

The original inequality of the parties in this type of association is not to be seen as an accidental circumstance, even less as an accidental evil, but to a certain extent as the precondition and foundation of the whole system;² not *how much power* one or the other possesses; but only whether he possesses it in such a way and under such limitations that he cannot with impunity deprive one of the rest of its own power – this is the question which must be decided in order to pass judgment at any given moment on the relation between individual parts or on the general proficiency of the edifice. Hence even a subsequent increase in that original necessary inequality may in itself be blameless, provided it does not come from sources, nor introduce incongruities, which violate one of the basic maxims.

Only when one or another state wilfully, or supported by fictitious pretexts and contrived titles, undertakes such acts which immediately or as an unavoidable consequence cause, on the one hand, the subjugation of its weaker neighbours and, on the other hand, perpetual danger, gradual debilitation and the final downfall of its stronger neighbours, only then, according to sound conceptions of the interest of a union of states, is a breakdown of the balance effected; only then do several states combine to prevent by means of an opportune counterweight the predominance of an individual state.

² If the world had been divided only into equal rectangles, large or small, no such union of states would ever have occurred,

and the eternal war of each against the others would probably be the only world-event.

6

The emergence of international law

Although a society of states has been in the making in Europe since at least the fifteenth century, the idea of a distinct body of law springing from and regulating this society remained hazy throughout the early modern period. The term “international law” (and cognate expressions in other languages) did not come into general use until the nineteenth century. Even then, the rules governing international relations were sometimes referred to as the “public law of Europe.” But most writers clung to the antiquated and equivocal term “law of nations” (*ius gentium, droit des gens, Völkerrecht*, etc.), struggling to describe new modes of diplomacy using a conceptual vocabulary inherited from ancient Rome and medieval Christendom.

The modern debate over whether a law-governed order is possible in a world of sovereign states reflects the growing importance of individualism. Theorists who base civil law on individual interests argue that the sole purpose of government is to protect the lives and property of its subjects. For some, this argument points toward constitutional government and the protection of individual rights. To others it suggests an instrumental conception of government in which laws are tools of rather than constraints on policy. Such a conception threatens individual rights by undermining the laws that define and protect them.

In its most extreme versions, individualism regards human beings as appetitive creatures, driven, in the absence of a superior earthly power, to be their own law in matters affecting their survival. In such a condition there is no authoritative superior law, only instrumental rules which freely choosing human beings devise for their own convenience. Natural law gives way to natural right – one’s *de facto* liberty to use one’s powers as best one can. The proposition that sovereign states are subject to a law prescribing limits on the pursuit of power, already undermined by radical conceptions of reason of state, had to be reasserted against this new theory of natural right. What we call international law is one of the outcomes of an intellectual effort to reconstruct the Stoic/Christian universal human community as a community of

territorial states. Whether states really do constitute a community regulated by international law is, of course, a debate that has not yet run its course.

Natural law and natural rights

According to the Stoics, there is a divine and natural law governing everything in the universe, including human conduct. In the Christian version of this view, the law is divine in being promulgated by God and natural in being knowable by reason without the aid of revelation. Because human beings are free, rational beings, they can choose to disobey this law. And natural law, understood as a morality binding on all human beings, must be distinguished from the laws observed in particular communities. This conception of morality goes back through Aquinas to the Stoic view that all human beings are citizens not only of a particular polis with its own local laws but of an ideal universal community: a "cosmopolis" whose law is this rationally knowable natural law. There are, in other words, objective, universal, and eternal standards of right and wrong by which human laws as well as human conduct are to be judged.

The most significant natural law theorists of the sixteenth and early seventeenth centuries were Catholic theologians working in the tradition of medieval scholasticism. But by the middle of the seventeenth century, Protestant writers drawing directly on the Bible and the classics were at the center of natural law theorizing. Chief among them were Grotius and Hobbes.

