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THE USE OF FORCE

The Classical International Law Tradition

In his magisterial introduction to international law, *The Law of Nations*, James L. Brierly quotes at length the French international lawyer Albert De Lapradelle on the significance of Vattel, whose text *Le Droit des gens*, published in 1758, is usually regarded as the standard founding statement of modern international law. The Frenchman praises Vattel for having written in advance of the events which the book represents, the principles of 1776 and 1789, of the American and French Revolutions. Vattel is credited with projecting onto the plane of the law of nations the principles of legal individualism. Vattel has written the international law of political liberty.[1]

Brierly comments astutely that the survival of the 'principles of legal individualism' has been a disaster for international law. The so-called natural independence of states cannot explain or justify their subjection to law and does not admit of a social bond between nations. Vattel has cut international law from any sound principle of obligation, damage which has never been repaired.[2]

It could be said that there is nothing in the critical legal studies movement about the law relating to the use of force that has not already been said clearly by Brierly in relation to Vattel. Brierly's views are worth repeating precisely because contemporary statements about Anglo-American *unilateralism*, above all in the context of Afghanistan and Iraq, however worthy and true, are statements of the obvious which do little to advance understanding. Focus will be on Brierly's critique of Vattel on the use of force since it is most relevant.

Vattel makes each state the sole judge of its own actions, accountable for its observance of natural law only to its own conscience.[3] This reduces natural law to 'little more than an aspiration after better relations between states.'[4] For instance, by necessary law (natural law) there are only three lawful causes of war: self-defense, redress of injury, and punishment of offences. By the voluntary law (effectively

the positive law, based on consent) each side has, we must assume, a lawful cause for going to war, 'for Princes may have had wise and just reasons for acting thus and that is sufficient at the tribunal of the voluntary law of nations.'[5]

Kant has already been quoted for disparagingly saying of the international law tradition, from Grotius to Vattel, that 'no example can be given of a nation having forgone its intention [of going to war]' because of this tradition. Nations do not and cannot stand under any common external constraints.[6] However Brierly is going further and telling us that the very categories of thought which the international law tradition, since Vattel, offers makes it impossible to think of that law effectively restraining the recourse of states to violence.

This is not helped by the ambiguity that appears to surround Vattel's position. As Bartelson also stresses, the argument that mankind is divided into separate states does not overrule universal natural law, now reinstated in the rationalist context of Enlightenment philosophy.[7] Bartelson quotes Vattel that each nation 'may be regarded as a moral person, since it has an understanding, a will and a power peculiar to itself; and it is therefore obliged to live with other societies or states according to the laws of the natural society of the human race.' The difficulty remains that this universal morality is not immediately binding upon the external conduct of states. Again, quoting Vattel, 'each has the right to decide in its conscience what it must do to fulfill its duties; the effect of this is to produce before the world at least, a perfect equality of rights among Nations'. This leaves the international law tradition with a contradiction. Without sovereignty, says Bartelson, after Vattel, the state cannot be understood as a moral person, but without a wider sense of universal values, this person cannot be sovereign.

This dilemma is what is meant by the question whether international law is binding, whether treaties are legal instruments, and, especially, whether sovereignty can be legally limited. It is attempted to argue that Vattel's idea of sovereignty does not negate the very idea of international law. The profession never tires of repeating that states declare their adherence to international law. The difficulty is clearly that the doctrine of legal equality means the interpretation of the law given by any and every state has equal value. Therefore, the principle of auto-interpretation of the law is inevitable, which means a total relativity of interpretations. The very idea of legal obligation is negated precisely by the universal willingness of states to appeal to law to vindicate their positions. So the evidence of

declared adherence to international law on the part of states is the problem that confronts us rather than the evidence that reassures us.

THE CONTINUANCE OF THE CLASSICAL TRADITION

So, by way of typical illustration of the actuality of this apparently theoretical difficulty one need look no further than the most internationally reputed standard textbook of international law. The editors of Oppenheim's 9th edition of *International Law* define international law, as any other law, in social terms as rules of conduct accepted in a community by common consent and enforced by an external power (para. 3). They rely upon the classical distinction between law and morality (para. 17) in terms of the latter applying to conscience and the former being enforced by external authority. A clear weakness of international law, recognized by the editors, is that the enforcement mechanisms of international law continue to be unsatisfactory and the Security Council does not offer an adequate substitute. Yet the same editors treat the controversy about the legal nature of international law as unrealistic (para. 4) simply because states recognize that their freedom is constrained by law. This remark is accompanied by the observation, assigned to a footnote, that such a position is not inconsistent with the fact that states may differ as to precisely what rules that law prescribes.

It may be that the editors are not concerned so much about the frequent resort to unilateral action by states in the form of self-help or special interpretations of the right of self-defense, etc., because it must always be possible to have judicial or Security Council review of such decisions if the idea of law is not to be eliminated from the scene (para. 127). That is, relevant officials could, conceivably, appear who would apply the international norms.

However, the practical implications of this have to be seen in the wider context of 'authoritative' mainstream doctrine as represented in the 9th edition of Oppenheim's *International Law* edited, *inter alia* by an FCO First Legal Advisor, Sir Arthur Watts. The editors of the 9th edition of Oppenheim, Sir Robert Jennings (an ICJ judge as well as an academic) and Sir Arthur Watts, regard the UN as having the potential of a complete legal system, but in the meantime 'we are not that far,' particularly insofar as concerns enforcement. Using the framework of the 1970 UN Declaration on FRAS (Friendly Relations Among states) and superimposing it on the notion of the nineteenth-century fundamental rights of states (Pillet),[8] the editors adopt the

rationalistic concept which underlay international law in pre-Charter times. So (para. 119), independence as a legal concept entails that violation of, for instance, the territorial sovereignty of another state may occasionally be justified on grounds of self-defense or by the failure or inability of the invaded state to fulfill the duties of control over its territory which are the corollary of its right to territorial sovereignty.

The difficulty, of course, is that each state will, in accordance with the legal principle of equality, claim the same right, and thereby cancel out the legal effects not only of all other legal claims, but also its own. The editors, and the mainstream of the profession, have always been aware of this difficulty and believe they can counter it by making a distinction between the claim of a right to self-preservation and a right to self-defense. While self-preservation as a legal concept is ruled out as illogical, the necessity of safeguarding the integrity of the State may, in strictly limited circumstances, justify acts that are otherwise wrongful (para. 126). Article 33 of the ILC draft articles on State Responsibility is the occasion for differing views. But maybe when there is only one means to safeguard essential interests of a state against grave and imminent peril, and there is no serious impairment of the essential interest of another state and no violation of *ius cogens* by using it (para. 127), force may be used. In any case, in the view of the editors, self-defense against subversive armed forces can involve crossing the border to deal with intended attackers, etc. Standard nineteenth-century cases are set out, such as the sinking of the Danish fleet at Copenhagen as well as the sinking of the French fleet at Oran in 1940.

What is more, anticipating an attack is not necessarily unlawful in all circumstances (para. 127, continued). In conditions of modern hostilities it is unreasonable to expect the state to wait. In practice it is for every state to judge for itself in the first instance whether a case of necessity in self-defense has arisen. There are practical difficulties in modern technology, for example aircraft approaching in what appears to be a hostile manner. The editors make no judgments about a number of incidents which they set out in a value-free manner: Suez 1956, Cuba, Aden, South Africa, Vietnam, Iraq, etc. So, it appears that the editors consider that forceful intervention is not necessarily illegal. Justifications have been the protection of citizens, as Britain in Suez, Israel at Entebbe, etc. (para. 131). That is, where national lives are in danger and the territorial authorities are unable or unwilling to protect those at risk, action may be taken which is, in any case, not inconsistent with the purposes of the UN Charter.

