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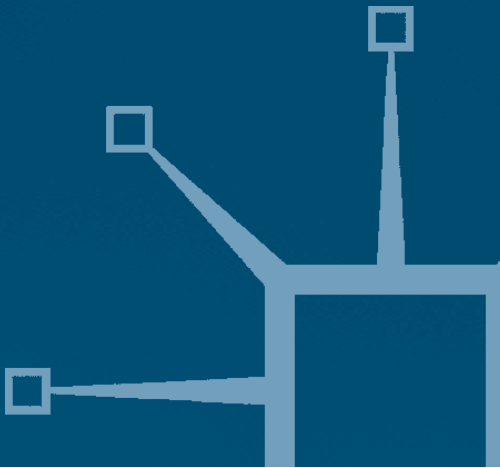
Hobbes, Realism and the Tradition of International Law

Charles Covell



Hobbes, Realism and the Tradition of International Law

Also by Charles Covell

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THE REDEFINITION OF CONSERVATISM: Politics and Doctrine

Hobbes, Realism and the Tradition of International Law

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Contents

Preface vi

Introduction **1**

1 First Principles of Law, State and Government in Hobbes's Civil Philosophy **10**
1.1 Pre-modern natural law theorizing and the modern natural law tradition 11
1.2 The natural state of men and the laws of nature 17
1.3 Covenanting, the commonwealth and the rights of sovereignty 29
1.4 The effects and consequences of the establishing of the sovereign power 32
1.5 The rule of law: civil law, crime and punishment 37
1.6 The office of sovereign 51

2 Natural Law, the Law of Nations and Realism in International Politics **55**
2.1 The international state of nature 56
2.2 The elements of the law of nations 63
2.3 Natural law, domestic legal order and individual rights 72
2.4 The realist tradition in international politics 85

3 The Tradition of International Law **99**
3.1 Grotius 100
3.2 Pufendorf and natural law jurisprudence 108
3.3 Pufendorf and the law of nations 117
3.4 Wolff and Vattel 125
3.5 The undermining of the natural law consensus on international law 135

Conclusion **146**

Notes and References 157

Bibliography 179

Index 184

Preface

This book is the outcome of the continuous study of the theoretical aspects of international law and international relations that I have been engaged in since 1991 at what was then the College of International Relations, and what is now the College of International Studies, of the University of Tsukuba in Japan. The aim of the book is to examine Hobbes in reference to realism, as a tradition in international relations, and in reference to the tradition of international law. Given this as its aim, the book supplements, and stands as a companion volume to, the two previous books of mine from the 1990s where I discuss the place of Kant in the development of modern international law together with his credentials as an exponent of the liberal tradition in international relations. For the purposes of a full understanding of the treatment of Hobbes provided here, the reader is recommended to consult the two books on Kant as entitled thus: *Kant, Liberalism and the Pursuit of Justice in the International Order* (1994) and *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (1998).

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Tsukuba, Japan
September 2003

Introduction

The primary subject-matter of this volume is the political thought of the English philosopher Thomas Hobbes (1588–1679). However, it is not intended that the volume is to stand, or to be read, as a contribution to what is established as the very large body of mainstream Hobbes scholarship. The intention is rather to consider Hobbes in relation to an agenda that is followed in a group of academic enquiries that are somewhat remote from the concerns of the Hobbes commentators proper, albeit that these are enquiries where Hobbes has in fact come to hold a prominent position. The academic enquiries that we shall be taking to set the context for discussion of Hobbes are the enquiries that fall within the province of international studies. One of the major departments of international studies is that of international politics, and, in line with this, Hobbes is examined in reference to issues in international politics and, particularly so, in reference to the leading traditions of thought and practice in international politics. Nevertheless, the principal focus of attention, in regard to Hobbes and international studies, lies with international law, and with this being assumed to comprehend the tradition of international law in both its historical and its general theoretical aspects. The situating of Hobbes in relation to the tradition of international law is the main endeavour in the present volume, and it is to be noted that, in this, the concern is not only with Hobbes, but also with the tradition of international law as such and with the larger implications of the matter of Hobbes as in his relation to international law for the understanding of the foundations of the as now current system of international law.

The international law focus that we here adopt in regard to Hobbes is one that determines the range and scope of the critical treatment of his works. Of course, there is a detailed review provided of Hobbes's

works, as the source materials that serve to support the claims about Hobbes and international law which are advanced in the volume. However, the review is selective, and with the principle of selection being based in the direct relevance of the materials treated of for establishing the position of Hobbes in relation to issues in international politics, and in relation to the tradition of international law. Accordingly, the discussion of Hobbes is restricted to the arguments to do with the principles of law, state and government that belong to his civil philosophy, as these arguments are to be found expounded in what stand as his three main political treatises. First, there is *The Elements of Law, Natural and Politic*, a work that Hobbes completed in 1640 and that was to be published for the first time in two parts in 1650.[1] Second, there is *De Cive*, with this being a work concerning the condition of men as citizens that Hobbes published in its original Latin version in 1642.[2] Third, there is the work that was first published in 1651, and that is acknowledged to be Hobbes's masterpiece: *Leviathan, or the Matter, Form and Power of a Commonwealth Ecclesiastical and Civil*.[3]

The starting-point for the consideration of Hobbes in relation to international law is given in what now ranks as a standard and influential reading of Hobbes as a political philosopher. This is the reading where Hobbes is positioned within the great line of natural law theorizing which has so decisively shaped the course of Western legal and political thought. Here, it is argued that there is reflected in Hobbes a radical break with the classical-medieval tradition of natural law, as this tradition is to be found represented in the work of such seminal thinkers as Plato (*c*.428–348/7 BC), Aristotle (384–322 BC) and St Thomas Aquinas (1224/5–74). The break that Hobbes made with the terms and assumptions of classical-medieval natural law theorizing is taken to define much of his modernity as a political thinker, and so, consistent with this view, it is argued further that Hobbes belongs to the distinctively modern tradition of natural law which came to establish itself as a dominant tradition in legal and political thought in Europe during the seventeenth and eighteenth centuries. The origins and foundations of the modern natural law tradition are associated with the work of the Dutch jurist and political theorist Hugo Grotius (1583–1645). As for the other leading representative members of the tradition, these included, as the successors to Grotius, Hobbes himself, the German legal and political philosopher Samuel Pufendorf (1632–94) and the English political philosopher John Locke (1632–1704). In addition, the modern natural law tradition was to include the German jurists Christian Thomasius (1655–1728) and Christian Wolff (1679–1754) and the Swiss jurists Jean-Jacques Burlamaqui (1694–1748) and Emmerich de Vattel (1714–67).

The modern natural law tradition was closely bound up with, and was itself indicative of, the underlying trends in the period of its dominance that were directed towards the secularization of legal and political thought. As evidence for this, there was the concern of the modern natural law thinkers to identify and expound the basic principles of natural law in terms which were relatively free of theistic assumptions. At the same time, the modern natural law tradition involved the endeavour, as on the part of its members, to establish some recognizably secular foundation for the general organization of state and society. This endeavour is evidenced, most particularly, in the substantive determinations that were offered within the tradition as to the first principles of natural law. Here, it is to be emphasized that the natural law came increasingly to be determined as comprising principles which related to the rights and interests of individuals. Specifically, the natural law was presented in terms where it served to define certain rights that were understood to belong to men by nature, and with these being rights that were explained as being connected with, and directed towards, the ends as given in the fundamental natural right of men to act in their own interests as to the extent of acting to defend and preserve themselves. In addition to this, the natural law was presented such that it served to define the basic principles of social order, and the basic principles relating to the institutional order of law, state and government, whose observance by men was to be considered as essential for their defence and preservation and, so also, for the full realization of the rights of men which were pointed to in the substance of the law of nature. The conceptual linkages as between the rights of individuals, the ends of self-defence and self-preservation, the principles of social order and the principles of law, state and governmental were central for the modern natural law thinkers, and their centrality as such is something that is everywhere apparent in the civil philosophy of Hobbes.[4]

The placing of Hobbes within the modern natural law tradition is of the first significance for the concerns of this volume, as a study that focuses on the tradition of international law and the position of Hobbes in relation to it. This is so because the natural law thinkers of the seventeenth and eighteenth centuries were instrumental in laying the foundations for the modern system of international law, and in the setting out of its essential conceptual structure. To be sure, the founders of modern international law are recognized to include the Spanish scholastic philosophers Francisco de Vitoria (*c*.1483–1546) and Francisco Suarez (1548–1617), who were aligned in their writings with Aquinas and with the Thomist standpoint in natural law theorizing.

Then again, there are to be reckoned with the secular writers, such as the Italian-born jurist Alberico Gentili (1552–1608), who significantly influenced the development of international law, but who stood somewhat apart from the mainstream of the natural law tradition which is held to originate with Grotius. Despite this, the modern natural law thinkers are to be counted as decisive in their contribution to the founding of modern international law. In this matter, the thinkers who are pivotal are Grotius, Pufendorf, Wolff and Vattel. For these were the natural law thinkers who were the most taken up with expounding in fully systematic form the basic principles of international law, or more properly the basic principles of the law of nations.[5]

In the history of international law in its modern form and tradition, the contribution of Grotius is considered to be seminal and with this contribution consisting primarily in two major works where he addressed himself to subjects relating to the law of nations. The first of these works was a treatise on the law of prize and booty written around 1604, *De Jure Praedae Commentarius*; the second work was the landmark treatise on the law of war and peace that underlines Grotius' claims for recognition as a leading founder of modern international law: *De Jure Belli ac Pacis Libri Tres* (1625).[6] The contribution of Pufendorf to international law is to be found contained in three main works. First, there was an elaboration of the elements of a universal jurisprudence entitled *Elementorum Jurisprudentiae Universalis Libri Duo* (1660); second, there was a comprehensive exposition of the principles of natural law and the law of nations, *De Jure Naturae et Gentium Libri Octo* (1672); third, there was an abridged version of the latter work, where Pufendorf presented in summary form the basic duties of men and citizens according to natural law: *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1673).[7] Wolff wrote voluminously on the subject of natural law, and with his work in the matter of the law of nations coming in the form of the exposition that he provided as to its essential elements as in accordance with the terms of what he termed the scientific method: *Jus Gentium Methodo Scientifica Pertractatum* (1749).[8] As for Vattel, his influence on the development of modern international law is generally held to be as great as that of Grotius, and with his outstanding contribution being the treatise where he expounded the elements of the law of nations conceived of, and presented, as the principles of natural law in their application to the conduct and business of states and their rulers: *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758).[9]

The natural law thinkers in the line of Grotius did not comprise the only school of writers on the law of nations active during the seventeenth

and eighteenth centuries. For in addition to the natural law writers, there were the writers who attended to the law of nations as conventional, or positive, law, and with this positivist school being represented by such writers as the German jurist Samuel Rachel (1628–91) and the Dutch jurist Cornelius van Bynkershoek (1673–1743). Nevertheless, the natural law school was the dominant school, at least so in regard to the more theoretical aspects of the law of nations. This ascendancy for the natural law conceptualization of international law is to be considered as holding until the time when, towards the end of the eighteenth century, it was brought openly into question with the emergence of new directions in legal and political thought. One such new line of direction was that pointed to in the positivist jurisprudence of the English legal and political philosopher Jeremy Bentham (1748–1832), who in the challenge that he made to the naturalist standpoint in theorizing about law, and here including international law, was to be importantly followed and confirmed in his arguments by his disciple John Austin (1790–1859). There was also the challenge to the natural law tradition that came in Germany with the work of Immanuel Kant (1724–1804). The challenge from Kant was a profound one, and it was to involve him in the explicit repudiation of Grotius, Pufendorf and Vattel, as writers on the law of nations, and in his proposing a system of international law which was left detached from a foundation in natural law. Hence the critical importance of the argument that Kant set out about international law in the key works as follows: *Perpetual Peace* (1795; 2nd edition, 1796); *The Metaphysical Elements of Justice*, this being the first part of the treatise *The Metaphysics of Morals* (1797).[10]

The tradition of international law is a continuous tradition. In consideration of this, it is to be emphasized that, in this volume, the modern natural law thinkers are read as having assisted in setting the foundations for the system of international law in the form that it is now established. Thus in specific terms, the principles of the law of nations, as these were identified and expounded by writers such as Grotius, Pufendorf, Wolff and Vattel, are here treated of as principles that stand as integral component elements of current international law. The present system of international law is the system that is based in the United Nations Organization and its Charter, and with the principles that are fundamental within this system including the principles that relate to the subject-matters of peace, self-defence, the faith of treaties, state sovereignty, the rights of individuals, diplomatic relations and the procedures for international adjudication and dispute settlement. As for the source materials for the law and the principles that are essential to it, the materials to which we shall be making particular reference are as

follows: the Charter of the United Nations (1945); the Statute of the International Court of Justice (1945); the Universal Declaration of Human Rights (1948); the Vienna Convention on Diplomatic Relations (1961); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Vienna Convention on the Law of Treaties (1969); the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970).[11]

In the present volume, Hobbes is discussed as a modern natural law thinker who stands in the line of Grotius, Pufendorf, Wolff and Vattel, and with it being on account of this association that he is considered in his relation to the tradition of international law. Thus as we shall bring out, Hobbes identified what he stated to be the first laws of nature as embodying the essential principles of the law of nations. In this, Hobbes was to be followed by Pufendorf, and through him by Wolff and Vattel also, while at the same time Hobbes gave recognition with his specification of the laws of nature to what we have referred to as the fundamental principles of the system of international law of the era of the United Nations. Nevertheless, it is to be observed that the relating of Hobbes to the tradition of international law, as here argued for, is something that runs counter to the reading of Hobbes that is conventional within the domain of international studies. This is the reading where Hobbes is understood to belong to the so-called realist tradition in international thought and practice. The realist tradition is a tradition originating in classical times, and it is a tradition whose key representative thinkers are generally held to be Hobbes together with Thucydides (*c.*455–400 BC) and Niccolò Machiavelli (1469–1527), and whose wider adherents are generally taken to include such thinkers as Benedict de Spinoza (1632–77), David Hume (1711–76), Jean-Jacques Rousseau (1712–78), Georg Wilhelm Friedrich Hegel (1770–1831), Karl Marx (1818–83), and Max Weber (1864–1920). As for the claims of the realists concerning international politics, these are claims that imply a limited role, or indeed no role at all, for law, and for the principles of justice and morality associated with law, in the conduct of states and rulers and in the overall organization of the international sphere. For the positive claims of the realists are, in their essentials, claims about the inescapability of the interests and power of states and rulers as the fundamental determinants of international politics, and about the necessity of states and rulers acting, and having to act, in neglect of the constraints of law and those of justice and morals.

It is a central part of the argument that we shall develop in this volume that the realist conception of international politics, and in fact of politics as such, is of limited relevance and application in the understanding of Hobbes as a political thinker. In this, it is argued particularly that the limitations of the realist conception, as in regard to Hobbes, are made evident through attention to what he identified and affirmed as the core principles bound up with the ideal of the rule of law, and with these principles having their embodiment, for him, both at the level of state law and, albeit more indirectly, at the level of the law which obtained in the international sphere of politics.

The matter of the realist conception of international politics and of Hobbes in relation to it is discussed in the fourth part of Chapter 2. Prior to that discussion, there is provided in Chapter 1 a detailed account of the basic elements of the civil philosophy of Hobbes, and with the focus being on the institution of the state and the structure of state law and state government. Here, it is explained how Hobbes assumed a clear distinction between the natural condition of the society of men and the condition of their society that was to be found within the state. It is explained further how Hobbes saw men as subject to certain laws of nature that were to be thought of as binding on them independently of the condition of their association within the state, and with the principles of natural law that so bound men being understood by him to comprise the fundamental principles of peace. The laws of nature, as Hobbes specified them, were such that they underwrote the right of men to act to defend and preserve themselves even through the means of war, while also directing that men were to create the proper framework for their defence and preservation through establishing the institution of the state and there submitting themselves to the rulership of a sovereign power. The rulership exercised by the sovereign power was one bound up with the rights and authorities of state government, and among these were the rights and authorities that related to the maintenance of the rule of law in the state as through the discharging of the offices of law-making, adjudication and law enforcement essential to the form of state law.

As it is made clear in Chapter 1, the rights and authorities that Hobbes saw as belonging to the sovereign power in the state were absolute and exclusive rights and authorities, but not arbitrary rights and authorities. For Hobbes thought of the sovereign power as a power that was to exercise rulership only in conformity with existing law, and with the underlying principles of legal order. The principles of legal order that applied to the sovereign power, in the exercise of rulership, were

principles that Hobbes presented as being given in the terms of the laws of nature. Thus it was that the laws of nature were understood by Hobbes to point to the principles of the rule of law that, where adequately realized in the condition of the state, were to provide for peace among men and for the securing and effecting of their rights under law. In Chapter 2, the laws of nature that Hobbes stipulated are treated of not in connection with the form of the rule of law maintained in states, but in connection with the form of the rule of law that had application to the relations among states in the international sphere. Here, it is brought out in the first part of the chapter how Hobbes was led to conclude that the law of nations, as the law holding among states and rulers in the international sphere, consisted in nothing more than the laws of nature considered in their application to states and rulers. In the second and third parts of Chapter 2, it is brought out how the laws of nature, as for Hobbes comprised the substance of the law of nations, were laws that served to affirm principles which, in their application to the condition of states and rulers, rank among the foundational principles of the system of modern international law. Included among these were the principles of due process and procedural justice essential to the rule of law, and with the principles at issue being principles which concern the rights of individuals in relation to the state and which, as such, have received recognition within the province of the international law of human rights.

The review of Hobbes and the laws of nature in relation to the principles of international law establishes the context for the setting out of the various considerations, as these come at the end of Chapter 2, which point to the need for the dissociating of Hobbes from the realist tradition in international thought and practice. There is also established in this the context for the treatment of the tradition of international law that comes in Chapter 3, and for the explanation of the place of Hobbes within it which lies in his status as a member of the line of modern natural law thinkers.

The main substance of Chapter 3 is taken up with the detailed discussion of Grotius, Pufendorf, Wolff and Vattel, and in regard to the particulars of the expositions that they set out as to the principles of the law of nations. In this discussion, Hobbes is related to Grotius. So also is he linked to Pufendorf, and positioned in relation to the subsequent development of natural law theorizing in international law matters as this extends to cover the contributions of Wolff and Vattel. The differences among these various thinkers in their respective approaches to the law of nations are acknowledged. Thus there is prominence given to certain

difficulties with the positions of Hobbes and Pufendorf as relative to Grotius and Vattel, and with these including the failure of Hobbes and Pufendorf to recognize the positive law of nations together with the failure to determine adequately the natural law principles in the contextual specificities of their application, as principles of international law, to the actual condition of states and rulers. Nevertheless, the emphasis is very much on the underlying unity of purpose of the natural law thinkers, and with this being evidenced by the vindication provided by the thinkers, and not least by Hobbes, for the substantive principles of the natural law as serving to establish an objective normative framework for the proper legal regulation of the conduct of states and rulers in the international sphere. It is further emphasized that the project of the modern natural law thinkers, as to making good the claims of international law from the natural law perspective, was negated by certain successor thinkers, including the two thinkers to whom we have already made reference in this connection: Bentham and Kant. The undermining of the natural law consensus on international law, as this is reflected in the work of Bentham and Kant, looked forward to the coming of what is the present predicament in international politics. There are many aspects to this predicament, and in the course of the Conclusion we shall be brought, at the end, to give some brief consideration to those aspects that relate to the viewpoint on international law that belongs to the modern natural law tradition, as in the form that this is represented by Hobbes.[12]

1
First Principles of Law, State and Government in Hobbes's Civil Philosophy

The focus of concern in the present chapter lies with the first-order principles of law, state and government that Hobbes expounded as basic component elements of his civil philosophy, and with this in the form in which the civil philosophy received its definitive statement in the argument of *Leviathan*. The principles of law, state and government to be considered are those that relate to the following main subject-matters of which Hobbes treated: the rights and powers of sovereignty specific to government in the civil state, or commonwealth; the liberty of the subjects of commonwealths; the organization of public administration in the state as effected through the exercise of sovereign rights and powers; the general principles of the rule of law maintained in the state, and as comprehending the principles of civil law and the principles of crime and punishment. In addition, there is consideration given to the underlying principles of legal-political order that Hobbes saw as being embodied in what he identified as the fundamental laws of nature. It is the first-order principles of law, state and government that Hobbes picked out, including the fundamental principles of natural law, that serve to underline the central position which is assigned to him in the modern tradition in political thought. As it was indicated in the Introduction, the modernity of Hobbes, as a political theorist, is to be viewed as being very much bound up with the radicalism of his departure from certain of the core assumptions which informed the pre-modern tradition in natural law theorizing. The foundations of the pre-modern tradition of natural law go back to the classical period, and particularly so to the work of Plato and Aristotle and to that of the Stoic philosophers and the Roman law theorists. The development of the tradition continued in the Middle Ages as it became closely associated with the doctrines of the Church, and its culmination during the medieval period came in the thirteenth

century with the synthesis of Aristotelian philosophy and Christian theology which is to be found in the thought of Aquinas.

1.1 Pre-modern natural law theorizing and the modern natural law tradition

The pre-modern tradition of natural law theorizing was distinguished by certain quite specific ideas concerning the individual and the relation of the individual to state and society. One such idea was that the state was based in, and established in accordance with, what was presented as being a normative order which was founded in the objectively given order of nature. Another was the idea that association in the state, including subjection to the form of political order that the state comprised, was something that was natural to men in what was understood to be their essential status as rational beings. Then again, there was the idea of the state as a moral, or ethical, form of association among men, and one where the justification for the state was taken to lie in its promoting the common good of its members and, through this, the provision of the objective conditions for the full realization by individuals of the ends of the good life within the framework of an ordered community. Yet further, there was the idea that the state was prior to the individuals forming it both with respect to the order of nature, and with respect to the normative order directed towards the ends of the good life within community which had its foundation in the natural order. This idea was of critical importance, for the reason that it carried with it the implication that the state exercised a direct and naturally sanctioned authority over its members which was prior to, and independent of, any specific voluntary act or acts on their part.

The leading ideas associated with pre-modern natural law theorizing, as referred to here, were integral to the thought of Aristotle, and, as such, they are to be found informing the argument of the *Politics*.[1] So also do they inform the writings of Aquinas on law, the state and the institutions of civil government, as with the exposition of the principles of law and justice which comes in his *Summa Theologiae* (*c*.1265–73).[2]

Aquinas wrote in full acceptance of what had been the core position of Aristotle that man was by nature a social and political animal, and hence that individual men were able to realize their destiny, as this was determined through the natural order, only by means of their participation in a form of political association established for the common good.[3] However, Aquinas went beyond Aristotle in the detailed consideration that he gave to the concept of law in explanation of the foundations of

political society. In the discussion of the concept of law in the *Summa Theologiae*, Aquinas identified four distinct forms of law. These were the eternal law, natural law, human law and divine law. The eternal law was understood by Aquinas to embody God's conception of the final end of the created universe, and hence to stand as the final metaphysical ground of all other forms of law.[4]

The natural law, as Aquinas explained it, was the part of the eternal law that was transparent to human reason, and that, as such, reflected the degree of involvement in the eternal law which was appropriate for men as rational beings.[5] Human law was the law established by men, as rational beings, for their own government in the context of organized social order. Aquinas saw the sphere of human law as extending to the law of nations, and with this being presented by him as law that pertained to the general norms of conduct which were common among peoples and nations. However, the essential form of human law, for Aquinas, was the civil law, with this being municipal law or state law, and, as such, the law that was laid down in states on the stipulation of rulers so as to promote the ends of the common good therein.[6] Divine law was explained by Aquinas as the law contained in the word of God as revealed through the Scriptures, and, as such, it was to be thought of as law that supplemented the natural law in the providing of normative guidance for human beings as to the meaning and implications of the eternal law.[7]

The basic principles of human association in political society and the state, and the principles of the common good as maintained through this form of association, were presented by Aquinas as principles which were contained in the natural law. In the account that Aquinas gave of it in the *Summa Theologiae*, the natural law was taken to embody the universal principles of practical reason. These principles related to the fundamental human goods, and to the naturally determined inclinations of human beings to pursue such goods and to avoid what was opposed to them. Thus the natural law had application to the inclinations, as with the inclination to self-preservation, which human beings had in common with all substances. In this context, the natural law stated the practical principles whose observance was conducive to the maintenance of human life as such. In addition, the natural law included practical principles that were based in the inclinations that human beings shared with other animals, and particularly so the inclination of men and women to join together in the producing and nurturing of offspring. The practical principles involved, here, were principles relating to the goods specific to the ends of family life and community. Finally, the natural law related to the inclinations to pursue goods such as the knowledge of God, and association

within organized society, which were unique to human beings as bearers of a fully rational nature. So, for example, the natural law was to be thought of as stating such first-order practical principles as those which required men to avoid ignorance, and to avoid the doing of harm to one another.[8]

As Aquinas explained it, then, the natural law pointed to association within society as an essential human good, while pointing also to the practical principles relating to the inclination of men to pursue this good. Given this, it is clear that, for Aquinas, the natural law constituted the underlying normative foundation for the civil state, as well as the final ground of justification for the subjection of men to the authorities established in states. In more specific terms, it was the natural law, and so indirectly the eternal law of which natural law was a manifestation, that Aquinas saw as grounding the laws which were brought into being by rulers for the advancing of the common good of men within the political condition of society. Thus it was the natural law that Aquinas took to stand as the basis for the derivation of human laws. Also, the natural law was the determinant of the justice of human laws, in the respect that the justice of human laws was held by Aquinas to depend on their conformity with, or their lack of significant divergence from, the general principles of conduct which were contained in natural law.[9]

The linking together of the form of the rule of law obtaining in the civil state with the basic principles of justice, as a matter of their direct and conceptually guaranteed connection, was essential to the whole thrust of the tradition of natural law theorizing of which Aquinas is representative. For his own part, Aquinas identified three conditions as determining the justice of human laws as in the civil state, which conditions related to the end, the authority and the form of human laws. Thus human laws were to be aimed at the common good as their defining end, and they were to be enacted in strict accordance with the actual authorities belonging to the rulers who stipulated them. In addition, it was required that human laws were to be enacted in a form such that the burdens that they imposed were to fall in a fair and equitable proportion as between the members of the communities where they were in force. It followed from this that human laws that promoted ends that ran counter to the common good, human laws that were enacted without proper authority and human laws that were applied to men contrary to equity stood as laws which were tainted with injustice, and hence stood as laws which, as Aquinas put it, were not laws as such but rather outrages. However, it also followed, for Aquinas, that when the conditions of end, authority and form were properly fulfilled by human laws, then the

laws concerned were to be thought of as standing in agreement with the eternal law as the basis of natural law, and hence were to be thought of as imposing an obligation of compliance with their terms which was strictly binding in conscience.[10]

In this way, the natural law served to underwrite the duty of obedience that fell on men in the civil state with respect to the laws laid down by the ruler. So likewise did the natural law serve, in a more general sense, to underwrite the obligation falling on men to conform with the comprehensive order of justice that Aquinas saw as being embodied in the laws laid down in the civil state, and as maintained for the promotion of the common good.[11]

The tradition of natural law theorizing that is represented by the thought of Aristotle and Aquinas was significantly diverged from, in respect of certain of its defining conceptualizations, by the thinkers belonging to what we have identified as the modern natural law tradition. In common with Aquinas before them, the modern natural law thinkers conceived of the natural law as a law comprising principles of universal reason, and as a law based in what was understood to be the essential nature of men as social and political beings. However, there was to take place a marked transformation as to the substance of the natural law. For the modern thinkers came to present the core principles of natural law in terms that rendered them relatively independent of theistic presuppositions. At the same time, and as a reflection of this secular recasting of itself, the natural law was presented in terms where its core principles were related to the interests of individuals as conceived of in the form of the basic rights of individuals, and related also to the framework of social and political order which was assumed to be necessary for the securing of individual rights.

This view of natural law was very much the one argued for by Grotius, who, as we noted in the Introduction, is associated with the beginnings of the modern natural law tradition. Thus Grotius stated the laws of nature as laws that were grounded in the right of men to act to defend and preserve themselves. The right of self-defence was fundamental, and it was by reference to it that Grotius derived the rights and duties relating to the person, property, contractual relations, restitution and punishment, and the determination of disputes through judicial procedures that he thought of as lying at the foundation of the form of society subject to law and government which obtained in the civil state. It was in terms of such foundational rights and duties that Grotius identified the laws of nature in the Prolegomena to *De Jure Praedae*.[12] Again, the Prolegomena to *De Jure Belli ac Pacis* contains the following specification

of the basic principles of law, as principles applying to the form of normative order which Grotius saw as arising from the natural desire of men to associate together within organized society:

> To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.[13]

There is a further notable respect where the modern natural law thinkers moved away from the natural law tradition of Aristotle and Aquinas, and one that underlines how, from the modern natural law standpoint, the substance of natural law came to be specified in terms of individual rights. The consideration, here, is to do with the matter of the origin and normative foundation of the state as a form of association among men. For Aristotle and Aquinas, the state had been taken to originate with, and to be founded in, a normative order which was thought of as being embodied directly in the order of nature. For the modern natural law thinkers, however, the origin and foundation of the state, and of the authority that it exercised, were to be explained not only in terms of the normative order as embodied in nature, but also in terms of a normative order that was presented as being based in principles of will and agreement, and, hence, as standing as something which was distinct from the sphere of the natural order.