Hugo Grotius (1583–1645) was, among other things, a humanist scholar, poet, historian, and self-taught theologian. Trained in Latin and Greek and then in law, he sometimes combined these interests in odd ways: one of his poems, for example, is a Latin verse paraphrase of the passages on *dominium* (property) from Justinian's *Institutes*, a manual of Roman law commissioned by the sixth-century emperor. Grotius held a series of offices under the patronage of the chief of the United Provinces of the Netherlands, Johan van Oldenbarnevelt. But his public career was abruptly terminated in 1619 when Oldenbarnevelt tangled with more powerful rivals and was executed for treason. Sentenced to prison for life, Grotius escaped to Paris, where he later served as the Swedish ambassador to France.

Grotius made his first significant contribution to international affairs in response to the Dutch rivalry with Portugal and Spain in the East Indies. In 1603 the Dutch East India Company captured a Portuguese vessel in the Straits of Malacca and brought it back to Holland, claiming ownership of the vessel and its cargo as "prize" (property seized lawfully in a war). Grotius, who at this time was a celebrated Latin author as well as a prominent lawyer, was a

natural choice not only to defend the company's claim in court but to make a compelling public case for Dutch efforts to disrupt Portuguese trade in the East Indies (Roelofsen, 1990: 105). This assignment resulted in a manuscript known as *The Law of Prize*. Except for a chapter printed in 1609 as *Freedom of the Seas*, the work remained unpublished until 1864.

The Law of Prize is more than a legal brief on behalf of the Dutch East India Company or a moral defense of the Dutch challenge to Portuguese and Spanish imperial claims, for it offers an elaborate philosophical argument for the right of individual and collective self-preservation and for the lawfulness of war, private as well as public, as an instrument of self-preservation. Instead of devising a narrow legal argument that would be sufficient to win his case in a Dutch court, Grotius develops a general justification of the use of armed force based on principles that could be acknowledged in Portugal as well as in Holland, and by Catholics as well as Protestants.

Grotius is grappling with a significant problem: how can one establish the truth of moral principles if people adhere to different traditions of moral belief? There are three obvious ways of handling this problem, which we might call dogmatism, relativism, and consensus. First, one can ground morality on some premise that one believes to be beyond doubt. The difficulty with this solution is that those who reject the premise will remain unconvinced: the premise and the conclusions it supports may be true, but this won't make any practical difference. Second, one can reason from within one of the competing traditions of moral belief, leaving others to reason within their own traditions. But this solution is even less likely than the first to generate moral agreement because it offers no basis for choosing between traditions. Third, one can seek a foundation in principles common to all systems of belief. But this solution, too, is problematic, for a proposition might be generally accepted and yet be false. This, however, is the solution Grotius finds most compelling.

Grotius argues that one cannot establish the truth of a moral conclusion by invoking principles drawn from some particular, historically contingent moral system. He therefore rejects both civil law and Holy Scripture as a source of universal moral principles. The rules of civil law are binding only on the citizens of a particular state. Nor is Scripture a source of universal principles: the law revealed to the Hebrews is law only for them, and even Christian teaching has limited universal validity because it is mainly concerned with how to lead a more Christian life. Only natural law – which consists of moral principles correctly derived from universally valid premises – possesses the required generality.

But how, we might ask, do we know where to begin? How can we discover which moral premises are universally true? Why should we embrace the Stoic idea of a universal law of nature? Grotius reasons that what Stoicism and the

other philosophical traditions of antiquity – which are, for him, the most authoritative systems of rational morality – agree upon must in fact be true. And all the ancient schools, including the “Academics” (Skeptics), agree on the primacy of self-preservation (Grotius, 1950: 10–11). Ancient Skepticism is not a purely epistemological view: it recommends suspending belief to achieve a state of mind in which one is free from anxiety. But because one must go on living to enjoy this state, Skepticism implicitly views self-preservation as the basic human motive. Grotius therefore concludes that the injunction to preserve oneself, which even the Skeptic acknowledges, is the indisputable foundation for morality (Tuck, 1987: 110–11).

Grotius establishes a moral right of self-preservation by reasoning that if the desire for self-preservation is inherent in human nature, no-one can be blamed for acting on this desire. And once we grant a right of self-preservation, we must grant other rights that are implied by it. Grotius uses the most important of these implied rights, self-defense and ownership, to formulate two fundamental principles of natural law: that it is permissible to defend one’s life and to acquire things useful for life (Grotius, 1950: 10).