A FURTHER GLANCE AT VATTEL'S HERITAGE

It has to be stressed once again that Vattel is the key figure of international legal modernity. Of course, he is not the originator of legal modernity itself. Nor did he necessarily understand the implications of the innovations that he made. One will have to come to these questions in a later part of this chapter. For the moment it is his place in the international law tradition that one wishes to highlight. As an historian of international law, Jouannet demonstrates the same continuity of the medieval legal method throughout the seventeenth and early eighteenth centuries from Grotius to Vattel. All the major legal figures continue some version of the medieval method. The main figures are Grotius himself and what Jouannet describes as his disciples, Rachel, Zouche, Textor, and Bynkershoek.[9]

The reason why international law had not until Vattel become an autonomous discipline in its modern recognizable form is rather surprising. Jouannet traces how none of the earlier jurists conceived of the state or nation, words used interchangeably, as a corporate entity distinct from the person of the government or the Prince. There are traces of the idea of the state as a corporate entity in the writings of Hobbes, which have also exercised an influence on Pufendorf.[10] However, even these two writers remained with the concept of government alone rather than developing a concept of a corporate entity which embraced both the governor and the governed. The elements which would make up the modern state in international law, government, territory, and population, remained the property of the Prince. He *had* a territory and a population, in a patrimonial sense. Such a personalized concept of authority directs attention to individuals and favors the retention of the medieval idea of a common law of human beings applied to the leaders of nations. Grotian-style erudition prevails into the eighteenth century to regulate the affairs of princes in their relations with one another, but also in their domestic and even private affairs.

It is with the Vattelian critique of Christian Wolff that one arrives at the modern conception of international law, where sovereignty as a legal concept comes to play a central part. Absolutely central is the notion of the corporate character of the state. As a legal entity, it has to be separate from both government and governed. It is the state, and not the government or Prince, which is subject to international law. It is and can be subject to international law only if it is sovereign, that is, equally independent of all other states.[11] What Jouannet is, above

all, anxious to stress is that law should have a dualist character in what she calls the classical form of international law. It is essential to the idea of the corporate character of the state that there should be no relations of individuals with one another across state boundaries. All the relations of individuals, for the purpose of international law, are absorbed into the corporate identity of the state, which then has legal relations with other states. In this way it is the sovereign equality of independent states which defines the object and scope of the rules of international law.

Yet Jouannet sees no difficulty in the Vattelian sovereign being integrated into an international legal order. The lack of difficulty is hardly surprising because this new legal order is made by states specifically for their relations with one another.[12] It is because states have no rights over one another that they have need of a law which recognizes that they are independent and equal.[13] Jouannet appears to see the entire exercise as a taxonomy of what relates or properly belongs to the rights and duties of nations rather than individuals. The idea that there should be rules specifically designed for the character of sovereign states can hardly pose problems of a legally binding character.[14] The aim of this taxonomic exercise is to register a break with the Roman and medieval tradition of law. The progressive character of this law is that it incorporates the two great principles of liberty and equality of states as the very basis of the society of nations, in place of the *genre humain* (human kind) of the naturalists. Now the nation can govern itself without dependence upon what is foreign to it.[15] The constant theme of this argument is the corporate character of the sovereign. Because sovereign nations deal only directly with one another, they can only see one another as societies of men of whom all the interests are held in common. It is not a law of nations derived from human nature which rules them, but a law derived from the particular nature of the state.[16]

It is interesting to give a prominent place to Jouannet's argument because international lawyers are so little troubled by the concept of sovereignty. She is aware of the problem of subjective appreciation but manages to make it appear that those who stress it misunderstand the structure of international law and lack the technical expertise to understand how it is supposed, following its own nature, to function. Jouannet admits that Vattel keeps the principle of the subjective appreciation of each state in the application of the law,[17] but considers it is unjust to make him responsible for the increasing voluntarism of international law. Voluntarism means that the entire body of international

law depends upon the continuing consent of states. They can, at any time, cease to accept that a rule binds them, and even cease to recognize other states as subjects of the law. Vattel is not responsible for such a view. He merely introduces the logic of Hobbesean and Lockean individualism into international law, in terms of the liberty and sovereignty of states as the foundation of international law.[18] A doctrine of the autonomy of states is not a doctrine of absolute or unlimited external sovereignty. It is not a non-submission to a superior juridical order but an autonomy of a political entity *vis-à-vis* other equally independent entities.

The root of the confusion, in Jouannet's view, is to have made a too rapid combination of the question of the application of international law with the decentralized structure of the community of states. There is no compulsory international adjudication. So states have to interpret for themselves the extent of their rights. She says the question of the subjective appreciation of the law is not an aspect or logical consequence of voluntarism in international law, a doctrine that all law is a product of state will, but arises from the conditions for the application of the law in a decentralized international legal order. International law is a universal abstract law, but appreciated unilaterally because subjectively. It therefore functions in practice as a series of reciprocal and bilateral interpretations given to it by states.

Vattel simply marks a reflection of a change at an international level which had been occurring generally in legal culture – a movement towards the individualization and subjectivization of law, combined with a realist vision of international relations where states have a mission to act to assure their security and preserve their interests. It is not Vattel who introduces this subjectivity into international law. It is simply an unavoidable fact of international law in the absence of any supra-state power. So, in the beginning and middle of the twentieth century it is not this subjectivist decentralized appreciation inherent in the structure of the international community which is the problem, but the legitimacy of the use of force which accompanies it.[19]

THE TWENTIETH-CENTURY REVOLT AGAINST STATE SOVEREIGNTY: THE FUTURE FOR INTERNATIONAL INSTITUTIONS

The war of 1914–18 greatly upset the confidence of international lawyers in the viability of a legal order which left appreciation of violations of rights and methods of vindicating them entirely within the discretion of sovereign states. The response which it is intended to

highlight as a reaction to this comes from within the same legal political tradition as Vattel's: democratic constitutionalism. In the first instance, it does not have to be read as a statement that international organization exists, but rather as a statement of what legal democratic theory would require at the international legal level. The fundamental epistemological condition is that law depends upon what the people express through their constitutional organs, i.e. through the state. At the international level, this means reproducing the characteristics of a state globally. This is the only possible democratic production of legal meaning. At present, international lawyers are left troubled by the in-between character of an incomplete international institutional order, wherein state sovereignty keeps seeping through.

After 1918 Europeans wished to conceive of the rule of law as being capable of defining the spheres of competence of the state. In Austria the *Stufenbau Lehre* (Legal Ladder/Steps) approach conceived of an ideal legal structure in terms of state responsibility. Just as order within the state depended upon the capacity to determine the competences of specific state organs constitutionally, so international order depended upon the existence of an international constitution which could determine the competences of the state in international relations. State responsibility was tied to the notion of executive responsibility towards a parliamentary regime, and to reproduce this regime internationally it was necessary to give priority to international over national law by creating international institutions which could limit effectively the legal competences of states. Such institutions could function as parliaments supervising states. [20]

The chief exponent of the ideal of an international constitutional order was Kelsen. He appreciated the historical perspective which had to be overcome. To argue that state power could look to itself rather than to a constitutional title for its competence to act is to hark back to the spirit of absolutism.[21] The notion that physical, or whatever, state power as such could legitimize an action is to leave the way open to the idea of *raison d'état*, in the sense in which a Renaissance disciple of Machiavelli would have understood this, that is, as the capacity of the Prince to put his concept of the public safety of the state above all considerations of law and morality. Kelsen's aim is to construct a barrier between modern constitutionalism, democracy guaranteed by positive law and the historical origin of European states, which was in absolute monarchies.[22] It is the latter who actually consolidated the power which constitutionalism is now supposed to democratize. Kelsen is a theorist of international law who does

recognize that there is a danger implicit in the classical notion of the state, whereby sovereignty does create a threat to the obligatory character of international law.