This voluntaristic explanation of the state and its authority was such that the state was understood to originate with, and the powers belonging to rulers were understood to be created through, certain acts on the part of men which involved the exercise and the transfer of their rights. The particular form for the acts establishing political society that was characteristically made reference to by the modern natural law thinkers was that of the act of pact or contract, which act was seen as expressly provided for, and its inherent normative force expressly affirmed, as a fundamental principle of natural law. Thus it was that Grotius appealed to the principles of will and agreement essential to pacts, and to the rule of natural law requiring that men were to perform promises deriving from pacts in good faith, in his explanation of the origin and basis of the form of legal regulation maintained in the civil state. So also did Grotius see the law that regulated the relations among states in the international sphere as based in the principles of will and agreement implicit in the

idea of pacts. For, here, he maintained that the law of nations was generated through the will and consent of the nations and states to which it had application.[14]

Hobbes was to follow Grotius in providing a rights-focused specification of natural law, where the fundamental principles of natural law were formulated as principles of conduct applying to the proper exercise of the rights which belonged to individuals by nature. He followed Grotius also in appealing to the idea of a contract-form procedure, and to the principles of will and agreement relating to this, so as to explain the basis of association among men in the civil state and the basis of the form of legal order particular to the civil state. This was so even though, as we shall return to in Chapter 3, Hobbes diverged from Grotius in the respect that he did not consider that the law that applied to states and rulers, in the international sphere, was to be thought of as being based in principles of will and agreement.

Of course, it is to be emphasized that Hobbes, as with Grotius before him, remained aligned with the classic natural law tradition of Aristotle and Aquinas in his affirmation of the ideal of natural law as a system of law embodying principles of universal reason. So too did Hobbes affirm the natural law to be bound up with, and expressive of, the inherently social character of men. For he specified the natural law as law that defined such general principles of conduct as were essential for the participation by men in the condition of organized society. Indeed, it is evident that while Hobbes thought of the civil state as being established through an act of agreement on the part of men, he also accepted that the state was a form of association possessing a clear and direct sanction in the natural order. Thus, as we shall see, Hobbes presented the instituting of the state by men through agreement, and their voluntary submission to the authority of civil rulers, as requirements that were themselves pointed to in what he picked out as the fundamental laws of nature. In addition, it was the laws of nature that, for Hobbes, stood as the normative foundation for the form of legal order maintained in the civil state, and with this normative foundation including such principles as were understood by Hobbes to secure and establish the justice of state law.

For all that Hobbes was in broad alignment with much of the general thrust of the natural law theorizing of Aristotle and Aquinas, there is no doubt that he effected a significant break with the pre-modern tradition of natural law and that this break was more decisive in his case than it had been with Grotius. That this is so is underlined by there being present with Hobbes the sense of a firm, if not quite an absolute, distinction

between the natural condition of the mutual association of men and the condition of their association within political society and the state. The firmness of this distinction in Hobbes is central in explaining how it was that he sought to ground the state, and to account for its origin and authority, in the will and agreement of men. It is central also in explaining how Hobbes opposed the condition of political society to that of the natural relations holding among men in what ranks as one of the most famous arguments in modern political thought. This was the argument to the effect that the natural condition of the relations among men was not a condition of society at all (as Aristotle and Aquinas had assumed), but was rather a condition of universal war, and with this as a condition where men were understood to have a right to all things in the sense of possessing the right and liberty to do, and to take, whatever was necessary to defend and preserve their person to the limits of their strength and power. The image that Hobbes presented of the state of nature as a state of universal war is a very impressive one. The impressiveness of the image is to do not only with its conveying how, for Hobbes, the natural passions and endeavours of men were to be viewed as deeply resistant to the constraints of law and political order. It is to do also, and crucially so for the concerns of this volume, with what, as we shall find, was the application that Hobbes made of the image of the natural state of war among men in the explanation that he provided as to the condition of international politics.

1.2 The natural state of men and the laws of nature

The specification by Hobbes of the natural state of men as that of universal war comes in Chapter 13 of *Leviathan*. Here, Hobbes began by insisting that men were by nature equals one to another in their bodily and mental faculties, and such that they remained permanently vulnerable to mutual attack. This natural equality of men gave rise to conflict among them. The principal causes for this, as Hobbes identified them, were competition, which made men attack one another for advantage, diffidence, which disposed men to attack others so as to ensure their security, and glory, which drove men to attack others in order to enhance their reputation. For Hobbes, the natural equality of men, and the conflict among them following from it, were such as to establish that the natural condition of the relations among men was that of war, or, more precisely, the war of all against all. It was this natural state of war that Hobbes presented as standing in opposition to the form of association among men particular to the civil state. Thus in the natural state of war,

there existed no common power to provide for the effective government of men, and hence no guarantee of security for men beyond what they were able to achieve for themselves through their own individual strength and initiative. At the same time, the natural state of war was distinguished by the absence of authoritative rules of law that served to establish determinate principles of just and unjust conduct, and determinate rules and principles relating to the acquisition and possession of property. As Hobbes put it:

> Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man.
>
> Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal.
>
> To this war of every man, against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice .... It is consequent also to the same condition, that there be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can keep it.[15]

It is clear from this that, for Hobbes, the natural condition of the relations among men, as a state of war, remained lacking in the form of normative order essential to the civil state. For in the natural state of war, men were without stable and effective institutions of government, law and property. In consequence, this was a condition where the security of men, in their person, was based only in the exercise of their right to defend and preserve themselves, and with this considered as a right of war. Nevertheless, it is to be emphasized that if Hobbes presented the natural condition of the relations among men as the antithesis of the normative order specific to the civil state, as he did, it is not the case that he thought that men in the natural condition of their mutual relations stood independent of all normative restrictions on their conduct. On the contrary, Hobbes held that men in the natural condition of their mutual relations were subject to the normative constraints that were embodied in what he stated to be the laws of nature.

In Chapters 14 and 15 of *Leviathan*, Hobbes laid down nineteen laws of nature.[16] These, as he stated and explained them, were laws which were universal and unchanging as to their substantive stipulations, and which were disclosed to the natural reason of men as the fundamental laws or principles of peaceful association. In their status as the laws of peace, the laws of nature are to be understood as the laws that Hobbes thought of as embodying norms and principles that were to set the framework for, and hence also to set the limiting constraints on, the exercise by men of the right which belonged to them in the natural state of war. This, to repeat, was the natural right of men to act to the end of securing their own defence and preservation. In the event, however, Hobbes recognized no contradiction between the idea that men possessed a natural right of self-defence and the idea that they were subject to such constraints on their conduct as were set through the laws of nature. For it is evident that, for Hobbes, the end for which men were assumed to exercise their natural right, namely their defence and preservation, stood as an end that he considered that men were best able to secure through their acting in conformity with the fundamental principles of peace, as these were stipulated in the laws of nature.

The view that Hobbes took of natural law, and of the relation between the right of nature and the constraints on conduct contained in the natural law, is made clear at the beginning of Chapter 14 of *Leviathan*.

> THE RIGHT OF NATURE, which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.
>
> By LIBERTY, is understood, according to the proper signification of the word, the absence of external impediments: which impediments, may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according as his judgment, and reason shall dictate to him.
>
> A LAW OF NATURE, *lex naturalis*, is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *jus*, and *lex, right* and *law*: yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbear: whereas LAW, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent.[17]

Central to the argument, here, is the contrast between the concept of a right and the concept of a law. Thus, a right Hobbes defined in terms of the idea of the liberty of men to act without being subject to external impediments. As for the right of nature (*jus naturale*), this, for Hobbes, consisted in the freedom or liberty of men to use their own power as they willed for the end of preserving themselves and their life, and to do this in accordance with the use of such means as they determined for themselves through the exercise of their own judgment and reason. A law, on the other hand, Hobbes defined in terms of the idea of a duty or obligation which served to impose an external restriction on the actions of men. As for a law of nature (*lex naturalis*), this was defined by Hobbes as a general principle or rule that was discovered by reason, and that as such forbade men to do whatever was destructive of their lives and of the means necessary for the defence and preservation of life. So defined, then, a law of nature for Hobbes was essentially a principle or rule that imposed some limiting constraint on the exercise by men of the right and liberty that belonged to them by nature, where the observance of the constraint by men was to be thought of as necessary for the end of their defence and preservation as this end was underwritten through natural right. As regards the status of the law of nature as a limiting constraint on action, this belonged to it because the law of nature was a law, which, in contrast to a right or liberty, served to determine and bind men to action or to forbearance.

The nineteen laws of nature laid down in *Leviathan* stated what Hobbes saw as the basic principles of social order essential for the defence and preservation of men in circumstances of peaceful association. Hence the laws of nature stipulated the principles of conduct whose observance by men was to provide for the concluding of the natural state of war, and for the establishing of the form of normative order specific to the civil state where, as for Hobbes, there existed the conditions of peace appropriate for the securing by men of their defence and preservation. The principles of conduct set out in the laws of nature related to matters of normative order. As in this aspect, the natural law principles, as Hobbes expounded them, stood not only as principles of peace, but also as general principles of justice and political morality which served to confer determinate normative content on the ideal condition of peace within the civil state. Of the nineteen laws of nature, the first, second and third occupy a central position in the argument of *Leviathan*. For, as we shall see, it was to the principles embodied in these laws that Hobbes appealed in explanation of the origin and normative foundation of the civil state and of the form of society which he took to be brought into being through its establishment.

The first law of nature stated that all men were to endeavour peace whenever circumstances were such that there existed the reasonable prospect of its being obtained. The requirement that men were to endeavour peace was qualified by the proviso that in circumstances where peace was not to be obtained, then men were at liberty to continue to exercise their natural right to act to secure their own defence as though they were in the state of war. Hence the first law of nature stated the seeking and following of peace to be the fundamental duty falling on men. At the same time, the first law of nature affirmed the possession by men of the natural right of self-defence, and indicated the conditions where this right was permissibly to be exercised.

> [I]t is a precept, or general rule of reason, *that every man, ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war*. The first branch of which rule, containeth the first, and fundamental law of nature; which is, *to seek peace, and follow it*. The second, the sum of the right of nature; which is, *by all means we can, to defend ourselves*.[18]

The second law of nature followed from the first. This law stated that men were to be prepared, when others were as well, to lay down the right to do and to take all things belonging to them by nature, and to remain content with as much liberty for themselves in relation to others as they would allow others to retain with respect to themselves. The laying down of the right of nature in this way was required of men for the reason that the unrestricted exercise of it would leave men in the condition of war.

> From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law; *that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself*. For as long as every man holdeth this right, of doing any thing he liketh; so long are all men in the condition of war.[19]

The crucial principle set out in the second law of nature was that men were to lay down their natural right to all things in accordance with some standard of reciprocity. In Hobbes's view, the reciprocal laying down by men of their natural right, as required under the terms of the second law of nature, presupposed some voluntary act on their part. The essence of this act was not the renunciation by men of their right,

but rather the transferring of it on a mutual basis to some other person or persons and, through this, the incurring of an obligation in justice not to obstruct those to whom the right was transferred from enjoying its benefits and hence not to void the terms of transfer.[20] The form of the mutual transference of right that Hobbes was most concerned with was that of the contractual agreement among men which he called covenant. As Hobbes explained the matter, covenants were agreements where the parties trusted one another to fulfil the terms of the agreements in question. For this reason, covenants involved the keeping of promises, or faith, and, where not performed by the parties to them, the violation of faith.[21]

According to Hobbes, covenants were based in the voluntary acts of men, and in consequence of this covenanting, as he presented it, was something that could take place only in conditions such that sufficed to guarantee the defence and security of the parties, as in accordance with the right of nature. So, for example, Hobbes insisted that covenants formed in the natural state of war, where there was no common power established to compel the parties to mutual performance, were void and so not binding. For, here, the individual parties had no security that performing their covenants would not render them vulnerable if other parties reneged, and so jeopardize the defence of their person and interests. Hence it followed, for Hobbes, that covenants were binding on parties in the strict sense only in the context of the civil state, where there was present the power sufficient to compel performance. Again, Hobbes held that there could be no valid covenants formed under the terms of which men were to undertake to refrain from defending themselves against physical attack, or to undertake to accuse themselves without the assurance of pardon. For the natural right of self-defence was non-transferable, and as such it was inherently incapable of being the subject-matter of covenants which involved the transfer of rights.[22]

Hobbes's discussion of covenanting led directly to what at the beginning of Chapter 15 of *Leviathan* he stated to be the third law of nature. This law provided that men were to abide by the terms of the covenants into which they entered. The duty falling on men to perform their covenants made was binding since in the absence of performance covenants would have no validity, and without covenants men would be unable to transfer their right and so would remain in the natural state of war.

> From that law of nature, by which we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind, there followeth a third; which is this, *that men perform their covenants*

> *made*: without which, covenants are in vain, and but empty words; and the right of all men to all things remaining, we are still in the condition of war.[23]

So formulated, the third law of nature embodied the fundamental principle of justice. For, in Hobbes's account of it, the condition of justice was the outcome of covenants and the transferring of rights, with the consequence that justice consisted in the performing of covenants, while its contrary, injustice, consisted in the failure to perform covenants made.

> And in this law of nature, consisteth the fountain and original of JUSTICE. For where no covenant hath preceded, there hath no right been transferred, and every man has right to every thing; and consequently, no action can be unjust. But when a covenant is made, then to break it is *unjust*: and the definition of INJUSTICE, is no other than *the not performance of covenant*. And whatsoever is not unjust, is *just*.[24]

Given that justice related to the performance of covenants made and injustice to their non-performance, and given that, as we have noted, Hobbes held that the validity of covenants depended on the availability of the power sufficient to compel performance that was present in the civil state, then it followed, for Hobbes, that the establishing of justice as such presupposed the existence of the civil state. The same was true for the establishing of propriety among men. For all property rights were based in covenants and so presupposed, for their full recognition and effecting, the framework of the state and the apparatus of coercive power essential to it.[25]

Following the specification of the faith of covenants as the basis of justice, Hobbes proceeded to state the other fundamental laws of nature. Thus the fourth law of nature that Hobbes laid down in *Leviathan* concerned the duty falling on men to show proper gratitude for the favours and benefits which they received from others, and hence to avoid ingratitude. The principle that Hobbes stated in explanation of the law was that when men received some benefit from others that was bestowed out of grace, then they were always to act such that the benefactors would have no cause to regret their good will. In Hobbes's view, the bestowing of a gift or benefit involved a voluntary act, and the object of voluntary acts was always to secure the good of the men who performed them. The neglect by men of the law of gratitude would frustrate the object of those who bestowed gifts and benefits. This, however, would make it impossible for men to establish the bases of benevolence, trust and

mutual assistance, or to establish the terms of proper reconciliation among themselves. In consequence, the neglect of gratitude would leave men in the condition of war, and hence in violation of the first law of nature which commanded men to pursue peace.[26]

The fifth law of nature related to the duty falling on men to reach mutual accommodation, and it stated the principle that men were always to strive to accommodate themselves one to another. In Hobbes's explanation of the law, the principle that men were to endeavour to establish the terms of mutual accommodation was a principle such that those who breached it were to be regarded as responsible for the state of war that would follow from the breach, and hence as acting contrary to the basic requirement to seek peace as set out in natural law. Men who observed the fifth law of nature were to be called sociable, while those who disregarded it were to be called, among other things, stubborn, unsociable and intractable.[27]

The sixth law of nature was to do with the duty falling on men to be willing to pardon offences done to them by others. Thus the law stated the principle that subject to the condition that proper securities were forthcoming as to the future time, then men were always to be prepared to pardon those who repented of their offences and were desirous for pardon. As Hobbes explained it, facility to pardon was required of men because the granting of pardon for offences done was a granting of peace. While the granting of pardon to men who persisted in hostile acts involved not peace but rather fear, a pardon not granted to offenders who provided proper assurances of security for the future time was an indication of an aversion to peace and so in conflict with natural law.[28]

The seventh of the laws of nature stipulated in *Leviathan* concerned the basis of punishment. The law stated that in revenge, or retribution, for offences done to them, men were to be guided not by consideration of the extent of the injury that they had suffered, but rather by consideration of the extent of the good which would follow from retribution. Thus, for Hobbes, it was against natural law for punishment to be inflicted for any purpose other than the correction of the offender or the example of others. To inflict punishment without regard for the purposes of correction and example would involve the triumphing, or glorying, in the suffering of the offender to no further end. This, the inflicting of suffering without proper reason, would tend to the introduction of the state of war among men as contrary to the laws of nature, and it was to be regarded not as punishment but only as an act of cruelty.[29]

The eighth law of nature related to the duty falling on men to refrain from contumely. The principle stated in the law was that men were to

refrain from all actions, words, expressions and gestures which indicated hatred or contempt for others.[30]

The ninth law of nature concerned the duty falling on men to refrain from undue pride in their own person. The laws of nature applied to men in their natural state, and, as Hobbes emphasized in his explanation of the ninth law, the state of nature was a condition of the relations among men where all men were to be counted as equals. Given that from the standpoint of nature men were equal one to another, then it followed for Hobbes that the recognition by men of their natural equality was to stand as an essential prerequisite for peace. Hence the ninth law of nature was summed up by Hobbes in terms of the principle that men were always to acknowledge other men as their equals by nature. The breach of this principle was pride.[31]

Just as the ninth law of nature provided that men were to avoid pride, so the tenth law of nature provided that men were to avoid arrogance and with this, once again, being for considerations relating to the natural equality of men. The tenth law of nature stated the principle that when men entered into conditions of peace, it was essential that no man was to require to have reserved to himself any rights which he was not prepared to allow to be reserved to other men. In explaining the law, Hobbes underlined that while it was necessary for the establishing of peace that men were to lay down their natural right and liberty to do as they willed, it was also necessary for the maintenance of life that men were to retain certain rights on an equal basis. Included among the rights that Hobbes held that men were to retain for themselves, on the basis of equality, were the right of men to have proper control over their own bodies, the right to enjoy air and water, the right to freedom of movement and passage from place to place, and the right to all other things in the lack of which there was no possibility of men living or living well. It followed from this that if, on the occasion of the making of peace, men insisted on rights for themselves that they would not concede to others, then they were to be regarded as standing in breach of the principle providing that men were to acknowledge one another in their natural equality, and hence as standing in breach of the terms of natural law. Men who observed the tenth law of nature were to be called modest, and those who went against it were to be called arrogant.[32]

The eleventh law of nature stated the principle of equity. This was the principle that when a man was entrusted to judge controversies, he was required to deal with the parties on an equal basis. As Hobbes explained the law, the absence of equity in the judgment of disputes would result in disputes among men being resolved only through the means of war.

Accordingly, a man who was partial or biased in his judgment of disputes would discourage men from resorting to judges and arbitrators, and would in this way serve to perpetuate the cause of war in contravention of the laws of nature as the laws of peace. The essence of the principle of equity stated in the eleventh law of nature was a principle of distributive justice, and with distributive justice being, in Hobbes's account of it, the sphere of justice that related to the equal distribution of benefits and advantages among affected parties as though through the procedure of judgment or arbitration. The breach of the principle of equity involved exceptions made in favour of particular persons, and with this being contrary to the rules of distributive justice.[33]

The twelfth law of nature concerned equality in respect of the use of things that were capable of being held only in common among men. The law, as Hobbes stated it, provided that things that were not capable of being divided were to be enjoyed in common, where this was possible, and, where the quantity of the thing in question allowed, without restriction. At the same time, the law provided that where things were not capable of being held in common, then they were to be allocated in proportion to the number of men with a rightful claim to them.[34]

As with the twelfth law of nature, the thirteenth and fourteenth laws of nature set down in *Leviathan* were explained by Hobbes as laws that served to preserve equity. The thirteenth law of nature stipulated that where things were capable neither of being divided nor of being held in common, then it was required that the entire right to them, or the first possession if the use of them was to alternate, was something to be determined through lots. This was required for the reason, as Hobbes observed, that lots were the only means for providing for the equality in the distribution of benefits and advantages as was demanded under natural law.[35] For Hobbes, there were two relevant forms of lots to be considered. These he described in explanation of the fourteenth law of nature. The first form of lots was arbitrary lots, where the allotment of things was settled through agreement among rival claimants to them. The second form of lots was natural lots, where the allotment was settled either on the basis of primogeniture – that is, by the right of the first born – or on the basis of first seizure – that is, by the right of first possession. The fourteenth law of nature had distributions according to natural lots as its particular concern. Thus the law provided that where things were not to be held in common or to be divided, then they were to be thought of as held by the first possessor, or by the first born, through acquisition as determined through natural allotment.[36]

The fifteenth, sixteenth, seventeenth, eighteenth and nineteenth laws of nature that Hobbes stipulated in *Leviathan* related to the procedural

arrangements which he presented as essential for the establishing of peace. Thus the fifteenth law of nature stated that all men who were charged with the mediation of peace were to be allowed safe conduct. As Hobbes explained it, the laws of nature commanded peace as their end, and so were to be thought of as pointing to intercession as the proper means for bringing about this end. Safe conduct was accordingly to be granted to mediators of peace, given that safe conduct was the means for intercession.[37]

The sixteenth law of nature related to the settlement of disputes concerning questions of fact and questions of right. In Hobbes's view, the parties to such disputes would arrive at a settlement, and so establish the terms of peace among themselves, only if they agreed to accept and stand by the judgment of some independent party: that is, an arbitrator. Thus the sixteenth law of nature stated the principle that men who were parties to disputes were to submit their claims of right to independent arbitrators for judgment.[38] The principle here stated was intimately connected with the principle that Hobbes proceeded to give in the seventeenth law of nature. This was the principle that provided, as a rule of equity applying to parties to disputes, that no man was to act as judge or arbitrator in his own cause. For equity demanded that parties to disputes were to enjoy equality in benefits and advantages, and with it following from this that in the absence of independent arbitration all parties held an equal claim to judge the merits of their cause, and so remained in dispute and thus in the condition of war.[39]

The integrity of the procedure for the independent arbitration of disputes demanded that arbitrators were to be trusted to render impartial judgment. Hence the eighteenth law of nature stated the principle that no man was to be accepted as arbitrator in a dispute where he had some natural cause or interest which inclined him to show bias towards some one or other of the parties. For, as Hobbes explained it, arbitrators with an interest in the outcome of disputes were in a position such that there could be no obligation on the parties concerned to trust them, with the consequence that disputes, and so also the condition of war, would continue unresolved.[40] Finally, it was essential for the arbitration of disputes to be fair. Hence the nineteenth law of nature provided that in disputes concerning questions of fact, then the arbitrators were to give equal credit to the arguments of the parties and to base their judgments on the balance of the testimony as submitted by independent witnesses.[41]

The specification of the laws of nature given in *Leviathan* stands as the definitive statement that Hobbes gave of what he saw as the fundamental principles of natural law. However, it is to be emphasized that in

The Elements of Law, Hobbes importantly affirmed a law of nature to which he made no explicit reference in *Leviathan*. This was the law to the effect that men were to be prepared to allow commerce and traffic among one another on a non-discriminatory basis. As Hobbes explained it, the law requiring men to refrain from discrimination in their mutual trade and commerce was a principle of peace. For men who allowed to one man what they denied to another declared their hatred for the latter, and, in doing so, declared themselves for war.[42]

The laws of nature that Hobbes laid down were linked together in the respect that they comprised the laws of peace. Thus the laws of nature stated the principles of conduct that were to stand as being essential for the endeavouring of peace, as this was stipulated to be the primary duty falling on men as in the first and fundamental law of nature laid down in *Leviathan*. At the same time, the laws of nature were linked together, for Hobbes, in the quite specific respect that they were presented by him as capable of being determined and explained through reference to one single general rule of conduct. This rule directed men to act towards others only as they would have others act towards themselves. Hobbes stated the rule thus:

> *Do not that to another, which thou wouldest not have done to thyself*.... [43]

Among the characteristics of the laws of nature that Hobbes picked out, the most important, in the context of the present discussion, is that the laws of nature were taken by him to possess a binding normative force in the respect that they were always to be thought of as binding on men in conscience (*in foro interno*). Thus the laws of nature stood as laws such that they always bound men to the desire that they were to be acted on. However, Hobbes underlined that the laws of nature were not always to be thought of as binding in effect (*in foro externo*). For the laws of nature were to be thought of as obliging men to act in fulfilment of their terms only in circumstances where it was safe and prudent for men to do so, and this meant in conditions of sufficient security for men to be assured that there would be a general conformity with the requirements which the laws of nature stated. Here, of course, Hobbes restated at a general level the consideration that he raised in connection with the law of covenants: namely, the consideration that covenants were strictly binding, as under natural law, only where there was a common power adequate to compel performance such as obtained in the civil state. As we shall see, it was the instituting of the civil state that Hobbes saw as essential in creating the secure conditions where the law of covenants,

and the other laws of nature, would come to impose obligations which were binding in effect.[44]

1.3 Covenanting, the commonwealth and the rights of sovereignty

The principle of covenants as appealed to in the second and third laws of nature was critical, for Hobbes, in that it served to bring together the framework of normative order pointed to in natural law with the realized form of normative order particular to the civil state. For it was by reference to the idea of covenanting that Hobbes proceeded to explain how men were able to establish the form of political society which was embodied in the state, or commonwealth. As Hobbes explained the matter in Chapter 17 of *Leviathan*, the commonwealth, as the specifically political form of society, was to be thought of as being brought into being, or instituted, through some act of covenant. Essential to the covenant by means of which Hobbes saw the commonwealth as being instituted was an act of agreement among a number, or multitude, of men which involved the mutual transferring of their right to some other person or persons. The right that was so transferred through covenant was natural right, and this, as we have found, was defined by Hobbes as the right of men to use their own strength and power as they willed to the end of their own defence and preservation, and to do this with such means as they determined through their own reason and judgment. Hence the covenant instituting the commonwealth was such that, under its terms, the individual men who were parties to it were understood to agree to give up the right to govern themselves in accordance with their own will, reason and judgment, and to transfer this right to some man or assembly of men. This man or assembly was thereby authorized to use the combined strength and power of the parties to the covenant for the peace and common defence of them all.[45]

The man, or assembly of men, established through covenanting stood as the sovereign in the commonwealth as instituted, and hence as the person holding the sovereign power. The parties to the covenant who formed the body of the commonwealth so created stood to the sovereign as subjects.[46] It is to be emphasized that, for Hobbes, the sovereign was referred to as a person, but was always understood to be an artificial, rather than a natural, person whose status as regards subjects was that of a representative person deriving authority from those whom he, the sovereign, represented. Thus in accordance with Hobbes's own explanation of the principles of personality and authorization, the sovereign power

in the commonwealth was exercised by a representative person, whose rights and authorities originated with, and were conferred through, the will and consent of the parties to the covenant by which the commonwealth was instituted. As for the parties themselves, they were united in association through their subjection to the representative person of the sovereign, and it was the presence of this representative person that set the fundamental terms of association among men within the framework of commonwealths.[47]

In Hobbes's account of it, the act of covenant establishing commonwealths marked the decisive abandonment by men of the state of war that obtained in the natural condition of their mutual relations. For the covenant to institute the commonwealth involved an agreement by the parties to it to follow peace, as through the subjecting of themselves to the authority of a common sovereign power. The establishing of the sovereign power brought into being a condition of society that provided for the proper enforcement of the foundational principles of peace, as Hobbes saw these given in the laws of nature. This was so in the respect that the establishing of the sovereign power created a condition of society where there existed the objectively sanctioned security for men, and for their rights, which, in Hobbes's view, was necessary if there was to be a real and effective obligation on men to conform with the terms of the laws of nature and so act in fulfilment of the principles of peace which the laws of nature stipulated. Thus it was that the instituting of commonwealths with a sovereign power was taken by Hobbes to stand as the essential precondition for the presence of a normative order that would make for the full realization of justice among men. For, as we have seen, justice for Hobbes consisted in the performing by men of their covenants, and with the establishing of a sovereign power working to ensure that the covenants of men would be binding in effect and, through this, that there would be binding rules of justice and propriety as founded in the principle of natural law which provided that men were always to perform their covenants made.

The sovereign power that in the condition of commonwealths gave effect to the laws of nature was a power that embodied, and that was exercised through, certain rights essential to sovereignty. The rights of sovereignty were brought into being and conferred through the act of covenant establishing commonwealths, and they belonged to the person of the sovereign for the reason that this was necessary for the securing by sovereign rulers of the peace and defence of commonwealths, as this end was pointed to in the terms of the founding covenant. Hobbes summarized the various rights of sovereignty in Chapter 18 of *Leviathan*.