According to this theory, the basis of natural law, *ius naturae*, is natural rights. The word *ius*, Grotius writes, stands for what is “just” by nature and, by extension, for the “law” by which natural justice and injustice is measured. But there is another meaning of *ius* which is close to what we mean today by “a right.” *Ius*, in this sense, means the moral quality by which a person can be said to justifiably perform an action or possess a thing. It includes moral powers which one has over oneself (freedom), others (mastery), and things (ownership), as well as contractual rights (Grotius, 1950: 35–6). This meaning of *ius* (plural *iure*) as a power owned by someone is not novel. Grotius’ Spanish contemporary, Francisco Suárez, for example, distinguishes *ius* as “the moral right to acquire or retain something” from *ius* as “law, which is the rule of righteous conduct” (1944: 326), and there is evidence that the use of *ius* to mean a right goes back at least to canon lawyers of the twelfth century (Tierney, 1997). In using the idea of natural right, then, Grotius is reshuffling the elements of an inherited tradition. But in making rights the foundation of natural law, he gives the individualist element in that tradition an importance it did not have in medieval thought.

Because of the primacy of self-preservation, Grotius argues, human beings have a right to defend themselves against attack – a right they retain even in civil society. And because the justification of civil society is that it secures the right of self-preservation, individuals may use force to defend their lives and property when government fails to protect them or to resist a government that attempts to deprive them of these things. In this way Grotius maps out a line of thought that is central to political theory for the next two centuries: that civil society is an artificial entity constructed by individuals

endowed with natural (pre-civil) rights, including the right of property. The idea that persons “have” rights, that civil law exists to protect their rights, and that government is illegitimate when it interferes with these rights, helped transform the Aristotelian/scholastic premises of medieval thought into the secular individualism we take for granted today.

Grotius does not, however, push his individualist premises to the limit. He argues that the natural kinship human beings feel for their fellows makes it reasonable to demand that they refrain from injuring one another. This demand generates two additional natural laws: that one may not physically harm others or seize their possessions (Grotius, 1950: 10). When Grotius says that “one’s own good takes precedence over the good of another” (1950: 21), he does not mean that in pursuing one’s own ends one can violate these two natural laws. A person is morally entitled to act in ways that injure the interests of other persons, but not their bodies or property.

The natural moral order implicit in these additional principles is nevertheless quite minimal. Natural law, as Grotius understands it, is a morality based on coexistence between self-regarding individuals, not on benevolence or on cooperation to secure shared social goods. Human beings may be inherently social, but the law of nature does not require that they assist one another, only that they leave one another alone, though there may be a duty to assist those who are the victims of violent injustice. Grotius’ understanding of sociality is only superficially like that of Aristotle and Aquinas, for it attributes to human beings no more than a natural propensity to respect one another’s interests. Founding natural law on natural rights undermines the Aristotelian assumption of natural human sociality and narrows the scope of natural law to mutual noninterference.

Grotius develops the implications of his theory of natural rights for international relations in *The Law of War and Peace* (1625). Like the earlier work, it is concerned with both private and public war. It is therefore not a treatise on international law, understood as a distinct body of law regulating international relations. Instead, it articulates a single theory of morality applicable to any person, individual or collective, whose natural rights are threatened by the actions of others. Civil societies are associations of persons cooperating to secure their lives and property, and one purpose of a government is to defend the rights of its citizens against injury by foreigners. Although individual human beings live in civil societies, these societies remain in a natural (pre- or non-civil) condition with respect to one another. Like the persons they protect, states have a right to self-preservation. The natural rights of states are analogous to the natural rights of individuals.

For Grotius, to defend one’s own life and property is the most fundamental ground for using armed force – hence the title of the chapter (Book 2, chapter 1) in which Grotius opens his discussion of the circumstances under

which war is justified: "The Causes of War: First, Defense of Life and Property." In defending one's rights by force one must, however, avoid violating the rights of others: "it is not ... contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed; and consequently the use of force which does not violate the rights of others is not unjust" (Grotius, 1925: 54). In the state of nature, one individual may punish another for violating the rights of any person, because such injuries set a bad example and are therefore the concern of all. The same is true of injuries inflicted on a state. Just as each person in the state of nature may fight to preserve the rights of all, so each state may fight to preserve the rights of all states. A state is therefore permitted to punish injuries to others as well as to itself. Any state, for example, may justly use force to suppress piracy or barbaric practices like cannibalism. But only the most serious crimes against nature can justify punitive war, which is always "under suspicion of being unjust, unless the crimes are very atrocious and very evident" (Grotius, 1925: 508).

