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998).
4. Aquinas, *Summa Theologiae*, Prima Secundae, Question 91, article 1; Question 93.
5. *Ibid*., Prima Secundae, 91.2; 94.
6. *Ibid*., Prima Secundae, 91.3; 95–97.
7. *Ibid*., Prima Secundae, 91.4–5.
8. *Ibid*., Prima Secundae, 94.2, pp. 81, 83.
9. *Ibid*., Prima Secundae, 95.2, pp. 105, 107; 95.4, pp. 111, 113, 115.
10. *Ibid*., Prima Secundae, 96.4, pp. 131, 133.
11. St Augustine, *Contra Faustum Manichaeum*, Libri XXXIII, trans. Richard Stothert, in St Augustine, *The Writings Against the Manichaeans and Against the Donatists*, ed. Philip Schaff (Grand Rapids, Michigan, 1887), pp. 155–345 – especially Book XXII, Sections 74–79. See also: Letters CLXXXIX, CCXXIX, in *Letters of Saint Augustine*, trans. J.G. Cunningham, 2 Volumes (Edinburgh, 1872, 1875), Volume 2, pp. 366–71, 435–7.
12. Aquinas expounded the conditions necessary for the just war in Question 40 of the second sub-part of the Second Part of the *Summa Theologiae* that is known as the Secunda Secundae. For the original Latin text with an English translation by Thomas R. Heath, see: *Summa Theologiae*, Blackfriars edition, Volume 35: *Consequences of Charity* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1972).

13. Aquinas, *Summa Theologiae*, Secunda Secundae, 40.1, pp. 81, 83, 85. As concerning Aquinas and the conditions for the just war, see: William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), Chapter 2.
14. Concerning the *ius in bello* principles in just war doctrine, see: O'Brien, *The Conduct of Just and Limited War*, Chapter 3.
15. For these various source materials, see for example: *Basic Documents in International Law*, ed. Ian Brownlie, 4th edition (Oxford: Clarendon Press, 1995). Regarding the modern system of public international law, see for example: J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edition, ed. Sir Humphrey Waldock (Oxford: Clarendon Press, 1963); L.F.L. Oppenheim, *International Law*, 9th edition, Volume 1: *Peace*, Introduction and Part 1, ed. Sir Robert Jennings and Sir Arthur Watts (Harlow, Essex: Longman, 1992); Malcolm N. Shaw, *International Law*, 5th edition (Cambridge: Cambridge University Press, 2003); Ian Brownlie, *Principles of Public International Law*, 6th edition (Oxford: Oxford University Press, 2003).
16. For the inherent right of states to act in self-defence, see Article 51 of the United Nations Charter.
17. Regarding the immunities and protections of non-combatant civilians and prisoners of war under international humanitarian law, see, for example, the specification of the grave breaches of the Geneva Conventions of 1949 set out in Article 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.
18. For the *pacta sunt servanda* rule, see Article 26 of the Vienna Convention on the Law of Treaties.
19. In this connection, see Articles 29–40 of the Vienna Convention on Diplomatic Relations.
20. Regarding these matters, see Articles 87 and 89 of the Convention on the Law of the Sea.
21. Concerning the functions of the United Nations in regard to threats to the peace, breaches of the peace and acts of aggression, see Chapter VII (Articles 39–51) of the United Nations Charter.
22. For these provisions, see Articles 5 to 11 of the Universal Declaration of Human Rights.
23. Universal Declaration of Human Rights, Articles 13, 16–21.
24. *Ibid.*, Articles 22–27.
25. In regard to international relations and political thought, see for example: Howard Williams, *International Relations in Political Theory* (Milton Keynes: Open University Press, 1992); David Boucher, *Political Theories of International Relations: From Thucydides to the Present* (Oxford: Oxford University Press, 1998); Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002); *International Relations in Political Thought: Texts from the Ancient Greeks to the First World War*, ed. Chris Brown, Terry Nardin and Nicholas Rengger (Cambridge: Cambridge University Press, 2002).
26. For Hedley Bull on what he identified as the realist, internationalist and universalist traditions in international thought and practice, see: *The Anarchical Society: A Study of Order in World Politics* (1977), 2nd edition (London: Macmillan, 1995), Chapter 2, pp. 23–6. See also the following articles by Bull:

'The Grotian Conception of International Society', in *Diplomatic Investigations: Essays in the Theory of International Politics*, ed. Herbert Butterfield and Martin Wight (London: Allen and Unwin, 1966), pp. 51–73; 'Hobbes and the International Anarchy', *Social Research*, 48 (Winter 1981), pp. 717–38. Concerning Martin Wight on what he characterized as the realist, rationalist and revolutionist traditions, see his posthumously published lecture series: *International Theory: The Three Traditions*, ed. Gabriele Wight and Brian Porter (Leicester and London: Leicester University Press, 1991), especially Chapter 1.