A neo-Kantian epistemological perspective is an essential part of Kelsen's critique of the traditional legal thinking about the state. Power, and hence state power, as an empirical concept has no legal significance. The notion of command has legal meaning/significance only in terms of a normative order which attributes roles: who may command and who must obey.[23] In international terms this implies a break with Vattel, who took the independence and equality of states for a natural fact. As Jouannet has said, it was possible to deduce the basic rules of law from the nature of the state. For Kelsen the coexistence of states is only legally conceivable on the basis of the existence of an exhaustive association which determines the limits of the validity of competences rather than powers, which are attributed to states. Such a legal framework puts states on the same juridical plane as their own provinces and communities in their own federal law.[24] That is to say, on a par with constitutional-administrative law, the state should be considered not as the highest instance, but as a *relatively high* instance, in a scale of juridical instances – hence the metaphor of *ladder*, or *Stufenbaulehre*.

The difficulty, of which Kelsen was aware, remained that power structures of international society did not automatically conform to his ideal construction for the future. Every legal system must be able to say which are its subjects, i.e. literally subject to it. A basic, real question is whether states are dependent upon an international order for their existence or whether they create themselves out of their own forces. Kelsen's response has the appearance of a play on words which is left to plague the whole structure of contemporary international law. The only juridical, internationalist way to answer the question is to suppose the existence of an international law norm which posits the acceptance of the legal character of any entity which succeeds to establish itself durably.[25]

Kelsen has to insist that the objectivity of a legal order, in the sense of its validity, has to be independent of acceptance by its subjects, just as the rule of law at a national level cannot depend upon its subjects. This leads him openly into the construction of a *civitas maxima*, a universal international law which stands over against the rules which states have consented to, and which grounds their validity. This is the same *civitas maxima* which Wolff constructed and which Vattel rejected as non-existent. It recognizes that the idea of law attaches to

the notion of the constitutional state as such, so that the only international legal framework which can adequately encompass the modern state has to be a world constitutional state. This, in the age of modernity, is the only construct which can be a substitute for the medieval notions of the ideas of a continuing Roman Empire, with its tradition of legal naturalism, of a *ius gentium*. Kelsen is not at all committed to claiming that such an order exists, but it is the only conceivable juridical pathway to overcome the absolutist, monarchist Machiavellian state at the international level.[26]

Once this legal ideal is set, the task is to reinterpret the foundations of international law accordingly and to overcome the obvious deficiencies of existing, positive international law, that is merely the legal rules to which states *have consented*, exposed as they are to the dangers of voluntarism. The first stage is easy. One may simply say, almost as a play on words, that treaties are binding, as are rules of general customary law, because there is a basic norm, i.e. derived from the idea of a *civitas maxima*, that confers legal validity upon the exercise of state consent which finds expression in such treaties and customs.[27]

However, the problem is not simply the creation of rules of law, but their interpretation and their enforcement. How does the *civitas maxima* work itself out at this stage? The *Stufenbaulehre* insists upon one simple and new way of looking at states. They are not sovereign entities but organs of the international legal community to which certain competences have been transferred. The difficulty which immediately emerges is that there are, in fact, nothing but states, that to regard them as organs of the international community is simply an international lawyer's way of speaking. Kelsen is fully aware of this fact. He is merely trying to conceive of the basic logical requirements for the construction of an international legal order. He appreciates, as does Jouannet, that there are problems with the very idea of a legal order, where there are no institutions for the interpretation of the law independent of the states themselves, and equally no mechanisms for the enforcement of legal obligations apart from the states.

So Kelsen embarks upon two important further arguments, concerning the place of war in the international legal order and the place of the judiciary in the interpretation and in the creation of legal norms. The intention at this stage is to explain critically how Kelsen, as a representative international lawyer, develops his ideas. War is a common fact of international life. If international law is to have credibility as a legal order, in Kelsen's view, it must integrate this fact into

its interpretative framework. If war is to be evaluated from a juridical perspective it can only be as a sanction that international law furnishes for the enforcement of law against violators of the law. Traditional doctrine viewed war as permissible. States could wage wars as an instrument of national policy, quite simply to seize territory and resources from other states. Anxious to eliminate such a traditional concept of sovereignty Kelsen claims that war is regulated by international law.[28] By this Kelsen means that only where a state has suffered an aggression – simply a violation of its rights – has it a discretionary power to react under international law, i.e. a discretion to enforce its right. In this sense war is legally objectivized. War becomes an institution created by the law to put the law into force.[29]

To claim that a state is able, at its discretion, to declare war, apart from having suffered a legal wrong, would signify the end of the idea of international law. So Kelsen tries to affirm that a state cannot employ the use of force until there has been first a violation of the law. However, the problems of interpretation and application are linked. The lack of an independent instance which can verify objectively whether there has been a violation of law remains. Yet somehow Kelsen believes that such an objection does not prevent a theoretical construction of war being considered as a coercive act, as a sanction, to enforce international law. He insists upon construing the state which has suffered a legal injury, and responds to it through the use of force, as functioning as an organ of the international legal community.[30] In pursuing this line of argument Kelsen is firmly determined to replace the traditional concept of sovereignty with a procedural approach to law which ensures that the possibility for initiative for states is clearly regulated.

The underlying motive of this approach to international law remains clear. All law must have a democratic foundation in consent. If legal subjects are to be allowed, within an admittedly primitive or decentralized system of law, to use force, this can only be in terms which are clearly agreed in advance by the legal community. Hence, the approach which Kelsen adopts, in order to determine whether the minimum conditions of a legal order exist, has enormous resonance in the profession and indeed can be said to be the only approach which is regarded as conceivable.

Kelsen is able to see that a simple prohibition on the use of force is not enough to settle when states may go to war. Logically, it will provide an answer. Either states use force illegally in contravention of the status quo or they act legally by using force to defend it. However,

some mechanism has still to be found to develop and adapt the law in the existing, primitive, and decentralized international society. The solution for Kelsen will be a system of obligatory jurisdiction which would issue judgements that an Executive would be required to implement. This would overcome the obvious fictionality in speaking of states which decide to use force to revenge a violation of their rights as doing anything other than 'taking the law into their own hands'. If a court had to decide whether there had been a violation and could do so in taking a dynamic attitude to the development of the law, the weaknesses of the present system, which favor an easy return to the language of unlimited sovereignty, could be overcome.