If the cause for which a war is fought is unjust, then, Grotius argues, everything done in the course of waging it is unjust. He does not recognize the modern principle that would excuse soldiers in an unjust war from the charge of criminality on the grounds that the rights and wrongs of conduct in war are independent of the justice of the war's aims. Nor does he offer moral reasons (that is, reasons based on natural law) for refraining from atrocities; instead, he condemns atrocities as un-Christian and inexpedient. This failure to connect the laws of war with the natural rights of noncombatants suggests that Grotius did not grasp the full implications of his own moral system.

Perhaps no consistent system of moral precepts is possible, however, if the right of self-preservation is treated as foundational. For Thomas Hobbes (1588–1679), self-preservation erodes rather than supports natural law. Grotius deduces natural law principles from the right of self-preservation. But the human beings whose right he postulates are not the ruthless powerseekers imagined by Hobbes. What Hobbes calls "the right of nature" is the unrestricted liberty of appetitive creatures competing for life and power: isolated selves who are driven to use one another, each for its own purposes. Human beings are rational creatures, but their rationality is the ends/means prudence of creatures concerned with self-preservation. Because their only motive in refraining from harming one another is self-regarding, Hobbesian selves lack even the minimal sociality that Grotius ascribes to human beings in the natural condition. Hobbes' theory of natural rights is therefore more radically individualist than Grotius'.

For Grotius, the state of nature, the situation of persons outside civil society, is still a moral order, but for Hobbes it is a lawless war of all against all: there can be no moral life without authority to declare and enforce a common law. For Grotius, as for the Thomists, moral principles create obligations even

in the absence of security. For Hobbes they do not: if others will not behave decently, you don't have to, either. In the absence of security, each person is free to do whatever, in his or her own judgement, is necessary for self-preservation. For Hobbes, outside civil society the laws of nature are in effect de-moralized: they become maxims of prudence for persons seeking self-preservation. If others are willing to cooperate, it will benefit you to cooperate as well, but you have no obligation to cooperate because in the state of nature there is no guarantee that others won't exploit your cooperation.

Hobbes uses these prudential maxims to generate civil society: rational persons, he argues, will put themselves under a system of authoritative and enforceable civil law. But the resulting states system is, paradoxically, still a state of nature. Whether sovereigns, too, might profit by establishing a world state depends on circumstances: for Hobbes, the costs of remaining in the state of nature are not as high for commonwealths as for individuals, so the motive for creating a super-state is weaker than that which brings individuals into civil society. But that is a contingent judgement; one can imagine circumstances in which the costs of remaining independent might motivate states to institute a world state (Airaksinen and Bertman, 1989).

Hobbes' view of international relations is, then, one we would call "realist" or Machiavellian. Within civil society, law rules; between civil societies "policy" (expediency) comes to the fore. The eighteenth-century theory of the balance of power illustrates how far international political theory can go on Hobbesian premises.

Seventeenth- and eighteenth-century theorists tried ingeniously to reconcile the new theory of natural rights articulated by Grotius and Hobbes with the older understanding of natural law. The most famous of these in his day was the German philosopher Samuel Pufendorf (1632–94). Pufendorf accepts Hobbes' argument that enforcement is essential to the idea of law. But instead of concluding that natural law is not enforceable and therefore not really law, he argues that it is authentic law because it is willed by God and backed by the threat of divine punishment. He also argues that Hobbes is mistaken in thinking that there can be rights without correlative duties. If there is a natural right of self-preservation, there must also be a natural duty to respect the lives and property of others. Finally, against Grotius, Pufendorf argues that our natural duties include a positive duty of benevolence:

Everyone should be useful to others, so far as he conveniently can ... It is not enough not to have harmed ... others. We must also ... share such things as will encourage mutual goodwill. (Pufendorf, 1934/1991: 64)

Underlying these duties is the fundamental principle of morality: that one should cultivate "sociality." This is Pufendorf's version of the Golden Rule, and it is fundamental in the sense that all the other precepts of morality derive from it. With these arguments, Pufendorf retreats from Hobbes' and even

Grotius' theory of natural right to a position less hostile to that of Thomistic natural law.