27. On the realist tradition in international relations theory in its classical and twentieth-century forms, see for example: Michael Joseph Smith, *Realist Thought from Weber to Kissinger* (Baton Rouge and London: Louisiana State University Press, 1986); Steven Forde, 'Classical Realism', and Jack Donnelly, 'Twentieth-Century Realism', in *Traditions of International Ethics*, ed. Terry Nardin and David R. Mapel (Cambridge: Cambridge University Press, 1992), pp. 62–84, 85–111.
28. One of the most distinguished modern representatives of the liberal internationalist tradition is Woodrow Wilson (1856–1924), who was President of the United States from 1913 to 1921. Wilson gave expression to certain of the core principles of international law and international order, as central to liberalism, with the Fourteen Points that he formulated at the beginning of the last year of the First World War, as a proposed basis for a general peace among the different powers. Thus the First Point provided for open covenants of peace, as openly entered into, and the exclusion of all private international understandings. The Second Point provided for the absolute freedom of navigation on the high seas in peace and in war, save where the seas were closed through international action aimed at the enforcing of international agreements. The Third Point provided for freedom of trade and commerce, in that it called for the removal of economic barriers and the establishing of an equality of trade conditions among nations that consented to the terms of the peace and associated together for its maintenance. The Fourth Point provided for reductions in national armaments to the degree consistent with the domestic safety of nations. The Fifth Point provided for a free, open and impartial settlement of all colonial claims, as where, in the determination of questions of sovereignty, the interests of the subject populations were to have equal weight with the equitable claims of the colonial governments concerned. The Fourteenth Point provided for the founding of a general association of nations under specific covenants, and with the purpose of affording mutual guarantees of political independence and territorial integrity to all states whether great or small. For Wilson's statement of the Fourteen Points, see: Address of President Wilson on the Conditions of Peace Delivered at a Joint Session of the Two Houses of Congress, 8 January 1918, in *Official Statements of War Aims and Peace Proposals: December 1916 to November 1918*, prepared under the supervision of James Brown Scott (Washington, DC: Carnegie Endowment for International Peace, 1921), pp. 234–9. On the liberal tradition in international thought and practice generally, see: Michael Joseph Smith, 'Liberalism and International Reform', in Nardin and Mapel (eds.), *Traditions in International Ethics*, pp. 201–24; Michael W. Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* (New York and London: W.W. Norton, 1997), Part 2.

29. In this connection, the essential point of reference is the liberal theory of justice as fairness as propounded by John Rawls, for which see: *A Theory of Justice* (1971), revised edition (Oxford: Oxford University Press, 1999).
30. The linkages and connections touched on in the Introduction as between natural law doctrine and liberalism are complex. For discussion of these in the context of twentieth-century jurisprudence and political thought as relating primarily to issues of internal domestic political order, see: Charles Covell, *The Defence of Natural Law: A Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshott, F.A. Hayek, Ronald Dworkin and John Finnis* (London: Macmillan, 1992).

Chapter 1 Vitoria, Suarez, Gentili and Grotius

1. Francisco de Vitoria: *De Indis Noviter Inventis* and *De Jure Belli* (Simon's 1696 edition), trans. John Pawley Bate, and *De Potestate Civili*, (Simon's 1696 edition), trans. Gwladys L. Williams, in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934), Appendixes A, pp. i–xlvi, B, pp. xlvii–lxx, C, pp. lxxi–xcii. For discussion of Vitoria in regard to issues of international law and international politics, see: Martin C. Ortega, 'Vitoria and the Universalist Conception of International Relations', in *Classical Theories of International Relations*, ed. Ian Clark and Iver B. Neumann (London: Macmillan, 1996), pp. 99–119.
2. Francisco Suarez: *De Legibus, ac Deo Legislatore* (1612 edition) and *De Triplici Virtute Theologica, Fide, Spe, et Charitate* (1621 edition), in Suarez, *Selections from Three Works*, trans. Gwladys L. Williams, Ammi Brown and John Waldron, The Classics of International Law, No. 20, Volume 2 (Oxford: Clarendon Press, 1944), pp. 1–646, 727–865.
3. Alberico Gentili: *De Legationibus Libri Tres* (1594 edition), trans. Gordon J. Laing, The Classics of International Law, No. 12, Volume 2 (New York: Oxford University Press, 1924); *De Jure Belli Libri Tres* (1612 edition), trans. John C. Rolfe, The Classics of International Law, No. 16, Volume 2 (Oxford: Clarendon Press, 1933); *Hispanicae Advocationis Libri Duo* (1661 edition), trans. Frank Frost Abbott, The Classics of International Law, No. 9, Volume 2 (New York: Oxford University Press, 1921). On Gentili and his place in the international law tradition, see particularly: Thomas Erskine Holland, 'Alberico Gentili' (1874), in his *Studies in International Law* (Oxford: Clarendon Press, 1898), pp. 1–39.
4. Hugo Grotius: *De Jure Praedae Commentarius*, translation of the original manuscript of 1604 by Gwladys L. Williams with the collaboration of Walter H. Zeydel, The Classics of International Law, No. 22, Volume 1 (Oxford: Clarendon Press, 1950); *De Jure Belli ac Pacis Libri Tres* (1646 edition), trans. Francis W. Kelsey *et al*., The Classics of International Law, No. 3, Volume 2 (Oxford: Clarendon Press, 1925). These works are cited hereafter and respectively as *JP* and *JBP*. Regarding the different aspects of Grotius' contribution to international law and international relations, see: Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Year Book of International Law*, 23 (1946), pp. 1–53; Hedley Bull, 'The

Importance of Grotius in the Study of International Relations', in *Hugo Grotius and International Relations*, ed. Hedley Bull, Benedict Kingsbury and Adam Roberts (Oxford: Clarendon Press, 1990), pp. 65–93; *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius*, ed. Yasuaki Onuma (Oxford: Clarendon Press, 1993). On Grotius in relation to modern natural law theorizing and, more generally, in relation to seventeenth-century political thought, see: Richard Tuck: *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), Chapters 3 and 8; *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), Chapter 5.