It is crucial to such a theory for the development of international law that its corpus consists of a complete system of general principles which can be applied effectively by a judiciary to concrete situations. Hence the Court will not have to say that, with respect to the issue being adjudicated, states have not consented to the development of rules which limit their sovereignty in a particular matter, with the consequence that the Court has to declare that there is no law covering the dispute before it. Such an argument would carry with it the implication that one cannot look to courts to overcome the deficiencies in the corpus of rules of international law which are known to exist, so that there is no alternative to states meeting together as a quasi-legislature to formulate rules of general application to limit and guide their conduct. Kelsen does not see such meetings as a real political possibility, which is why he prefers the option of obligatory international adjudication. Hence he has to insist upon a strong role for the judiciary. He insists that the application of a general norm to a concrete case is by its very nature an individualization of the norm. That is to say, 'the existing rule is a framework of several different rules. By choosing one of them the law applying organ [the judiciary] excludes the others and thus creates, for the concrete case, a new law . . .'[31] The conclusion which Kelsen and the profession generally draw from this argument is that there is only a difference in degree and not in nature between the creation and application of law and that in this way the structural weakness of international law can be saved through the judiciary.[32]

The second part of Kelsen's argument was that the judgments of such a dynamic court had to be the starting point for the action of an international executive, such as the Security Council. Kelsen himself demonstrates that such is not what we have. Superficially, one might argue that the sovereignty of states is effectively limited by law

because the UN Charter is a treaty and under this treaty states are bound by decisions of the Security Council. However, the Charter does not tie the Council in any way either to decisions of the Court or even to a reference to international law. The former may decide upon the use of force wherever it considers a situation constitutes a threat to the peace under Article 39 of the Charter. It can also leave a decision of the Court unenforced. Nor is there anything to oblige the Council to consider any disputed question of fact in an impartial or quasi-judicial fashion. The Charter foresees what might be called a perfect independence of the Court and the Council, both principal organs of the UN.[33]

So, a state is prohibited by Article 2/4 of the Charter from having recourse to the use of force except when its territory is physically attacked. Thus the state is deprived of any effective mechanism for the adjudication and enforcement of its legal rights wherever it considers that there has been a violation. The outcome is that the Charter represents a deterioration in the quality of international law in comparison to the classical law. It excludes the individualized sanction for a violation of law by a state acting on its own, but does not replace it with an effective collective sanction. This means that in terms of the minimum conditions for the existence of law one cannot expect that international law will function.[34]

Therefore, it is to be expected that, in practice, states will not refrain from enforcing their rights individually whenever they consider them violated. Given that there is no compulsory international adjudication, should we be able to say that minimum conditions for an international legal order can exist where states act *as if* they are organs of the international community when they defend their rights. Kelsen recognized that it was the minimum condition for the existence of a legal order that it could characterize acts of violence as illegal or as sanctions against illegal behavior. International law does not have an objective instance (i.e. independent of states themselves) to distinguish between delicts and sanctions. Therefore, Kelsen would like to say, we have to suppose that each state decides itself if it estimates itself injured and if it will ensure that the injuring state incurs sanctions. Yet recently a major logical defect of Kelsen's system has been highlighted.

Nothing has been said, in the setting out of the logical conditions for a legal order, about the reasons a state has to give for considering itself injured. The feeble level of explication required of an individual state means that it is impossible for an observing third state to

distinguish the 'delinquent' from the 'sanctioner'. This is because it is not possible to follow a rule on one's own. The idea of a rule is that there is a common explication of the existence and content of the rule. Yet we do not have the adjudicative process which could guarantee this. Therefore, even from Kelsen's perspective, the minimum conditions for an international legal order do not exist.[35]

In other words, the radical subjectivization of international law, which Jouannet admits does come with Vattel's concept of sovereignty, with the introduction of sovereignty as a legal concept into international law, swallows up the legal character of this order. After considering this critique of international law, it remains to explore yet again Vattel's wider philosophical roots.

The Failure of Institutions and the Need for a Return to Philosophical Foundations

While the primary view of the original influences on Vattel is to attribute them to Locke, most recent scholarship in the history of political ideas traces the Western international law tradition most closely back to the Renaissance humanist tradition, in opposition to the medieval Scholastic tradition, which is eventually the same tradition from which Hobbes emerges. This is to insist at the same time on the falseness of a dichotomy between Locke and Hobbes, especially insofar as concerned Western relations with non-Western societies and peoples. The key element of this research, brought to the forefront by Richard Tuck, is precisely the element of subjectivity stressed within the mainstream international law canon by Brierly, albeit it is now rooted in a distinctive anthropology, which one might parody, following Tuck, as the 'Renaissance Man.'

So Tuck treats Hobbes as the most coherent representative of a tradition which encompasses all of the figures that concern us, and especially Vattel. The primary source of the conflicts of the state of nature is epistemic in character. It is not that persons are spontaneously aggressive. Rather, they are fundamentally self-protective and only secondly aggressive. It is the differing judgements which people make, which themselves arise from the fact that there is no objective standard of truth, which makes people aggressive, 'it is the fear of an attack by a possible enemy which leads us to perform a pre-emptive strike on him, and not, strictly speaking, the desire to destroy him . . .'[36]

The connection between epistemic moral skepticism and the conventional construction of meaning through the human construction

of the state is clear in the following passage from Hobbes' work *On the Citizen*, of which Lejbowicz speaks:

> This common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known *in rerum natura*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is nonexistent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power . . . and consequently the civil laws are to all subjects the measures of their actions, whereby to determine, whether they be right or wrong . . . [I]t shall not be decided by Aristotle, or the philosophers, whether the same be a man or no, but by the laws. (II.10.8)[37]

If one sees Hobbes as the culmination of a humanist tradition, in which Gentili is treated as a prime example, the understanding of 'humanist' may appear surprising. It refers to the Tacitist, reason-of-state tradition, with its implication that fear, whether objectively justified or not, was a legitimate basis for aggressive war. In other words, there could be no place for the Scholastic tradition of the distinction between just and unjust war. The idea of objective criteria for the justification of war was an illusion. This view was expounded first by Gentili, of whom Hobbes was perhaps an actual student (in the sense that he followed his lectures at Oxford). This is to distinguish the rhetorical and sophist humanist tradition beginning with Cicero, from the Aristotelian and Stoic tradition (Seneca), and to put it back in its context through the Renaissance of classical scholarship after the long medieval Christian practice of interpreting Cicero and others as only permitting war in defense of one's innocent and immediate safety.[38]

The anthropology underlying Hobbes's construction is that which is decisive, meaning, quite simply, his vision of man. The weakness of man's sociability is not simply rooted in fear. The fear itself has to be seen in the context of the fundamental desire of man not for friendship but for glory. In fact,

> every man would seek the company of other men whose society is more prestigious and useful to him than to others. By nature, then, we are not looking for friends but for honour or advantage from them . . . Even if this is sometimes harmless and inoffensive, it is still evident that what they primarily enjoy is their own glory and not society . . . Every voluntary encounter is a product either of mutual need or of the pursuit of glory . . .[39]

This anthropology explains both the roots of subjectivity and the inevitability of violent conflict.

However, there is an added dimension to Hobbes's work which needs to be made explicit and which is crucial to providing it with its epistemic foundation. The added distinction is crucial because the European tradition which Hobbes was negating, and Gentili as well, was the Scholastic tradition based upon Aristotelian–Thomist philosophy. The epistemic center as the modern state was not, maybe, an exclusively Protestant phenomenon, but it was, as already suggested, an outcome of the Reformation and a break with the medieval tradition.