Pufendorf's *On the Duties of Man and Citizen* (1673) is a compact survey for students of the principles of natural law expounded in a massive treatise published the year before, *On the Law of Nature and of Nations* (1672). In these works, Pufendorf identifies natural law as a kind of moral knowledge. It is knowledge of one's duties as a human being, acquired by the use of reason, as distinguished from knowledge of one's duties as a citizen, as determined by the civil laws of one's country, or knowledge of one's duties as a Christian, based on divine revelation. In modern terms, we might say that Pufendorf distinguishes philosophical ethics from positive jurisprudence, on the one hand, and moral theology, on the other.

If natural law is really law, then international relations is governed by law. But it is of course moral, not positive, law. Morally speaking, a state has no unlimited right to wage war for its own security, only a right to defend itself against unjust attack or to rectify some other injury to itself. Like Grotius, Pufendorf relies on customary practice as well as natural law in discussing the moral limits that govern the conduct of war. He observes, for example, that international custom permits states at war to use all measures necessary for victory, though civilized nations may choose to forego such measures as the use of poison or the assassination of rulers. And although immovable property seized in war belongs to the conquering sovereign, custom entitles soldiers to keep movable property they have taken as booty. Pufendorf is reluctant to ascribe such principles, which reflect the state of civilized opinion regarding the conduct of war, to natural law.

From *ius gentium* to *ius inter gentes*

Much attention has been given since the middle of the nineteenth century to the origins of international law. While some have claimed the title of founder of international law for Grotius, others bestow the honor on Gentili, Vitoria, or Suárez (A. Nussbaum, 1954: 296–306; Haggenmacher, 1990). The dispute, fueled in part by national and religious rivalries, presupposes a naive conception of history. Modern international law is a complex practice, and the concept that corresponds to this practice was only slowly clarified. The main elements of this modern concept of international law – that there exists a body of rules specifically regulating the relations of independent territorial states, and that these rules have their source not in natural reason but in the customs and agreements of states – were articulated by theorists using a vocabulary ill-suited for the task.

The Romans distinguished *ius* (customary law) from *lex* (enacted law). Every *lex*, being enacted at a particular time, is law only after it has been enacted. And, because it has been enacted, it can be amended or repealed. Civil law, which governs relations between Roman citizens, is *lex* but the law governing relations between citizens and foreigners – that is, aliens living under Roman authority – was not the product of legislation; rather, it was originally case law emerging from the decisions of administrators and judges handling disputes between the two classes of persons. It is, therefore, a body of common or customary law. The Romans called this customary law governing relations between members of different *gentes* or peoples *ius gentium*. In late medieval and early modern Europe, *ius gentium* meant the customary law common to all or most civil societies. It is positive law in the sense of being a social practice, not in being *lex* declared by a sovereign (Haakonssen, 1996: 18–19).

In the legal and political theory of early modern Europe, *ius gentium* occupies an ambiguous place between natural and human law. Theorists devoted much thought to untangling the relationship between *ius gentium* and other kinds of law. Some, like Grotius, identified *ius gentium* with natural law on the grounds that any practice acknowledged as lawful among many peoples must be inherently reasonable. But even those who rejected this identification regarded *ius gentium* as closer to natural law than to the enactments of particular sovereigns. Yet because *ius gentium* is composed of generally recognized principles, it could be characterized as the “civil law” of a single human community. As Vitoria puts it:

The law of nations (*ius gentium*) does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment (*lex*). The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations. (Vitoria, 1991: 40)

The idea of enactment here is of course metaphorical. Bodin, too, is drawn toward identifying *ius gentium* as a kind of *lex* – he calls it *lex omnium gentium communis*, the law common to all peoples. For neither author, however, does *ius gentium* carry any suggestion of international law as an autonomous system of rules, based on treaties and customary state practice, binding independent territorial states in their relations with one another.