5. Vitoria, *De Potestate Civili*, Section 21, p. xc.
6. Vitoria, *De Indis*, Section I, particularly Propositions 4, 6–7, 19–24.
7. *Ibid.*, II, pp. xvi–xxxi, xxxiii–xxxiv.
8. *Ibid.*, III, Sub-sections 1–8.
9. *Ibid.*, III, 9–14.
10. *Ibid.*, III, 15–18.
11. Vitoria, *De Jure Belli*, Paragraphs 1, 2–6, 10–13, 15–19.
12. *Ibid.*, 21–23, 27–32, 34–37, 39–43, 44–49, 50–51, 54–59.
13. Suarez, *De Legibus*, Book II, Chapter XVII, Sections 1–2, 8, and Chapter XIX, Sections 1–2.
14. *Ibid.*, II.XIX.6, p. 345.
15. *Ibid.*, II.XIX.6–10.
16. For Suarez on the state and state government and on their basis in the consent of men, see particularly: *De Legibus*, III.I.3–4, 6–7, II.3–6, III.4–7, IV.1–2.
17. Suarez, *De Charitate*, Disputation XIII: *De Bello*, Section II, sub-section 1.
18. *Ibid.*, XIII.IV.1–5, V.1, 4.
19. *Ibid.*, XIII.VII.1, 3, 6–7, 11–12, 15, 20.
20. For Gentili on the limitations on the immunities of ambassadors, see: *De Legationibus*, Book II, Chapters XVI, XVIII.
21. Gentili, *De Jure Belli*, Book I, Chapter I.
22. *Ibid.*, I.VI.
23. *Ibid.*, II.XVI–XVII, XXI.
24. *Ibid.*, III.XIV–XVII, XXII.
25. For Gentili on the different aspects of maritime law, litigation procedure and property and contract, see for example: *Hispanicae Advocationis*, Book I, Chapters XI–XII, XIV–XV, XXV; Book II, Chapters I–VI, IX–X, XIX–XXI, XXIX–XXX.
26. Further to the question of Gentili as in relation to Grotius, see particularly: Peter Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in Bull, Kingsbury and Roberts (eds.), *Hugo Grotius and International Relations*, pp. 133–76.
27. Grotius, *JBP*, Prolegomena, Sections 6, 11.
28. Grotius, *JP*, II: Prolegomena, pp. 10–11, 13–14, 15–18, 24–5, 27.
29. Grotius, *JBP*, Prolegomena, 8, pp. 12–13.
30. As to Grotius on the natural law principle of pacts as basing municipal legal orders, see particularly: *JBP*, Prolegomena, 15. Regarding pacts as the basis of political society generally, see: *JP*, II: Prolegomena, pp. 18–20.
31. For Grotius on the right of men under natural law to defend themselves, and as in relation to the right of private war, see: *JBP*, Book I, Chapter II,

Section I and Chapter III, Sections I–II. For Grotius on self-defence, the recovery of property and the punishment of wrong-doing as the principal just causes for war, see: *JBP*, II.I.I–II.
32. Grotius, *JBP*, III.I.
33. *Ibid.*, Prolegomena, 17.
34. *Ibid.*, I.I.X, XIII–XIV. It is to be noted that Grotius divided volitional law into volitional human law and volitional divine law, the *ius voluntarium divinum*, and with the latter having its origin in the will of God. *JBP*, I.I.XV.
35. Grotius, *JBP*, III.XIX–XXIV.
36. *Ibid.*, I.III.I, IV; III.III.
37. For Grotius on these various subject-matters of the law of nations, see: *JBP*, II.XVIII–XIX; III.II, IV–IX.
38. Regarding Grotius in connection with these different aspects of justice in war, see for example: *JBP*, Prolegomena, 3, 25–28; I.I.I, II; II.I.II, XXIV.VIII–IX; III.XXV.I–II, VII.
39. Grotius, *JBP*, I.III.VI–VII.
40. *Ibid.*, I.III.VIII – particularly sub-sections 1, 2–4, 14.
41. *Ibid.*, I.III.XI–XII.
42. For Grotius on the freedom of the seas and in regard to international trade and commerce, see: *JP*, Chapter XII – and as so, for example, at pp. 218–19.
43. Grotius, *JBP*, II.XV–XVI.
44. *Ibid.*, II.XVIII.
45. *Ibid.*, II.XX.XLVIII, L.
46. *Ibid.*, II.XXII.VIII–IX, XII–XIV.
47. *Ibid.*, II.XXIII.XIII.
48. *Ibid.*, III.IV.III–IV, VI, IX–XII, XIV.
49. *Ibid.*, III.V–VIII.
50. *Ibid.*, III.XI.VII–XV, XVIII.
51. *Ibid.*, III.XII–XIII, XIV.III–IV, XV.
52. Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* (1737 edition), trans. Tenney Frank, The Classics of International Law, No. 14, Volume 2 (Oxford: Clarendon Press, 1930).