Hobbes was the most explicit exponent of the thesis that the state had to be *omnipotent* in the making of laws and the final arbiter of any dispute where, *ex hypothesi*, there was no agreement as to how a supposed norm was to apply.[40] The decisive aspect of this exercise of authority is the absorption of all symbols of legality into the state, which includes the unification of the religious and the political. Why Hobbes felt compelled towards this course he makes plain when he says in Part III of *Leviathan* (*Of A Christian Commonwealth*) that the reason for the right of the sovereign to appoint pastors is that the right of judging what doctrines are fit for peace and to be taught to subjects must rest in the sovereign civil power, whether it be one man or an assembly of men. The reason is obvious: 'that men's actions are derived from the opinions they have of the Good, or Evil.'[41]

What may not be fully clear even from these words is the sacralization of the state which Hobbes deliberately intends. The sovereign must have supreme power in all ecclesiastical matters, where the sovereign is a monarch or an assembly 'for they that are the Representatives of a Christian People, are Representatives of the Church: for a Church, and a Commonwealth of Christian People, are the same thing. . .' (p. 576). When Hobbes begins his extensive controversy with the Roman Catholic Prelate Bellarmine, he declares: 'I have already sufficiently proved that all Governments which men are bound to obey, are simple and Absolute . . .' Whether the authority is democratic, aristocratic, or monarchic does not matter. The essential point is the power it has to be 'an Absolute Sovereignty' (576–7). A crucial feature of the medieval so-called philosophical tradition would be the presence of numerous persons with different interpretations of 'reason.' Hobbes says that all laws have need of interpretation. Therefore, the idea of law must be subordinated to the question of who interprets it. The answer is that the law is binding because it is 'the Sovereign's sentence' (322–3). There is no place for an independent learned class, making doctrines which depend on

their learning and not upon the legislative Power (368). In the reading of books, one imagines the exploits of the Greeks and the Romans in overthrowing tyrants, where words such as regicide and tyrannicide are used. People imagine that if they use the right words they can lawfully rebel (369). Again, Hobbes is determined on the sacralization of state power. The Doctors claim to set up a ghostly authority against a civil 'working on men's minds, with words and distinctions, that of themselves signifie nothing, but bewray (by their obscurity) that there walketh (as some think invisibly) another Kingdome, as it were a Kingdom of Fayries, in the dark . . .' (370). In his discussion of the supposed distinction between temporal and spiritual he sees only anarchy. 'For seeing the Ghostly Power challengeth the Right to declare what is Sinne it challengeth by consequence to declare what is Law, (Sinne being nothing but the transgressor of the Law;)' (371).

Yet the image of the divinity of the state leaves the European international law tradition with a concept of the state which is incompatible with any overarching binding notion of law. Hobbes explains why the commonwealth cannot be subject to the civil law (that is to say, what the commonwealth has already commanded). The religious tone of the following expression is clear, remembering that Hobbes has already equated the religious and political commonwealths. This can be seen in the reference to binding and loosening, an analogy with the scriptural authority for ecclesiastical authority and papal infallibility:

> The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not subject to the Civil Lawes. For having power to make and repeal lawes, he may when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him . . . Nor is it possible for any person to be bound to himself; because he that can bind, can release . . . (chapter 26, 313)

Locke and Vattel are equally committed to this epistemology of the state as the source of meaning. However, the specific contribution of the international law tradition, from Grotius to Vattel, is to add the racial element, that the Law of Nature had the specific quality to authorize special action by the Europeans against its breaches by non-European peoples. Particularly in the context of European relations with non-European peoples, Locke insisted upon a continuance of a natural right to punish, precisely because the laws of Europeans, the states of England, France, and Holland, do not extend to the Indians who do not recognize them. Without recourse to natural law the safety and property of humankind could not be preserved, where the so-called Indians are violating the Laws of Nature, particularly with respect to

property and commerce.[42] In this Locke followed the humanist tradition, as distinct from the Scholastic tradition, giving little place to a natural law of sociability.[43] In this Locke was also following on from Grotius, who Rousseau rightly complained could not be distinguished from Hobbes.[44] Locke's theory of punishment was identical to Grotius's and is a remarkable example of intellectual convergence.[45]

Essentially, Locke followed Grotius's situating of himself on the side of Gentile against the Scholastics in the following substantive respects. The *Second Treatise*, according to Tuck, offers a political theory which 'vindicates a private right of punishment against peoples or nations which break the law of nature . . . and which allows settlers to occupy the lands of native peoples without consulting their wishes in any way . . .'[46] Grotius, in his turn, concludes Tuck, far from being the heir of Vitoria and Suárez, followed the humanist tradition which they distrusted, and as a consequence, 'Grotius endorsed for a state the most far-reaching set of rights to make war . . . [and] he accepted a strong version of the international right to punish, and to appropriate territory which was not being properly used by indigenous peoples. . .'[47]

So the concepts of sociability and humanity to which Vattel could claim inheritance were already very thin. Vattel did distinguish himself from Grotius on the key element of the right to punish, which he shrewdly observed left the door open to a wide variety of fanatical enterprises which would bear comparison with the escapades of Mohammed.[48] However, it would still be difficult to distinguish this restraint from the license which Vattel gave for the powers to wage preemptive war against an apparently growing hegemony. 'For if there be found a restless and unprincipled Nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all the others would have the right to unite together to subdue such a Nation, to discipline it, and even to disable it from doing further harm . . .'[49] Besides, if a Prince violates the fundamental law in relation to his people, giving them a lawful case to resist then it is permissible to assist such a brave people.[50] Finally, Vattel was insistent on the right of Europeans to colonize North America, which the 'savage' tribes had no right to keep to themselves.[51]

Tuck concludes that Vattel's *Law of Nations* was a

> more or less faithful version of the Grotian argument, as developed by Locke . . . Liberal politics, of the kind that both Locke and Vattel amply subscribed to, went along in their work with a willingness to envisage international adventurism and exploitation, and this was no accident: for

> the model of the independent moral agent upon which their liberalism was based was precisely the belligerent post-Renaissance state. . . . There is a kind of violence within liberalism of the Lockean type which goes back to its origins in the violent politics of the Renaissance, in which liberty and warfare (both civil war and international conflict) were bound together . . .[52]

In my opinion this inspired judgement exactly encapsulates the broader historical context of the violence which specifically the liberal democratic, market economy states inflict upon the parts of the world that were colonized and are now so-called Third World. Doctrines of pre-emptive attack have to be understood specifically within the social constitutions from which they come, but the focus and direction of their violence has always been directed outwards towards the south. None of this is to attribute higher moral worth to the southern regions of the world. This study does not attempt to say anything about them. Yet there remains a bitter twist in the tail of the argument that democracies do not fight one another. They direct their negative energies outwards. The following Appendix illustrates how this phenomenon is integrally embedded in the basic ideas of a Western country concerning the nature of international customary law and its development in relation to the law relating to the use of force.

APPENDIX: THE IRAQ WAR AS A CONTINUING ACTUALITY OF THE IMPLICIT COLONIALISM AND RACISM OF THE PARADIGM OF A LIBERAL-HUMANIST INTERNATIONAL ORDER

There is a serious need to place British, and of course US, state practice, as represented by the invasion of Iraq, in the wider context of the history and present character of the British state. To do this it is necessary to do a lot more than consider the legal advice tendered, whether by the Attorney General or by Foreign Office lawyers, offering to justify the war. The arguments used by leading British politicians, especially Tony Blair, to convince Parliament and obtain consent for the invasion are more central to the creation of a British *opinio juris* concerning the material element of state practice, i.e. the actual invasion. This is because official, even legally formulated positions are not as decisive in constituting the *action of a state* as the arguments used by political elites to drive the institutions of the state into motion. It is in this wider context that one can expose and draw out the underlying anthropology that is driving the state. Perhaps the *New Statesman*'s political editor, John Kampfner, affords the most authoritative survey

of the development of elite political thinking, based on selected interviews, from Tony Blair's commitment to George W. Bush to go to war on April 6, 2002 at Crawford, Texas, until the actual outbreak of war.[53] The NGO activist and former Chatham House (RIAA) Research Fellow Mark Curtis, in his turn, affords a key officially documented review of the place of the invasion from within the history of British institutional practice, particularly in terms of the rather overlooked review which the British state is itself making of the invasion.[54] However, for both the international lawyer and the philosophical anthropologist, really central is the British civil servant (now European) and former Blair policy advisor, Robert Cooper's study [55] to gain an understanding of just how deliberate and systematic is the present British government's rejection of the international law of the UN Charter on the use of force. As a key advisor to Blair, who articulates the government's thinking, Cooper reveals how there is now a commitment to a doctrine of preventive attack, or pre-emption. What it is crucial to understand about this doctrine is how it conceives the threat that Britain is supposed to face in terms of an enemy which has rather familiar overtones from Britain's colonial heritage.