As Hobbes stated them, the rights of sovereignty served to establish the absolute and exclusive authority of the sovereign with respect to subjects. Hence the rights of sovereignty were such that the subjects of commonwealths were not permitted to change the form of government through which the sovereign power was exercised. Nor were subjects entitled to claim that the sovereign had forfeited his power, as on the ground of some alleged breach of the act of covenant by which commonwealths were instituted. At the same time, there was no legitimate basis, consistent with the rights of sovereignty, for subjects to accuse the sovereign of injustice or to seek to inflict punishments on the sovereign.[48] Given that the sovereign was the bearer of an absolute and exclusive authority in the respects here detailed, then it followed also, for Hobbes, that the sovereign was the sole judge of the means that were to be adopted as necessary to preserve the peace and security of commonwealths. So, for example, the sovereign had the right to judge and regulate all opinions and doctrines, and to determine which of these were conducive to the maintenance of peace and thus appropriate to be propagated in public among subjects.[49]

Of the rights of sovereignty that Hobbes identified, the ones that were central were those that related to the legislative, judicial and executive authorities of government, and hence to the basic constitutional structure of the state through which the sovereign power was organized. Thus the sovereign held the legislative power, with this consisting in the right to prescribe the rules of propriety and just conduct obtaining in the commonwealth which were to be observed by subjects. The rules prescribed by the sovereign in his legislative capacity were the civil laws, which laws were the laws particular to commonwealths.[50] In consequence of possessing the right of legislation, the sovereign possessed also the right of judicature. This was the judicial authority exercised by the sovereign, and it consisted in the right of hearing and deciding all controversies among subjects concerning matters to do with civil law and the laws of nature, and concerning matters of fact.[51] The specifically executive powers that Hobbes listed as rights of sovereignty were powers relating to the business of government and public administration. Thus the sovereign held the right of making war and peace in respect of other commonwealths, and of maintaining armed forces such as were essential for the defence of the commonwealth and its subjects. Again, the sovereign had the right to appoint all ministers and other such public officials within the commonwealth, both in peace and during wartime. Yet further, it fell to the sovereign to reward subjects, and to punish subjects for breaches of the law or, in the absence of appropriate legal rules, to impose punishments

in order to encourage subjects to serve the commonwealth and to deter them from doing disservice to it.[52]

The rights of sovereignty were indivisible rights, and they were capable of being granted away by the rulers bearing them only through the direct renunciation of sovereign authority itself.[53] In addition, the rights of sovereignty were essential to the sovereign power in commonwealths, in the respect that they were rights that belonged to the sovereign power without regard to the particular constitutional form of government which it assumed. Hobbes recognized three distinct forms of government, as determined through the number of men who formed the representative person of the sovereign: monarchy, where the sovereign representative was one man; democracy, where sovereignty was vested in an assembly formed from all members of the commonwealth; aristocracy, where the sovereign power belonged to an assembly formed from a part of the membership of the commonwealth. In Hobbes's view, there were different merits and demerits as between monarchical government and government by sovereign assemblies, but with the crucial consideration being that the sovereign power, and the rights integral to it, remained the same whatever the form of government through which the sovereign power happened to be constituted.[54] Further still, Hobbes insisted that there was no difference made to the nature of the sovereign power in commonwealths, or to the rights that belonged to it, in regard to the manner in which the sovereign power was in fact established. Thus it was that, for Hobbes, the rights of sovereignty were identical as between the cases where the sovereign power was established through the voluntary submission of men, and hence where the commonwealths so formed were commonwealths by institution, and cases where the sovereign power was established through force, as with conquest through war, and hence where the form of commonwealths was that of what he termed commonwealths by acquisition.[55]

1.4 The effects and consequences of the establishing of the sovereign power

According to Hobbes, the rights of sovereignty were such that through the establishing of agencies of sovereign power within commonwealths, men were to be thought of as being rendered subject to an absolute and exclusive authority. The subjection of men to the absolute and exclusive authority of the sovereign power carried with it certain effects and consequences, of which the one that stands out particularly for detailed attention is that relating to the liberty which belonged to men in their

status as the subjects of commonwealths. The liberty of subjects was treated of by Hobbes in Chapter 21 of *Leviathan*. The essential consideration here was that the instituting of the commonwealth through covenant, and the establishing of the sovereign power therein, involved men in the limitation of their natural liberty as through the acceptance of external constraints on conduct. These constraints came in the form of the civil laws prescribed by the sovereign power, and with the regulation of conduct through such laws there was set the basis for the liberty specific to the subjects of commonwealths as opposed to the liberty which belonged to men by nature. The liberty specific to subjects was, for Hobbes, real and substantial, and he pointed to it as consisting in matters where legal regulation was omitted by the sovereign power in commonwealths. So, for example, there was the freedom of subjects to buy and sell and to enter into contractual relations with one another, together with the freedom to choose their place of domicile, their form of work and the condition of their family life. However, the liberties of subjects, as here mentioned, implied no qualification to the rights of sovereignty, and, as Hobbes indicated, they were to be regarded as consistent with the absolutism and exclusivity of the authority attaching to sovereign power in commonwealths.[56]

As Hobbes explained the matter, the liberty of the subjects of commonwealths was something that, in its fundamentals, was based in the terms of the association that held as between subjects and the sovereign power. Accordingly, the liberty of subjects was not conditioned decisively by the constitutional form of sovereignty, and so, as Hobbes put it, the freedom of men in commonwealths remained the same irrespective of whether the sovereign power was organized as a monarchical or as a popular form of government.[57]

The liberty of subjects in commonwealths being bound up with the relation between subjects and the sovereign power, then it followed that the principal aspects of the liberty of subjects were to be understood in terms of what Hobbes saw as the end for which men associated in commonwealths, and there covenanted together to submit to a sovereign power. This end was that of the common defence and preservation of men, and it was by reference to the end of self-defence that Hobbes identified those parts of the liberty of subjects which related to the right of subjects to disobey even the lawful commands of the sovereign. Of crucial concern, here, were the rights that Hobbes considered inalienable in the respect of being rights that were incapable of being transferred by men through covenants, and with these being the rights that he saw as underlining the retention by men of their natural right in the condition

of commonwealths. Thus it was essential to the liberty of subjects in commonwealths that subjects had the right and liberty to defend their person against attack, even where the assault on their person was sanctioned by the sovereign power and hence was lawful. At the same time, it was essential to the liberty of subjects that subjects had the right and liberty to refuse to confess to crimes, and so accuse themselves, excepting in circumstances where they were assured of pardon.[58]

Beyond this, it is to be emphasized that while, for Hobbes, men in commonwealths were bound to the sovereign power as in subjection to an absolute and exclusive authority, the relationship between subjects and the sovereign power remained one that was based in and structured through laws, and one where law itself stood as the institutional form through which the rights of sovereignty were embodied and exercised. Accordingly, the subjects of commonwealths possessed the measure of liberty that was appropriate to them as persons whose rights and obligations were determined through laws. This had the effect that in matters where law was absent, there was no relevant external constraint or limitation on conduct and so men were free to act in accordance with their natural right and liberty. Thus it was that, as Hobbes insisted, the greatest liberty of subjects depended on the silence of laws, albeit that, as he explained, the actual extent of this liberty within particular commonwealths remained conditional on the substantive determinations of the sovereign power.

> As for other liberties, they depend on the silence of the law. In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do, or forbear, according to his own discretion. And therefore such liberty is in some places more, and in some less; and in some times more, in other times less, according as they that have the sovereignty shall think most convenient.[59]

At the same time, the liberty of the subjects of commonwealths was a liberty based in law in the respect that the law, as prescribed by the sovereign power, was such that it served to define, and hence also to secure and protect, the rights and liberties of subjects. In consequence of this, subjects were at liberty to secure and protect their rights through having established law enforced against the sovereign. Thus:

> If a subject have a controversy with his sovereign, of debt, or of right of possession of lands or goods, or concerning any service required at his hands, or concerning any penalty, corporal, or pecuniary,

> grounded on a precedent law; he hath the same liberty to sue for his right, as if it were against a subject; and before such judges, as are appointed by the sovereign.[60]

It is evident from what Hobbes wrote regarding the liberty of men in commonwealths that, for him, all aspects of their conduct as subjects remained liable to regulation through laws and hence subordinate to the rights of the sovereign power. Certainly, there were the inalienable rights of men, such as the right of self-defence. Even so, these rights were not presented by Hobbes as setting limits to the competences of the sovereign power, but only as providing subjects with grounds for non-compliance with what were the lawful commands of the sovereign. Again, there was the liberty that belonged to men as subjects of commonwealths through the silence of the laws. Here, however, the liberty of subjects was, as Hobbes emphasized, contingent on the legislative will of the sovereign, but without this implying anything by way of guaranteed exemption from legal constraints and limitations. So, likewise, the rights and liberties that subjects held under law, and that they were entitled to enforce against the sovereign, remained rights and liberties that were defined in their substance through laws which it fell to the sovereign power to determine. In principle, then, the liberty that Hobbes was prepared to concede to subjects of commonwealths was not such that it qualified the absolute and exclusive authority which he assigned to the sovereign power. As the effect and consequence of this, the rights of sovereignty, for Hobbes, were such that they were to be thought of as working to extend the jurisdictional control of the sovereign power to virtually each and every recess of civil life.

That this was the position that Hobbes took is underlined by the discussion in Chapter 22 of *Leviathan* of the sovereign power in its relation to the various associations of men, or what he called the systems of peoples, which came within the general jurisdiction of commonwealths. For, in this matter, Hobbes presented all forms of association among the subjects of commonwealths as subordinate to the absolute jurisdictional rights of the sovereign, and with this being so in the key respect that the association of subjects was governed by the ordinary civil law as maintained through the sovereign power.[61] There is likewise the discussion in Chapter 24 of the sovereign power in its jurisdictional rights in relation to the economic interests and engagements of subjects. Here, Hobbes insisted that ownership rights in material things and commodities, as held by subjects, were based in rules of propriety that were to be specified and applied as rules of civil law. Hence, all matters of ownership and

property in commonwealths, and all matters concerning the distribution of property holdings among subjects, were to be determined and regulated by the sovereign power as the bearer of the right of legislation.[62] Then again, Hobbes maintained that the rights of sovereignty were such that it belonged to the sovereign power to stipulate the conditions under which subjects were permitted to enter into trading relations with foreign parties, and also to stipulate the conditions under which subjects were permitted to transfer ownership rights in property to one another as through such transactions as buying, selling, exchanging, lending, letting and taking to hire.[63]

It is essential in understanding the view that Hobbes took of sovereignty to recognize that while he affirmed the absolutism and exclusivity of the authority belonging to the sovereign power, he did not consider that the sovereign held and exercised arbitrary power. For, as Hobbes explained the matter, the sovereign power in commonwealths was not a natural person, but an artificial person possessing representative status and capacities. Hence the rights and powers pertaining to the sovereign were rights and powers which were based in and exercised through offices, and which, as official rights and powers, were limited through the condition of their being directed towards the proper concerns of government and public administration. The structure of government and public administration that Hobbes saw as giving institutional embodiment to the sovereign power was comprehensive, and the extent of it reflected the extent of the absolute and exclusive jurisdiction which he associated with the rights of sovereignty.

This is well brought out in Chapter 23 of *Leviathan*, where Hobbes discussed the function of public ministers, considered as officials who acted for the sovereign power in the administration of public business in commonwealths, rather than as who acted for the bearers of the sovereign power in their private standing as natural persons. In this context, Hobbes presented the structure of government and public administration through which the sovereign power in commonwealths was organized as extending to offices of general administration, such as those of Protectors, Viceroys and Governors, and to offices responsible for specialized areas of administrative direction, such as economic affairs, the military establishment and the instruction of the people. In addition, there were the officials who exercised the rights of adjudication pertaining to the sovereign power, which officials were of the status of public ministers. So also did Hobbes view as public ministers the officials who acted for the sovereign power in the execution of judicial determinations, the publication of the lawful commands of the sovereign power,

the suppression of disorder, the arrest and imprisonment of malefactors, and the representation of the sovereign in foreign states through embassies.[64] The official, or public, status that Hobbes assigned to the persons who acted for the sovereign power is of critical importance. For there is here underlined not only how Hobbes thought of the sovereign power as a non-arbitrary power, for the reason that it was a power embodied in, and hence limited through, offices. In a stronger sense, there is underlined in this how, for Hobbes, the sovereign power was to be thought of as being subject to such limitations as were appropriate to it as a power which was based in law, and which had as its object the maintenance of the rule of law.

1.5 The rule of law: civil law, crime and punishment

The connection that Hobbes saw as holding as between the rule of law and the principles of sovereignty was fundamental. For, as Hobbes presented the matter, the sovereign power in commonwealths stood as a construct which was established and validated through law. He likewise presented the rights of sovereignty as including those, such as the right of law-making, the right of adjudication and the rights to do with executive functions, which concerned the determining and enforcement of law as the basis for the regulation of the subjects of commonwealths. Beyond this, the rule of law was something that, for Hobbes, lay at the foundations of the form of association specific to commonwealths as subject to a sovereign power. Thus it was the rule of law that men were directed to establish, as under the terms of the laws of nature. Specifically, the terms of the laws of nature were such as to provide that men were to submit to some system of laws based in the power of the sovereign, where submission to the rule of law was understood to be a precondition for men having their rights and security guaranteed to them in circumstances of peace and in accordance with determinate principles of justice and propriety. Yet further, there is the consideration that the laws of nature stated certain principles of justice and political morality that stand among the essential principles of form and substance relating to the rule of law. The general principles of legal order at issue here, as Hobbes pointed to them, were such as to link together the rule of law and the basic considerations of justice, as in line with what, in discussion of Aquinas, we identified as central to the direction of natural law theorizing. At the same time, these were principles of legal order that served to describe the institutional framework through which the rights and powers of sovereignty were to be exercised, and through

which in consequence the sovereign rights and powers were to be rendered subject to law and to the constraints and limitations as imposed through the rule of law.

There is little difficulty in identifying the general principles of legal order contained in the laws of nature that Hobbes stipulated. For the principles concerned are everywhere presupposed in the detailed specification that Hobbes provided of the form of legal regulation which he saw as particular to commonwealths. To bring this out, it is necessary only to review the laws of nature as stated in Chapters 14 and 15 of *Leviathan*. The first law of nature enshrined the right of self-defence as a right of war, and with this being a right that Hobbes thought of as standing in opposition to the limitations on conduct which were to be set through law. However, there was also affirmed in the first law of nature the duty falling on men to endeavour peace, and the duty to act for peace plainly relates to the rule of law as being among its presupposed general principles. The same is true of the principle contained in the second law of nature. Thus the requirement laid on men, under the terms of this law, to reciprocate in the setting aside of the right to defend themselves through means of war stands as a precondition for the entering by men into fully legal relations.

As for the third law of nature as the law stipulating that men were to fulfil covenants made in good faith, this underlined the faith of agreements as a substantive principle of justice that is fundamental for the rule of law and, in doing so, there was pointed to the centrality for law of the various principles which are associated with the core principle of good faith. Thus it was here confirmed that the rule of law was to give proper effect to the defining principles of contract and promissory obligation, such as the principle that men were to be able to set the terms for their legal relations on a voluntary basis. Related to the second and third laws of nature, there are the cases of the fourth law of nature specifying the duty of gratitude, the fifth law of nature requiring men to reach mutual accommodations, and the sixth law of nature requiring men to pardon the offences of others. For the laws of nature, as here referred to, stated general principles of good faith in conduct which, for Hobbes, were to be thought of as working to establish stable foundations for the association among men under the rule of law.

Moving beyond this, there is the seventh law of nature that provided that punishments were to be inflicted only relative to a prospective good. The general principle stated here was a principle of punishment, and one that served to distinguish punishment according to law from acts of gratuitous injury. The eighth law of nature requiring that men

were to refrain from contumely underlined that the rule of law was to promote mutual respect among men, as, say, through the provision of effective legal rules which prohibited libel and slander. The ninth law of nature, as requiring that men were to be recognized in their natural equality, and the tenth law of nature, as requiring equality in rights among men, went together in their common recognition of the general principle of legal order as to the formal equality of persons as subject to the rule of law. Likewise, there is the principle of equity affirmed in the eleventh law of nature, as a principle providing for equality of treatment for affected parties in the settlement of disputes and in the allocation of benefits and advantages. For the principle of equity, as Hobbes here stated it, clearly presents itself as a general principle of law and of the justice essential to it.

The twelfth, thirteenth and fourteenth laws of nature, as concerned the disposition of things coming under rights of use and ownership, related to basic principles of property such as belong to the rule of law as a normative framework applying to men within political society. The fifteenth, sixteenth, seventeenth, eighteenth and nineteenth laws of nature stated general principles relating to procedures for the peaceful resolution of disputes, which principles stood also as principles governing adjudication as a formal procedure based in, and necessary for, the rule of law. Thus there was here stated, as in the sixteenth law of nature, the fundamental principle of the rule of law that men were required to settle their disputes through submission to independent judgment and arbitration. In addition, there were the principles stated in the seventeenth and eighteenth laws of nature, as principles relating to the basis of justice in adjudication and hence to the basis of the integrity and independence of adjudicative procedures: the principle that no man was to be judge in his own cause, and the principle that no man was to act as judge of a dispute where he had some interest in its outcome.

The laws of nature, in Hobbes's specification of them, were the laws of peace, and it is as principles of peace that the principles of legal order as expressed in the natural law are most appropriately to be regarded. As we have seen, the laws of nature were thought of by Hobbes as laws where the general principles that they stated were to be given effect to only in circumstances in which there existed a coercive power sufficient to bring men to comply with their requirements. The power necessary to ensure compliance with the laws of nature was, for Hobbes, the sovereign power, and with the proper circumstantial setting for this being the condition of society obtaining among men within commonwealths. In the event, it is to be emphasized that, as Hobbes explained the matter,

it was the rule of law, as the form of legal regulation maintained in commonwealths, that he saw as embodying the determinate institutional structure within which sovereign power was to be exercised, so as to ensure conformity with the terms of peace as these were given in the laws of nature. In other words, it was through the institution of the rule of law that the sovereign power was to act, up to and including the application of coercive force against subjects, in order to achieve the full realization of the ends of peace among men. Thus it was that Hobbes presented the sovereign power as being limited to the extent implicit in the conditions where, as in accordance with the ideal of the rule of law, it was law which was to set the framework institutional context for the rights of sovereignty and their exercise. The rule of law in commonwealths, in Hobbes's elaboration of it, comprehended the principles relating to the civil law as the law specific to commonwealths, the principles relating to crime and penal sanctions, and the principles relating to punishment as the primary law-based context for the direct application to subjects of the coercive power which belonged to the sovereign. These matters Hobbes addressed in Chapters 26–28 of *Leviathan*.

According to Hobbes, the civil law was the law established in commonwealths through the agency of the sovereign power, and so it was law that was binding on men through their membership of commonwealths. In order to explain the attributes of civil laws, Hobbes adopted a quite specific model of law, and with this being the model of law as consisting in the commands issued by a law-maker. In line with this model, Hobbes presented civil law as the commands issued by the sovereign power. The command view of law was such that through appeal to it, Hobbes was able to identify the defining characteristics of law in general and those of civil law in particular. So, for example, the view of law as commands was such as to underline that law possessed a binding normative force for its subjects, where this was formally independent of any prospect of benefit or advantage for them. Again, the command view of law was such as to underline that law was based in some antecedent right or authority to prescribe it as vested in the person of its maker, and that law involved a duty of compliance for its subjects which derived from a general obligation owed by subjects to the law-maker. It was by reference to these characteristics of laws conceived of as commands that Hobbes distinguished commands from counsel. For, as he argued, counsel in contrast to command was directed to the benefit of the addressee, and counsel gave rise to no obligation to follow it and so was by definition incapable of involving a right to counsel.[65] Thus Hobbes provided a

general specification of civil law as follows:

> And first it is manifest, that law in general, is not counsel, but command; nor a command of any man to any man; but only of him, whose command is addressed to one formerly obliged to obey him. And as for civil law, it addeth only the name of the person commanding, which is *persona civitatis*, the person of the commonwealth.
>
> Which considered, I define civil law in this manner. CIVIL LAW, *is to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right, and wrong; that is to say, of what is contrary, and what is not contrary to the rule*.[66]

The civil law being for Hobbes the law established in commonwealths, it followed that he saw the legislative authority in commonwealths as belonging only to the sovereign power. Thus Hobbes maintained that the sovereign power held the exclusive right to prescribe, or command, the laws obtaining in commonwealths, in addition to the exclusive right to abrogate the same.[67] In consequence of the sovereign power bearing authority in relation to law on this exclusive basis, the sovereign power was in its legislative capacity to be considered free from legal constraint and limitation in the respect of its being free from subjection to civil laws. This freedom of the sovereign power from subjection to civil laws was, in Hobbes's terms, bound up as a matter of jurisprudential logic with what he understood to be the absolutism of the right of legislation as a right of sovereignty. For, as he emphasized, the sovereign power held the right to make, and to repeal, the civil laws entirely at its own will and discretion, and with the freedom implicit in this right being such as formally to exclude the possibility of the civil laws having application to the sovereign power in terms of principles of subjection or obligation.[68]

Not only was the sovereign power presented by Hobbes as the exclusive legislative authority in commonwealths, but he insisted that the sovereign power was the ultimate ground of validation for all laws obtaining in commonwealths and irrespective of the manner of their generation. Thus in circumstances where civil laws were established as customary laws through long use, the authority of the laws derived not from long use as such but from the consent of the sovereign power, as this was expressed through the silence of the sovereign power.[69] In like manner, as Hobbes argued, the laws based in the customs of the local provinces of commonwealths owed their authority not to prescription

of time and long use, but rather to the sovereign power as it was presently constituted.[70]

For Hobbes, as we have explained, the natural law was bound up with the law maintained in commonwealths in that the terms of the natural law directed men to establish the form of legal regulation specific to commonwealths, and with this form of legal regulation serving to give effect to the principles of peace stated in the natural law through the supplementing of them with the coercive power of the sovereign. In Chapter 26 of *Leviathan*, Hobbes confirmed this position through his claim that the natural law and the civil law obtaining in commonwealths contained each other. Thus the laws of nature acquired the character of laws proper only in the condition of commonwealths, where the principles of natural law stood as commands having the status of civil laws and having the sanction of the sovereign power such as to ensure the obedience of men to their substantive requirements. If the laws of nature were, in this sense, an integral part of the civil law systems established in commonwealths, it was also the case, as Hobbes brought out, that civil law was something founded integrally in the laws of nature. For the basis of civil law, and of the duty of obedience to civil law, lay in the covenants instituting commonwealths, and so it lay also in the provisions of natural law as these required men to act to fulfil their covenants made. Hence civil law and natural law were directly linked to each other as forms of normative regulation. This connection Hobbes pointed to through insisting that civil law and natural law were not different kinds of law but rather different parts of law, and with civil law being written law and natural law being the unwritten law. As if to underline the connection between civil law and natural law, Hobbes emphasized also that the civil law did not contain the right of nature, but was in fact opposed to it. For the civil law was a matter of obligation not of right, and so was intended to impose restrictions on the liberty of men such as was implicit in natural right.[71]

While Hobbes affirmed the continuity between natural law and civil law, there nevertheless remained, in his account of it, certain quite crucial distinctions between them as different parts of law. Thus the law of nature was law that was universal and unchanging, and determined as such by men through the exercise of their natural reason. The civil law, in contrast, pertained to what Hobbes identified as the sphere of positive law. This meant, in Hobbes's terms, that the civil law was not universal and unchanging but particular to the condition of commonwealths, and that it was not law based in natural reason but law that was made, or posited, through the will of an author having sovereign power, and with the author of it as civil law being the sovereign power in commonwealths.[72]

In accordance with the status of civil law as law thus pertaining to the sphere of positive law, Hobbes maintained that it was essential to civil law that it was to be capable of being made known to the persons to whom it applied through there being an adequate declaration of the will of the sovereign power which commanded it. For, as Hobbes put it, law that was made failed as law if it was not also made known, and so, in the condition of commonwealths, the laws that were there commanded were to stand as laws only for such persons as had the means to take notice of them.[73]

Laws that were unwritten, but that were binding for all subjects of commonwealths without exception, were to be counted as laws of nature, and the laws of nature, for Hobbes, required no specific act of declaration given that their foundation lay in universal principles of natural reason.[74] With laws other than the laws of nature, however, there was the requirement that these laws were to be made known to the persons who were subject to an obligation to obey them. Thus in the case of civil laws, it was necessary that these were to be declared through word or through writing, or declared through some other form of act, where this would indicate that they were based in the authority of the sovereign power.[75] In Hobbes's view, it was not sufficient that the laws laid down in commonwealths were declared by such means as writing and publication. In addition, there was need for manifest and adequate signs to establish that the laws applying in commonwealths did, in fact, proceed from the will of the sovereign power as their author. This demanded the presence of means and procedures not for establishing the authority of the sovereign as such, but rather for the verification of the specific lawful authorities which derived from the sovereign. So, for example, the subjects of commonwealths were to consult the public registers, in order to determine what stood as declared law, and also to inspect the relevant public warrants in order to determine the authority of public officials.[76]

Hobbes emphasized one further essential characteristic of the law maintained in commonwealths, and distinct from the conditions relating to its declaration and verification. This was that law required some authentic interpretation of its meaning, if it was to have binding application in regard to subjects. For Hobbes, the interpretation of laws depended on the sovereign power, and so it was to be conducted by persons who acted with the authority of the sovereign power. There was, in this matter, no distinction between the unwritten laws of nature and the civil laws as laid down in the written sources, since, as Hobbes insisted, all law stood in need of authentic interpretation. In the condition of commonwealths, the authentic interpretation of the laws was not that provided by writers learned in the law. For the key consideration relating

to authenticity in the interpretation of law was not reasonableness in interpretation, but the authority of the sovereign power by whose command the law was made and validated. Accordingly, the authentic interpretation of laws in commonwealths was the responsibility of the judges, as the officials appointed by the sovereign to exercise the rights of judicature and to decide the controversies which related to the laws. The office of adjudication, as Hobbes explained it, required that judges were to proceed through the reasoned application of the natural law, and with this meaning, in particular, that the laws obtaining in commonwealths were to be interpreted and applied by judges with the assumption that the intention of the sovereign as the author of the laws was always to maintain equity. Thus it was that Hobbes included among what he saw as the qualities making for competence in judges, and in those interpreting the laws, the quality of the right understanding of equity considered as one of the principal parts of the laws of nature.[77]

The civil laws were thought of by Hobbes as stating the rules of just conduct that were to be followed by the subjects of commonwealths. Hence the civil laws, for Hobbes, were such that the breaches of the rules of just conduct that they stated were to be counted as having the formal status of crimes, and with crimes being specific to the condition of commonwealths since involving acts in violation of civil laws. Hobbes addressed the subject of crimes in Chapter 27 of *Leviathan*. A major part of his concern here lay with the principles of criminal responsibility, and, more particularly, with the principles relating to excuses which served to qualify the attribution of criminal responsibility. So, for example, Hobbes held that ignorance of the laws of nature was always inadmissible as an excuse for criminal misconduct, although ignorance of civil law was to be admitted as an excuse in circumstances where the law was insufficiently declared. At the same time, there was no excuse for crimes lying in ignorance of the sovereign power, or in ignorance of the prescribed penalties. Even so, Hobbes allowed that where penalties were expressly laid down in law for specific crimes, then it was not permissible for more severe penalties to be imposed.[78] Just as Hobbes in this excluded the retroactive determination of penalties for crimes, so he absolutely excluded from consideration the *ex post facto* attribution of criminal responsibility in respect of positive law. Thus he insisted that nothing was capable of being made a crime under a law enacted after the fact.

> No law, made after a fact done, can make it a crime: because if the fact be against the law of nature, the law was before the fact; and a positive

> law cannot be taken notice of, before it be made; and therefore cannot be obligatory.[79]

The acts that Hobbes discussed as falling within the sphere of substantive crimes under civil law were acts that were destructive of peace, and that, as such, stood as acts whose prohibition was implicit in the terms of the laws of nature. However, the acts that were criminal according to civil law were, for Hobbes, distinct from bare offences against the laws of nature. For in contrast to those acts offending only against natural law, crimes had the public aspect that belonged to them as acts prohibited under civil laws, and where the terms of prohibition accorded with the defining ends of the form of association maintained in commonwealths.

The public status that Hobbes assigned to crimes is reflected in his insistence that acts that involved hostility against the authority of the commonwealth, and against that of the sovereign power, were crimes of a greater seriousness than crimes perpetrated against private persons. This was true for example of treason and attacks on the person of the sovereign, bribery and false testimony, and counterfeiting of the currency. Such crimes were essentially public in character, and while contrary to natural law since subversive of the integrity of commonwealths as the condition for peace, they were nevertheless crimes which presupposed for their determination the context of commonwealths instituted through covenanting. The criminal acts directed at private individuals were also acts that stood in contravention of natural law, given that these were acts that undermined the security of persons and personal rights. Hence the principal crimes against private individuals that Hobbes cited were unlawful killing, mutilations and personal injuries, theft of property, and violations of chastity. Even so, crimes perpetrated against private persons still had the standing of public crimes. For these were crimes that involved injury not only to private persons but also to the commonwealth itself, and so resulted in accusations presented both in the name of private persons and in the name of the commonwealth. Thus it was that, for Hobbes, offences against the principles of natural law were transformed, as to their status and character, when these offences came to acquire formal specification within commonwealths as crimes from the standpoint of civil law.[80]

The performing of acts of criminal misconduct by the subjects of commonwealths, as such crimes were defined in civil law, was the occasion for the application of coercive sanctions on the part of the sovereign power and in accordance with the right of punishment. As Hobbes

specified it, the right of punishment was a core right of sovereignty in commonwealths. For the inflicting of punishment on subjects for breaches of law, as in the applying of coercive sanctions, was, in Hobbes's account of it, the principal form in which the power of the sovereign was brought to bear in order to secure the compliance of subjects with the requirements set in civil law, and so also their compliance with the more abstract requirements of peace as embodied in the laws of nature. Hence it was the right of punishment that ensured that the form of association particular to commonwealths provided for the means of power for the giving of effect to the laws of nature, and this such as Hobbes considered to be essential if there was to be a real and enforceable obligation falling on men to act in conformity with the principles of peace contained in natural law.

To understand the significance, for Hobbes, of the right of punishment, it is necessary to recognize three features of the right that are everywhere underlined in his discussion of it, as this comes in Chapter 28 of *Leviathan*. First, the right of punishment was presented by Hobbes as a right where sanctions were imposed by the sovereign power that involved the application to men of some harm or evil, and with the application of this taking place for some violation of law and being directed towards the end of promoting compliance with law. Thus did Hobbes define punishment.

> A PUNISHMENT, *is an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience*.[81]

Second, Hobbes saw the right of punishment as a public right, and the exercise of the right as a public act. Thus the right belonged to the sovereign power as an exclusive right, and in consequence of the covenant through which commonwealths were instituted. The right of punishment was not, as such, granted to the sovereign by subjects through covenant. For the right involved the right to inflict harm and evil, and, for Hobbes, there could be no binding covenant by which men relinquished their right to defend themselves against harm and evil done or threatened to their person. As Hobbes explained it, the origin and foundation of the right of punishment lay in the natural right of men to adopt the means of war for their own defence and preservation. Here, the key consideration was that this right of nature was to be thought of as being set aside by those individuals who through covenant subjected

themselves to sovereign authority, but as being retained by the bearer of the sovereign power and exercised as the right of punishment in the interests of subjects as though in the natural state of war and hence as limited by the laws of nature. As Hobbes stated the position:

> [B]efore the institution of commonwealth, every man had a right to every thing, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of punishing, which is exercised in every commonwealth. For the subjects did not give the sovereign that right; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him only; and (excepting the limits set him by natural law) as entire, as in the condition of mere nature, and of war of every one against his neighbour.[82]

The third feature of the right of punishment, as Hobbes discussed it, was that it was a public right that he held was to be exercised only subject to the conditions implicit in the ideal of the rule of law. Thus, for Hobbes, punishment was a public right whose exercise by the agents of the sovereign involved not the application of arbitrary power, but rather the application of official powers in accordance with the forms of law and with the general constraints and limitations of legal order. This is underlined with the eleven principles of punishment that Hobbes laid down in Chapter 28 of *Leviathan*. These were as follows. First, acts of private revenge, or injuries caused by private men, were not punishments, since such acts did not proceed from the public authority. Second, lack of preferment by the public authorities was not punishment, there being absent here the application of some specific and additional evil as to offenders. Third, the inflicting of harm on men by the public authority without prior public condemnation according to law was an act of hostility, not an act of punishment: for the deeds of men that left them liable to punishment had first to be determined by the public authorities as constituting breaches of law. Fourth, harm done through usurped authority, or through the decisions of judges acting without the authority of the sovereign power, involved hostile acts not punishment. Fifth, there was no punishment, but only hostility, in the inflicting of harm unrelated to the intention to promote future good, as where punishment was not aimed at the correction of the offender or the deterring of others.