But as the selections from Grotius and Hobbes illustrate, as soon as sovereigns were seen as persons outside civil society – persons governed by natural law – theorists could begin to connect natural law with the practices governing sovereigns in exchanging ambassadors, regulating trade, making treaties and alliances, and waging war. For some, these practices were essentially a reflection of natural law applied to the relations of states. For others, they constituted a body of human law which, though similar in content to

natural law, was based on custom, not on reason. The existence of such practices also suggested a distinction between two kinds of *ius gentium*, one comprising norms common to the domestic laws of different states, the other comprising norms observed by sovereigns in their dealings with one another—a system of law springing from and regulating relations between states. In the early modern period there is much confusion because a single expression, the law of nations (*ius gentium*) is used for both kinds of law. International law proper, sometimes identified by the label *ius inter gentes* (“law between nations”), only gradually separated itself from the law of nations understood as principles common to different systems of civil law.

Among the first to discuss the two meanings of *ius gentium* was the Spanish Jesuit theologian Francisco Suárez. Writing in 1612, Suárez distinguishes “laws which individual states or kingdoms observe within their own borders, but which is called *ius gentium* because the said laws are similar and are commonly accepted” from “the law which all the various peoples and nations ought to observe in their relations with one another” (1944: 447). Only the latter is *ius gentium* proper, Suárez argues; the former is really part of the civil law of each state. Suárez continues, however, to presuppose a community of mankind: each state, though a “perfect” (independent) community, is also a member of the universal society comprising humanity as a whole. But this universal society is not a society of states. It is an undifferentiated society of persons, some of whom happen to be sovereigns.

Hobbes, writing several decades after Suárez, is perhaps the first to restrict the expression *ius gentium* or “law of nations” to the law between sovereigns: just as civil law is the law of nature applied to the citizens of a commonwealth, the law of nations is natural law applied to sovereigns, who are not members of any commonwealth, and for whom it serves not as binding law but as prudential good sense. And in a 1650 treatise, Richard Zouche, an English lawyer, distinguishes “the law which is observed between princes or peoples of different nations” from the civil laws common to all or most nations (1650/1911: 1). Zouche calls the former *ius inter gentes* and identifies it with the *ius feciale*, the law of the early Roman “college of feccials” or priests whose office was to ascertain the lawfulness of Rome’s wars and treaties. Seventeenth-century writers often turned to the *ius feciale* to make sense of the emerging practice of international law. Leibniz, for example, labels natural law applied to the relations of sovereign states *iuris fecciales inter gentes* (1988: 175). Because it is confined to this body of law and includes a discussion of treaties, Zouche’s treatise is recognizably a work on international law as we now understand that subject.

The late seventeenth-century understanding of the law of nations as a distinct body of international law is represented here by some passages from “On the Law of Nations” (1676) by Samuel Rachel (1628–91). For Rachel,

who was a contemporary and critic of Pufendorf, the law of nations “properly so called” consists of positive laws springing not from the will of a superior but from the joint will of sovereigns as expressed in agreements between them. This international law, which we can conceive as being jointly enacted by the participating states, must be distinguished from the civil laws common to various states, on the one hand, and from natural law, on the other. But international law, which rests on agreement and good faith, is not enforced by any superior state. To remedy this implicit defect, Rachel proposes that states agree to establish a new “college of feccials” to decide disputes under international law (p. 355). For Rachel, the idea of international law implies the need for a world court.

During the course of the eighteenth century, legal theorists gradually distinguished international law from domestic public law, regarding it as an autonomous system rooted in international practice. A steadily increasing volume of treaties, the availability of records concerning state practice, and the increasing professionalization of law contributed to this development by inviting new ways of establishing international legal rules.

In his *The Law of Nations Treated According to a Scientific Method* (1748), Christian von Wolff (1679–1754), like Pufendorf a prominent figure in the German Enlightenment, defines the law of nations as “the science of that law which nations or peoples use in their relations with each other” (p. 356). This definition reveals an academic’s rather than a practitioner’s conception of the subject. Wolff, who had no legal training or experience, was interested in international law solely as a subject for philosophical analysis.