Official accounts of the legal justification for the invasion of Iraq are very well rehearsed. They concern supposed material violations by Iraq of its disarmament obligations under Security Council Resolutions. These violations were supposed to lead to a revival of the force of SCR 678, on the right to use all necessary means to restore peace and security in the area. So SCR 687 merely setting out the ceasefire conditions only suspended SCR 678. A proposal that the famous 2002 SCR 1441 should contain a requirement for a further decision by the Council before 'action was taken' was not adopted.[56]

However, these opinions came at the very end of a process, in the weeks of March 2003. It is much more illuminating to explore the nature and style of the argument and charge that Iraq had not complied with its disarmament obligations. The entire weight of British government strategy, to obtain the consent of Parliament and the acquiescence of public opinion to the invasion, was directed to the nature and conduct of Saddam Hussein's government with respect to weapons of mass destruction (WMD). This is the crucial area of activity to explore. The British government believed that the way to justify war was to show that there was a serious threat coming from the Iraqi regime.

The arguments about whether there were WMD in Iraq are known to be slippery. It is, however, widely accepted, after the Butler Report,[57] that the British government put a weight on

available intelligence that it could not bear. This can be understood to be deception. However, that is not a central matter for the present argument. Rather more important is to follow closely the types of formulations of the 'threat from Saddam Hussein' that had to be met. It is in fact the nature of their definition of this threat that gives the first indication that the British government is operating within a framework of preventive or pre-emptive attack, a fact that will be seen even more clearly in official pronouncements after the invasion.

The context for the definition of the threat was provided by Saddam Hussein's 'non-compliance' with paragraphs 3 and 4 of SCR 1441. He had to produce tangible evidence of his actual programs to develop chemical, biological, and nuclear weapons. 'Non-compliance' meant false statements or omissions in the declarations Iraq made pursuant to the SCR. It is in such a context that Kampfner pinpoints the technical aspect of the danger Iraq is supposed to represent. The British government intelligence dossier (of September 2002) contains, in part 1, of chapter 3, a statement that Iraq retained some chemical warfare stocks which would enable it to produce significant quantities od chemical weapons within weeks. Intelligence about chemical and biological warfare facilities pointed to a continuing research program. Kampfner comments: 'These observations were hard to prove or disprove. The language was carefully crafted, combining hypothesis and assumption with alarm . . .' (205).

It is against this carefully sustained ambiguity of the intelligence base that Kampfner summarized how Blair frequently appeared to say, for instance in the autumn of 2001, that 'the world would face a threat of an altogether different scale if Saddam made his chemical and biological weapons available to terrorists groups . . .,' an analysis that Kampfner describes as an hypothesis based upon an assumption (157). In September 2002, Blair was saying, of the history of Saddam and WMD, that the present threat is real and the UN has to be a way of dealing with it, not a way of avoiding dealing with it (Kampfner, 196). Yet later in the same month Blair said to journalists, 'I am not saying it will happen next month or even next year, but at some point the danger will explode . . .' (Kampfner, 198). The final speeches to the House of Commons were equally vague. On February 5, 2003, Blair said, 'It would be wrong to say there is no evidence of any links between al-Qaeda and the Iraqi regime. There is evidence of such links. Exactly how far they go is uncertain . . .' (Curtis, 63).

Immediately the invasion began, on March 20, 2003, Blair announced in a television broadcast, that the goal was to remove

Saddam Hussein from power and disarm Iraq of WMD. In other words, comments Curtis, the only way to disarm Iraq is to change the regime (Curtis, 38). While beforehand regime change was recognized not to be in itself a legally permissible objective, now it could be stated openly. It was the regime itself that was the object of the invasion. In June 2003 the Foreign Secretary, Jack Straw, said that neither he nor Blair had ever used the words 'immediate' or 'immanent' to describe the threat Iraq posed. Instead, they spoke of a current and serious threat (Curtis, 54).

In July 2003 the government made a response to the House of Commons Defence Committee which treated international law as no absolute: 'We will always act in accordance with legal obligations, but also effectively to defend the United Kingdom's people and interest and secure international peace and stability' (Curtis, 39).

Then, in March 2004, Blair explicitly set out a full-blown doctrine of pre-emption. The key stage in expanding upon and articulating a doctrine of pre-emption or preventive war, Curtis notes, comes with Blair's speech of March 5, 2004 (Curtis, 40). Blair is responding once again to the controversy surrounding the invasion and endeavoring to put it in a wider context. He questions the UN Charter's limit on armed intervention to self-defense in the face of armed aggression.

> Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically I am not saying that every situation leads to military action. But we surely have a duty and a right to prevent the threat materialising; and we surely have a responsibility to act when a nation's people are subjected to a regime such as Saddam's . . .[58]

Curtis highlights how the scene is further developed in the Ministry of Defence White Paper of December 2003, *Delivering Security in a Changing World*.[59] Curtis places this document in the context of previous Ministry documents, going back to the Strategic Defence Review of 1998, which said that 'in the post-cold war world we must be prepared to go to the crisis rather than have the crisis come to us' (Curtis, 74). Among the development highlighted in various official papers, that from *Operations in Iraq: Lessons for the Future* is interesting in placing the invasion in an embedded context of British politico-military strategy rather than in some inexplicable submission to US demands: 'The operation in Iraq demonstrated the extent to

which the UK armed forces have evolved successfully to deliver the expeditionary capabilities envisaged in the 1998 Strategic Defence Review and the 2002 New Chapter . . .'[60] Curtis elaborates that the December 2003 White Paper takes this argument further. One must now envisage crises across sub-Saharan Africa and arising from the wider threat from international terrorism (Curtis, 76).

It is quite clear that the threat and use of force are becoming once again an integral part of UK national policy. The Secretary of Defence, Geoff Hoon, writes in his Foreword: 'it is now evident that the successful management of international security problems will require ever more integrated planning of military, diplomatic and economic instruments at both national and international levels . . .' [61] In the same vein the document declares that 'effects-based operations' mean that 'military force exists to serve political and strategic ends. . .Our conventional military superiority now allows us more choice in how we deliver the effect we wish to achieve . . .'[62]

Curtis quotes these phrases in order to translate them as: 'we will increasingly threaten those who do not do what we say with the prospect of military force' (Curtis, 77). That is the light in which one has to understand the passage in Blair's speech of April 5, 2004, where he remarks of those who oppose his policies: 'When they talk, as they do now, of diplomacy coming back into fashion in respect of Iran or North Korea or Libya, do they seriously think that diplomacy alone has brought about this change?'[63]

The major intellectual support for the policies described through interviews by Kampfner and through official documents by Curtis, comes from Robert Cooper, who set out his views in his now infamous *Observer* article of April 7, 2002 '*Why We Still Need Empires*', one day after Blair's commitment to Bush at Crawford, Texas, to invade Iraq (Kampfner, 152). His central point is that 'outside the post-modern continent of Europe, we need to revert to the rougher methods of an earlier era – force, pre-emptive attack, deception . . .'[64] Cooper is a diplomat reputed to offer a 'theoretical framework' for Blair's foreign military-security policy. It is clearly and repeatedly reflected in the Defence White Paper and in Blair's speech of March 5, 2004. Cooper's significance is enhanced by the press accolades which accompany the publication of his book, describing him as 'a senior British diplomat who has gone from being one of Tony Blair's closest foreign policy advisers to serving under Javier Solana, the European Union's new putative foreign minister.' The authoritative contemporary Cambridge historian Brendan Simms writes, 'Robert Cooper is

widely believed to provide the intellectual superstructure for what the prime minister thinks, but is as yet unwilling to articulate publicly . . .'[65]

In *The Breaking of Nations* Cooper has offered a precise paradigm for intervention by a developed country in the internal affairs of a developing country on humanitarian grounds. Humanity must be firmly linked with the needs of security, which Cooper understands ultimately in the postmodern terms of the undisturbed quality of the private lives of individuals pursuing their own development. He recognizes that international law exists, but needless to say, it is out of date, belonging to a time when the modern reigned supreme, thanks mainly to the vigor of Western colonial empires.