Chapter 2 Hobbes and Pufendorf

1. Thomas Hobbes: *The Elements of Law, Natural and Politic*, edited with a Preface and Critical Notes by Ferdinand Tönnies (1889), 2nd edition with a new Introduction by M.M. Goldsmith (London: Frank Cass, 1969); *De Cive*, The English Version, entitled in the first edition *Philosophicall Rudiments concerning Government and Society*, ed. Howard Warrender, The Clarendon Edition of the Philosophical Works of Thomas Hobbes, Volume 3 (Oxford: Clarendon Press, 1983); *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, edited with an Introduction by Michael Oakeshott (Oxford: Basil Blackwell, 1946). On Hobbes generally, see: Michael Oakeshott, *Hobbes on Civil Association* (Oxford: Basil Blackwell, 1975); Richard Tuck, *Hobbes* (Oxford: Oxford University Press, 1989); Noel Malcolm, *Aspects of Hobbes* (Oxford: Clarendon Press, 2002), and especially Chapter 13 for discussion of Hobbes and international relations. Regarding the views of the present author on Hobbes and the law of nations, see:

Charles Covell: 'Hobbes, Natural Law and the Law of Nations', *Historia Juris*, 9 (March 2001), pp. i–xlviii; *Hobbes, Realism and the Tradition of International Law* (Basingstoke, Hampshire and New York: Palgrave Macmillan, 2004).

2. Samuel Pufendorf: *De Jure Naturae et Gentium Libri Octo* (1688 edition), trans. C.H. and W.A. Oldfather, The Classics of International Law, No. 17, Volume 2 (Oxford: Clarendon Press, 1934); *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1682 edition), trans. Frank Gardner Moore, The Classics of International Law, No. 10, Volume 2 (New York: Oxford University Press, 1927). These works are cited hereafter and respectively as *JNG* and *OHC*. For general discussion of the political and legal thought of Pufendorf, see: Leonard Krieger, *The Politics of Discretion: Pufendorf and the Acceptance of Natural Law* (Chicago and London: University of Chicago Press, 1965). On Pufendorf in relation to the tradition of the law of nations, see: Charles Covell, 'Pufendorf and International Law', *Tsukuba University Journal of Law and Political Science*, 32 (March 2002), pp. 55–130.
3. For Hobbes on the natural state of war obtaining among men prior to the forming of commonwealths, see: *Leviathan*, Part I, Chapter XIII.
4. As concerning the argument here, see the formal distinction drawn by Hobbes between the right of nature and the laws of nature: *Leviathan*, I.XIV, p. 84.
5. For Hobbes's statement and explanation of the nineteen laws of nature, see: *Leviathan*, I.XIV–XV.
6. Hobbes, *The Elements of the Law*, Part 1, Chapter 16, Section 12.
7. Hobbes, *Leviathan*, I.XV, p. 103.
8. *Ibid.*, II.XVII, p. 112.
9. *Ibid.*, *Leviathan*, II.XVIII, pp. 117–18.
10. For Hobbes on the sovereign power as unimpeachable and on the matter of the constitutional forms appropriate for the sovereign power, see: *Leviathan*, II.XVIII, pp. 113–14, 115–16, XIX, p. 121.
11. Hobbes, *Leviathan*, II.XXX, p. 219.
12. For Hobbes on the principles of civil law, crime and criminal responsibility and punishment, see: *Leviathan*, II.XXVI–XXVIII.
13. Hobbes, *Leviathan*, I.XIII, p. 83. For Hobbes on the natural hostility among commonwealths, see: *De Cive*, Part II, Chapter XIII, Section VII, p. 159.
14. Hobbes, *Leviathan*, II.XXX, pp. 231–2. For Hobbes on the law of nations as identical with the natural law, see also: *The Elements of Law*, 2.10.10, p. 190; *De Cive*, II.XIV.IV, p. 171.
15. The writings of Spinoza's that are key here are the political writings, and with these being the *Tractatus Theologico-Politicus* (1670) and the posthumously published *Tractatus Politicus*. For the original Latin text of these treatises with an English translation, see: *The Political Works: The Tractatus Theologico-Politicus in Part and the Tractatus Politicus in Full*, edited and translated with an Introduction and notes by A.G. Wernham (Oxford: Clarendon Press, 1958).
16. For Spinoza on the right of nature and natural law, and on the rights and powers of sovereign rulers within commonwealths, see especially: *Tractatus Theologico-Politicus*, Chapter XVI; *Tractatus Politicus*, Chapters II–IV.
17. Pufendorf, *JNG*, Book II, Chapter III; *OHC*, Book I, Chapter III.
18. Pufendorf, *OHC*, I.IV.
19. Pufendorf, *JNG*, II.IV; *OHC*, I.V, Sections 1–4.