For Wolff, international law begins with natural law: because nations are “individual free persons living in a state of nature” (p. 356), the law of nations is natural law applied to nations. Wolff calls this law the “necessary law of nations” (p. 358) because the obligations it prescribes are unchanging and unchangeable: this kind of international law belongs to natural law (morality), and we can’t change morality. But unlike Grotius, Pufendorf, and other natural law theorists, Wolff treats the principles of natural law that apply to states as a separate branch of natural law. Because states have qualities that distinguish them from individual persons, the natural law of nations is not merely an application of the natural law of individuals (Knight, 1925: 200).

Wolff develops a philosophical foundation for international law, so understood, in his theory of the universal or supreme state (*civitas maxima*). We must imagine that states comprise a society governed by natural law, and that this natural society of states constitutes a universal state. All states are united in this universal state and subject to its laws. In other words, all states, considered collectively, must be imagined to hold a kind of sovereignty over each state considered individually. And because its decisions are made by the agreement of its free and equal members, the “government” of the universal

state is democratic. Here, as in other democracies, the majority rules: this is why customary international law is binding on all, even if some do not comply with it. But because the member states cannot assemble, we must deduce their agreement from what is reasonable. Finally, we must imagine a fictitious ruler of the universal state who wills the law of nations on the basis of right reason. The natural law of nations may be said to be "voluntary" in reflecting the will of an imagined world sovereign who represents the presumed rational will of the member states. But this voluntary law of nations, which rests on the presumed will and consent of nations, must be distinguished from the law that springs from the actual will and consent of nations and is embodied in the positive law of nations.

It is easy to scoff at this pyramid of definitions and fictions, but Wolff is in fact exploring, philosophically, the concept of international law as a body of rules governing the relations of independent states. A system of rules implies authoritative procedures for declaring and interpreting rules. If we cannot identify a real sovereign who performs these functions, we can try to grasp the logic of the system by attributing their performance to a postulated notional sovereign. This would seem to call for an organized union of states with institutions for securing the rule of law. Wolff does not, however, understand the *civitas maxima* as a proposal for such a union: it is, for him, a pure philosophical construct reflecting the internal logic of international law.

When Emmerich de Vattel (1714–67) decided to popularize Wolff's system, he dismissed Wolff's metaphysics and wrote a book designed to be useful to statesmen and diplomats. Trained in philosophy, Vattel pursued a brief and undistinguished diplomatic career in the service of several minor sovereigns. His *Law of Nations or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, which appeared in dozens of editions in various languages, was widely used for more than a century after its publication in 1758. The American founders owed their knowledge of international law in part to Vattel.

As its title implies, Vattel's book treats international law as a branch of natural law. And it is concerned with internal as well as foreign affairs. In both respects, the book resembles the works of Grotius and Pufendorf more than it does a modern textbook of international law. Vattel's modernity, like that of Grotius, has been exaggerated by those seeking the origins of international law (Hurrell, 1996). But unlike his predecessors, Vattel pays attention to contemporary diplomatic practice and understands international law as an autonomous body of law.

The passages in which Vattel discusses the equality of states and the laws of war indicate the gulf that separates eighteenth-century international law from the laws of medieval Christendom. States have equal rights under international law, no matter how weak or powerful they may be: "A dwarf

is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom" (Vattel, 1916: 7). This equality provides the justification for the balance of power, which according to Vattel conditionally justifies preventive war against a would-be hegemonic state. And it means that the laws governing the conduct of war apply equally to all, regardless of whose cause is just: what is permitted to one side as a lawful means of war is also permitted to the other belligerents. The rationale for this equality is that it brings war within the bounds of law: if war cannot be forbidden, it should at least be regulated.