Cooper denies the very universality of international society and divides it into three parts: the pre-modern, the modern, and the postmodern. The pre-modern world covers an expanding area where the state has lost the monopoly of the legitimate use of force. In language which shows how a surprisingly colonial European international law tradition belongs to present-day Europeans, Cooper writes:

> we have, for the first time since the 19th Century, a *terra nullius* . . . And where the state is too weak to be dangerous, non-state actors may become too strong. If they become too dangerous for established states to tolerate, it is possible to imagine a defensive imperialism. If non-state actors, notably drug, crime or terrorist syndicates, take to using non-state (that is pre-modern) bases for attacks on the more orderly parts of the world, then the organized states will eventually have to respond. This is what we have seen in Colombia, in Afghanistan and in part in Israel's forays into the Occupied Territories . . . (Cooper, 17–18)

The pre-modern refers to the failed state, to the pre-modern, post-imperial chaos of Somalia, Afghanistan, and Liberia. The state no longer fulfills Weber's criterion of having a legitimate monopoly on the use of force. Cooper (66–9) elaborates upon this with respect to Sierra Leone. This country's collapse teaches three lessons: chaos spreads (here to Liberia, as the chaos in Rwanda spread to the Congo); second, as the state collapses crime takes over, and as the law loses force privatized violence comes in. It then spreads to the West, where the profits are to be made. The third lesson is that chaos as such will spread, so that it cannot go unwatched in critical parts of the world. An aspect of this crisis is that the state structures themselves, which are the basis of the UN language of law, are a last imperial imposition of the process of decolonization.

So Cooper formulates a general principle for dealings with non-Western states which is incompatible with the international law of the Charter. It is based upon an openly imperialist anthropology that, not surprisingly, he sees to be as much a part of European as of American elite mentalities. In Blair's case, Kampfner supports this point. He insists that Blair regards as a major foreign policy priority 'Our history is our strength,' that we have to draw on Britain's influence as a former colonial power. 'Our empire left much affection as well as deep problems to be overcome' (236). The danger of the so-called pre-modern is that, while 'We' (postmodern Europeans) may not be interested in chaos, chaos is interested in us. The rhetoric is blistering, reminiscent of the 'yellow peril' or 'the dark heart of Africa':

> In fact chaos, or the crime that lives within it, needs the civilised world and preys upon it. Open societies make this easy. At its worst, in the form of terrorism, chaos can become a serious threat to the whole international order. Terrorism represents the privatisation of war, the pre-modern with teeth; if terrorists use biological or nuclear weapons the effects could be devastating. This is the non-state attacking the state. A lesser danger is the risk of being sucked into the pre-modern for reasons of conscience and then being unwilling either to take over or to get out. . . (77)

While European international lawyers inhabit a postmodern world (of which more later) Europe itself is a zone of security beyond which there are zones of chaos which it cannot ignore. While the imperial urge may be dead, some form of defensive imperialism is inevitable. All that the UN is made to do is to throw its overwhelming power on the side of a state that is the victim of aggression (58). So, as presently constituted, it cannot provide a guide for action. Nonetheless, Cooper generally counsels against foreign forays. For Europeans to practice humanitarian intervention abroad is to intervene in another continent with another history and to invite a greater risk of humanitarian catastrophe (61). However, the three lessons of recent state collapse in Sierra Leone, etc., cannot be ignored. Empire does not work in the post-imperial age (i.e. acquisition of territory and population). Voluntary imperialism, a UN trusteeship, may give the people of a failed state a breathing space and it is the only legitimate form possible, but the coherence and persistence of purpose to achieve this will usually be absent. There is also no clear way of resolving the humanitarian aim of intervening to save lives and the imperial aim of establishing the control necessary to do this (65–75). While Cooper concludes by saying that goals should be expressed in relatives rather

than absolutes, his argument has really been that the pre-modern, the modern, and the postmodern give us incommensurate orders of international society. This is the context of our dilemmas concerning interventions in the chaotic pre-modernity of non-Western parts of international society. Cooper's incommensurability is infused with the anthropological heritage of colonialism.

The UN is an expression of the modern, while failed states come largely within the ambit of the pre-modern. Cooper means, practically, that the language of the modern UN does not apply to pre-modern states. This is not to say the Charter is violated in that context. It is simply conceptually inapplicable (16–37). The modernity of the UN is that it rests upon state sovereignty and that in turn rests upon the separation of domestic and foreign affairs (22–6). Cooper's words are that this is still a world in which the ultimate guarantor of security is force. This is as true for realist conceptions of international society, as governed by clashes of interest, as it is of idealist theories that the anarchy of states can be replaced by the hegemony of a world government or a collective security system. I quote: 'The UN Charter emphasizes state sovereignty on the one hand and aims to maintain order by force' (23).

Even in the world of the modern the typical threats to security render the Charter rules on the use of force redundant. The modern also presents nightmares for which classical international law is not prepared. The sovereign equality of states means that, where all could possess nuclear and other WMD, one faces nuclear anarchy, with all states capable of destroying one another (Cooper, 63). Preventing this nightmare of the modern 'should be a priority for all who wish to live in a reasonably orderly world' (64). And so international law is obsolete. 'Following well-established legal norms and relying on self-defence will not solve the problem. Not only is self-defence too late after a nuclear attack, but it misses a wider point . . .' (64). Weapons affect those not directly involved. The more countries which have them the more likely it is they will be used. The more they are used the more they will be used. And so on! This means: 'It would be irresponsible to do nothing when even one further country acquires nuclear capability. . . Nor is it good enough to wait until that country acquires the bomb. By then the costs of military action will be too high . . .' (64).

So the doctrine of preventive action in US National Security Strategy is not so different from the traditional British doctrine of the balance of power. For instance, the War of the Spanish Succession was a war to prevent the Crowns of France and Spain coming together.

No one attacked Britain, but if it had waited for the two Crowns to form a new superpower, it would have been unable to deal with a resulting attack.

Not content to denounce international law doctrine on the use of force, Cooper strikes at the heart of the rule of law, as a standard of formal equality, by saying:

> if everyone adopted a preventive doctrine the world would degenerate into chaos . . . A system in which preventive action is required will be stable only under the condition that it is dominated by a single power or concert of powers. The doctrine of prevention therefore needs to be complemented by a doctrine of enduring strategic superiority – and that is, in fact the main theme of the US National Security Strategy . . . (64–5)

This is not to treat American dominance as an optimal ideal. The US is, in any case, not fully effective in the Middle East and quite absent in Africa (Cooper, 81–5). There must be a virtual monopoly of force. At present it is with the US and clearly the US will exercise it in its own interests. This is not legitimate. The power should rest with the UN, whose many failures show it cannot easily lose legitimacy (167). The question is how to get there, and anyway the new UN would have to be prepared to engage regularly in preventive wars, in order to spread democracies and the liberal state, the only form of government which can make the world secure (167, 177).