20. Pufendorf, *JNG*, II.V; *OHC*, I.V.5–17.
21. For Pufendorf on the distinction between absolute and hypothetical duties owed under natural law, see: *JNG*, II.III, Section 24; III.I.1; *OHC*, I.VI.1.
22. Pufendorf, *JNG*, III.I; *OHC*, I.VI.
23. Pufendorf, *JNG*, III.II; *OHC*, I.VII.
24. Pufendorf, *JNG*, III.III; *OHC*, I.VIII.
25. Pufendorf, *JNG*, III.IV–IX; *OHC*, I.IX.
26. Pufendorf, *JNG*, III.IV.9; *OHC*, I.IX.4.
27. Pufendorf, *JNG*, III.IX.8; *OHC*, I.IX.22.
28. Pufendorf, *JNG*, II.II; V.XIII.2; *OHC*, II.I.
29. Pufendorf, *JNG*, VII.I; *OHC*, II.V.
30. Pufendorf, *JNG*, VII.II; *OHC*, II.VI.
31. Pufendorf, *JNG*, VII.IV; *OHC*, II.VII.
32. Pufendorf, *JNG*, VII.V; *OHC*, II.VIII.
33. Pufendorf, *JNG*, VII.VI; *OHC*, II.IX.
34. Pufendorf, *JNG*, VIII.I; *OHC*, II.XII. See here also Pufendorf on the right of punishment: *JNG*, VIII.III; *OHC*, II.XIII.
35. Pufendorf, *JNG*, VIII.VI–VIII; *OHC*, II.XVI.
36. Pufendorf, *JNG*, VIII.IX; *OHC*, II.XVII.
37. For Pufendorf on the natural condition of the society holding among states and rulers, see: *JNG*, II.II.4; *OHC*, II.I.6.
38. Pufendorf, *JNG*, II.III.23, p. 226.

Chapter 3 Wolff and Vattel

1. Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 edition), trans. Joseph H. Drake, The Classics of International Law, No. 13, Volume 2 (Oxford: Clarendon Press, 1934). Cited hereafter as *JGMSP*.
2. Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758 edition), trans. Charles G. Fenwick, The Classics of International Law, No. 4, Volume 3 (Washington, DC: Carnegie Institution of Washington, 1916). Cited hereafter as *DG*. For discussion of Vattel on the law of nations, see: Charles G. Fenwick, 'The Authority of Vattel', *American Political Science Review*, 7 (1913), pp. 395–410 and 8 (1914), pp. 375–92; Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's Le Droit des Gens* (Dobbs Ferry, New York: Oceana, 1975); Andrew Hurrell, 'Vattel: Pluralism and its Limits', in Clark and Neumann (eds.), *Classical Theories of International Relations*, pp. 233–55.
3. Wolff, *JGMSP*, Prolegomena, Sections 4–6.
4. For Wolff on the stipulative and customary forms of the law of nations, see: *JGMSP*, Prolegomena, 23–24.
5. Wolff, *JGMSP*, Prolegomena, 25.
6. *Ibid.*, Prolegomena, 10.
7. *Ibid.*, Prolegomena, 9, 11–15, 19.
8. *Ibid.*, Prolegomena, 20–22.
9. For Vattel's arguments concerning the earlier writers on the law of nations, see: *DG*, Preface, pp. 3a–10a.

10. Vattel, *DG*, Introduction, Sections 6–9.
11. *Ibid.*, Preface, p. 10a.
12. *Ibid.*, Introduction, 24–27.
13. *Ibid.*, Preface, 9a.
14. *Ibid.*, Introduction, 4–5, 10–12.
15. Wolff, *JGMSP*, Prolegomena, 7–10.
16. Vattel, *DG*, Introduction 13–15, 18.
17. *Ibid.*, Introduction, 17.
18. *Ibid.*, Introduction, 20–21.
19. For Vattel on the law of international commerce, see: *DG*, Book I, Chapter VIII, and Book II, Chapter II.
20. Vattel, *DG*, II.XVIII.323–335.
21. *Ibid.*, III.XII.
22. For Wolff on public war, the just causes and objects of war, and good faith among enemies and peace treaties, see: *JGMSP*, Chapter VI, Section 607; VI.617, 619; VII.799–801; VIII.975–976. For Vattel on the same, see: *DG*, III.I, Section 2; III.III.26, 28; III.X.174–175; IV.II.19, IV.35–36.
23. For Wolff on trade and commerce and related matters, see: *JGSMP*, I.58–64; II.187–236. For details of Vattel on the same, see note 19 above.
24. Wolff, *JGSMP*, VII.792–797; Vattel, *DG*, III.VIII.145, 149.
25. Vattel, *DG*, I.I.4, p. 11.
26. *Ibid.*, I.I.1–4, 12.
27. *Ibid.*, I.II.14, 16, 18–19, 21–23.
28. *Ibid.*, I.III.26–27, 29, 31–37; II.IV.56, 62.
29. *Ibid.*, I.IV.38–41, 46–49, 51, 53–54.
30. *Ibid.*, I.XIII.158–163, 165–170, 172–173.
31. For Wolff on the representative character of rulers, the natural equality of nations and states, and the principle of non-interference, see: *JGMSP*, I.39; II.250, 255–257, 269.
32. Regarding Wolff on the question of the patrimonial conception of the state, see especially: *JGSMP*, VII.871–872; VIII.982.
33. According to Vattel, the idea of patrimonial kingdoms was not to be accepted in view of the harmful effects that this would have on the minds of sovereign rulers. *DG*, Preface, p. 8a.
34. Vattel, *DG*, I.V.57–61, 68–69.
35. On the importance of Vattel regarding the subject of state sovereignty, see: F.H. Hinsley, *Sovereignty* (1966), 2nd edition (Cambridge: Cambridge University Press, 1986), Chapter 5, pp. 194–5.