The sixth principle of punishment that Hobbes stated was that the harmful natural consequences of criminal acts for their perpetrators did not constitute punishment, since no human authority was engaged in causing them. Seventh, there was no punishment in circumstances where the harms occasioned in the punishing of crimes were outweighed by the benefits of the crimes for the offenders. Eighth, it was not punishment, but hostility, with such parts of penalties imposed for crimes as were in excess of those that were specifically provided for in the laws. Ninth, harms inflicted in respect of acts performed prior to there being laws prohibiting them once again involved hostility, but not punishment. For, as Hobbes explained, there was no transgression of law where no law was established, whereas the determination of acts as violations of law was necessary as the proper basis for punishments. Tenth, the sovereign power in commonwealths was not liable to punishment, and this because punishment was a right belonging to the sovereign representative, as the public authority, and hence not a right to which the sovereign was to be made subject. As an eleventh principle of punishment, Hobbes stated that subjects who were in rebellion against the authorities in commonwealths were to be subdued by the sovereign power in accordance with the right of war, rather than the right of punishment.[83]

It is clear from this how the different principles of punishment bring out that, for Hobbes, the right of punishment related to the exercise of public powers, while remaining free from arbitrariness through its being a right which was subject to legal constraints and limitations. So, for example, the public character of the powers involved in the right of punishment, as a right belonging to the public authorities, was underlined in what Hobbes gave as the principle that punishment was distinct from private revenges, and in the principle that punishment was distinct from the natural evils befalling the perpetrators of crime. There was yet further underlining of the public character of the right of punishment in the principle where punishment was to be distinguished from harms inflicted by persons usurping official powers, or by judges acting without the sanction of the sovereign authority. For with this principle, the lawful authority attaching to the legitimate occupation of public office was presented by Hobbes as an essential precondition for the proper application of coercive sanctions, as through the right of punishment. As for the principle providing for the exemption of the sovereign power from punishment, this, as Hobbes explained it, points not only to how he saw the right of punishment as involving a public right. It points also to how Hobbes saw the right of punishment as a right that was exclusive to the form of public authority specific to the sovereign

power in commonwealths. Thus Hobbes here ruled out of consideration the possibility of there being a bearer of the right of punishment separate from the sovereign, and to whom the sovereign was to be considered as subordinated in respect of punishments.

That the right of punishment was for Hobbes non-arbitrary, in the sense of being subject to legal constraints and limitations, is indicated with those of the principles of punishment which, as he stated them, stand as framework principles of the rule of law as such. This is true, for example, of the principle providing that punishments were to be applied by the public authority only in respect of violations of law which were determined as such through prior public condemnation. It is true also of the principle that punishments were not to exceed the penalties as set down in law for the relevant crimes, and true again of the principle that excluded punishments for acts performed prior to the enactment of laws prohibiting them as criminal. As stipulated by Hobbes, there are here presented some of the most fundamental principles contained in the concept of the rule of law: the principle that the right of punishment is to be concerned with the enforcement of actual law, and hence that its exercise is to be restricted to occasions where criminal offences are reliably proved and demonstrated; the principle that the right of punishment is to be exercised by agents of the sovereign authority through the application of coercive sanctions against subjects only in consequence of public condemnation, and hence that the right is to be exercised only in conformity with procedures of adjudication according to law; the principle excluding laws providing for the retroactively effective designation of acts as criminal, and the principle excluding the retroactive determination and application of criminal punishments.

These principles of legal order, as Hobbes affirmed them, related not only to the limitation of punishment as a right of sovereignty. The principles were also such that, as implicit in the form of legal regulation particular to commonwealths, they served to bring more precise definition to the principles of natural law which Hobbes held were to be given effect to in commonwealths, and which, as we have seen, he held were to work to constrain and limit the sovereign power in the exercising of the right of punishment. Hobbes himself explicitly included among the principles of punishment the natural law principle that punishments were to be directed towards future good. Beyond this, however, it is to be emphasized that the principles of legal order, as relating to punishment, gave determinate form to what Hobbes stated to be the principles of natural law that provided for the equality of men as persons and in their

rights, the decision of controversies in accordance with the rule of equity, and the submission of controversies to adjudicative procedures. Thus the exclusion of punishments without prior public condemnation and punishments applied in accordance with retroactively effective laws served to remove arbitrariness from the law, and to do this such as to maintain the equality of men as subjects of law and to maintain equity in the deciding of controversies among men where punishment remained a possible outcome. At the same time, the restriction of punishment to matters settled through prior public condemnation accorded with the natural law principle which required the submission of controversies to adjudication as such. For this restriction relating to punishments went to underline that the agents of the sovereign power were themselves to be bound by independent procedures of adjudication, and particularly so in those of their dealings with the subjects of commonwealths where the applying of coercive sanctions was at issue.

Hobbes specified a variety of punishments for violations of law, and with these including capital punishment, financial penalties, imprisonment and exile.[84] The forms of punishment that Hobbes cited were all evils the inflicting of which on men involved public acts which were detrimental to their person, and their rights and liberties. However and to repeat, the acts in question possessed justification because the men to whom they were directed stood condemned for crimes under known laws, and with this rendering them liable to the application of the right of punishment as vested in the sovereign power. In other words, there was, for Hobbes, an essential connection between the right of punishment and the injustice according to law of those individuals in respect of whom the right was applied. Hence there followed what Hobbes pointed to as the fundamental principle of the law of nature, to the effect that the punishing of innocent subjects by the sovereign power was to be excluded on an unconditional basis. As Hobbes put the matter:

> All punishments of innocent subjects, be they great or little, are against the law of nature; for punishment is only for transgression of the law, and therefore there can be no punishment of the innocent. It is therefore a violation, first, of that law of nature, which forbiddeth all men, in their revenges, to look at anything but some future good: for there can arrive no good to the commonwealth, by punishing the innocent. Secondly, of that, which forbiddeth ingratitude: for seeing all sovereign power, is originally given by the consent of every one of the subjects, to the end they should as long as they are obedient, be protected thereby; the punishment of the innocent, is a

> rendering of evil for good. And thirdly, of the law that commandeth equity; that is to say, an equal distribution of justice; which in punishing the innocent is not observed.[85]

1.6 The office of sovereign

The recognition that Hobbes gave to the principles of the rule of law indicates that he thought of the sovereign power as a non-arbitrary power, for the reason that the rights of sovereignty were rights which were to be exercised only within the framework of legal order. However, the non-arbitrariness that Hobbes saw as attaching to the sovereign power as a power based in law does not alter the fact that, for Hobbes, the authority belonging to the sovereign power was to be considered as an absolute and exclusive authority. Indeed, the authority belonging to the sovereign power was absolute and exclusive precisely because it was a power that was based in, and constrained and limited through, the rule of law. For the form of legal order specific to commonwealths, as this served to base and to constrain and limit the sovereign power, was such that it presupposed for its integrity the absolutism and exclusivity of the rights of sovereignty, such as the rights of legislation, adjudication and executive enforcement, which were foundational in the establishing and maintenance of the rule of law in commonwealths.

In Hobbes's view, the absolute and exclusive authority of the sovereign power was essential for the preservation of commonwealths, and hence essential also for the effectiveness of commonwealths in the providing of adequate security for their subjects. That Hobbes thought this is underlined by the argument developed in Chapter 29 of *Leviathan*, where he treated of the factors that he saw as leading to the subverting and dissolution of commonwealths. In this matter, Hobbes emphasized that the lack of absolute power in the sovereign authorities served only to threaten commonwealths with internal disorder.[86] The integrity of commonwealths was also undermined through the influence of certain doctrines that Hobbes presented as detracting from the objective binding normative force of civil laws. These included the doctrine to the effect that the subjects of commonwealths were permitted to make private judgment as to the measure of good and evil in conduct, together with the doctrine to the effect that subjects were permitted to act wholly in accordance with the deliverances of conscience. For Hobbes, such doctrines were to be excluded as false, since they provided that subjects might disobey the civil laws and challenge the sovereign power in commonwealths.[87]

Accepting that Hobbes saw the sovereign power in commonwealths as exercising absolute and exclusive authority under law, the question presents itself as to whether, and if so in what sense, Hobbes thought of the sovereign power as being subject to duties or obligations. In regard to this question, it is to be admitted at once that Hobbes insisted that while the sovereign power was to be considered as subject to the laws of nature, the sovereign power was not to be considered as standing subject to civil law and to the form of obligations which the civil law involved. For as we have seen, the right of legislation, as an absolute and exclusive right of sovereignty within commonwealths, was something that Hobbes took to presuppose the exemption of the sovereign power from such constraints and limitations as were imposed through civil laws.[88]

If Hobbes was insistent that the sovereign power was free from subjection to civil laws, he was nevertheless prepared to allow that there were certain duties to which the sovereign power was to be thought of as being subject. He set out these duties in Chapter 30 of *Leviathan*, where he addressed the question of the charges and responsibilities relating to the office of the sovereign in commonwealths. The duties that Hobbes discussed in respect of the office of sovereign were not of the character of the enforceable obligations that he associated with the sphere of civil law. Instead, these were duties that, in Hobbes's account of them, concerned general principles of sound law and good governance that were implicit in the laws of nature, and implicit in the considerations of peace and order to which the laws of nature gave recognition. In specific terms, it was the office of the sovereign in commonwealths to secure the safety of subjects as in accordance with the provisions of the law of nature. The end of safety as here referred to involved not only the basic preservation of men, but also their enjoyment of such goods as were attainable through lawful industry and enterprise. As for the realizing of this end within commonwealths, the essential requirement, for Hobbes, was for the sovereign power to provide a general direction of civil life through proper public instruction in doctrine and example, and through the making and execution of good laws for subjects to apply in the context of their individual circumstances.[89]

The effectiveness of the sovereign power in securing the safety and preservation of men was, of course, something that Hobbes presented as being bound up with the possession and exercise by the sovereign power of the various rights of sovereignty. Thus it was that Hobbes held that it was fundamental to the office of sovereign that the sovereign power was at all times to maintain the rights of sovereignty in their entirety. This meant that it was to be considered contrary to the duty of the sovereign

for the bearer of the sovereign power to relinquish any of the defining rights of sovereignty, as through some act of transfer or repudiation. It was likewise contrary to duty for the sovereign to fail to instruct subjects in the grounds and reasons for the rights of sovereignty, such that this would encourage resistance to the sovereign power on the part of subjects.[90] So, for example, the people were to be instructed to the effect that they were to refrain from attempting to change their form of government, and to refrain from challenging and impugning the sovereign power.[91]

As to the office of the sovereign concerning the proper making and enforcement of laws, Hobbes here maintained that it was required of those bearing the sovereign power, as a condition for the safety of the people, that justice was to be administered equally among the people without regard for their wealth and degree. This requirement was based in the rule of equity contained in the laws of nature, which rule, as a principle of natural law, was binding on the bearers of sovereignty as it was binding on the subjects of the sovereign authorities. It was not against equity for the sovereign power to pardon such breaches of the law as involved offences against commonwealths. However, breaches of the law involving offences against individual subjects, considered as private men, were in equity to be pardoned only with the consent of the injured parties.[92] In addition to being bound to make an equal application of the laws, the sovereign power was bound as a requirement of office to ensure that the laws that were laid down and enforced in commonwealths had standing as good laws. This meant that the laws made on the authority of the sovereign power were to be necessary laws, in the sense of their being necessary for the good of the people. So too were the laws to be perspicuous, in the sense that their purposes were to be made as clear, and their terms to be rendered as concise, as possible.[93]

There was one final set of duties bound up with the office of sovereign rulers that Hobbes gave consideration to in Chapter 30 of *Leviathan*. These were the duties that sovereign rulers were to be thought of as owing in their office as one to another. The part of the office of sovereign rulers bearing on this set of duties is central for the concerns of the present study. For the duties at issue were duties that Hobbes saw as having application to sovereign rulers in the sphere of the mutual external relations of independent commonwealths, and hence as having direct application to the sphere of international politics. It is evident that, for Hobbes, sovereign rulers were to be regarded as being subject to duties which, as in and of themselves, were authentic duties. Also, the duties falling on sovereign rulers formed duties that Hobbes indicated were

to be considered as having a foundation in law, and hence as duties pertaining to a body of laws which were to be considered as having fully international standing and application. However, the law that, for Hobbes, was to have application to sovereign rulers in the international sphere – that is, the law of nations – was something that he held was to be thought of as consisting exclusively in the laws of nature which had application to men, as independently of the conditions of their association in political society and in subjection to sovereign authorities. The identification that Hobbes made of the law of nations with the principles of natural law was essential to the view that he took of politics in its international dimension. As we shall now see, Hobbes was led to identify the law of nations with the laws of nature as a consequence, primarily, of the specification that he gave of the situation of independent commonwealths as one of independent entities co-existing in the natural condition of society. In addition to this, we shall see that the laws of nature that Hobbes insisted were to be taken as constituting the law of nations, and hence as setting the office of sovereign rulers with respect to one another, were laws that embodied rules and principles which belong to the substance of international law.[94]

2

Natural Law, the Law of Nations and Realism in International Politics

The first principles of law, state and government that, for Hobbes, had their embodiment in the condition of commonwealths were principles which he saw as given in what he stated to be the fundamental laws of nature. At the same time, the laws of nature were presented by Hobbes as laws that applied to commonwealths in the sphere of their mutual external relations, and hence as laws which, in their international application, were to be thought of as being identical with the substance of the law of nations. In this chapter, the concern lies with the principles of natural law that Hobbes specified in their status as principles of the law of nations, and so with the view that Hobbes took of international law and of its essential constituent elements. Thus there is consideration given to the idea of the international state of nature, as the form of society holding among commonwealths in which the principles of natural law were regarded by Hobbes as having application. Also, there is detailed treatment provided of the principles that Hobbes gave expression to with his statement of the laws of nature, as these served to define what stand as the leading substantive principles of public international law. Further to this, the laws of nature that Hobbes laid down are examined as stipulating principles that relate to the internal domestic legal order of states, but where the principles concerned are nevertheless understood to possess a direct bearing on the law which applies in the international sphere. The main issue, here, is to do with the picking out by Hobbes of certain of the core principles which belong to the now current international law of human rights. Finally, it is explained how the sense of international law that is to be found present with Hobbes is something that runs counter to, and so qualifies, the standard reading of Hobbes as the representative of the realist tradition in international thought and practice.

2.1 The international state of nature

The identification that Hobbes made of the law of nations, as the laws of nature in their international application, was bound up with the view that he assumed as to the condition of the society which obtained in the sphere of the mutual co-existence of the independent commonwealths and their rulers. For Hobbes, the independent commonwealths, as represented by their rulers, were to be thought of as independent entities or persons co-existing in the specifically natural condition of society, and hence in the same condition of society where individual men were to be thought of as co-existing prior to the institution of commonwealths through covenants. The natural condition of society, as Hobbes explained it, was the state of nature, and with this being the state of war. Thus the international state of nature was distinguished as a state of war, where commonwealths and rulers, as with individual men prior to the formation of commonwealths, were understood to be seized of the natural right and liberty to act to the limits of their strength and power, and to adopt all the means of war, so as to secure the end of their defence and preservation. That Hobbes saw the international state of nature as the state of war is underlined by what he wrote, in Chapter 13 of *Leviathan*, to support his claim that the natural state of men was that of the war of all against all. For Hobbes here made explicit reference to the condition of continual war present among the commonwealths as maintained by their rulers, albeit that he emphasized that the external security arrangements of rulers supported and organized the engagements of subjects such that the relations among commonwealths were not in fact as perilous as those which held among individual men.

> But though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbours; which is a posture of war. But because they uphold thereby, the industry of their subjects; there does not follow from it, that misery, which accompanies the liberty of particular men.[1]

It is evident from this that, for Hobbes, the terms of the co-existence of commonwealths within the international state of nature were such that

commonwealths and their rulers remained confronted with the same limitations, as to the condition of their society, as he associated with the natural condition of the society of individual men. Thus the separate commonwealths were to be assumed to stand in a condition of unrelieved mutual conflict, where they were moved to attack one another from competition, so as to gain advantage, from diffidence, so as to ensure security, and from concern for glory so as to promote reputation. Then again, the separate commonwealths, in the condition of their society in the international sphere, were to be thought of as standing exempt from the form of institutional structure that Hobbes presented as obtaining in the civil state, and as contrasted with the natural state of war. Accordingly, there was no allowance made by Hobbes for the presence of a common governmental power in the international sphere, or for the defence and security of the separate commonwealths being guaranteed other than through their own individual strength and power. Likewise, there was no allowance made for the presence of a legal order in the international sphere comparable with the form of the rule of law specific to the civil state, and with this meaning that commonwealths and rulers were to be considered as being bound by no fully determined and enforceable rules of just and unjust conduct or rules relating to property.

Despite all this, it remained the view of Hobbes that, as with the situation of individual men prior to the formation of commonwealths, the separate commonwealths and their rulers were to be thought of as being subject to the laws that he took to apply within the natural condition of society, and so as pointing to the normative framework for peace whose establishing was essential for the transcending of the state of war. This body of law consisted, of course, in the laws of nature. While the natural law, for Hobbes, was defective as law as relative to the civil law, it did however stand as a framework of laws that had proper application to commonwealths and rulers, and, in this aspect, it stood as a framework of laws which was to be regarded as being identical with the law of nations. This in its essentials was the position that Hobbes took in Chapter 30 of *Leviathan*. Thus he here formally identified the law of nations with the natural law. At the same time, he affirmed that sovereign rulers had the same natural right to act to preserve the safety of commonwealths as individual men had to preserve themselves, but that sovereign rulers were nevertheless bound in conscience to conform with the normative requirements contained in the laws of nature.

> Concerning the offices of one sovereign to another, which are comprehended in that law, which is commonly called the *law of nations*,

> I need not say anything in this place; because the law of nations, and the law of nature, is the same thing. And every sovereign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring the safety of his own body. And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard of one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies; there being no court of natural justice, but in the conscience only....[2]

The laws of nature that Hobbes identified as comprising the substance of the law of nations were laws that he presented as applying indifferently to individual men and to commonwealths and rulers. Even so, there were recognized, in Hobbes's account of the matter, some quite fundamental distinctions as between the situation of individual men, in the natural condition of their society, and the situation of the separate commonwealths as these were represented by their rulers within the international state of nature. As we have noticed, one such distinction was pointed to directly by Hobbes, as when, in Chapter 13 of *Leviathan*, he emphasized that the natural condition of war obtaining among rulers did not result in the same misery as that which marked the plight of individual men in the state of nature, for the reason that the security structures set by rulers provided support and organization for the subjects of commonwealths as to their engagements. Of greater significance here, however, was the distinction assumed by Hobbes as between the different forms of personality pertaining, respectively, to individual men and to the separate commonwealths as maintained in subjection to the authority of sovereign rulers.

For Hobbes, individual men were natural persons, and, as such, they were to be thought of as being seized of the right and liberty which belonged to them by nature, and which served to define the state of their specifically natural freedom and independence. Nevertheless, there was, in Hobbes's view, no normative sanction for men to hold to their natural freedom and independence, save in circumstances where this was necessary as in reference to right of self-defence. Thus Hobbes insisted that individual men were bound by the laws of nature to seek peace, and hence to renounce the natural condition of society considered as the state of war. As for the form of this commitment to peace, this was to involve the laying aside by men of the right of war, as this right was essential to their natural freedom and independence, and their covenanting together to subject themselves to some sovereign power in the condition of the civil state.

In contrast to how Hobbes conceived of the status and situation of individual men, the separate commonwealths were understood by him not as natural persons, but as artificial persons. The form of artificial personality that belonged to commonwealths, as Hobbes explained it, was one where personality was based in an authority structure that comprised a complex of laws, and a complex of offices and institutions, which were maintained in accordance with the principle of representation. The authority structure constitutive of commonwealths was, for Hobbes, something created through covenants and, hence, something commanding a legitimacy that derived from its being an authority structure which was brought into being through the consent and agreement of those individuals subject to it. As for the organizational foundation for the authority structure, this was embodied in the rights and powers of sovereignty considered as rights and powers which were exercised by the rulers who acted to represent the person of commonwealths.

The subjection of individual men to the sovereign power, as within the authority structure specific to commonwealths, served to establish a normative order that, in Hobbes's account of it, was an order which stood as supported with the full sanction of natural law. For it was a normative order that, as based in the rights and powers of sovereignty, was required for the defence and preservation of men as this end was underwritten by the natural law in its status as the law of peace. At the same time, the normative order established in commonwealths was one where the laws of nature guaranteed the freedom and independence that belonged to commonwealths as artificial persons. For the laws of nature served to underwrite the rights and powers of sovereign rulers that Hobbes saw as basing the freedom and independence of commonwealths, and that he claimed were never to be relinquished by rulers except in violation of the defining office of sovereigns. So it was that Hobbes excluded covenants among commonwealths to establish a common governmental power on the international plane, and this even though he insisted that it was only through covenants to institute sovereign authorities, as within commonwealths, that individual men would be able to give effect to the laws of nature and to the terms of peace which the laws of nature stipulated.

The sovereign rights and powers that Hobbes took to belong to the rulers of commonwealths, and to define the terms of the freedom and independence of commonwealths, were rights and powers that, as we saw in Chapter 1, formed a jurisdictional authority which stood as an absolute and exclusive authority. Thus, for Hobbes, the rights and powers of sovereignty that set the jurisdictional authority exercised within commonwealths were monopoly rights and powers, since also absolute and

exclusive rights and powers, and this both with respect to the subjects of commonwealths and with respect to all authorities which remained external to commonwealths. As an authority based in the rights and powers of sovereignty, the jurisdictional authority exercised through commonwealths involved a form of jurisdiction that was established, and determined, through law and through offices and institutions which related to the maintenance of the rule of law and to the maintenance of government and public administration according to law. Essential to this jurisdictional authority, of course, were the right of legislation, the right of adjudication and the rights relating to law at the level of its execution and enforcement. Also essential were the general executive rights, such as the appointment of public officials, the rights of peace, such as the rights of embassies and alliances, and the rights of war, such as the right to maintain armed forces and to initiate hostilities against other commonwealths for the purposes of self-defence.

The various rights and powers of sovereignty that Hobbes identified did not serve only to establish the absolutism and exclusivity of the form of jurisdictional authority exercised through commonwealths, and through this establish the foundation for the freedom and independence of commonwealths as the bearers of artificial personality. In addition, the rights and powers of sovereignty served to define the position of the commonwealths as artificial persons within the sphere of international politics. This was so both regarding commonwealths in their relations with one another, and regarding commonwealths in respect of the law which was to be thought of as having application to them in the international order. Here, as we argue, Hobbes was entirely in line with the general development of international law. For with the specification that he made of the rights and powers of sovereignty, as basing the jurisdictional authority of commonwealths and as setting the terms of their freedom and independence, Hobbes gave effective recognition to what are now accepted in international law as the essential elements of statehood and of the form of legal personality pertaining to states. Of particular relevance, in this connection, are such aspects of the position of states under international law as those of sovereign equality, political independence, territorial and personal authority, rights of self-defence, freedom from intervention by outside powers in respect of internal affairs and territorial jurisdiction.[3]

It is important to note that the sovereign rights and powers, as Hobbes assigned them to the rulers of commonwealths, did much more than define the position of commonwealths in regard to the law applying to them within the sphere of international politics. In a stronger sense, the

rights and powers of sovereignty, as Hobbes explained the conditions for their generation and exercise within commonwealths, were such that they served to point to the presence of a basic framework of normative regulation for the relations among commonwealths as conducted within the international sphere. Thus the origin of the rights and powers of sovereignty, for Hobbes, lay in the covenants instituting commonwealths, and with this form of covenanting being an act that was understood by him to result in what, from the standpoint of the international order, involved a radical reduction in the incidence of conflict and antagonism among individual men. For the form of covenanting concerned with the establishing of commonwealths was such that it rendered men subject to authoritative institutions of law and government, where these institutions gave effect to the terms of peace which were embodied in the natural law.

Further, there is the consideration that the rights and powers of sovereignty, as conferred on the rulers of commonwealths through covenanting, stood as monopoly rights and powers. Hence the establishing of commonwealths meant that the international sphere was distinguished by the existence of determinate forms of legal order, and where the basis of these was understood to be given in such of the rights and powers of sovereignty which concerned the making and enforcement of laws. As to the actual substance of the monopoly rights and powers of sovereign rulers specified by Hobbes, it is to be observed that some in fact had as their substantive subject-matter the relations between the separate commonwealths, as with, for example, the authorization of ambassadors to represent the interests of commonwealths. Central among these sovereign rights and powers was the right belonging to rulers to wage war for the ends of self-defence. The right of war, for Hobbes, was fundamental. Thus it was essential to the covenant that Hobbes saw as establishing commonwealths that it involved the laying aside by individual men of the natural right to wage war in their own defence, and in favour of the representative person of the sovereign ruler exercising the right on their behalf on an exclusive basis, and hence also on a monopoly basis. The monopoly status of the right of war carried with it the consequence that, within the international sphere, the waging of war was a right whose exercise was effectively restricted to the rulers of commonwealths. The restrictions on the waging of war that followed from the establishing of commonwealths were normatively significant restrictions, and it is to be concluded that, in Hobbes's account of it, these implied the introduction of some minimum form of normative order obtaining within the sphere of international politics.

There is no question that the form of normative regulation that, for Hobbes, was introduced within the international sphere through the assignment to the rulers of commonwealths of the monopoly right of war, and the other monopoly rights and powers of sovereignty, is something that is to be understood as comprising a real and substantial form of normative order. However, it is to be emphasized that this was not an adequate and fully rendered normative order, as regards the question of the organization of the external relations of commonwealths and rulers by means of law. For the rights and powers of sovereignty sufficed to establish the rule of law within commonwealths and to establish proper terms for stable external relations among commonwealths, but they nevertheless remained rights and powers which, as viewed from the perspective of the international sphere, stood as a function of natural right and hence as a manifestation of the natural freedom and independence of the commonwealths.

Here, it is to be recalled that, for Hobbes, rights and powers involved considerations to do with freedom or liberty in acting, where liberty to act was at all times to be opposed to principles of law and obligation. Accordingly, the rights and powers belonging to sovereigns, as Hobbes specified them, implied the necessity of, but without as such serving to constitute, some framework of laws that would impose constraints and limitations on sovereign rulers as to their rights and powers and, through this, constraints and limitations bearing on the freedom and independence of commonwealths as such. To account for the basis of this normative framework, Hobbes had to move from the sovereign rights and powers of commonwealths, as these were a function of their natural right and liberty, and to move towards the laws of nature considered as the embodiment of the law of nations. For the laws of nature were laws, and in being so they served, in their international application, to establish principles of law and obligation which were capable of standing as impediments to the unrestricted exercise by the rulers of commonwealths of the rights and powers of sovereignty.

In the event, there remain serious difficulties with the identification that Hobbes made of the law of nations with the laws of nature. First, it is to be observed that Hobbes insisted that the law of nations consisted in nothing other than natural law. In this, Hobbes would not allow for the possibility of a positive law of nations: that is, a law of nations set through the will and agreement of states and rulers. That Hobbes excluded a positive law of nations is significant, and problematic, for the reason that he here implied an absolute opposition between international law, as the sphere of natural law, and civil law as pertaining to the

sphere of positive law, and with this also an absolute opposition between the condition of international society and that of the civil state. Second, the position that Hobbes took regarding the law of nations was one where it was implied that the law of nations, as natural law applied to commonwealths and rulers, was law flawed through an inherent imperfection, in the respect that it was law that gave rise to no duties and obligations for its subjects which carried a binding normative force as to effect. For the laws of nature were laws that remained unsupported by any machinery of coercive power sufficient to ensure actual compliance with their terms, and, for Hobbes, the coercive machinery essential to perfect the obligations contained in natural law was present only in the condition of society to be found in commonwealths based in sovereign authorities. Third, there is the difficulty that Hobbes did not distinguish adequately between the laws of nature, as these applied to individual men, and the laws of nature in their application to states and rulers. Accordingly, Hobbes fell short of a specification of the principles of the law of nations based in a differentiation of the law of nature as law modified to conform with, and to answer to, the defining status and condition of states and rulers. This limitation of the treatment Hobbes provided of the law of nations was one where, as we shall see in Chapter 3, there was the greatest contrast between Hobbes (and Pufendorf) and the leading eighteenth-century natural law jurists Wolff and Vattel.

2.2 The elements of the law of nations

The laws of nature, for Hobbes, were the laws of peace, and, in their international application, the laws of nature were understood by him to state the terms of peaceful association appropriate for the defence and security of the separate commonwealths, just as they stated the terms of peaceful association appropriate for the defence and security of individual men within the condition of society present in commonwealths. When the laws of nature that Hobbes specified are considered in their status as laws applying to states and rulers, then it is evident that they form what is intelligible as a framework for international peace and hence also as a framework for international law. It is as component parts of such a complex normative framework that the laws of nature will now be reviewed. In this review, it is brought out how certain of the laws of nature served to lay down general principles of conduct that, in their international dimension, stood as principles that were essential for the establishing of a condition of society among states and governments sufficient to allow for the introduction of law as the basis for its organization. It is further

brought out how there are included among the laws of nature certain laws where Hobbes gave recognition to principles of conduct whose acceptance by states and governments is presupposed in the idea of international law, considered in its character as the law of peace. Above all, there is underlined that Hobbes specified laws of nature that enshrined principles that, as relating to the conduct of states and governments, belong centrally to the substance of the law of nations. As we indicated in the Introduction, these are principles that are foundational to the system of international law of the era of the United Nations and principles that are affirmed as such in the relevant source materials for the law, including, most notably, the Charter of the United Nations (1945) and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970).