Vattel justifies retaining a link with natural law on the grounds that if consent were the only source of international law we could not condemn evil practices like the slave trade. Though much of international law rests on the consent of states expressed in treaties and customary practice, Vattel argues that this law is binding because it is consistent with natural law. It is the natural law principle *pacta sunt servanda* ("agreements must be honored"), for example, that requires states to keep their promises. But his is the last mainstream work in which international law is identified with natural law. From the late eighteenth century onwards, international law is usually understood to be positive, not natural law. It is positive not in being enacted by a superior but in being jointly willed by states, who bind themselves explicitly through treaties or implicitly through customary international law.

FURTHER READING

For Grotius, beginners are well served by Bull, Kingsbury, and Roberts (1990), more advanced students by Haggemacher (1983) and Onuma (1993). For Hobbes, beginners might start with Tuck (1989) and then read the speculative essays on the international implications of Hobbes' political thought in Airaksinen and Bertman (1989). Schiffer (1954), Linklater (1990), and Boucher (1998) each devote a chapter to Pufendorf, on whom the standard work by Krieger (1965) may also be consulted. The standard history of international law, superficial, dated, but nevertheless useful in the absence of competitors, is A. Nussbaum (1954). The history of international law is considered from the standpoint of political theory by Nardin (1983).

SOURCES

- Hugo Grotius, from *The Law of War and Peace* (1625), trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), Prolegomena, sections 1, 5–13, 15–23, 25, 28–9, 39–40, 48, 50, and Book 1, ch. 2, sections 1, 2, 4 (part), 5 (part), and 6 (part), pp. 1, 10–18, 20, 23–4, 26–7, 51–4. Author's and translator's notes omitted.
- Thomas Hobbes, from *Leviathan* (1651), ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), chs. 13 and 14 (part), pp. 86–92. Hobbes' spelling has been modernized and his marginal headings omitted.

- Samuel Pufendorf, from *On the Duties of Man and Citizen* (1673), ed. James Tully (Cambridge: Cambridge University Press, 1991), Book 2, chs. 1 and 16, pp. 115–19 and 168–72.
- Samuel Rachel, from “On the Law of Nations” (1676), in *Dissertations on the Law of Nature and Nations*, trans. John Pawley Bate (Washington, DC: Carnegie Institution, 1916), sections 1–3 (part), 11–12, 84–91, and 119, pp. 157–8, 164–5, 204–8, and 223.
- Christian von Wolff, from *The Law of Nations Treated According to a Scientific Method* (1748), trans. Joseph H. Drake (Oxford: Clarendon Press, 1934), Prolegomena, pp. 9–19. The translator’s notes have been omitted.
- Emmerich de Vattel, from *The Law of Nations or Principles of Natural Law* (1758), trans. Charles G. Fenwick (Washington, DC: Carnegie Institution, 1916), Book 2, ch. 3, and Book 3, ch. 12, pp. 126–9 and 304–6. The author’s notes, cross-references, and marginal headings have been omitted.

HUGO GROTIUS

HUGO GROTIUS (1583–1645), Dutch humanist, theologian, and jurist. Grotius achieved fame first as a poet and later for his efforts to reconcile Protestant and Catholic Christianity. He is known to students of international relations for his defense of the principle of freedom of the seas and, even more, as the author of *The Law of War and Peace* (1625), which he wrote while living as an exile in France. Despite its baroque style and almost complete neglect of contemporary international practice, Grotius’ famous work continues to be read as a statement of the view that the jurisdiction of morality extends even to war (the law of war, for Grotius, is natural, not positive, law). Although the habit of regarding Grotius as the founder of international law both ignores the contributions of his predecessors and reads back into his work ideas that belong to a later period, his writings contain, in embryo, a powerful theory of international justice.

From *The Law of War and Peace*

Prolegomena

1. The municipal law of Rome and of other states has been treated by many, who have undertaken to elucidate it by means of commentaries or to reduce it to a convenient digest. That body of law, however, which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement, few have touched upon. Up to the present time no one has treated it in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished.

...

5. Since our discussion concerning law will have been undertaken in vain if there is no law, in order to open the way for a favourable reception of our work and at the same time to fortify it against attacks, this very serious error must be briefly refuted. In order that we may not be obliged to deal with a crowd of opponents, let us assign to them a pleader. And whom should we choose in preference to Carneades? For he had attained to so perfect a mastery of the peculiar tenet of his Academy that he was able to devote the