Chapter 4 Locke, Hume and Bentham

1. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960). The *Second Treatise: An Essay concerning the True Original, Extent, and End of Civil Government*, as the work focused on in this chapter, is cited hereafter as *2T*. For Locke in regard to issues in international politics, see: Richard H. Cox, *Locke on War and Peace* (Oxford: Clarendon Press, 1960).
2. David Hume: *A Treatise of Human Nature*, ed. L.A. Selby-Bigge, 2nd edition with text revised and variant readings by P.H. Nidditch (Oxford: Clarendon

Press, 1978); *Essays Moral, Political and Literary* (Oxford: Oxford University Press, 1963); *An Enquiry concerning the Principles of Morals*, in Hume, *Enquiries concerning Human Understanding and concerning the Principles of Morals* (posthumous edition of 1777), ed. L.A. Selby-Bigge, 3rd edition with text revised and notes by P.H. Nidditch (Oxford: Clarendon Press, 1975), pp. 167–323. These works are cited hereafter and respectively as *Treatise*, *Essays* and *EPM*.

3. Jeremy Bentham: *A Fragment on Government*, ed. J.H. Burns and H.L.A. Hart, with an Introduction by Ross Harrison (Cambridge: Cambridge University Press, 1988); *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart (London: Athlone Press, 1970); *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970); *Principles of International Law*, in *Works of Jeremy Bentham*, published under the superintendence of John Bowring (Edinburgh, 1838–1843), Volume 2, pp. 535–60; *Anarchical Fallacies; being an Examination of the Declarations of Rights issued during the French Revolution*, in *Works*, Bowring edition, Volume 2, pp. 489–534. These works are cited hereafter and respectively as *Fragment*, *IPML*, *OLG*, *PIL* and *AF*. On the legal and political thought of Bentham generally, see: H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982). For discussion of the international dimension of Bentham's thought, see: F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press, 1963), Chapter 5.
4. Locke, *2T*, Chapter II, Sections 4–12.
5. *Ibid.*, III.16–19.
6. *Ibid.*, IV.
7. *Ibid.*, V.27.
8. *Ibid.*, VII.87–89.
9. *Ibid.*, VIII.95–99, 119–122.
10. *Ibid.*, IX.
11. *Ibid.*, X.
12. *Ibid.*, XI.
13. *Ibid.*, XII.143–144, 146–148.
14. *Ibid.*, XIII.149–150.
15. *Ibid.*, XV.171–174.
16. *Ibid.*, XVI.175–183, 196.
17. *Ibid.*, XVIII.199, 202–204.
18. *Ibid.*, XIX.211–229, 231–232, 240–243.
19. *Ibid.*, XII.145–146.
20. *Ibid.*, II.14, p. 276. As concerning Locke on commonwealths, and princes and governments, as co-existing in the state of nature, see also: *2T*, XVI.183–184.
21. For Locke, promises and agreements were capable of being made in the state of nature, and were as such binding on those who entered into them therein. *2T*, II.14.
22. Thus Alexander Wendt has written of three distinct cultures of international politics: the Hobbesian, Lockean and Kantian cultures. The terms of the Lockean culture of international politics, as Wendt described it, closely parallel the terms of what Bull characterized as Grotius' conception of international society. For Wendt on the Lockean culture of international politics, see: *Social*