Of the laws of nature that Hobbes set out in *Leviathan*, the first law of nature laid down a general principle that is plainly essential to the idea of international law as the law providing for peace among states and governments. Thus the first law of nature stipulated that the primary duty falling on men was the duty to endeavour peace. This duty, for Hobbes, was the primary duty, and it is through reference to it that the principles set out in the other laws of nature that he stated are to be explained, as with those relating to the faith of agreements and to the independent adjudication of disputes. In the context of its application to the sphere of international politics, the first law of nature provided that commonwealths and their rulers were to remain subject to the basic duty to act for peace, and with this standing as what Hobbes is to be read as having thought of as being the first principle of the law of nations. The basic duty or obligation of endeavouring peace is one that lies presupposed at the foundations of international law. For the possibility of international law, as law applying to states and governments, must presuppose the preparedness of states and governments to act for peace, and to maintain the peace once it is established. The foundational status of the duty on states and governments to endeavour peace is fully recognized in the now current system of international law, as is evident with the general principle to the effect that states are required to establish their relations, and to settle their disputes, through law rather than through the application of force and power. So, for example, the threat or the use of force by states against one another, as in matters to do with their territorial integrity and political independence, is expressly prohibited under the terms of Article 2, paragraph 4 of the Charter of the United Nations.[4]

As we have seen, the first law of nature did more than state that men were subject to the duty to endeavour peace. In addition to this, it was

provided that in conditions where there was no prospect of peace, then men were at liberty to exercise their natural right to defend and preserve themselves with all the means of war. Of course, for Hobbes, the natural right of men to wage war, to ensure their own defence and preservation, was not an unconditional right. For it was a right that Hobbes saw as qualified by the obligation falling on men to conform with the principles of peace contained in the laws of nature, and with these being the principles that he presented as setting the normative framework within which men were in fact best able to secure their defence and preservation. Despite this, the right of self-defence, as involving the means of war, was understood by Hobbes to stand as a residual and inalienable right, and one that it was always permissible for men to exercise in circumstances where peace was unobtainable and their security remained imperilled under conditions of war.

The right of self-defence that was enshrined by Hobbes in the first law of nature is a right that possesses a clear application to the sphere of international politics. For if the first law of nature in its international aspect is to be interpreted as stipulating that the endeavouring of peace stood as the primary duty of commonwealths and their rulers, so also is it to be interpreted as stipulating that commonwealths and rulers were guaranteed the right to resort to war in order to maintain their defence and preservation. To be sure, the terms of the first law of nature, for Hobbes, were such that the right of self-defence that belonged to commonwealths and rulers was framed by the duty falling on them to act for peace. Accordingly, it was a right that was to be exercised only where there was no prospect of peace, and hence where the endeavouring of peace would detract from the defence and preservation of commonwealths and rulers. Nevertheless, the right of self-defence remained a fundamental right belonging to commonwealths and rulers, and its possession and exercise by them as a right of war underlines how commonwealths and rulers were thought of by Hobbes as standing to one another in the specifically natural condition of society. The right of self-defence, as the basic justification available to states for the resort to war, ranks among the foundational substantive principles of international law. This is so with respect to the tradition of the law of nations before Hobbes wrote, and also with respect to the tradition in the form in which it developed after him. Thus the principle of self-defence has occupied a privileged position in modern international law, and this not least so with the international law of the era of the United Nations. In evidence for this, there is Article 51 of the Charter of the United Nations, where it is recognized that states have an inherent right to act individually or on a collective basis in the defence of themselves against armed attack.[5]

The first law of nature that Hobbes stated in *Leviathan* provided that men, and so also by implication commonwealths and rulers, were to endeavour peace. With the second law of nature, Hobbes affirmed that if men were to act for peace, then it was essential that they were to accept mutually binding constraints and limitations on their natural freedom. Thus the law provided that men were to lay down their natural right to all things, as this was consistent with their defence and security, and to remain content with as much liberty for themselves as they would allow to others. In its application to the sphere of international politics, the second law of nature required that commonwealths and rulers were to lay aside their natural right to freedom (subject to the legitimate rights of self-defence), and to allow rights and liberties to one another on the basis of equal extent.

The terms of the second law of nature, in its status as a law applying to commonwealths and rulers, were such as to involve an appeal on Hobbes's part to a further principle which is presupposed as a foundational principle of international law. This is the principle of reciprocity. Thus the second law of nature, in its international application, implied that commonwealths and rulers were to reserve rights and liberties to themselves in accordance with a proper standard of reciprocity, and that there was to be proper reciprocity as between commonwealths and rulers in the matter of the constraints and limitations which they accepted as regards their rights and liberties. The principle of reciprocity, as here referred to, is clearly presupposed in international law: for international law is law governing the relations among states that are assumed to be equals in their personality under law, and equals also in respect of their rights and liberties as defined in law and in respect of the restrictions placed on these through law. It is evident that the idea of reciprocity is something that Hobbes thought of as being essential to the laws of nature that set the framework for peace, as these applied both to men and to states and rulers. This is so not only from the terms of the second law of nature. It is so also in regard to those of the laws of nature that provided for the equality and equal recognition of the subjects of the laws, which laws, as we shall see, served to underline in their international aspect a general principle that is closely bound up with the principle of reciprocity: namely, the principle of the sovereignty and equality of states.[6]

The third law of nature laid down in *Leviathan* enshrined a substantive principle as integral to international law as the principles of peace and self-defence that Hobbes affirmed with the first law of nature. The principle stated in the third law of nature was the principle of justice to the effect that covenants made were to be performed by the parties to them in

good faith. The application of the third law of nature to relations among commonwealths and rulers within the international sphere is plain. For when it is considered in its international application, the third law of nature was such that it provided that agreements as between the sovereign rulers of commonwealths were to be thought of as binding in conscience as a condition of peace (and this even though, for Hobbes, there could exist no superior power to compel sovereign rulers to the performance of covenants). It stands as a foundational principle of international law that states are to fulfil the terms of international agreements, and with the principle underlying the law of treaties as the law established through voluntary agreements as between states. The central position in international law of the principle of the faith of agreements, and essentially in the form that it was stated by Hobbes with the third law of nature, is reflected in the overridingness which is assigned in international law to the rule *pacta sunt servanda*: that is, the rule providing that treaties and like agreements are binding on the parties to them, and that they are to be performed by the parties in good faith.[7]

The fourth, fifth, sixth, seventh and eighth laws of nature that Hobbes specified in *Leviathan* are laws that, in their international application, did not so much state substantive or presupposed principles of international law, as they gave recognition to principles of conduct essential for the establishing of a condition of society among states and governments in the international sphere. The fourth law of nature provided that men, and so by implication commonwealths and their rulers, were to have proper gratitude for benefits received, and so preserve the bases of mutual benevolence, trust and assistance among themselves. The fifth law of nature was the law requiring that men, and so again by implication commonwealths and rulers, were to aim for mutual accommodations in their relations. In its international aspect, this law is to be construed as stipulating a general obligation falling on commonwealths and rulers to conduct themselves so as to maintain the condition of mutual sociability.

With the sixth, seventh and eighth laws of nature, there were stated general principles that related to the minimizing of the occasions for conflict, and to the ensuring that disputes would not prove prejudicial to peace as to their consequences. The sixth law of nature concerned facility to pardon, and, in its international application, it is to be read as providing that conditional on proper securities as to the future, then commonwealths and rulers were to pardon offences done to them and to decline to treat these as pretexts for the waging of war against the malefactors involved. The seventh law of nature concerned punishments, and it provided that in inflicting punishments for wrongs done

to them, men were to be guided not by consideration of the extent of the harm suffered, but only by consideration of the good which would follow from the act of punishment. As it applied in the international sphere, the law carried with it the implication that where commonwealths and rulers were compelled to act against, and so punish, such commonwealths and rulers as were judged delinquent, then there was present a requirement that the punishment inflicted was to be such that it remained consistent with the ends of peace and, hence, that it did not serve to perpetuate a condition of war. As for the eighth law of nature, this required that men were to refrain from the expression of hatred and contempt. In its international application, the law implied that commonwealths and rulers were to avoid gratuitously offensive behaviour, and so maintain the bases of proper respect for one another.

The principles of conduct affirmed in the fourth, fifth, sixth, seventh and eighth laws of nature stand as principles whose acceptance by states and governments must work only to render them more amenable to regulation through law. For principles such as those commending mutuality in benefits and mutual accommodation, and facility in pardoning offences and moderation in imposing sanctions, clearly serve to set the terms for the establishing of substantial bonds of society among states and governments in the international sphere, and so serve to promote real co-operation among states and governments and even, as it is now said, the interdependence of states and governments.

In the modern world, the interdependence of states and governments is recognized to be bound up with their increasing involvement, and participation, in mutual trade and commerce on the international plane. Here, it is to be emphasized that in *The Elements of Law*, Hobbes presented freedom of trade and commerce among men as a law of nature, and hence as a condition of peace, and with this law implying, in its international aspect, that states and rulers were to enter into trade and commercial relations among themselves on a non-discriminatory basis. Thus in explaining the law, Hobbes underlined the connection between trade and commerce among states and the maintenance of peace in the international sphere, through his insistence on how the refusal of states to trade with one another constituted a material cause for war.[8] The co-operation among states and governments that goes together with free trade and commerce, and with relations among them as based in mutuality of benefits and mutual accommodation and the other principles that Hobbes gave recognition to, stands as a general condition of international society whose fostering is to be understood not only as an essential basis for the rule of international law, but also as a substantive object

of international law. So, for example, it is held that states are subject to a duty to co-operate with one another in such matters as international peace and security, and the promoting of international economic order and progress, and to co-operate without discriminating among themselves on the basis of the differences in their own particular systems of political, economic and social organization.[9]

International law is a system of law that applies to relations between independent states, and, in being so, it is founded in the principle that states, as its subjects, are to be regarded as sovereign and equal. For Hobbes, as we have seen, states were by definition sovereign in their rights and powers, given that, in his explanation of their origin and justification, the separate commonwealths were established through their rulers coming to acquire the rights and powers of sovereignty. In addition, Hobbes affirmed through his statement of the principles of natural law that commonwealths were to be recognized as sovereign and, more particularly, as equals in the rights and duties belonging to them in consequence of their subjection to that body of law. This is evident from the terms of the ninth, tenth and eleventh of the laws of nature set down in *Leviathan*.

The ninth law of nature provided that men were to be counted as equals by nature, and that they were to accept one another in their natural equality. In its international application, the law implied that commonwealths and their rulers, which as for Hobbes co-existed in the natural condition of society, were to recognize one another as equals as the basis for peace. The tenth law of nature also involved reference to the idea of equality, since under its terms it was provided that men were not to reserve to themselves any rights which they were not prepared to allow as being reserved to others. The application of this law to the sphere of international politics is plain. For the law here provided that commonwealths and rulers were to be assumed as enjoying full equality in their rights, in the respect that all reservations as to rights were to be made only on the basis of strict equality. Much the same was implied through the terms of the eleventh law of nature, where Hobbes stated the core principle of equity to the effect that men entrusted to judge disputes were required to deal equally with the parties. As for the international dimension of the law, this was that commonwealths and rulers were to be treated as equals in matters concerning their rights and interests. The equality assignable to commonwealths and rulers under the ninth, tenth and eleventh laws of nature is something that, from the standpoint of Hobbes, is to be seen as a concomitant of the sovereignty of commonwealths and of the rights and powers which defined this. So it is that with these parts of the natural law, Hobbes made appeal to what stand as the

essential terms of the substantive principle of the sovereignty and equality of states, and with this ranking as the fundamental constitutional principle of international law.[10]

The final eight of the laws of nature that Hobbes stated in *Leviathan* concerned holdings by common use and by lots, procedures for the making of peace and procedures for the settlement of disputes. With these laws of nature too, there were articulated general principles that relate to international law at the level both of its presupposed foundation and of its actual substance. As regards the laws of nature concerning the matter of holdings, it is here to be emphasized that the states that are the subjects of international law stand as independent territorial entities, and, as such, exercise exclusive jurisdiction in their respective territories as an aspect of their sovereignty. In consequence of this, international law is a system of law that must, of necessity, involve the provision of rules, however primitive, for determining the basis and limits of state territory and the exclusive jurisdictional rights of states and governments with respect to it. So also must international law provide rudimentary rules for determining the basis and limits of the rights of states and governments with respect to things and subject-matters which fall outside the compass of their exclusive territorial jurisdiction. Hobbes gave implicit recognition to this dimension of international law with his statement and explanation of the twelfth, thirteenth and fourteenth laws of nature.

The twelfth law of nature provided that things that were not capable of being divided were to be enjoyed in common, if possible, and, where the quantity of the particular things in question permitted, enjoyed without restriction. The law also provided that where things were not to be made subject to common use, then they were to be allocated in proportion to the number of individuals having rightful claim to them. The thirteenth law of nature provided that with things that were neither to be divided nor to be held in common use, then the entire right to them, or, if the use was to alternate, the first possession of them, was to be determined by lot. The fourteenth law of nature laid it down that things that were not to be held in common use and not to be divided were to be regarded as being held through natural allotment, and with this meaning that they were to be considered as being held either through the right of primogeniture or through the right of first possession.

The application of the twelfth, thirteenth and fourteenth laws of nature to the law that now applies in the international sphere is not straightforward. For it is evident that with the principles determining exclusive territorial allotments as between states, the principles that have come to be recognized as applicable under international law extend

beyond the principles of primogeniture and first possession which Hobbes himself stipulated. Nevertheless, it remains the case that Hobbes was correct to imply, as he did, that the law that was to have application to states and governments in the international sphere was to provide uniform rules for determining exclusivity in the allotment of land and territory as between states and governments. Hobbes was likewise correct to imply, as again he did, that the law applying in the international sphere was to provide for rights to the common use of things which were not capable of being divided. Thus rights of this type are formally recognized in current international law, as witness, for example, the legal regime which is at present established with respect to the high seas.[11]

With the fifteenth law of nature laid down in *Leviathan*, Hobbes stipulated that men charged with the mediation of peace were to be allowed safe conduct. In its international dimension, the law implied, among other things, that it was necessary for there to be rules for determining the status and privileges of public officials, such as ambassadors and envoys, who exercised responsibilities for the maintenance of peaceful relations among states and governments. The rules that Hobbes here pointed to are rules that belong to, and whose existence is presupposed in, the part of current international law which concerns the law of embassies and the principles of diplomatic immunity. So, for example, there are the various immunities assigned to diplomatic agents in the Vienna Convention on Diplomatic Relations (1961).[12]

The sixteenth law of nature stated the principle that the parties to disputes concerning matters of fact and matters of right were to submit to the judgment of some independent arbitrator, and to bind themselves to accept his determination. The seventeenth, eighteenth and nineteenth laws of nature stated principles essential to the integrity of adjudication procedures. Among these, there was the principle that no man was to be accepted as the arbitrator in a dispute who was a party to the dispute concerned, or who had some interest in it such as would incline him to show partiality to one or other side. The laws of nature regarding the arbitration of disputes have an obvious application to the maintenance of international peace. For the principle that was affirmed by Hobbes with these laws of nature, in their international application, is the principle that states and governments are to resolve their disputes through procedures of peaceful settlement. This is a principle that is, of course, everywhere presupposed in the idea of international law as a system of law which establishes the framework for peaceful relations among states and governments, and as a system of law which remains conditional on the consent of states and governments to be bound by its substantive

norms and stipulations. At the same time, the principle that states and governments are to seek the peaceful settlement of their disputes is a principle that has received formal recognition in the source materials of current international law. Thus is the acceptance of the principle, as a foundation for international relations according to law, reflected in the great expansion in procedures for arbitration and dispute settlement which has occurred since 1945, as witness, for example, the case of the procedures relating to the International Court of Justice.[13]

It is plain that the laws of nature that we have reviewed in their status as the law of nations, as Hobbes assigned this to them, go together to comprise what, in his terms, was to stand as a proper normative framework providing for the regulation of the external relations among commonwealths and rulers in the sphere of international politics. Thus the laws of nature, in their international application, embodied principles of conduct that were essential to the establishing of the condition of society among states and governments. In addition and to repeat the point, there were specified with the laws of nature certain principles that are among the fundamental substantive principles of international law, and that, as such, comprise its core elements. These principles that Hobbes so specified are as follows: the duty falling on states to maintain the peace, and to refrain from the use of force; the right of self-defence; the faith of agreements; the sovereignty and equality of states; territorial jurisdiction; the immunities of diplomatic agents; the duty of states to submit to procedures of peaceful settlement for the resolution of their disputes. The principles of natural law that Hobbes presented as forming the elements of the law of nations stood, for him, as the law of peace, and it is clear that he is to be read as having thought of this law, in its international dimension, as setting out the general normative restrictions on conduct whose observance by commonwealths and rulers would provide for the full realization of the end of their defence and security in circumstances of peace. So it was that the laws of nature, considered as forming the law of nations, were understood to impose constraints and limitations on the exercise by commonwealths and rulers of the natural right of war, and, in so doing, to involve the introduction and presence of a framework rule of law within the international state of nature in its condition as the state of war.

2.3 Natural law, domestic legal order and individual rights

The laws of nature, in Hobbes's specification of them, have been reviewed in their international aspect as embodying the principles of

the law of nations, and, as such, as constituting the normative framework which he thought of as applying to the external relations among states and rulers. However, the laws of nature were laws that Hobbes saw as applying not only in the international sphere, but also as having application in the establishing of the terms of association among individual men in the condition of civil states and as subject to the form of domestic law and government as there obtained. Given that Hobbes specified the laws of nature as applying continuously as between the international sphere of politics and the sphere of the domestic political organization internal to states, it is essential to consider the following matter. This is how the form of domestic legal order that was to apply to individual men within commonwealths, such as Hobbes saw as being required for giving institutional effect to the principles of natural law, bore on the substance of the law which he understood was to hold in the international order. The matter here stated presents itself for consideration for the reason, among others, that the current system of international law is one that is now acknowledged as applying not only to states and governments in their mutual external relations, but also to the situation of individual men within states and to the basis of the relationship of individual men with the institutions of state government. This is true, most particularly, with respect to the international law of human rights, as this body of law has been elaborated in the era of the United Nations as in the Universal Declaration of Human Rights (1948) and in later instruments, such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (1966).[14]

The rights that stand in current international law as human rights are rights that are understood to be universal rights, in the respect that these are rights which are understood to have application to all persons without exception. So, for example, it is affirmed in Article 1 of the Universal Declaration of Human Rights that all human beings are born free and equal in their dignity and rights, in addition to their being possessed of reason and conscience. In Article 2, it is affirmed that all persons are entitled to make claim to all the basic human rights, and this without regard for such factors as, among others, those of race, colour, gender, religion, political views, nationality, property, birth, and the particularities in the legal-political status belonging to the different countries and territories. Likewise in Article 3, it is affirmed that all persons have the right to life, liberty and security, and with this right being presented at the level of generality and abstraction appropriate to the universal status pertaining to human rights as such.

As rights that are universal in their application, human rights are rights that, in principle at least, are to be claimed by men on an absolute

and unconditional basis. In consequence of this, human rights are rights that serve to qualify the assignment of absolutism and unconditionality to the sovereign rights and powers exercised by states and governments, and hence stand as rights that are to be taken as implying the presence of substantial limitations bearing on the rights and powers of states and governments. It is to be observed further that the rights pertaining to the international law of human rights fall into distinct and separate categories, and with this depending, as it would appear, on the institutional framework that is presupposed for the various rights concerned as the context for their proper realization. Here, the key consideration is to do with the institutional context for human rights that is provided by the state, and then in this context with the different state agencies, functions and powers which are required to give effect to human rights as belonging to their various categories. The distinction as between categories of human rights that is in this respect central is the one, as is pointed to in the relevant legal source materials, as between the human rights falling in the category of civil and political rights and those which fall in the category of social, economic and cultural rights.

The human rights stipulated to be fundamental civil and political rights, as scheduled in the international law of human rights, comprise the basic rights of individuals as the subjects of states. As such, the civil and political rights serve to define the essential freedoms and liberties of individuals with respect to the state authorities, and so serve also to define the proper limitations which are to apply to the substantive powers as held and exercised through the governmental institutions of states. The civil and political rights that are critical, in this connection, are the rights that are bound up with the maintenance of the rule of law, and with the principles of due process and procedural justice which are foundational to the structure of legal order. Thus the Universal Declaration of Human Rights contains the relevant stipulations as summarized as follows: the exclusion of torture, and of cruel, inhuman and degrading treatment or punishment (Article 5); the right of individuals to be recognized as having personality before the law (Article 6); the equality of individuals under the law, and hence their right to the equal protection of the laws and free from discrimination (Article 7); the right of individuals to the securing of effective remedies as through proper national tribunals, in respect of acts involving the breaching of the fundamental rights as guaranteed under the relevant state constitutions and laws (Article 8); the exclusion of arbitrary arrest, detention and exile (Article 9); the equal right of individuals to a fair and public hearing to be conducted by independent and impartial tribunals, as in the matters of

the establishing of their rights and obligations and the determination of criminal charges brought against them (Article 10); the right of individuals to the presumption of innocence in charges involving penal offences as prior to the determining of guilt in accordance with law and through proper public trial – and with this right being coupled with the exclusion of determinations of guilt for penal offences in respect of acts or omissions that did not constitute actual offences in law as at the time of their occurrence, and the exclusion of punishments for penal offences more severe than those in force at the time of the committing of the offences (Article 11).

In addition to the rights of individuals relating to the form of the rule of law maintained in the state, there are the rights belonging to the category of civil and political rights that relate to the personal rights and freedoms of individuals. As stipulated in the Universal Declaration of Human Rights, these include the following: the right to freedom of movement and residence within the borders of states (Article 13); the right to marry and to start a family, and the right to the enjoyment of proper protection for the institution of the family through society and the state (Article 16); the right to the ownership of property, and with this involving the exclusion of the arbitrary deprivation of property (Article 17); the right to freedom of thought, conscience and religion, and with this comprehending the freedom for individuals to manifest their religious and other beliefs, whether alone or in association and whether in public or in private, in such contexts as those of teaching, practice, worship and observance (Article 18); the right to freedom of opinion and expression, and with this comprehending the freedom of individuals to seek, receive and impart ideas and information through all the different media forms and without regard for borders (Article 19); the right to freedom of peaceful assembly and association (Article 20). Also, there is affirmed the right of democratic participation in the process of government, and with this requiring, among other things, that the will of the people is to constitute the basis for government and that the will of the people is to be determined through regular elections that accord with the principles of universal and equal suffrage (Article 21).[15]

The set of human rights classified as civil and political rights stand as rights that are to be claimed against the institutions of government in the state, and that, in being so claimed, serve to secure the basic freedoms and liberties of individuals in relation to state and government. However, the honouring of the rights at issue, and the securing of the freedoms and liberties that they define, would seem to be conditional primarily on the presence of constraints and limitations on the powers

of the governmental institutions of the state and on their exercise. In contrast, the human rights belonging to the category of social, economic and cultural rights are rights that involve claims that are to be made against the institutions of state and government less with respect to the securing of basic individual freedoms and liberties, than with respect to the providing for individuals of substantive benefits, services and facilities.

Hence the social, economic and cultural rights stand as rights that presuppose, for their provision, the active and interventionist exercise of political-administrative powers on the part of state and government. So also do these stand as rights that presuppose, as the condition for their complete realization, the presence of relatively advanced levels of social, economic and cultural development. As evidence for this, the Universal Declaration of Human Rights confirms the following to be included among the basic social, economic and cultural rights to which all human beings are held to be entitled: the right to social security (Article 22); the right to work, and such related rights as, for example, those to freedom of choice in employment, just and favourable work conditions, and just and favourable rates of remuneration for workers (Article 23); the right to rest and leisure (Article 24); the right to a standard of living adequate for the maintenance of health and well-being, and with this right involving claims to such substantive goods as those of food, clothing, housing and medical care and essential social services, and involving also the right to proper security in the case of such circumstances as those of unemployment, sickness, widowhood and old age (Article 25); the right to education (Article 26); the right to free participation in the cultural life of the community (Article 27).[16]

The international law of human rights of the present era is the product of a long tradition of reflection in the West as to the first principles of law, justice and political morality, and Hobbes occupies an important place within that tradition. For Hobbes was one of the major modern natural law theorists, and with the modern natural law school of theorizing being one where, as we have seen, the law of nature came to be expounded as a law which served to define the fundamental rights of men. Here it must be said, among much else, that for Hobbes, as for the other modern natural law thinkers, there was clear and explicit appeal made to the idea of rights that belonged to men by nature. In this, natural rights were understood to belong to men on an equal and universal basis, and hence to stand as rights that bore the characteristics of equality and universality which are essential to the concept of human rights as under international law. As regards the substantive form of the right

of nature in Hobbes's own particular explanation of it, this was that of the right of self-defence, and with this involving, as he specified it, the idea of the sort of rights to life, liberty and security that are given among those of the human rights possessing the highest measure of generality and abstraction. Beyond this, there is the consideration that the natural right of self-defence was treated of by Hobbes as being an inalienable right. As such, it was a right that stood as an absolute and unconditional right, and so as a right that carried with it the implication of its being a right which was to be thought of as setting limits to the power and authority of the governmental institutions of the state. The implication of the natural right of self-defence, as here referred to, is of course the implication that is to be found everywhere bound up with the as now currently elaborated schedule of universal human rights.

However, it is to be emphasized that while Hobbes saw the natural right of men to defend and preserve themselves as inalienable, and hence as absolute and unconditional, it was also a right that he took to direct that men were to enter into political society, as within the state framework, and there subordinate themselves to a sovereign power which was to be absolute and unconditional as to its own authority and defining rights. The absolutism and unconditionality of the sovereign power in the state, for Hobbes, was such that the rights of men, in their status as the subjects of commonwealths, were understood to be dependent on the sovereign power. This dependence in the matter of rights, as relative to the sovereign power, is important here. For in the form that Hobbes presented it, there was involved the clear sense of some check to, and detraction from, the sort of absolutist and unconditional status that is associated with the rights which are identified as human rights.

To be sure, there is full recognition given in the international law of human rights that the fundamental rights of men must presuppose the existence of some objective legal-political order for their proper effecting. Indeed in Article 28 of the Universal Declaration of Human Rights, it is expressly provided that all individuals are entitled to the provision of a social and international order where the basic human rights and freedoms are capable of finding their complete realization. There is also recognition that the fundamental human rights are dependent on the legal-political order that is to contain and give effect to them, in the sense that the rights in question are understood to be subject to real institutional constraints and limitations as to their exercise. Even so, the emphasis here is very much on the conditions that are to attach to the restrictions applying to human rights. Thus in Article 29 of the Universal Declaration of Human Rights, it is laid down that individuals are to be made subject to restrictions

in the exercise of their rights and freedoms only where these are determined by law. It is likewise laid down that the law-determined restrictions bearing on the rights and freedoms of individuals are to be imposed solely for the purposes of ensuring proper regard for the rights and freedoms of others, and of fulfilling the just requirements of morality, public order and general welfare which are taken to be bound up with the democratic form of society.

As for Hobbes, in contrast, the emphasis was not with the conditions to do with the limiting of rights through institutions of legal-political order, and least of all with the conditions that related to the ends of democratic society and its defining principles of justice. Rather, the emphasis was on the elaboration of what Hobbes picked out as the sovereign rights and powers belonging to the institutions of government such as were essential for the maintenance of the public peace, and hence also for the maintenance of personal security, in the context of the state. Regarding the dependence of the rights of individual men on the sovereign power in the state, this, in Hobbes's terms, was something that followed strictly from the specification of the rights of sovereignty, in relation to which individual rights were as a matter of jurisprudential logic deprived of all absolutist and unconditional status.

The dependent position of individual rights in relation to the sovereign power, as Hobbes explained this, is underlined in what he had to say about that most abstract of all rights: the right to liberty, as based in the right of nature. For Hobbes, as we have seen, the sphere of natural right was that of natural liberty, and natural liberty, in his account of it, stood opposed to such constraints and limitations on liberty as were set through law and principles of obligation. The liberty that belonged to men in consequence of the right of nature was something that Hobbes thought of as persisting within the context of political society and the state, where law and obligation as restrictions on liberty had force and application, and through this persistence as serving to define and mark out a significant sphere of civil right and freedom. Nevertheless, the liberty of men as specific to the civil state, and as comprising the liberty of the subjects of commonwealths, was identified by Hobbes as relating either to the right of self-defence or to what remained to men through the silence of laws. The right of self-defence, of course, was an inalienable right and so the liberty of subjects that it implied, as with resistance to the lawful sanctions of the sovereign power and non-self-accusation in regard to criminal charges, was absolute and unconditional. On the other hand, the liberty of subjects in commonwealths that was occasioned through the silence of laws was circumstantial, and hence dependent on

the sovereign power as to its scope and extent. For this was liberty that, in Hobbes's view, was eligible to be determined, restricted and abrogated entirely at the will and discretion of the sovereign power.

There are similar considerations to do with the dependence of the rights of individual men on the sovereign power in the discussion that Hobbes provided as to certain of the rights pertaining to the sphere of what, in the international law of human rights, are scheduled as civil and political rights. Hobbes gave full acceptance to rights of this sort, and to the freedoms relating to them, as an essential aspect of the condition of subjects within political society. So, for example, he held that the subjects of commonwealths exercised the rights that were implicit in such basic freedoms as those of freedom of domicile, commerce and family life. However, the rights at issue here were, for Hobbes, such that they remained dependent rights, since bounded and determinable by the sovereign power. This was so, in specific terms, with his treatment of the rights relating to property ownership, and the rights relating to such freedoms as freedom of opinion and expression, freedom of conscience and freedom of assembly and association.