The rest of Cooper's argument explores Europe's postmodern ease. Its motivating force is the primacy of the individual over the collective, the private over the public, and the domestic over the foreign. This expresses itself in post-national cooperativeness, transparency (especially in security and military matters), and the priority of the individual's personal development needs over the chimera of the power and prestige of the state. This European quality of life rests upon the US security umbrella, as does a similar life style in Japan and in much of the American continent (161).

All of this hugely confines the prospects for significant European 'humanitarian' interventions, i.e. ones driven, in any case, primarily by the need to secure the quality of European lifestyles. One possibility may be for the postmodern cooperative Empire of Europe to extend itself ever wider (Cooper, 78). However, the attractiveness of postmodern Empire as a dream may never happen and, until it does, 'the post-modern space needs to be able to protect itself. States reared on *raison d'état* and power politics make uncomfortable neighbors for the post-modern democratic conscience . . .' (79).

Will Europe respond to such a traditional challenge? Cooper thinks not. The European postmodern mood has gone too far. Cooper quotes the horrid Nietzsche, himself a painful memory of the early twentieth century, in *On the Genealogy of Morals:* 'How much blood and horror lies at the basis of 'all good things'. Justice arises not from the desire of the weak for protection but from the tragic experience of the strong. From the traumas of the twentieth century Europe has lost the will to power, while from the trauma of September 11, the US rediscovered it (164–5).

Curtis's general argument is, effectively, that Blair's government is not Bush's poodle, precisely because it is continuing an imperial policy largely uninterrupted even by the Suez Crisis. It may have become more or less covert after 1956, but he might say that, in a political culture as immature as Britain's, there is really no need for the Blair government to conceal its policies. No matter how loudly it shouts them out, there are very few who will be listening and who will understand. Certainly international lawyers appear to take the government's 'legal arguments' at face value, without regarding the government's actual practice. That is what makes Cooper's revival of an explicit imperial culture so promising. Blair and his colleagues, at the least, have heard Nietzsche's call, whether tragic or tragic comic.

Conclusion

The purpose of this chapter has been to demonstrate that the principles, rules, and institutions of what is supposed to be positive international law are rooted in a thoroughly perverse anthropology which makes violence, and particularly racial violence, inevitable at the inter-state level in international society. It is only by unraveling from its very origins the poison of liberal humanitarianism that it will be possible to imagine a concept of humanity in international society that can rest upon a possibility of mutual sympathy, respect, understanding, and solidarity.

Notes

1 Brierly, *The Law of Nations* (1963) 39–40.
2 Ibid., 40.
3 Ibid., 38.
4 Ibid.
5 Ibid., 39.

6 I., Kant, *Perpetual Peace and Other Essays on Politics, History and Morals*, trans. and ed. T. Humphrey (1982) 355.
7 J. Bartelson, *A Genealogy of Sovereignty* (1995) 194–5.
8 *International Law* vol. 1 (1992/6) 135–6.
9 E. Jouannet, *L'Emergence: Part II Autonomisation du droit des gens* (1993) esp. 141–7.
10 Ibid., 300–24.
11 Ibid., 354–88, esp. 384 ff.
12 Bartelson, *A Genealogy of Sovereignty*, esp. 137–85, a summary of chapter 5, 'How policy became foreign.'
13 Ibid., 194–5.
14 Jouannet, *Autonomisation*, 447.
15 Ibid., 448.
16 Ibid., 451.
17 Ibid., 454–8.
18 Ibid., 458–9.
19 Ibid., 472.
20 B. Stoitzner, 'Die Lehre vom Stufenbau der Rechtsordnung,' in S. Paulson and, B. Walter, *Untersuchungen zur Reinen Rechtslehre* (1986), 50 at 76; also T. Ohlinger, *Der Völkerrechtliche Vertrag* (1975).
21 H. Kelsen, *Der soziologische und der juristische Staatsbegriff* (1928) 137.
22 Ibid., 138–9.
23 Ibid., 82–3.
24 Ibid., 86.
25 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920/8), 230–1, 239–41.
26 Ibid., 239–41, 249–52, 274.
27 Ibid., 261.
28 Ibid., 264.
29 Ibid., 265.
30 Ibid., 266.
31 H. Kelsen, *Collective Security under International Law* (1954) 18.
32 C. Tournaye, *Kelsen et la securité collective* (1995) 43–4, citing Kelsen and refering to other literature.
33 Ibid., 63.
34 Ibid., 70, 77.
35 O. Pfersmann, 'De la justice constitutionnelle à la justice internationale: Hans Kelsen et la seconde guerre mondiale,' *Revue française de droit constitutionnel* 16 (1993) 761 at 788–9.
36 Richard Tuck, *The Rights of War and Peace, Political Thought and The International Order from Grotius to Kant* (1999) 130.
37 Cited in Ibid., 131–2.
38 Ibid., esp. 138–9 and the whole of chapter 1 of *Humanism*, and esp. 22 ff.; and 126 for the possibility that Hobbes heard Gentili's lectures.

The connections between Hobbes and the international law tradition represented by Gentili form the heart of Tuck's book.

39 A quotation from Hobbes, *On the Citizen*, I, 2 by Tuck, at 134.

40 This follows an argument already presented in Anthony Carty '*English Constitutional Law from a Postmodernist Perspective*,' in *Dangerous Supplements*, ed. Peter Fitzpatrick (1991) 182–206.

41 Thomas Hobbes, *Leviathan*, ed. C. B. McPherson (1968), chapter 42, 567.

42 Tuck, *The Rights of War and Peace*, 170–1, quoting Locke's *Second Treatise of Government*, paras 7 and 9.

43 Ibid., 180.

44 Ibid., 94–102, esp. 102.

45 Ibid., 171.

46 Ibid., 177.

47 Ibid., 108.

48 *The Law of Nations*, vol. II, 1, 7.

49 Ibid., vol. II, 4, 53.

50 Ibid., vol. II, 3, 56.

51 Ibid., vol. II, 7, 97.

52 Tuck, *The Rights of War and Peace*, 195–6.

53 John Kampfner, *Blair's War* (2004) 152.

54 Mark Curtis, *Unpeople, Britain's Secret Human Rights Abuses* (2004).

55 Robert Cooper, *The Breaking of Nations* (2004).

56 *International and Comparative Law Quarterly* 52 (2003) 811 ff. The Attorney General's Answer and a Foreign and Commonwealth Office Paper.

57 *Review of Intelligence of Weapons of Mass Destruction*, HC 898, July 2004.

58 www.pm.gov.uk/output/Page5461.asp March 5, 2004, Prime Minister warns of continuing terror threat. This very substantial speech shows the influence of Cooper in the comprehensiveness with which it rewrites the agenda of international law, and will be considered later.

59 www.mod.uk.

60 www.mod.uk. Chapter 3, 'Lessons From The Operation: Key Lessons,' no. 1, quoted in Curtis, 76.

61 www.mod.uk. White Paper, p. 1.

62 Ibid., chapter 4, p. 10.

63 www.pm.gov.uk/output/Page5461.asp.

64 www.observer.guardian.co.iuk/worldview/story/0,11581,680117,00.html.

65 *Breaking of Nations*, inside cover pages for both quotations.