Theory of International Politics (Cambridge: Cambridge University Press, 1999), Chapter 6, pp. 279–97.
23. Hume, *Treatise*, Book III: 'Of Morals', Part I, Sections I–II.
24. For Hume's arguments here, see: *Treatise*, III.II.I–II; *EPM*, Section III.
25. Hume, *Treatise*, III.II.I, p. 484.
26. *Ibid.*, III.II.III.
27. *Ibid.*, III.II.IV.
28. *Ibid.*, III.II.V.
29. *Ibid.*, III.II.VII.
30. *Ibid.*, III.II.VII–X. For Hume on the different aspects of civil government and the obligation owed to it, see also: 'Of the First Principles of Government', 'Of the Origin of Government' and 'Of the Original Contract', in *Essays*, pp. 29–34, 35–9, 452–73.
31. Hume, *Treatise*, III.II.XI, pp. 567–8.
32. *Ibid.*, III.II.XI, pp. 568–9. See also: *EPM*, IV, sub-section 165.
33. Hume: 'Of the Origin of Government', pp. 37–8; 'Of the Original Contract', pp. 457–8.
34. Hume, 'Of the Balance of Power', in *Essays*, pp. 339–48.
35. Hume, *EPM*, IV.165, p. 206.
36. Bentham: *Fragment*, Chapter 1; *AF*, pp. 501–2.
37. Bentham: *Fragment*, Preface, pp. 3, 25–6; *IPML*, Chapter 1, especially pp. 11–13.
38. Bentham: *Fragment*, Preface, pp. 7–8, 24–8; *IPML*, Chapter 17, pp. 293–4.
39. Bentham, *OLG*, Chapter 1, p. 1.
40. *Ibid.*, Chapter 1, pp. 1–2.
41. *Ibid.*, Chapter 1, especially pp. 3–8, 10–15.
42. *Ibid.*, Chapter 2, especially pp. 18–19.
43. Bentham, *IPML*, Chapter 17, p. 296.
44. Bentham, *PIL*, Essay 1: 'Objects of International Law', pp. 537–9.
45. *Ibid.*, Essay 2: 'Of Subjects, or of the Personal Extent of the Dominion of the Laws', pp. 540–1, 543–4.
46. *Ibid.*, Essay 3: 'Of War, considered in respect of its Causes and Consequences', pp. 544, 544–5, 545–6.
47. For Bentham's statement and explanation of Propositions 1–11, see: *PIL*, Essay 4: 'A Plan for an Universal and Perpetual Peace', pp. 547–50.
48. Bentham, *PIL*, Essay 4, pp. 550–2.
49. *Ibid.*, Essay 4, pp. 552–4.
50. *Ibid.*, Essay 4, pp. 554–60.
51. Bentham, *AF*, p. 501.
52. John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995).
53. For Austin on international law as a form of positive morality rather than a form of positive law, see: *The Province of Jurisprudence Determined*, Lecture 1, p. 20; Lecture 5, pp. 112, 123, 124–5; Lecture 6, p. 171.
54. As to Kelsen and international law, see: *Pure Theory of Law* (1934; 2nd edition, 1960), trans. Max Knight (Berkeley and Los Angeles: University of California Press, 1967), Chapter 7; *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Massachusetts: Harvard University Press, 1945), Part 2, Chapter 6.

55. For the position of Hart regarding international law, see: *The Concept of Law* (1961), 2nd edition (Oxford: Clarendon Press, 1994), Chapter 10.

Chapter 5 Rousseau, Kant and Hegel

1. Jean-Jacques Rousseau: *The State of War*, trans. M.G. Forsyth, and *Abstract and Judgement of Saint-Pierre's Project for Perpetual Peace*, trans. C.E. Vaughan, in *Rousseau on International Relations*, ed. Stanley Hoffmann and David P. Fidler (Oxford: Clarendon Press, 1991), pp. 33–47, 53–100; *The Social Contract*, trans. Maurice Cranston (Harmondsworth: Penguin, 1968). The two essays on Saint-Pierre are cited hereafter as *AJ*. For Rousseau's international thought, see: Hinsley, *Power and the Pursuit of Peace*, Chapter 3.
2. Immanuel Kant: *Critique of Pure Reason*, trans. Norman Kemp Smith (London: Macmillan, 1929); *Fundamental Principles of the Metaphysic of Morals* and *Critique of Practical Reason*, in Kant, *Critique of Practical Reason and other Works on the Theory of Ethics* (1873), trans. Thomas Kingsmill Abbott, 6th edition (London: Longmans, Green and Company, 1909), pp. 1–84, 85–262; *The Metaphysical Elements of Justice*, Part 1 of *The Metaphysics of Morals*, trans. John Ladd (Indianapolis and New York: Bobbs-Merrill, 1965); *Idea for a Universal History with a Cosmopolitan Purpose* and *Perpetual Peace: A Philosophical Sketch*, in Kant, *Political Writings*, trans. H.B. Nisbet, ed. Hans Reiss, 2nd edition, enlarged (Cambridge: Cambridge University Press, 1991), pp. 41–53, 93–130. The *Fundamental Principles of the Metaphysic of Morals* is cited hereafter as *FPMM*; the *Critique of Practical Reason* is cited as *CPracR; The Metaphysical Elements of Justice* is cited as *MEJ*, and with the part of the work entitled 'The General Theory of Justice' being cited as GTJ; and *Perpetual Peace* is cited as *PP*. For Kant's political thought generally, see: Howard Williams, *Kant's Political Philosophy* (Oxford: Basil Blackwell, 1983). For Kant's international thought, see: Hinsley, *Power and the Pursuit of Peace*, Chapter 4; Charles Covell: *Kant, Liberalism and the Pursuit of Justice in the International Order* (Münster and Hamburg: Lit, 1994); *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (London: Macmillan, 1998).
3. G.W.F. Hegel: *Elements of the Philosophy of Right*, trans. H.B. Nisbet, ed. Allen W. Wood (Cambridge: Cambridge University Press, 1991); *The Philosophy of History*, trans. J. Sibree (New York: Dover, 1956). On Hegel's political thought generally, see: Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975), Part 4; *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979). For Hegel's views on international politics, see: Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), Chapter 10.
4. For Rousseau's analysis of war here, see generally *The State of War*. See also: *The Social Contract*, Book I, Chapter 4, pp. 55–6.
5. For Saint-Pierre's plan for perpetual peace, see: *Selections from the second edition of the Abrégé du Projet de Paix Perpétuelle by C.I. Castel de Saint-Pierre*, trans. H. Hale Bellot, The Grotius Society Publications: Texts for Students of International Relations, No. 5 (London: Sweet and Maxwell, 1927).