In Hobbes's account of the matter, the ownership of property, and the rights and liberty connected with it, stood as something fundamental to the form of association among men which was specific to commonwealths. Even so, Hobbes was quite clear that the rights involved with property ownership were non-absolute and conditional relative to the sovereign power. For, as he explained, ownership rights such as were held by the subjects of commonwealths were based in the rules of propriety brought into being, and applied, through the sovereign power, with the consequence that it was for the sovereign power to set and regulate the distribution of the property holdings of subjects. Likewise, there is little sense in which Hobbes is to be read as having conceded the presence of absolute and unconditional rights in the context of freedom of thought, conscience and religion, and of freedom of opinion and expression, as running along the lines of the relevant provisions of the international law of human rights. For, as we have seen, the rights of sovereignty that Hobbes elaborated, as in Chapter 18 of *Leviathan*, were such that the expression and the imparting of opinions and doctrines among men were considered as remaining subject to the sovereign power for the purposes of their supervision. In addition, the rights of the sovereign power extended, for Hobbes, to the qualification of the claims of individual conscience, in the same way that the rights of sovereignty extended by definition to the strict public control and regulation of the religious practice and observance of subjects within commonwealths. Concerning the

right of freedom of assembly and association, the position that Hobbes took was that the subjects of commonwealths were free to form associations (or what he termed systems of peoples), but that this freedom was conditional given that such associations were at all times to be limited by the terms of civil law and by the jurisdictional rights of the sovereign power.[17]

Finally, it is to be noted, in connection with Hobbes and the matter of the as now adopted schedule of civil and political rights, that, in his account of it, there was no necessity based in natural law, or in the natural rights of men, that the sovereign powers in the state were to be exercised through the democratic form of constitution. Accordingly, Hobbes is here to be taken as standing rather at odds with the terms of what is provided for in the international law of human rights. For he did not recognize that there existed a universal requirement of right and justice that men were to have the opportunity to participate in the processes and institutions of government, as in accordance with the conventional principles of democratic participation.

In addition to civil and political rights, there is the category of human rights that are specified as social, economic and cultural rights. The situating of Hobbes in relation to the schedule of social, economic and cultural rights remains somewhat problematic. The rights in question, of course, are rights that relate to the provision of substantive services, benefits and facilities, and rights which, as such, have come to be given effect to in the institutional context of the modern welfare state. Thus there are here asserted such rights as the right to social security, the right to work, the right to rest and leisure, the right to health and well-being, the right to food, clothing, housing and medical care, the right to proper security in conditions of unemployment, sickness, widowhood and old age, and the right to education.

It is evident that the institutional fabric of the modern welfare state, as essential for the securing of the different welfare rights, involves a machinery of public administration, and an apparatus of legal regulation, which go far beyond anything that Hobbes envisaged with his own particular specification of the principles of law, state and government as embodied in the condition of commonwealths. Even so, it is to be emphasized that Hobbes elaborated the rights of sovereignty in commonwealths in terms such that there was no reason, as inherent in that elaboration, to exclude the sovereign power from acting to provide the sort of services, benefits and facilities which are the substantive subject-matter of the social, economic and cultural category of human rights. However and this is the crucial consideration, the acting by the sovereign

power to make such provisions was something that, for Hobbes, would have stood to be determined through the will and discretion of sovereigns. It was not, as is the sense with the international law of human rights, something that would have stood to be grounded and justified through appeal to the concept of universal rights which were, in principle, to be claimed and asserted as against the institutions of state government. For in Hobbes's presentation of the matter, there was no self-evident basis in natural law, and hence no universally compelling requirement of justice, that men were to enjoy rights to such things as social security, work, medical care, education and so on: any more than there was such a basis and requirement, as contained in natural law, in respect of rights to do with the process of democratic participation in government.

There is one set of rights belonging centrally to the substance of the international law of human rights to which Hobbes gave very clear recognition, and to which he unambiguously assigned the sort of standing of absolute and unconditional requirements of justice which is bound up with universal human rights. The rights in question are the ones falling in the category of civil and political rights that comprise the rights that are secured to men under the rule of law, and that are based in the principles of due process and procedural justice which are involved in the proper maintenance and enforcement of the rule of law. Hobbes everywhere affirmed the ideal of the rule of law and the procedural rights essential to this. So, for example, there is a firm commitment to the ideal of the rule of law, and by implication also to the ends of due process and procedural justice, that informs the elaboration of the duties relating to principles of sound law and good governance which, as we have explained, Hobbes saw as being associated with the office of sovereign. For Hobbes here stated that the sovereign power in commonwealths was to administer the laws equally among subjects, and so without regard for the wealth and status of subjects. It was further stated by Hobbes that the laws were to be directed towards the good of the people, and were to be clear and transparent as to their rationale. However, the key context where Hobbes affirmed the procedural rights, as presupposed in the rule of law, lay with his specification of the principles of natural law as the first principles of peaceful association among men, and with his specification of the principles of legal order that he presented as deriving from natural law and as applying in the condition of the state where men were subject to the rights of the sovereign power.

As we have seen, the international law of human rights that relates to rights under the rule of law provides for the right of men to be assigned

personality under the law, together with their right to recognition as equals under the law to which they are subject. Thus it is that Article 6 of the Universal Declaration of Human Rights states that all individuals have the right to recognition as a person before the law. Then again, Article 7 states that all individuals are equal before the law, and are entitled to the equal protection of the laws without discrimination. Turning to Hobbes, it is evident that, for him, the laws of nature enshrined principles to the effect that men were to be recognized as bearing personality under the laws. Likewise there were enshrined principles to the effect that men were equals as subjects of the laws applying to them, and were, as such, due the equal protection of the laws in matters affecting their rights. So, for example, the ninth law of nature that Hobbes stipulated in *Leviathan* provided that men were to recognize one another in their natural equality, and hence to recognize one another as equals with respect to the laws to which they were subject. The tenth law of nature provided that men were to be considered as equals with respect to the rights that they held under the laws, and hence that no reservations regarding rights were to be made for the advantage of specific individuals. Further, there was the eleventh law of nature given in *Leviathan*. This provided that in the judgment of disputes, the parties were to be dealt with by arbitrators on an equal basis, and hence that bias in the judgment of disputes involving exceptions in favour of persons was always to be excluded.

The terms of the eleventh law of nature were such as to link together the principle of equal protection under the law with the principle of impartiality as a condition for justice in adjudication. In the international law of human rights, there are, in addition to the rights relating to the equal protection of the laws, certain other rights affirmed which are concerned with access to proper procedures of adjudication and with the impartiality of the bodies charged with the application of such procedures. Thus Article 8 of the Universal Declaration of Human Rights provides that all persons are to be recognized as having the right to effective remedies through competent state tribunals, as in respect of acts involving the violation of their constitutional rights and their rights under law. Also, it is provided in Article 10 that all persons are to be considered entitled in full equality to a fair and public hearing conducted by some independent and impartial tribunal, as regarding the determination of rights and obligations and the determination of criminal charges.

In keeping with the provisions of Articles 8 and 10 of the Universal Declaration of Human Rights, there are the principles of natural law that Hobbes stipulated regarding adjudication and the integrity of adjudicative procedures. Thus the sixteenth law of nature set down in *Leviathan*

confirmed the necessity for proper arrangements to be made for the adjudication of disputes, as through its stated principle that men who were the parties to disputes were required to submit their respective claims of right for determination by independent judges. With the seventeenth law of nature, Hobbes stated the principle of natural justice to the effect that no man was to be judge in his own cause. In this, there was carried the clear implication that disputes were to be settled through adjudicative procedures which were impartial and independent. The eighteenth law of nature underlined the principle as to the impartiality and independence of the adjudication of disputes, through the statement of the additional principle of natural justice to the effect that men were never to be admitted as judges in disputes where they had an interest in the outcome. Finally, the nineteenth law of nature provided for fairness in adjudicative procedure. For it stated that in adjudication men were to give equal credit to the arguments of the different parties, and to base their judgements on the balance of the testimony furnished by independent witnesses.

The international law of human rights does not only affirm the entitlement of all persons to have access to adjudicative procedures in matters concerning their rights and obligations. There are affirmed also the basic principles of due process and procedural justice essential to adjudication. Central among these is the exclusion of the retroactive determination of criminal fault and liability. Thus it is provided in Article 11 of the Universal Declaration of Human Rights that no one is to be held guilty of any penal offence in respect of acts or omissions that did not constitute penal offences, under municipal or international law, as at the time of their occurrence. In addition to this, it is provided that no heavier punishments are to be imposed than those actually in force as at the time when the penal offences concerned were committed.

In regard to these principles of due process and procedural justice, it is again evident that Hobbes affirmed principles which now belong to the substance of international human rights law. For example, Hobbes expressly excluded the retroactive determination of criminal fault and liability with the principles of legal order that, in his presentation of them, derived from, and gave effect to, the terms of the laws of nature. Thus in connection with the principles of crime and criminal conduct, he excluded the attribution of criminal responsibility on an *ex post facto* basis, while insisting also that it was not permissible for penalties for crimes to be increased as to their severity in circumstances where the penalties concerned were themselves stipulated in standing law. Likewise, there is what he wrote in *Leviathan* with regard to the principles

relating to the institution of punishment, as with his insistence that punishments inflicted in respect of acts performed prior to the issuing of laws prohibiting them as criminal were not in fact punishments, but acts of hostility. Beyond this, it is to be observed that in stating the principles of punishment, Hobbes pointed to general considerations of justice in law and adjudication that are implied in the provisions of the international law of human rights which relate to the principles of the rule of law. Thus Hobbes held that punishments were to be inflicted only in accordance with established law, and only in consequence of some act of prior public condemnation. In addition, he strongly asserted the principle that is foundational for the rights of men in their status as the subjects of legal order: this was the principle as to the strict injustice of, and hence the strict impermissibility of, the inflicting of punishments on innocent persons.

The principles of due process and procedural justice relating to the rule of law, and the rights of individuals implicit in them, were, for Hobbes, principles that were given in the laws of nature and principles which comprised absolute and unconditional requirements of justice. As such, these were principles where acceptance of, and conformity with, their terms were understood by Hobbes to be essential if there was to be peace established among men, and if there were to be legal-political structures brought into being such as would be conducive to the securing of peace. The primary sphere of application for the principles of the rule of law was presented by Hobbes as lying with the form of domestic law and government obtaining within the separate commonwealths. As we suggested earlier in this chapter, however, the establishing of commonwealths, in Hobbes's account of it, carried significant consequences for commonwealths in the sphere of their co-existence, and so also for the international order as such. For with the establishment of the separate commonwealths, there was created a normative framework within the international sphere, where this was based in institutional structures specific to the commonwealths which involved legal order and jurisdictional authority as maintained through sovereign rights and powers. In the respect that this normative framework present in the international sphere served, as through the medium of the separate commonwealths, to give concrete institutional embodiment to the principles of natural law, then here certainly there was implied by Hobbes an interconnectedness of the domestic and international spheres of law and politics, as based in the continuous application to the two spheres of the laws of nature and the principles of peace which they defined.

In this, Hobbes was in agreement with both the spirit and the informing direction of the modern international law of human rights. For the

law of human rights implies a continuity as between international law and the domestic law of states, as it also presupposes that the condition of peace that is projected to be secured through the reign of international law must depend on the proper realization of the universal standards of justice, as recognized in international law, through the forms of domestic legal order established within states. To repeat, the rights of individuals belonging to the modern international law of human rights that for Hobbes ranked as universal standards of justice, as in his statement of the laws of nature, were confined to the rights bound up with the principles of due process and procedural justice which are essential to the rule of law. Accordingly, there was nothing in Hobbes that involved the assignment of universality, or the assignment of absolute and unconditional status, to the rights recognized in current international law as relating to such subject-matters as property, religious belief and observance, democratic participation in government and social welfare provision. Despite this, the rights based in due process and procedural justice that Hobbes endorsed, and expressed in terms of principles of natural law, are real and significant rights, and in their status as rights relating to the rule of law they are indicative of the clear commitment of Hobbes to the ideal of limited government. This commitment to limited government is an important consideration in assessing Hobbes in respect of the tradition of international law. For the laws of nature, as for Hobbes comprised the law of nations, stood as laws of peace that were to apply in the international sphere to commonwealths which were to follow the ways of peace, in the matter of internal domestic political organization, through their conformity with and their giving effect to the principles of the rule of law. As we shall now see, the commitment to limited government also stands as an important consideration that is to be reckoned with in assessing Hobbes in regard to international politics, and, more specifically so, in regard to the realist tradition of theorizing about international politics to which the tradition of international law is famously placed in opposition.[18]

2.4 The realist tradition in international politics

The realist tradition is one of the leading traditions of thought and practice as to politics in its international dimension. As we noted in the Introduction, the principal representatives of the realist tradition in its classical form are taken to be Thucydides, Machiavelli and Hobbes, but with the tradition also being taken to comprehend such political thinkers as Spinoza, Hume, Rousseau, Hegel, Marx and Weber. In addition to classical realism, there is the modern realist tradition, which tradition was to prove notably strong during the twentieth century among the

Anglo-American authorities on international politics. The authorities that, here, present themselves for attention include such as E.H. Carr, Hans J. Morgenthau, George F. Kennan, Henry A. Kissinger and Kenneth N. Waltz.[19] It is, of course, true that there are traditions in international thought and practice that are distinct from, and that are considered as running counter to, the tradition of realism. Thus, for example, the international relations theorists Martin Wight and Hedley Bull were to maintain that the realist tradition of Machiavelli and Hobbes was to be distinguished from a so-called rationalist or internationalist tradition in international thought and practice, as represented by Grotius, as well as from a so-called revolutionist or universalist tradition which it was claimed was represented by Kant.[20] Despite this, however, the realist tradition stands out as the dominant tradition in the field of international politics, and this for the reason, among others, that it is in relation to realism that the opposing traditions have primarily come to be defined and situated. As for the concerns of the present volume, it is of particular significance that in critical discussions where the dominance of the realist tradition in international politics is pointed to a central position is conventionally assigned to Hobbes in the explanation of its development.[21]

There are certain core assumptions informing the realist tradition in international thought and practice, and where these assumptions serve to identify what persists as the distinctively realist analysis as to the true character of international politics. To begin with, the thinkers standing in the realist tradition are to be linked together through their common assumption that states form the basic constitutive elements of the international order, and that the central component part of international politics is to be found in the sphere of the external relations among states and governments. Further, there is present with the realist thinkers the shared assumption that states in the international sphere stand to one another in the condition of permanent conflict and antagonism, and with this being such that war among states is to be thought of as a defining and essential aspect of the structure of their external relations. Thus it is that the analysis of international politics that is bound up with realism stands as a state-centred and conflict-based form of analysis.

It is very much in accordance with the state-centred and conflict-based analysis of international politics that the realist thinkers have been disposed to point to international politics as being anarchic in character, and to point to war among states as the chief function and manifestation of that condition of international anarchy. The condition of anarchy obtaining in the sphere of international politics is something that, for

the realist tradition, is assumed to be given in the actual structure of international politics. This is so in the respect that the international anarchy is presented as something that is to be accounted for in terms of such deep structural factors as that states are free and independent entities, that states are subject to no external superior power or authority, and that states are required to defend and preserve themselves through their own power capabilities, or, as it is put, through reliance on the means of self-help. So, for example, there is the neo-realism or structural realism of Waltz. For, here, the explanation for war among states is understood as something that is to be looked for not in considerations to do with the natural inclinations of human beings towards aggression or with the internal domestic political organization of states, but rather in considerations that are to do with the objective and self-subsisting structure of international politics as an inherently anarchic structure of political order.[22]

The view of the realist thinkers as to the inherently anarchic condition of international politics has gone together with their assuming of what is a narrowly conceived interests-focused analysis as to the ultimate ends of, and the underlying motivation for, state practice. More specifically, it has been assumed by the realist thinkers that states will characteristically possess and follow their own exclusive interests. With this has gone the related assumption that states are to be thought of as being rational actors, in the respect that states will characteristically manifest in their behaviour the degree of rationality that is appropriate to the securing of their respective interests in instrumental terms. The essential idea contained in this analysis is that states, and the governments of states, are to be considered as being at liberty to pursue their exclusive interests with regard to one another, and to do this through the exercise of the various powers that are at their disposal up to and including the means of war. Thus, for the realists, it is the interests and power of states, or, as it was put by Morgenthau, the interests of states as defined in terms of their power, that for analytical purposes have been taken to stand as the fundamental determinants of international politics.[23]

Contrary to the realist analysis of international politics, it may be argued that the sphere of international politics is one that it is proper to think of as being based in something more than the interests and power of states. For it is a sphere of politics that would appear to involve principles of law, and those of general justice and morality, such as imply the presence of constraints and limitations as bearing on states in the pursuit of interests and the exercise of powers. As to this line of argument, it is to be observed that there is a quite specific position associated with

the realist tradition in regard to the question of the status of principles of law, and those of general justice and morality, as phenomena in international politics. This is that such normative phenomena are to be considered either as inapplicable to international politics, or, if admitted as having application, then as being nothing other than a function and manifestation of relations among states which, in the determination of their actual substance and structure, remain based in and governed by the more fundamental factors of interests and power. Thus it is that, for the realists, interests and power are assumed to have primacy in the sphere of international politics in respect of forms of normative organization, and with interests and power, but most particularly the factors of power, being assumed to stand as the essential condition for, and the essential element of, such forms of normative order as serve to give effect to the abiding principles of law, justice and morality.

As evidence for this as being the realist position, it is appropriate to observe that the realist tradition in international politics includes thinkers who have been prepared to claim that states and rulers are free to exercise their power, as in the pursuit of interests, even to the point of the flagrant transgression of conventional standards of law, justice and morals. This, notoriously, was the position argued for by Machiavelli in the treatise of his that is ranked as one of the classic contributions to political realism: *The Prince* (1513).[24] At the same time, the realist thinkers include those who have maintained that principles of law, and ethical principles of general justice and morality, have no compelling force for states and governments in the sphere of international politics considered as a sphere determined through interests and power. So, for example, Morgenthau questioned the appeal to moral standards in their abstract and universal formulation as having straightforward application to the practice of states, without regard for the circumstantial contingencies of time and place; as he questioned also, and in this along with Kennan, the very validity of the legalistic–moralistic approaches towards international politics.[25] Then again, there are the arguments of realist thinkers, as with the arguments of Kissinger and Waltz, where power is presented as an essential support for the external politics of states, and where the balance of power among states, rather than some substantively normative principle of organization, is presented as the ultimate foundation for order in the international sphere.[26] Finally and to underline the opposition of realism to international law, there is the differentiation made by Wight and Bull as between the realist tradition in international politics of Machiavelli and Hobbes, where law is taken to be marginal to international relations, and the rationalist-internationalist tradition of

Grotius and the revolutionist-universalist tradition of Kant, where the respective positions on international politics are very largely defined through the acceptance of international law as applying to the relations among states.[27]

The general view of the matter, as this is set out in the relevant authorities, is that Hobbes is a thinker who belongs squarely within the realist tradition in international politics.[28] So, for example, it is as a representative of the realist tradition that Hobbes is pointed to by Carr, Wight and Bull.[29] There is a like presentation of Hobbes in such recent critical commentaries in international relations theory as those of Michael W. Doyle and David Boucher.[30]

In response to this, it is to be admitted that there are certain respects in which Hobbes is obviously to be associated with the realist analysis of international politics, and so placed within the realist tradition in international thought and practice. First and foremost, Hobbes gave clear expression to what is the defining realist view of international politics as a form of political order which is anarchic as to its essential structure. For, as we have explained, Hobbes saw international politics as a sphere of politics where free and independent commonwealths co-existed in the natural condition of society, and with this condition of society being considered by him to stand as the state of universal war. In this, of course, the determinants for conflict among commonwealths, as allowed for by Hobbes within the terms of his presentation of the state of nature, were such that these were to be thought of as involving the same basic dispositions, as relating to competition, diffidence and glory, that he picked out as making for war among individual men prior to the institution of commonwealths. Despite this, however, the natural condition of universal war that Hobbes took to define the situation of commonwealths in the international sphere was something that, in his account of it, related less to the warlike dispositions of the commonwealths and their rulers, and more to the structural aspects of international politics as such. Thus it was that, for Hobbes, the separate commonwealths were to be thought of as being subject to no common governmental power, as required to provide for their defence and security through their own individual strength, initiative and power, and as compelled to co-exist without the benefit of a rule of law with the determinacy and effectiveness which belonged to the form of legal order maintained in the civil state.

According to Hobbes, then, the sphere of international politics, in the character that he assigned to it as a form of the natural state of universal war, stood as an anarchic political order, and with the essential aspects of the condition of international anarchy being given in the structural

form of the external relations among the separate commonwealths. Here, Hobbes is beyond question to be regarded as being aligned with the realist position on international politics. This is so not least as concerns his looking forward to the work of those of the more recent modern realist thinkers for whom, as we have noted, the anarchic political order, as present in the international sphere, has been analyzed through attention to international politics at the level of its objective and self-subsisting structure. There are further respects, as related to considerations to do with the aspects of anarchic political order, that are also indicative of the alignment of Hobbes with the realist position and of his adherence to what we have identified as the core assumptions which define it.

One such respect where this is true is the affirming by Hobbes that a self-help principle formed the fundamental organizing principle for state action in the international sphere, as this concerned the defence and security of states. Thus in the international state of nature, as Hobbes explained it, the separate commonwealths were not able to rely on a stable and enforceable framework of law and political organization for their defence and security. Instead, the commonwealths were to defend and secure themselves one against another through reliance on their respective power capabilities up to the point of resorting to the means of war, and with the resort to war, as in accordance with the principle of natural right and liberty, being the very embodiment of self-help as a basis for state action. The ends for which the power capabilities of the commonwealths were to be exercised were understood by Hobbes to lie with their own defence and preservation, and hence to lie with matters relating to the most essential of the defining interests of commonwealths as free and independent entities. Here, the appeal of Hobbes was to the interests and power of commonwealths as the fundamentals of international politics, and in this, to be sure, Hobbes was in agreement with the realist position as to the standing of interests and power as the underlying determining factors driving states in the international sphere.

It is clear from this that the sphere of international politics was, for Hobbes, something that was to be rendered intelligible in terms of the analytical categories, such as those of anarchic political structure, self-help and interests and power, which have been given prominence in the realist tradition in international thought and practice. Even so, there remain important considerations that underline how Hobbes runs counter to realism in what he had to say about politics in the international sphere. This is so particularly with the view that he took of the right of war, and with the view that he took of law as a factor in international politics.

As we have found, the right of war, in the terms that Hobbes accounted for it in its international application, was a right which belonged to commonwealths and their rulers by nature and which was to be exercised in order to secure the defence and preservation of commonwealths. As such and to repeat, the right of war in the form that Hobbes made appeal to it served to confirm the realist assumptions as to the anarchic structure of international politics, the self-help basis for the security of states and the primacy of interests and power as the determinants of state action. However, the right of commonwealths and rulers to defend and preserve themselves through resort to the means of war was a right that, for Hobbes, remained an essentially residual right. For the right of war, as Hobbes presented it, was a right that involved no negation of the primary obligation, as falling on commonwealths and rulers, to act for peace in circumstances where there existed the reasonable prospect of its being obtained. Thus it was that from Hobbes's standpoint, the right of war, as it related to the ends of self-defence and self-preservation, was a right that was properly to be exercised by commonwealths and rulers only in the context of their underlying conformity with the first principles of peace as set out in the fundamental laws of nature.

The principles of peace that Hobbes specified with his statement of the laws of nature were set out and elaborated by him as universal principles of peace, and ones that contained the general principles of justice and morality and the general principles of legal order which were essential for realizing the ends of peace. Thus did the laws of nature considered as the laws of peace comprise a framework of normative order and organization. In the particular context of the application of the laws of nature to the sphere of international politics, the normative framework formed through natural law was something that involved the imposing of significant constraints and limitations on commonwealths and rulers as in regard to their actions towards one another. Here, Hobbes gave recognition to the presence, and the validity, within the international sphere of universal standards of conduct which were to be thought of as possessing binding normative force. As such, Hobbes is in this matter to be read as standing at odds with the realist tradition: or, to be more precise, as standing at odds with the strand of realist thinking where the sphere of international politics has been viewed as being based in the interests and power of states, but as being unrestricted by norms which relate to the ethical considerations of justice and morality.

In the event, the laws of nature, as Hobbes presented them, did more than state the principles of justice and morality which were to apply to commonwealths and their rulers. For the laws of nature, in their

international application, were also presented by Hobbes as embodying the substantive principles of the law of nations. As we have explained, the laws of nature, for Hobbes, stood as laws which served to set the fundamental terms of peaceful association applying to the relations among the separate commonwealths and their rulers, and which, as such, served to set the bare minimum conditions essential for the establishing of society among commonwealths and rulers in the international sphere. Thus the laws of nature, as forming the substance of the law of nations, went beyond the securing to commonwealths and rulers of the right of war, as founded in the natural right of self-defence, and to extend to the specification of the main elements of the law of peace. To restate the particulars of this, the laws of nature in their international aspect provided that commonwealths and rulers were bound, among other things, to conduct themselves as follows: to act for peace, to reciprocate in the mutual limiting of rights, to fulfil agreements made in good faith, to establish the conditions for sociability up to and including the maintenance of freedom of trade and commerce on a non-discriminatory basis, to respect the sovereignty and equal standing of one another, to respect territorial rights and allotments, and to make peaceful settlement of disputes through adjudicative procedures. In all of this, Hobbes explicitly affirmed the applicability of law to the situation of commonwealths and rulers, and, in doing so, he underlined his possession and acceptance of what is recognizable as a concept of international law. The appeal that Hobbes made to the concept of international law is of course critical among the concerns of the present volume, and it is very much in relation to these concerns that the appeal to international law is pointed to as further evidence of divergence on Hobbes's part from the orthodox realist assumptions regarding the sphere of international politics.[31]

There is one analytical claim regarding international politics that is centrally bound up with the realist tradition, and that, as it is to be found advanced by Hobbes, presents itself as a claim which has to be reckoned with here. For this is a claim that is of crucial relevance in explaining the view that Hobbes took of the law of nations as a normative framework applying to the relations among commonwealths and rulers. So also is it of crucial relevance in explaining the strong sense that is conveyed by Hobbes as to the defects and limitations of the law of nations, and hence as to the defects and limitations of international law as such, as a form of legal-political regulation. At issue is the claim integral to realism to the effect that interests and power rank as the primary factors in the sphere of international politics. This claim involves, as we have noted, an assumption by the realists as to the primacy of interests and power in

respect of the different forms of normative organization, and with it being assumed, as we have also noted, that the presence of power is to stand as an essential condition for, and as an essential component element of, those forms of normative order which are to be thought of as being based in principles of law and in principles of justice and morality.

The emphasis that is placed in realism on power in relation to normative order carries clear implications for the concept of international law. This is so particularly in respect of the defects and limitations, or rather the imperfections, of international law as relative to the form of the rule of law which has application in the context of the internal domestic political organization of states. For the realist analysis of political phenomena is one where regarding the matter of law it is recognized that the rule of law, if it is to secure general principles of justice and morality, has to be supported by machinery of coercive power such as to ensure the effective enforcement of law and the effective compliance with its terms on the part of those subject to it. The realist analytical premises as concerning law and power are of course faithfully answered to as with the domestic law of states, given that this form of law is based in adequate means of power focused in state institutions and is made perfect as law through this basis in power. However, the same does not hold for international law. For the rule of law in the international sphere stands unsupported by institutional means of power sufficient for its proper and consistent enforcement, and in consequence of this it stands as a form of legal order which remains steeped in imperfection. Hence there is the tendency of realist thinkers to point to the impotence of international law relative to the interests and power of states as determinants of international politics, and to insist that the proper realization of the defence and security of states must be founded in their self-help capacities rather than through the appeal to law.

The power-centredness of politics in both its domestic and its international dimensions was well understood by Hobbes. So also did he understand that the presence of power was critical in the establishing of forms of normative order, as based in law and capable of securing the condition of justice and the ends of morality relating to justice. As concerning the connection that Hobbes saw as holding between power and normative order, there stands out for particular consideration what he maintained as to the binding normative force of the laws of nature in their status as the laws of peace. In this, as we have seen, Hobbes emphasized that while the laws of nature were always to be thought of as binding on men in conscience, the laws of nature were not always to be thought of as binding in effect and hence as giving rise to a real and material obligation of

actual compliance. For the laws of nature to be binding in effect, it was necessary that there should exist proper securities that men would in general act in conformity with their terms and requirements, and with this depending, in Hobbes's explanation of it, on the presence of some common power sufficient to compel men to the actual performance of their obligations under natural law. The power that, for Hobbes, was crucial for the effecting of the laws of nature was the sovereign power, as this was instituted in the condition of commonwealths. The presence of the sovereign power was the essential condition for the providing of the securities appropriate for the fulfilment by men of their natural law obligations. In addition, it was the sovereign power that Hobbes regarded as grounding the normative order specific to commonwealths, and with this comprehending the order of justice, as deriving from the principle of the faith of covenants, together with the institutional order embodied in the form of the rule of law maintained in commonwealths as in accordance with the principles of peace contained in the laws of nature.

In the account that Hobbes gave of the sovereign power, as the guarantor of the normative order of law and justice in the civil state, he was in broad terms consistent with the classic realist premises as to the underlying power-determined organization of law and politics. For all that, however, Hobbes did still depart significantly from realist premises in what he had to say about the power of sovereignty within commonwealths. To be sure, Hobbes presented the sovereign power in commonwealths as being itself a power, and one that commanded, among much else, the available state machinery of coercive power. Nevertheless, the sovereign power was not a power that Hobbes saw as unlimited by law, as in line with the realist premises as to the constraint-free character of power, or a power that he saw as independent of, or prior to, the order of law and justice in commonwealths that it founded in the senses implied in the realist premises as to the primacy of power relative to the forms of normative order. On the contrary, the sovereign power was a power that Hobbes presented as a power that was in fact the product of law, and hence the subject of the normative order of law and justice which was particular to commonwealths.

Here, it is vital to understand that, for Hobbes, the sovereign power in commonwealths stood as an artificial person with a representative status, and that the institution of the sovereign power was to be explained as involving not the establishing of a structure of unbridled power, but rather the establishing of a comprehensive authority structure. As for the various powers of sovereignty pertaining to this authority structure, these, as we have seen, were powers that were vested in offices, and that,

as official powers, had as their object the bringing into being and the maintenance of the rule of law. Thus, crucially, the powers integral to sovereignty comprised the powers of law-making and adjudication. In addition, there were the executive powers of government such as were concerned with general public administration and with the enforcement of the laws, as with the application of punishments for breaches of the laws on the part of the subjects of commonwealths. Beyond this, it is to be emphasized that the restrictions that Hobbes saw as placed on the liberty of the subjects of commonwealths as according to the jurisdictional reach of the sovereign power, as in contexts such as property and voluntary associations, were not arbitrary restrictions, but restrictions that he presented as being set and imposed through the laws which the sovereign power itself prescribed and enforced.

For Hobbes, then, the powers of sovereignty were powers relating to law in the respect that they were powers which had as their object the establishment and maintenance of the rule of law. However, the sovereign power in commonwealths was understood by Hobbes to be bound up with the rule of law in an even stronger sense than this. For the powers of sovereignty, as Hobbes explained them, were powers that were based in and justified through law as the presupposed institutional framework for their exercise. The effect of this, for Hobbes, was that the powers of sovereignty stood as powers which were to remain in principle subject to the constraints and limitations as embodied in legal forms and procedures. This was so particularly with the conditions of due process and procedural justice that, as we have seen, were conditions that Hobbes presented as being implicit in the laws of nature, and that we have had occasion to make reference to in connection with the matter of Hobbes in his recognition of certain of the core principles of the international law of human rights. So, for example, the powers of sovereignty, as powers relating to the rule of law, were constrained and limited in the respect that these powers were to be exercised in accordance with the principle that the subjects of commonwealths were equals under the laws, and were hence entitled to equality of treatment in the actual application of the laws. Likewise, the sovereign power in commonwealths was to maintain the laws in accordance with the principle that the laws were to have application, in regard to the conduct of subjects, only through procedures of adjudication which were to stand as fully independent procedures.

Of the different powers of sovereignty that Hobbes identified, it is the power of punishment that best underlines how he saw the sovereign power in commonwealths as being constrained and limited through the discipline of legal forms and procedures. Thus and more generally, it is

the power of punishment that serves to bring out how it was that, as contrary to the classic realist assumptions, Hobbes understood the exercise of power in the political sphere as something which involved justification and regulation through law. That this is so is because, for Hobbes, the power of punishment stood as a power where the application of the machinery of coercive force by the sovereign and its agents with respect to the subjects of commonwealths was at its most unmediated, and where the sovereign power was required to act most directly in providing the securities to subjects under law which were essential for the realization of the order of justice embodied in commonwealths.

Concerning the power of punishment, it is to be borne in mind that punishment, as Hobbes defined it, concerned the inflicting of harm and evil, and hence the exercise of coercive force, as in relation to the subjects of commonwealths. However, the power of punishment was still presented as being hedged about by such conditions of substance and procedure, as were bound up with the rule of law, that there were removed from the power all aspects of naked arbitrariness or, as Hobbes put it, of hostility. Thus punishment involved not private revenge but the exercise of official powers proceeding from public authority, and it was, as such, to have application to subjects only in consequence of acts of public condemnation based in adjudication according to law. Then again, the power of punishment was, for Hobbes, to be directed to the enforcement of actual law, and with this being reflected in his claim to the effect that there was no proper and legitimate punishment in circumstances where punishment was applied for acts performed prior to the stipulation of laws designating them as offences. Above all, punishments were to be inflicted only relative to desert, and relative to due procedure. Hence there followed the absolute and unconditional exclusion that Hobbes insisted on as regards the imposing of punishments on individuals who were innocent.

The preparedness of Hobbes to recognize the presence of legal constraints and limitations bearing on the sovereign power, in the condition of commonwealths, is clearly something that is to be taken in qualification to the conventional situating of him within the realist tradition in international politics. This is so not only in the respect that with this recognition Hobbes signalled his commitment to the principles of limited government, and those of the rule of law, which have tended to be downplayed by realist thinkers in preference for the normative-indifferent factors of interests and power. Of greater consequence still, there is the consideration that in attending to the constraints and limitations imposed through law on the sovereign power, Hobbes

underlined, as in opposition to the realist orthodoxies, that the normative order of law and justice based in commonwealths was not reducible to the bare facts of power and power relations, but was in fact the containing framework for the legitimate exercise of the powers specific to sovereignty.

Certainly it is the case that, for Hobbes, the establishing of the appropriate means of institutional power formed an essential condition for the full realizing of the ends of law and justice within commonwealths, and hence for the full effecting of the rights and obligations of their subjects. Thus it was that Hobbes associated the order of law and justice in commonwealths with the institution of sovereign authorities, where these were seized of the power sufficient to enforce the prevailing rules of just conduct. Nevertheless, the element of power that Hobbes saw as indispensable for the realization of law and justice in commonwealths was something that he presented as being necessary for the perfecting of the rule of law, but yet as something which was to be applied only through legal forms and procedures and which, as such, was to have no status apart from the institutional structure of the rule of law itself. To the extent that Hobbes, in this, connected the possibility of law and state institutions with the presence of agencies of power, as he did, then there remains nothing here that in and of itself suffices to place him within the tradition of realism. For the claim that agencies of power form an integral part of the rule of law in the state is hardly specific to Hobbes, or specific to any of the thinkers who are customarily held to be realist thinkers. Indeed, this is a claim that is to be found advanced by political thinkers who are not generally held to be realist at all in their alignments: as is the case, for example, with Locke as a defender of the ideal of limited government,[32] and as is the case also, and most notably so, with Kant the supposed exponent of the revolutionist-universalist viewpoint in international thought and practice.[33]

The considerations that we have set out concerning Hobbes and realism in connection with the matter of power relate to the form of the rule of law that Hobbes saw as obtaining in commonwealths, at the level of their internal domestic political organization. However, there is still the question of the form of the rule of law that Hobbes saw as applying in the sphere of international politics, and with this being the law of nations. As we have explained, the law of nations was distinguished by Hobbes from the civil law maintained in commonwealths, in the respect that it consisted exclusively of the laws of nature as applied to commonwealths and rulers. Accordingly, the law of nations, in Hobbes's understanding of it, was law that remained unsupported by determinate institutional agencies of power such as to provide for its adequate maintenance and

enforcement, and hence law that remained incapable of establishing a rule of law to apply to commonwealths and rulers where there was real and material effect given to their rights and security. In this, Hobbes is no doubt to be read as having accepted, and here in conformity with the classic realist assumptions, that international law was inherently defective and limited, as a form of law, as in relation to the form of domestic law as maintained within states. For in Hobbes's terms, international law was law that was dissociated from the means of power to enforce it, and with this being such that it offered no relief to states from the necessity of giving effect to their rights, and making good their defence and security, through the means of war as in accordance with the principle of self-help.

Even so, it is to be emphasized that the sense that Hobbes conveyed as to the imperfection of international law, as a form of law, does not carry with it the implication that he had no sense of international law as such. Still less is there implied that Hobbes had no sense as to the desirability, or for that matter the inescapability, of the rule of law being so extended in its reach and claims as to make it have application to the sphere of international politics. To repeat, Hobbes affirmed with the laws of nature that he saw as applying to commonwealths and rulers what we have identified as being among the foundational principles of modern international law, such as the principles relating to peace, self-defence, the faith of treaties and the sovereignty and equality of states. Likewise, the natural law principles that, for Hobbes, comprised the law of nations went to constitute a normative framework which he thought of as implying the presence of significant restrictions on commonwealths and rulers, and with these restrictions being, in his explanation of it, such as to involve the imposing of formal and substantive constraints as to the exercise by commonwealths and rulers of the powers belonging to them. As we shall now see, the approach that Hobbes followed with the law of nations is something that strongly underlines his place in the tradition of international law. This is so not only as concerns the specification that Hobbes provided as to the core natural law principles which he took to form the elements of the law of nations. It is so also concerning the recognition that Hobbes gave as to the inherent imperfection of the law of nations as a form of law, where what he recognized in this matter is in fact consistent with what has come to be generally understood as to the defects and limitations distinctive to the form of the rule of law which applies in the international sphere.

3
The Tradition of International Law

Considered in the broadest terms, the tradition of international law or the law of nations stands as a tradition of great antiquity, and with its origins lying in classical Greek-Roman civilization and with its subsequent evolution going on continuously throughout the Middle Ages. In the distinctively modern sense and meaning of international law, however, the tradition of international law is something that is generally presented as having come into being in Europe during the sixteenth and seventeenth centuries. This period saw the overseas expansion of the European powers into Africa, the Americas and the Far East, together with the founding of the modern states system in Europe that, in the aftermath of the Renaissance and the Reformation, was to be established with the Peace of Westphalia which concluded the Thirty Years' War (1618–48). The developments here referred to were to prove decisive factors in the emergence of the modern system of international law, and this is reflected in the crucial shift that occurred in the sixteenth and seventeenth centuries as to the understanding of the essential character of the law of nations. The shift in question was the one involving a move away from the pre-modern understanding of the law of nations, as something formed from laws that were recognized to be common among the different nations and peoples, and towards the modern understanding of the law of nations which is familiar from the as now existing order of international law. This in its fundamentals is the law of nations conceived of, and expounded, as comprising the body of laws that are recognized to govern, and as applying to, the external relations between independent states and political communities.

The thinkers who played a major part in the establishing of the modern tradition of international law include, as named in the Introduction, such as Vitoria, Suarez and Gentili, in addition to Grotius and Pufendorf

as leading representatives of the line of modern natural law theorists. Of these thinkers, Grotius is pivotal, given that it is he who is conventionally identified as the principal founder of international law in its modern form. There is also Hobbes, who, as we shall argue in the present chapter, is to be situated positively in relation to the tradition of international law. The crucial consideration here is not the standing of Hobbes as a successor to Grotius, but is rather the matter of the relation between Hobbes and Pufendorf. In this connection, it is explained that Pufendorf developed certain of the main lines of theorizing opened up by Grotius and Hobbes, and that, in doing so, he constructed a detailed system of natural law jurisprudence which was to have an immense impact on subsequent reflection on international law and its theoretical basis and structure. Thus it was that the natural law system in jurisprudence formulated by Pufendorf set the conceptual framework for the classic expositions of the elements of the law of nations, such as were provided in the eighteenth century by Wolff and Vattel. These expositions of the law of nations proved to be authoritative, and it is emphasized that Hobbes is linked through Pufendorf to Wolff and Vattel and to the dominant naturalist conception of international law which they served to articulate through their work. In the event, the system of international law as conceived in terms of principles of natural law was to be challenged, and substantially undermined, by theorists such as Kant and Bentham. As we shall see in the final part of the chapter, the subverting of the naturalist conception of international law, as effected by Kant and Bentham, involved significant new departures in thinking about the law applying in the international sphere, and departures that marked a radical move away from the natural law consensus on the law of nations and its theoretical foundations with which Hobbes is here associated.

3.1 Grotius

The main contribution that Grotius made to the development of international law, in its modern form and tradition, comes in the exposition of the elements of the law of war and peace that he provided in *De Jure Belli ac Pacis Libri Tres*. The greater part of the law of war and peace, as Grotius expounded it, had application to the external relations between states and rulers, and it is in this respect that he is to be read as having looked forward to the emergence of the modern system of international law. Even so, it is essential in understanding Grotius' intentions in *De Jure Belli ac Pacis* to recognize that the law of war and peace that he set out, as to both its substance and its formal organization, was continuous with

what was an already active and well-grounded tradition of reflection on the legal order which was assumed to apply to states and rulers in the international sphere. This was the tradition of theorizing as to justice in war, as it had come to establish itself during the Middle Ages. The medieval tradition of just war theorizing was to have a profound influence on international law in the modern period. For the tradition affirmed that law provided the basis for the exercise of powers by states and rulers as against one another, and hence that states and rulers were to be thought of as subject to legal constraints and limitations in the sphere of international politics. In these respects, the just war tradition served to give expression to the ideal, as informing the system of modern international law, that it is the rule of law rather than interests and power that must set the terms and conditions for the external relations among states and governments.

The principal focus of attention for the leading just war theorists lay with the specification of the conditions for justice in war. Of the different conditions specified by the just war theorists, there are three that were to prove to be of central importance. The first such condition was that of lawful authority. This condition was presented in terms where the just war was a war waged on the command of a sovereign ruler having proper authority in the state, and with this implying that the right of war, in its essential form, was a right of public war vested in states rather than a right belonging to private individuals. The second main condition for justice in war was that of just cause. The key idea appealed to with this condition was that there was just cause for states to undertake war when their lawful rights were subjected to violation. Thus it was that the defence of rights, the restoration of rights and the punishing of rights violations were specified as the principal instances of just cause for states to resort to war. The third condition for justice in war to be emphasized was that of right intention. This condition provided that war was to be waged only so as to do good, and with this involving the idea that war was to be undertaken only so as to secure justice and to bring about a peace founded in justice. The condition of right intention underlined the concern of the just war theorists to see law applying to states in the conducting of war. For it was implied with this condition that states at war were to conform with such legal-form constraints and limitations on their actions as were necessary for the preservation of justice as among belligerent parties, and so also for the preservation of the possibility of belligerent parties being able to restore the order of a just peace. The principles of lawful authority, just cause and right intention form the basic principles relating to justice in war as identified within the medieval just

war tradition, and it is these principles that are to be found affirmed by Aquinas in his classic statement of the requirements for the just war in the *Summa Theologiae*.[1]

The lines of enquiry opened up by the just war theorists as to war, and as to the standards of law and justice applying to states and rulers in the waging of war, were to be developed in detail by the thinkers who are associated with the founding of modern international law. This is so most notably with Grotius in *De Jure Belli ac Pacis*. For the order of the exposition of the law of war and peace, as set out in the three books that comprise the treatise, is such that it was in effect organized in accordance with what we have identified as the core principles concerning justice in war. Thus in Book 1, Grotius addressed matters pertaining to the principle of lawful authority, and with these including the basis of public war in the rights of states as bearers of lawful authority, the rights of the sovereign power in states, and the obligations of the subjects of states. In Book 2, he considered matters pertaining to the principle of just cause, and with these including the rights, such as the rights of the person and the rights relating to property and promises, whose violation gave rise to justification for the resort to war. Finally in Book 3, the concern lay with matters to do with the principle of right intention, as this related to the constraints and limitations on states and rulers at war that worked to preserve justice among them and to allow for the restoration of peace. So, for example, Grotius here specified rules that were to be followed by belligerent states in order to moderate the harsher effects of war for the parties to it, in addition to elaborating the principles of good faith in agreements which he held were to be observed by belligerent states and their agents.

In the exposition of the elements of the law of war and peace in *De Jure Belli ac Pacis*, Grotius was taken up with more than general rules and principles that related to justice in war. For he was concerned to state rules and principles to do with matters of war and peace which had the specific force and standing of law. There were three forms of law to which Grotius gave prominence in his statement of the law of war and peace. These were the law of nature, the municipal law maintained in states, and the law of nations. Of the forms of law here referred to, the two that were central to the law of war and peace, in its international application, were the law of nature and the law of nations.

As we saw in Chapter 1, the law of nature was for Grotius a law of self-defence, in the respect that it was grounded in the right of men to act to defend and preserve themselves. At the same time, the law of nature laid down the principles of justice and morality that were involved in the

basic rights and duties as concerned persons, property ownership, contractual agreements, restitution and punishment, and adjudicative procedures. These basic principles of natural law stood as principles of social order, and principles that Grotius held were to be given effect to through the framework of law and government embodied within the civil state. As Grotius classified the different forms of law in *De Jure Belli ac Pacis*, the law of nature was presented as being a universal law of reason, in the sense that the principles that it stated were to be thought of as self-evident to men in their natural condition as rational beings. Thus Grotius defined the law of nature as a dictate of right reason, which served to determine the moral necessity, or the moral baseness, of acts as relative to their agreement, or their disagreement, with the standard of rational nature.[2]

Standing in contrast to the law of nature in Grotius' classification of the forms of law, there was the sphere of law that he presented not as law based in reason, but as law whose origins lay in the will. This was the sphere of law that Grotius termed volitional law, and with the part of volitional law that originated in the will of men being volitional human law.[3] One form of volitional human law was municipal law, as the law that was brought into being through the will and agency of the sovereign power in states. The other principal form of volitional human law was the positive or voluntary law of nations. For Grotius, the law of nations stood as a form of volitional human law in the respect that it was law that was to be thought of as originating in the will of nations. As concerning the evidence for the law of nations as volitional human law, this Grotius held was to be found in the customary practice of the nations and in the recorded testimony of the writers who were learned in it.[4]

Among the parts of the law of war and peace as expounded in *De Jure Belli ac Pacis*, the law of nature was primary and foundational. To begin with, the law of nature in Grotius' account of it was presented as enshrining the first-order rights that were assumed to belong to men prior to the formation of states. As an example of this, there was the right of men to wage private war, where the means of war were to be adopted by men in the securing of their person and property as in accordance with the principles of self-defence as underwritten in natural law.[5] In turn, it was the law of nature that, for Grotius, served to found the part of the law of war and peace that related to the form of political society which was specific to the state. For the law of nature included the principle of pacts, and with this being the principle that the terms of promises and other voluntary agreements were to be fulfilled by the parties to them. The principle of pacts was a fundamental principle of justice and morality, and, as

we emphasized in Chapter 1, it was this principle that Grotius referred to in explanation of the origin of the state and the basis of the form of legal order which was embodied in the state as a form of human association.[6]

Above all, the law of nature served to found the part of the law of war and peace that Grotius saw as having application to states and rulers in the sphere of their external relations. Thus it was by appeal to principles of justice and morality contained within the law of nature that Grotius identified the essential just causes for war, and with these being self-defence, the recovery of property and the punishment of wrong-doing. The just causes for war, as here cited, were all taken by Grotius to provide occasion for the exercise by men of the right of private war. Even so, the natural law-sanctioned principles of self-defence, recovery of property and punishment of wrong-doing, as defining the proper objects for war, were all made explicit reference to by Grotius in his explanation of the lawful justifications for the undertaking of public war by state authorities.[7] Then again, there is the principle of pacts as a principle of natural law. This principle, as Grotius explained it, did more than base the form of legal order obtaining in states. For it was also a general principle of justice and morality whose observance stood as the precondition for states and rulers being able to establish, through their will and agreement, a body of law for the regulation of their external relations and then to act in accordance with this law in good faith. In this connection, the principle of pacts, for Grotius, comprised the underlying normative foundation for the positive or voluntary law of nations.[8]

It is evident, then, that the law of nature contained principles of justice and morality that Grotius considered to apply to states and rulers, and that certain of these were principles that he thought of as being foundational for the positive or voluntary law of nations. Nevertheless, the fact remains that the part of the law of war and peace that Grotius presented as applying essentially to states and rulers, in their external relations, was the law of nations in its status as a form of volitional human law. Thus it was that Grotius devoted a substantial part of *De Jure Belli ac Pacis* to the exposition of the elements of the positive or voluntary law of nations, and with this the law of nations proper being expounded as something separate and distinguishable from the law of nature as such. Of the elements of the law of nations that Grotius treated of in *De Jure Belli ac Pacis*, the following stand out for particular mention: the law relating to the conditions for public war, and especially the conditions of sovereign authority and the declaration of war;[9] the law of embassies;[10] the law of burial;[11] the law relating to the taking of the goods of subjects to meet the just liabilities of their rulers;[12] the law relating to the rights belonging

to the parties to public wars, such as the rights in respect of the killing of enemies, pillage, prisoners of war and the rulership of conquered peoples;[13] the law relating to the principles of good faith which were to be adhered to by parties to war.[14]

There are two general characteristics of the positive or voluntary law of nations that, as Grotius explained it, serve to underline what was for him the difference between it and the law of nature. First, it was Grotius' view that the origin and foundation of the law of nations were to be explained as lying not in the normative order inherent in nature, but rather in the will and agreement of states and rulers, and that it was from the will and agreement of states and rulers that the law of nations derived its binding normative force. As evidence for this, it is to be observed that when Grotius pointed to the contrast between the law of nations and the law of nature in *De Jure Belli ac Pacis*, he emphasized that the law of nations was distinguished in the respect that it was law which was founded in the mutual consent of states.[15] At the same time, Grotius maintained, as he did with the rights of states at war, that the normative force of the principles of natural law was absolute, but that the normative force of the principles of the law of nations remained conditional on consent in the respect of its being relative to some antecedent promissory act on the part of those subject to the law.[16]

The second characteristic of the law of nations that, in Grotius' exposition of the law of war and peace, serves to differentiate it from the law of nature is that the law of nations proper was law whose primary and essential sphere of application lay with the external relations between states and rulers. This was not so with the law of nature, as Grotius conceived of it and of its sphere of application. For Grotius saw the law of nature as a body of law that applied in the first case to individual men, but to states and rulers only in a secondary and derivative sense. Hence the standpoint of the law of nature was such that the principal form of war to which it related was that of private war, where individual men adopted the means of war in exercise of the natural right of self-defence.

As opposed to the law of nature, the positive or voluntary law of nations was law that Grotius considered to have its primary and essential sphere of application with states and rulers in their external relations. Indeed, the law of nations, for Grotius, was not only law that applied to states and rulers. It was also law that presupposed as the condition for its generation, and as the condition for its having application to men, the association of men in states and their subjection there to rulers wielding sovereign power. For the law of nations, as Grotius explained it, was law that served to define, and to regulate, the public rights that were specific

to states as the bearers of sovereign power as these rights were exercised by states with respect to one another, and particularly so as regards the public rights which were bound up in the waging of war by states on the basis of their sovereign authority. Thus it was that Grotius presented the essential form of war that pertained to the sphere of the law of nations as being not private war, but public war. That is to say, the law of nations related essentially to war waged by states on the authority of the sovereign power, and in accordance with such formal conditions as, for example, the condition that war was to be accompanied by a declaration of war on the part of the state rulers concerned. In this matter of public war, it is to be observed that Grotius expounded a large part of the substantive law of nations as law that followed as the effect of the right of public war, and with the latter right being understood as a monopoly right belonging to states and rulers.[17]

In all this, Grotius' specification of the positive or voluntary law of nations, and his differentiation of it from the law of nature, carried a crucial implication concerning the law of nations in its character as law which applied to states and rulers in the sphere of international politics. This was that the principles of the law of nations were to be thought of as principles that reflected, and answered to, the defining condition and attributes of states and rulers in their status as the subjects of the law of nations, and hence principles that were, in consideration of this, to be distinguished from the principles of natural law as these were understood to apply to individual men in respect of their specifically natural condition and attributes. The implication, here, was plainly one of immense significance for the coherence of the natural law perspective on the law of nations. However, it was an implication that, as we shall see, was not to be recognized, and worked through, by the natural law thinkers in the line of Grotius until the efforts of Wolff and Vattel to establish an adequate basis of demarcation as between the law of nature and the law of nations proper.

The natural law thinkers formed one of the distinct schools of writers on the law of nations in the period after Grotius. As well as the natural law school, there was, as we noted in the Introduction, the positivist school of writers as represented by the jurists Rachel and Bynkershoek. The positivist writers followed Grotius in underlining the voluntary character of the law of nations. In this, the positivists assumed that the law of nations was based in the consent and practice of states, while its substantive rules and principles were to be found given in state custom and state treaties as the conventional sources of law. As for the natural law writers, they of course expounded the law of nations in terms of its embodiment in

universal principles of natural law, and with these principles being assumed to have authentic application to states and rulers in the international sphere. It is to the natural law school of writers on the law of nations that Hobbes belongs, as when he is considered in respect of his place in the tradition of international law in its modern form.

To situate Hobbes in relation to the tradition of international law involves the situating of him in relation to Grotius, and in this the key points that present themselves for attention are the points of divergence as between the two thinkers. To begin with, it is to be emphasized that while Grotius was a founder of modern international law, he also addressed the subject of the law applying in the international sphere from within the conceptual framework provided through the established tradition of just war theorizing. Against this, there is little in Hobbes that reflects a direct engagement with the core of just war doctrine, or an explicit working through of issues in international law and politics from the standpoint of the just war tradition. Indeed, it may well be argued that Hobbes challenged the entire basis of just war theorizing, through his bringing into question its fundamental premise to the effect that principles of justice and injustice had proper application to the state of war. For, as we have seen, Hobbes was quite clear that war obtained in the state of nature, and that in the natural condition of society, as this was present among the independent commonwealths, there existed no settled law and no settled rules of just and unjust conduct.

However, the remoteness of Hobbes from the just war tradition is not to be overstated, since he did in fact extend some recognition to what we have identified as the essential principles relating to justice in war. This is true, certainly, of lawful authority. For as Hobbes explained the matter, the instituting of commonwealths had the effect that the right of war became a public right vested in the sovereign power and exercised on the authority of the sovereign, save in conditions where subjects adopted the means of war in their private capacities for the ends of self-defence. As for just cause, Hobbes clearly affirmed the primacy of self-defence as the fundamental ground and justification for war both for individual men and for commonwealths and rulers, and with the right of self-defence, in his account of it, including within itself the right of punishment. Finally, there is right intention. The principle here is pointed to in the terms of certain of the laws of nature that Hobbes saw as framing the right of war. These were the laws of nature that, as in accordance with the idea of right intention, related to the duty of endeavouring peace and to the constraints and limitations on conduct whose observance was critical for the maintaining of peace and for its restoration in circumstancs of conflict.

Thus, for Hobbes, the separate commonwealths and their rulers were to be thought of as exercising the right of war within a normative framework where they were directed to act for peace through the pardoning of offences, the seeking of retribution only for the sake of future good, the granting of safe conduct for mediators of peace, and the referring of disputes giving occasion for war to adjudicative procedures for peaceful resolution.

The above considerations are hardly decisive in claiming Hobbes for the just war tradition. Still, there is enough here to suggest that in the matter of marking Hobbes off from Grotius, as from the perspective of the tradition of international law, the issue concerning the justice of war is not to be taken as central. In the event, the crucial and inescapable point of divergence between Grotius and Hobbes, as in regard to international law, relates to the issue of the juridical status of the law of nations. As we have explained, Grotius placed the law of nations with the municipal law of states in the category of volitional human law, and, in doing so, he presented it as the positive or voluntary law of nations. In contrast to Grotius, Hobbes did not allow that the province of positive law extended from the civil law to comprehend the form of law that he saw as applying in the sphere of international politics. For Hobbes, positive law presupposed covenants to establish some law-maker, but since the separate commonwealths were not to be thought of as being capable of making such covenants, there was no possibility of the commonwealths being rendered subject to positive law for the purposes of the regulation of their mutual external relations. Thus it was that Hobbes held that the law of nations consisted exclusively in the principles of natural law that stipulated the basic terms of peace, as these were to be followed by individual men prior to the establishing of commonwealths. Here, as we shall see, Hobbes was to be followed by Pufendorf. This was so not only in respect of the identification of the law of nations with the natural law, but also in respect of the specification of the substantive principles of the law of nations, as in accordance with the terms of natural law, as principles that stand as foundational within the modern system of international law.

3.2 Pufendorf and natural law jurisprudence

Pufendorf constructed a complex system of natural law jurisprudence. The core elements of this system are to be found given in the exposition of the principles of the law of nature and the law of nations that Pufendorf set out in *De Jure Naturae et Gentium Libri Octo*, and in the

summary abridgment of the latter treatise that he provided in *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo*. Essential to the project in jurisprudence conducted in these works were the statement and explanation by Pufendorf of the principles of natural law that he saw as relating to the conduct of individual men, and as establishing the terms of their association within political society. In this, Pufendorf distinguished natural law from the forms of law that remained positive in their character. Thus natural law was contrasted with the divine law that embodied the will of God, as this was revealed to men through the Scriptures. So also was natural law set apart from the civil law, as the law established through the will of the rulers of states and, as such, determining the rights and duties of men as the subjects of the various states where it was laid down. In contrast to divine law and civil law as forms of positive law, the natural law was a law founded not in will but in reason. In being so, the natural law stood as a universal law that defined the rights and duties which belonged to all men without consideration for their status as the members of particular states and nations.