6. For the details of Saint-Pierre's proposals as here discussed, see: *Abrégé*, Part 1, First Proposition, pp. 24–31; Part 1, Second Proposition, Section 10.
7. Rousseau, *AJ*, pp. 55–61, 67–70, 85–7.
8. *Ibid.*, pp. 88–90, 93–4, 100.
9. Rousseau, *The Social Contract*, I.6.
10. *Ibid.*, I.8, p. 65.
11. *Ibid.*, II.1, p. 69.
12. *Ibid.*, II.6.
13. *Ibid.*, III.1, pp. 101–3.
14. For Kant on the contradiction between freedom and determinism, see his discussion of the so-called antinomies of pure reason as particularly: *Critique of Pure Reason*, I: 'Transcendental Doctrine of Elements', Part II, Division II, Book II, Chapter II, Section 2: 'Third Antinomy' and 'The Antinomy of Pure Reason', Part III, pp. 464–79.
15. Kant, *FPMM*, Section II, p. 31.
16. *Ibid.*, II, pp. 38, 46–7, 49, 52.
17. For Kant on the autonomy of the will, see: *FPMM*, II, p. 59; *CPracR*, Part I, Book I, Chapter I, Section VIII.
18. In this connection, see Kant's discussion of the idea of the heteronomy of the will and the conceptions of morality associated with this: *FPMM*, II, pp. 59–64; *CPracR*, I.I.II, pp. 155–6.
19. For Kant's arguments here, see: *FPMM*, III; *CPracR*, I.I.I, pp. 131–40.
20. Kant, *MEJ*, 'Introduction to the Elements of Justice', Sections C–E.
21. *Ibid.*, GTJ, Part II, Section I, sub-sections 43–4.
22. *Ibid.*, GTJ, II.I.45–46.
23. *Ibid.*, GTJ, II.I.47.
24. *Ibid.*, GTJ, II.I.48–49.
25. *Ibid.*, GTJ, II.I: 'General Remarks on the Juridical Consequences arising from the Nature of the Civil Union', Sections A–E.
26. *Ibid.*, GTJ, II.I.52, pp. 111–13.
27. For Kant's statement and explanation of the first definitive article of perpetual peace, see: *PP*, pp. 99–102.
28. For Kant's statement and explanation of the six preliminary articles of perpetual peace, see: *PP*, pp. 93–7.
29. Kant, *MEJ*, GTJ, II.II.53–60.
30. Kant, *PP*, p. 96.
31. *Ibid.* For Kant's argument here, see also: *MEJ*, GTJ, II.II.57, p. 120.
32. Kant, *PP*, pp. 99–102.
33. For Kant's statement and explanation of the second definitive article of perpetual peace, see: *PP*, pp. 102–5. See also: *MEJ*, GTJ, II.II.61.
34. For Kant's statement and explanation of the third definitive article of perpetual peace, see: *PP*, pp. 105–8. See also: *MEJ*, GTJ, II.III.62.
35. The Kantian formulation of liberalism is associated particularly with the work of Rawls. For a concise specification of the defining features of Kantian liberalism, see: Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), Introduction.
36. For Kant's arguments here, see particularly the statement and explanation of the Fourth, Fifth, Seventh and Eighth Propositions set down in the *Idea for a Universal History with a Cosmopolitan Purpose*.

37. Kant, *PP*, 'First Supplement: On the Guarantee of a Perpetual Peace', especially pp. 112–14.
38. For Hegel's discussion of abstract right, morality and ethical life in its three moments of the family, civil society and the state, see respectively Parts 1, 2 and 3 of the *Philosophy of Right*.
39. Hegel, *Philosophy of Right*, Part III: 'Ethical Life', Section 3: 'The State', A: 'Constitutional Law', II: 'External Sovereignty', especially sub-section 324.
40. *Ibid.*, III.3, B: 'International Law'.
41. For Hegel's arguments here, see: *Philosophy of Right*, III.3, C: 'World History'; *The Philosophy of History*, Introduction, especially pp. 8–79; Part IV: 'The German World', especially Section III.
42. For Hegel on Kant and the federation of free states, see: *Philosophy of Right*, III.3, B, sub-section 333.

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'The Importance of Grotius in the Study of International Relations', in *Hugo Grotius and International Relations*, ed. Hedley Bull, Benedict Kingsbury and Adam Roberts (Oxford: Clarendon Press, 1990), pp. 65–93.

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