The substantive principles of natural law, in their fundamentals, were for Pufendorf what they had been for Grotius and Hobbes. Thus the law of nature was a law that Pufendorf presented as being based in the right of men to act for their own defence and preservation, and so secure themselves in their person and in their rights. At the same time, the law of nature was presented as defining the framework principles of social order, and the duties relating to them, where the observance of these by men was understood to be the precondition for their defence and preservation and for the securing of their personal and other rights. The law of nature, then, was for Pufendorf essentially the law of self-defence or self-preservation and the law of social order, or, as he put it, the law of sociability. In addition to this, Pufendorf divided the principles of natural law into three distinct categories, as in accordance with the different objects of the substantive duties which the relevant principles stipulated. First, there were the duties in natural law that men were to be regarded as owing to God. Second, there were the duties in natural law that men were to be held to owe to themselves. Third, there were the duties in natural law that men were to be considered to owe to one another.[18]

The main duties that men owed to God in natural law were duties that concerned the forming of proper conceptions as to the nature of God's existence, His attributes and His powers, and that concerned the proper honouring of God at the level of practice as through the appropriate forms of worship. The duties of men towards God under natural law were duties relating to the sphere of natural religion and focused on the

cohesion of state and society, and, in being so, they were duties that were independent of the principles of divine law which were revealed to men through the Scriptures.[19]

The duties that men owed to themselves in natural law were based in what Pufendorf presented as the fundamental duty of men to act to preserve themselves. The duty of self-preservation, as Pufendorf explained it, was broadly conceived, and it included the duty falling on men to develop themselves through the proper use of their natural gifts and talents, and so through the general perfecting of their intellectual and physical nature.[20] However, the crucial part of the principle of self-preservation concerned the natural right of men to defend themselves, as through the killing or injuring of those who subjected them to violent attack in their person or who violated their rights and property. For Pufendorf, the right of self-defence was foundational, and, as with Hobbes, he considered it to obtain in the condition of natural liberty where men were to be thought of as situated outside of or prior to the establishing of the state, as well as in the condition of the state itself. In the condition of natural liberty, the right of self-defence was such that men were permitted to pre-empt potential attackers, to punish actual attackers, and to secure guarantees against further attacks. In the condition of the state, where men were subject to civil government, the right of self-defence was strictly limited. Thus the exercise of force by men for the ends of self-defence was here allowable only in circumstances where there existed no opportunity to appeal to the civil authorities for protection, while all rights to do with pre-emption, punishments and guarantees in relation to attacks were reserved exclusively for the civil authorities. Despite this, men retained the right of self-defence in the civil state as an inalienable right, and the retention of the right by men as the subjects of civil states is confirmation of how, for Pufendorf, the law of nature stood as a law of self-preservation.[21]

The third category of natural law principles that Pufendorf specified were the principles that stated the duties which men owed to one another. These duties were either absolute or hypothetical in form, and the range of the absolute duties and hypothetical duties that Pufendorf identified were elaborated in great detail in *De Jure Naturae et Gentium*. The absolute duties in natural law to which men were subject in their conduct towards one another were the duties that men were to be thought of as owing to one another universally and by nature in a direct sense, and hence prior to and independent of the establishment of human customs and institutions. The hypothetical duties falling on men under natural law were the duties that men were to be thought of as

owing to one another not on a universal basis and by nature direct, but only in consequence of the existence of some particular human custom, institution or state as introduced and consented to by men through some specific act on their part.[22]

The first and most fundamental of the absolute duties that men owed under natural law was the duty falling on men to respect their mutual rights, and to refrain from harming one another in their person and in their rights. This duty extended to all men without exception, and it was, as Pufendorf presented it, the foundation of all social order and of the rights that were held by men through the maintenance of social order. So, for example, it was a duty that was such as to guarantee to men proper protection for their life, bodily integrity and liberty, in addition to proper protection for the conventional rights belonging to them in matters relating to property and ownership. In reflection of this, the duty imposed on men in natural law to refrain from harming one another in their person and rights was implicit in the general prohibition on the commission of the first-order crimes, as with murder, physical assault and theft. Closely bound up with the duty of respect for rights was the basic rule of justice that where men harmed one another, and so violated rights, then they were required to make good the loss or damage caused. Thus it was that Pufendorf saw the duty on men to respect their mutual rights and to avoid rights violations as presupposing the principle of restitution, as a principle essential for the maintaining of social order as consistent with the terms of natural law.[23]

The second absolute duty imposed in natural law that Pufendorf maintained was owed by men towards one another was a duty that had been expressly affirmed by Hobbes, and with this being the duty laid on men to recognize one another in their natural equality. The duty in natural law here referred to was based in the consideration that men were equal by nature, and, as such, it was a duty that Pufendorf followed Hobbes in explaining as a necessary condition for the possibility of social order subject to the rule of law. For it was a duty that bound men to recognize one another as equals under the law, and so recognize one another as bearers of the rights and obligations as embodied in natural law and in positive law on the condition of strict reciprocity. Hence there followed the impropriety in natural law of men claiming exemption from duties imposed through laws that were binding on others, and of their reserving rights for themselves which they would deny to others.[24]

Next among the absolute duties under natural law that applied to men in their conduct towards one another were what Pufendorf identified as the common duties of humanity. These were the general duties of

benevolence through the fulfilling of which men provided gratuitous services and benefits for one another, such as worked to promote mutual assistance and co-operation, and hence mutual good will, among themselves. According to Pufendorf, the basis of the common duties of humanity lay in the rule of gratitude. Thus for Pufendorf, as for Hobbes before him, it was required of men in natural law that they were to show proper gratitude towards benefactors, and to conduct themselves such that benefactors would have no cause to regret their good will.[25]

The last of the absolute duties falling on men under natural law that Pufendorf treated of was the duty of good faith that had application to men who were the parties to agreements. As Pufendorf explained it, the duties of men concerning respect for rights, natural equality and common humanity were absolute duties, but as such fell short of forming an adequate normative framework for social order. For men to secure the full benefits available to them through association within society, then it was essential, Pufendorf argued, that they were to make formal agreements with one another, where these agreements would establish fixed rules and principles to govern the interactions of men through providing for a precise determination of their respective rights and duties. The benefits of the practice of voluntary agreements were self-evident, as with the facilitating of the exchange of goods and services among men and with the structuring of their individual projects and personal relations so as to minimize occasions for conflict. Thus it was that to set a normative foundation for the practice of voluntary agreements, there was to be assumed to hold an absolute duty, as imposed under natural law, to the effect that men were required to fulfil the terms of their promises and agreements in good faith.[26]

The principle of the faith of agreements was a principle of natural law that Pufendorf thought of as lending a quite specific normative status to the duties and obligations that were established in conformity with its terms. Of particular relevance here is the distinction that Pufendorf made, in discussion of good faith, as between the duties owed by men that were consequent on a promise or agreement and the duties owed by men which stood as common duties of humanity. According to Pufendorf, the common duties of humanity comprised authentic rights and duties, but for all that remained nothing more than imperfect rights and duties. For the rights and duties forming the sphere of the common duties of humanity were rights and duties where proper conduct by men relating to them might be requested, and improper conduct relating to them might be condemned on grounds of inhumanity, but where there was present no resort to legitimate means of effective coercion such as to

compel men to honour the rights and to discharge the duties concerned. As opposed to the sphere of the common duties of humanity, the sphere of promises and agreements among men was the sphere of perfect rights and duties. For the rights and duties set through promises and agreements were perfect, for Pufendorf, in the respect that these were rights and duties that were supported by a coercive power, and where it was legitimate to resort to appropriate means of coercion in order to compel men to respect the rights and to fulfil the duties at issue.[27]

The distinction between imperfect rights and duties and perfect rights and duties, as Pufendorf explained it in treating of the subject of promises and agreements, relates directly to what was a critical claim that he made concerning the faith of agreements. This was that the principle of the faith of agreements stood as the bridge, or connecting link, between the absolute duties in natural law that men owed to one another and the hypothetical duties to which they were subject from the standpoint of natural law. As it has been noted, the duties stated in the hypothetical principles of natural law were the duties that Pufendorf saw as presupposing, as the basis for their application to men, the context formed through customs and institutions which were introduced and consented to by men. In the view of Pufendorf, the institutions that provided the context for the application to men of the hypothetical duties set through natural law were institutions that were founded in some specific agreement among men, and hence institutions that presupposed for their establishing the acceptance by men of the absolutist normative status of the foundational principle of the faith of agreement. There were three key institutions that Pufendorf picked out for detailed examination in *De Jure Naturae et Gentium* as belonging to the category of institutions founded in agreements: language; property and ownership, and with this including subject-matters that involved value and the exchange of values; government in the civil state.[28]

Of the three institutions based in agreements that Pufendorf discussed, it is the institution of the civil state, and of the government as maintained there, that is crucial in consideration of his place in the tradition of international law. Thus in the specification that Pufendorf gave of the civil state, there were expounded the various hypothetical principles of natural law pertaining to this institution as related to such concerns as the following: the constitutive causes of states, the internal structure of states, the functions of the sovereign power, the form of state government, civil law, property, and the powers of sovereign rulers with regard to the making of war and peace and to the forming of treaties with other states. In all these concerns, Pufendorf clearly set out

positions that Hobbes had taken before him, and most particularly so in the matter of what he explained was the first ground of justification for the necessity of the state as an institution. So it was that, for Pufendorf, the establishing of the state was necessary for the perfecting of the rights and duties that belonged to men under the terms of natural law, and with this being so because the state stood as the institution that possessed the means of coercive power adequate to secure general respect for the rights of men and general fulfilment by men of their duties. The security that Pufendorf saw the state as providing for men in the matter of their rights and duties was the principal regard in which he thought of the state as serving to overcome, and so to transcend, the limitations of what he presented as the specifically natural condition of the society that obtained among men in their relations with one another.

The natural condition of the society of men was for Pufendorf what it had been for Hobbes: that is, a condition of society that was to be thought of as being in opposition to the condition of society maintained in the civil state. As we have seen, Hobbes defined the natural condition of the relations among men as the state of universal war, and explained this through pointing to how, in their natural society, men co-existed without common governmental institutions, effective security for the person, and settled rules for determining just and unjust conduct. In the event, Pufendorf did not follow Hobbes in presenting the natural condition of the relations among men as the state of war as such. For he saw men in this condition as bound together through nature in the form of kinship given in their common humanity. Nevertheless, it is to be emphasized that Pufendorf accepted and made appeal to, as premises for argument, the very aspects of the natural condition of men that Hobbes had pointed to in order to make good his claim that this condition of society was the state of war.

In particular terms, the state of nature, as Pufendorf specified it, was the state of natural liberty and natural equality, where men were free to exercise their right and power to realize their own ends without subjection to superior authority. Thus in the state of nature, men were to act to defend and preserve themselves, and, in doing so, to determine for themselves how most effectively to secure their person and their rights. Nevertheless, there was in this natural condition no proper security for men, since men were entirely dependent on their own individual strength and power to provide for the ends of their self-preservation. Crucially, there was no common power with the authority to exercise government over men. Hence there was present in the state of nature no power authorized to adjudicate disputes about rights, to stipulate rules

to apply in adjudicative proceedings, or to impose coercive sanctions against offenders in the enforcement of adjudications. The absence of such a common governmental power, for Pufendorf, did not make for a state of war in itself. However, it did mean, as he explained, that the natural state of men stood as a condition of society where there was no effective institutional context for the rights and duties stipulated in natural law, and hence no effective institutional context for the realizing of the ends to which men were directed in natural law as relating to their self-preservation and their participation in social order.[29]

The institutional context that Pufendorf saw as providing for the full realization of the ends of self-preservation and social order, and so for the overcoming by men of the natural condition of society, was the context as formed by the civil state. According to Pufendorf, the main causal factors bound up in the development of the state related to the concern of men for protection from harm, and for enjoyment of the benefits of social existence.[30] However, the essential foundation for the state, and for the instituting of the governmental power specific to it, consisted in the agreement of men. This was so because, by nature, men were free and equal and so independent of all superior authority, and with this meaning that the subjection of men to the authority of the form of government in the state necessitated an explicit act of agreement by which the state, as an institution, was brought into being. The state formed a unified association of men, and with this providing for decisive judgments as to common ends, and its forming involved the subjection of men as associated to a common power, and with this working to ensure that men would respect their mutual rights and so act in furtherance of the common interest. Hence, for Pufendorf, the agreement founding the state was at once an agreement directed to the establishing of the state as a form of association, and an agreement directed to the determination of the person or persons on whom the institutional powers particular to the state were to be conferred. The state, as instituted through agreement, stood as a distinct legal person with its own rights, and with a capacity for independent will and agency that was to be exercised by the person or persons holding the governmental powers essential to rulership, and, as such, possessing the rights and powers of sovereignty.[31]

The concern of the sovereign ruler lay with the public good, and with the security of the state and its subjects. In respect of this concern, the sovereign ruler was seized of certain rights and powers, and these, in Pufendorf's elaboration of them, were more or less the rights and powers of sovereignty that Hobbes had picked out. Thus, for Pufendorf, the sovereign ruler held the legislative power in the state. This power was

exercised in the promulgation of the civil law, and with the civil law comprising the general rules that served to determine the rights and property of subjects. Further to this, the sovereign ruler held the power of enforcing the laws, as exercised through the punishment of those violating the law, and the adjudicative power, as exercised through the settlement of disputes in accordance with law. The sovereign ruler was also empowered to wage war against other states, to make peace, and to conclude treaties and alliances. In addition, the sovereign ruler held the powers relating to the appointment of public officials responsible for the administration of the state, together with the powers relating to the levying of the taxes that were essential for the conducting of the public business of the state.[32]

Pufendorf recognized that there were different constitutional forms for the governmental authority through which the rights and powers of sovereignty were exercised in the state, and with these being the classic constitutional forms of monarchy, aristocracy and democracy. However, he insisted, as had Hobbes, that whatever the form of constitution adopted for the organization of government in the state, the actual rights and powers of sovereignty belonging to government always remained the same.[33] So also did Pufendorf consider that the matter of the constitutional form of government left unaffected the question of the basic characteristics of governmental authority which, as he picked them out, served to identify the state as a sovereign and independent form of association. For example, he held that the governmental authority in the state possessed the characteristic of supremacy. Thus the state was to be thought of as exercising authority in accordance with its own will and judgment, and in freedom from subjection to any external power claiming superiority in relation to it. Again, the government authority in the state possessed the characteristic of non-accountability, in the respect that the state was not required to make account to an external power for the exercise of its sovereign authority, or to be rendered liable for punishment in connection with this. As a final example, the governmental authority in the state, for Pufendorf, was to be thought of as standing exempt from subjection to civil law, and this for the reason, as emphasized by Hobbes, that the civil law could have no binding application with respect to the sovereign power given the status of the sovereign as the final source and origin of the laws.[34]

The characteristics of sovereignty that Pufendorf pointed to are such as to underline that he saw the legislative power, as the power relating to civil law, as foundational among the rights and powers of sovereignty belonging to the governmental authority in the state. As Pufendorf

explained it, the civil law was distinct from natural law in that it was law that proceeded from the will of the sovereign ruler, and hence law that presupposed the presence of the state as an institution founded in agreement. However, the civil law remained based in natural law, in that its binding normative force for men was underwritten through the first-order principles of natural law to which it gave effect and embodiment. Here, the particular distinction that Pufendorf saw as belonging to civil law, as a form of legal regulation, lay in its giving specificity to the determination of the rights and duties stipulated in natural law, as with the rights and duties relating to the person and to property. The civil law was further distinguished, for Pufendorf, in that it involved an institutional structure which comprehended judicial procedures and law enforcement procedures. This institutional structure, as Pufendorf understood it, was essential for the establishing of the rule of law in the state and, through this, for the effecting of the provisions of the natural law. For the institutional structure relating to civil law was taken by Pufendorf to stand as the precondition for men being brought to observe the duties imposed in natural law, and this through its providing for judicial remedies and penalties in circumstances where the duties were not fulfilled. Thus it was that, in Pufendorf's explanation of it, the civil law, and the sovereign rights of adjudication and punishment bound up with it, served to support the natural law with the sanction of coercive power, and, in doing this, served also to ensure that within the state the rights and duties of men as laid down in natural law were properly rendered as perfect rights and duties.[35]

3.3 Pufendorf and the law of nations

The supremacy, non-accountability and exemption from civil law, as essential characteristics of the sovereign power in the state, bore directly on the matter of the function that Pufendorf considered to be discharged by the state, as through the maintenance of the rule of law, in realizing the ends of the natural law through the perfection of the rights and duties which the natural law described. This perfecting by the state of the rights and duties of men under natural law of course presupposed the subjection of men to the rights and powers of the sovereign ruler, and with these being rights and powers that for Pufendorf were absolute in precisely the sense implicit in the assignment to the governmental authority in the state, as the bearer of sovereignty, of the characteristics of supremacy, non-accountability and freedom from limitation through civil law. There is a central question regarding Pufendorf that presents itself here, and it is

one that runs along the lines of the question that we confronted in the comparable context in our discussion of Hobbes. This is to do with how, and in what form, states that were sovereign in the particulars that Pufendorf identified were to be thought of as relating to one another in the international sphere under the constraint and regulation set through law. In response to this, it is to be emphasized that in *De Jure Nature et Gentium*, Pufendorf clearly pointed to the presence of an authentic legal framework which was to have application to the relations among states and rulers in the international sphere. This came through the specification that Pufendorf made of the rights belonging to the sovereign power in the state as concerned war and peace and the forming of treaties.

In connection with these rights of sovereignty, Pufendorf set out the basic principles, at the level of hypothetical natural law, that he held were to regulate the relations among states and rulers in the sphere of international politics. Thus Pufendorf here confirmed the substance of classic just war doctrine through his insistence that the waging of war by states required just cause, and with the relevant causes including defence against unlawful attack, the recovery of what was duly owed, and the securing of restitution for rights violations and guarantees for future safety. He further confirmed the terms of just war doctrine through insisting that the rights of war and peace in respect of the state were monopoly rights vested in the sovereign ruler, and with the right of undertaking war and the right of entering into peace agreements to conclude wars being rights which were vested in the sovereign on an exclusive basis.[36] As for treaties, Pufendorf summarized the principles relating to the law of treaties, as understood as the law governing the agreements formed by sovereign rulers. Thus he here gave consideration to the category of state treaties that specified general rights and duties set in natural law, as with treaties providing for diplomatic rights, in addition to the category of state treaties that he saw as giving effect to rights and duties which were not as such set in natural law.[37]

In principle, the rights of sovereignty concerning war and peace and the law of treaties, as Pufendorf elaborated them, belonged to the law of nations as the form of international law that served to regulate the external relations among states and rulers. This, as we have seen, was how it had been for Grotius in *De Jure Belli ac Pacis*. As against Grotius, however, Pufendorf did not present the law of war and peace, and the law of treaties, as pertaining to the province of the law of nations proper. For Pufendorf, the rights of war and peace and the rights relating to treaties, as rights of sovereignty, were rights that were exercised in the context of the institutional order particular to the state. Accordingly, these stood as

rights that were to be thought of as originating through agreement, and as obtaining only within the context of the state as an institution based in agreement. For all that, the explanation that Pufendorf gave of the matter was such that the sphere of the mutual external relations of states and rulers, as the sphere of politics where international law had its application, was the sphere of the state of nature. As such, it was the sphere of a natural form of society that was to be thought of as subsisting without the framework support of institutions and independently of all such agreements which created institutions.[38]

Given that Pufendorf saw states and their rulers as co-existing in a natural condition of society, then it followed that he was not able to admit the law that was to regulate the relations among them on the international plane as law that had the status of law that proceeded from agreement or that involved, as the basis for its application, institutional structures which presupposed agreement. In other words, the law that was to be considered as having application to states and rulers in the international sphere was nothing other than the natural law, and with this being the law that Pufendorf presented as specifying the fundamental principles of self-preservation and social order among men. Thus it was that when Pufendorf came to came to address the question of the status of the law of nations, as the form of international law applying to states and rulers, he confirmed the position of Hobbes to maintain that the law of nations consisted in the same principles of natural law which applied to individual men as prior to the founding of states through institutional agreements. Of course, the principles of natural law that formed the substance of the law of nations were the absolute principles of natural law. For in the international sphere, as Pufendorf explained it, there were no institutions based in agreements holding among states and rulers, and so there could exist no institutional context providing for the elaboration of a law of nations formed from principles of natural law which possessed the status of hypothetical principles. Hence the law of nations, for Pufendorf, was understood to comprise the principles that pertained to absolute natural law as follows: the principles relating to the rights and duties of men as concerned the ends of self-preservation; the principles relating to the duties of men as concerned mutual respect for their person and rights; the principles relating to the duties of men as concerned mutual respect for their natural equality; the principles relating to the sphere of the common duties of humanity; the principles of good faith as the precondition for the forming of agreements.[39]

It is unnecessary to consider in detail how the principles of absolute natural law, as these were taken by Pufendorf to embody the substance

of the law of nations, present themselves as principles that go together to form a coherent legal framework for the regulation of the external relations of states and rulers in the international sphere. For the principles at issue were principles that Hobbes identified, and, as we explained in review of Hobbes, these were principles that in their application to states and rulers stand as principles which lie at the foundations of international law in its modern form. As a matter of record, however, it is to be noted, for example, that the right of self-preservation that Pufendorf thought of as belonging to men under natural law was a right that, in its relation to states and rulers, conforms to what is recognized in international law as the fundamental right of states to act in self-defence. Then again, the basic rights of men that, for Pufendorf, were underwritten in absolute natural law, as in relation to the person and property, are to be viewed as corresponding in their international application to such rights of states as those relating to territorial jurisdiction and political independence. Still further, the natural law principle that men were to be treated as equals one to another involved appeal to the principle of natural equality, and, as with Hobbes, this was a principle that, as Pufendorf saw it applying to states and rulers in the international sphere, implied the recognition of the equality of states that, as within the framework of modern international law, is the essential concomitant of the sovereignty and independence of states. As a final case, there is the absolute duty that Pufendorf took to fall on men as regards the faith of agreements. This duty is of course to be found confirmed in the fundamental rule of international law to the effect that treaties, and other international agreements, are binding on the states that are parties to them, and that they are to be performed by the states concerned in good faith.

The principles of natural law that, for Pufendorf, embodied the substance of the law of nations were the absolute principles of natural law, and included none that possessed the status of hypothetical principles of natural law. For hypothetical principles of natural law applied only in the context of institutional structures based in agreement, whereas, as we have seen, Pufendorf insisted that states and rulers were to be thought of as co-existing in a natural condition of society, rather than as bound together through their will and agreement within an institutional framework. Even so, it is to be observed that the hypothetical principles of natural law that Pufendorf identified were such as to have a direct bearing on the law applying to states and rulers in the international sphere. This was so most particularly in the case of the hypothetical principles of natural law that, for Pufendorf, were specific to the institution of government in the civil state. For these were hypothetical principles of natural

law that served to define the foundations of the state as a form of human association, and, in doing so, they defined the particular attributes and character of states, and rulers, considered as the subjects of the absolute law of nature which Pufendorf took to have application to them as the substantive law of nations.

The institution of the state, as this was explained by Pufendorf by reference to the hypothetical principles of natural law, was presented by him in terms parallel to those in which Hobbes had presented the institution of the commonwealth as this was to be understood from the standpoint of the law of nations. In specific terms, Pufendorf saw the state standing as a distinct legal person with its own rights and property, and as having a capacity for will and agency to be exercised by the individuals possessing the powers of government which belonged to rulership in the state. The individuals having governmental powers in the state were representative persons, who acted through the constituted offices of rule in the exercise of the rights of sovereignty. The rights essential to sovereignty in the state were directed to the maintenance of the rule of law and related to the institutional powers that were the basis for legal order, as with the powers of law-making and adjudication and the powers concerned with the execution of the laws. From the perspective of the natural law hypothetical to states, the rights of sovereignty were such as to establish states as sovereign and independent entities, and with this involving those of the characteristics of states, as with supremacy and non-accountability, that Pufendorf considered to be essential to the exemption of states from the control and scrutiny of external powers and agencies as to their own government and administration.

The essential form of the state that Pufendorf elaborated from the standpoint of the hypothetical natural law is, in its essentials, the one that has come to be assumed by the states in their standing as the subjects of international law. Thus the modern system of international law is such that, for its purposes, states are recognized to bear distinct legal personality, to be subject to institutions of self-government, to exercise the sovereign rights essential to rulership, and to possess sovereignty and political independence as on conditions where this secures to them freedom from outside powers and agencies as to the conduct of their internal affairs. The identification that Pufendorf made of these the basic principles of the modern state is crucial in understanding the contribution that he made to the tradition of international law: in the same way that it is crucial that he affirmed with the absolute natural law that states and rulers were bound under principles, such as those of self-defence, the equality of states and the faith of agreements, which are embodied in

international law as its foundational principles. Despite the recognition that Pufendorf gave to the basic principles of the institution of the state, it is to be emphasized that he fell short of providing an adequate determination of international law such that its principles were rendered properly consistent with those specific to states and rulers as the subjects of the law. For there were notable defects with the concept of international law that Pufendorf adopted, and defects that, as we now review them, run parallel to those which were present in the concept of international law as Hobbes expounded it.

The first defect to point to in the account that Pufendorf gave of international law lies in his exclusion of positive law, as law based in principles of will and agreement, from the sphere of the law which applied to states and rulers in the international sphere. For Pufendorf, as for Hobbes before him, the law of nations consisted in the principles of natural law in their application to states and rulers, and with this being, by definition, law that applied to states and rulers, as it applied to individual men, without regard to their will and agreement. Here, Pufendorf and Hobbes stand in sharp contrast to Grotius. To be sure, Grotius did identify certain first-order principles of natural law, such as the principles of self-defence, property rights and good faith in agreements, where these were held by him to form part of the law of war and peace as it applied both to individual men and to states and rulers. However, Grotius also held that the law of war and peace, in its application to states and rulers, comprehended the law of nations proper, and with this law being presented as positive or voluntary law which was based in the will and consent of states and rulers and which, as such, was fully distinguishable from the law of nature itself. In this matter, Grotius was very much more in line than Hobbes and Pufendorf with the underlying trends that were subsequently to unfold in the development of international law. For modern international law has developed such that it is acknowledged to incorporate within itself strong elements of positive law, and with the positive law of nations being understood to be embodied in such of the conventional sources of law as state custom and the treaty agreements formed by states and rulers.

The neglect by Pufendorf of the elements of positive law present in the law applying to states and rulers relates to a further defect in his approach to international law, and one where the matter of the status and position of states and rulers as the subjects of international law is of central concern. Here, once again, the contrast with Grotius is pertinent. For Grotius, the positive or voluntary law of nations was law that originated in the will and consent of states and rulers, and law that he saw as having exclusive

application to states and rulers as its own quite particular subjects. As against this, however, there was the law of nature. This, for Grotius, was law that applied to states and rulers, but also law that had common and indiscriminate application to individual men and to states and rulers, and this notwithstanding the consideration that its effects as law for men were radically distinct from the effects that it involved for states and rulers. As with Grotius, Pufendorf thought of the natural law as applying both to individual men and to states and rulers in the international sphere. Nevertheless, it remains the case that for Pufendorf, as opposed to how it had been for Grotius, there was no reference to be made to a positive law of nations which was to be assumed as having application to states and rulers on an exclusive and particular basis. Thus it was that Pufendorf followed Hobbes in advancing a concept of international law where the principles of international law were left unrelated to the actual situation of states and rulers, and where, in consequence of this, the juridical sufficiency of international law was left critically undermined at the level of the rights and duties which the law was intended to define and to give effect to.

The principles of natural law, as Pufendorf specified them, were such as to direct that men were to establish, and to subject themselves to, states and state institutions. This Pufendorf considered to be essential if the rights and duties of men, as defined in natural law, were to be rendered as perfect rights and duties. For perfect rights and duties were understood by Pufendorf to be rights and duties that were enforceable through the exercise of coercive power, where this power was relative to some institutional structure based in acts of will and agreement. Hence, for Pufendorf, it was the state that served to perfect the rights and duties of men, given that, as he explained the matter, states provided for the institutional procedures relating to law-making, adjudication and executive authorities which made possible the full and effective enforcement of the rights and duties falling on men under natural law.

In common with the situation of individual men prior to the forming of states, the situation of states and rulers in the international sphere was presented by Pufendorf as one where states and rulers were to be thought of as being subject to the absolute principles of natural law. Even so, Pufendorf still recognized the same crucial point of distinction as had Hobbes as between the situation of individual men in relation to natural law and that of states and rulers. This was that in contrast to how it was for individual men, there was no requirement, as contained in natural law, to the effect that states and rulers were to place themselves in subjection to an institutional authority possessing the capacities of coercive

power for the effective enforcement of their rights and duties. To the contrary, Pufendorf insisted that states were related to one another in the international sphere as in a natural condition of society, where this remained exclusive of all institutional frameworks based in will and agreement. Hence there were present, as among states and rulers, no hypothetical principles of natural law applicable to the international sphere sufficient to bring juridical perfection to the rights and duties to which states and rulers were subject. Indeed and to repeat the point, the hypothetical principles of natural law that Pufendorf saw as particular to the institution of the state were such as to underwrite the supremacy and non-accountability of states, and with this being so in terms that served to exempt states from subjection to the form of governmental control powers which were appropriate to individual men as associated together under state authorities.

The view that Pufendorf took as to the situation of states and rulers in international society was in its essentials that taken by Hobbes, and it is one where there was implied what has come to be accepted as the inherent limitation of international law as a form of legal regulation. This is the absence from international law, as law applying to states, of centralized institutions of law-making, adjudication and executive enforcement of the laws, together with the absence of centralized arrangements for the imposing of sanctions in cases of the breach of obligations. Despite this, it is to be emphasized that while Pufendorf properly recognized the limitation of international law, the account that he gave of this was such that he was led to the unwarranted conclusion as to the imperfection, and hence the juridical inadequacy, of international law in respect of the rights and duties to which it related. That Pufendorf concluded this is understandable. For he saw states and rulers as bound only by absolute natural law, and as standing outside all institutional frameworks based in will and agreement and such as might give effect to hypothetical principles of natural law. However, it is this conclusion that underlines Pufendorf's ultimate failing in the determination of the concept of international law. In specific terms, it is here underlined that Pufendorf failed to determine the concept of international law such that the principles of international law were understood to answer to the actual condition and attributes of states and rulers, but with the juridical integrity of international law and the juridical perfection of rights and duties at international law being nevertheless vindicated and made good. This failing was to be avoided, and a more adequate concept of international law determined, in the work of Wolff and Vattel.

3.4 Wolff and Vattel

Wolff and Vattel were the successors to Grotius, Hobbes and Pufendorf in the modern natural law tradition. As such, Wolff and Vattel presented the natural law as a universal law of reason that applied to men in the condition of nature that existed prior to political society, and that, in doing so, stood as a law that defined the principles of self-preservation and the principles of social order which provided for the realization of the ends of self-preservation. Regarding the natural law in its application to the international sphere, this was presented as law that defined the conditions appropriate for the self-preservation of states, and the conditions of social order appropriate for securing the defence and preservation of states and their rights and interests. In the context of the present discussion, Wolff and Vattel are to be placed with Grotius, and to be distinguished from Hobbes and Pufendorf, in the respect that they understood the law applying to states and rulers to comprise not only the law of nature, but also what they took to stand as the positive law of nations. As Wolff and Vattel explained it, the sphere of the positive law of nations included the principles of natural law that were modified to fit with the circumstances of states and rulers, and in accordance with their own will and consent. This part of the law applying to states and rulers, as Wolff and Vattel elaborated it, is crucial in understanding the respects in which they avoided the defects in the concept of international law as are associated with Hobbes and Pufendorf.

In the exposition of the law of nations that Wolff set out in the treatise *Jus Gentium Methodo Scientifica Pertractatum*, there were identified four distinct parts of the law of nations. First, there was the necessary law of nations, which comprised the law of nature in its direct application to nations and states. This part of the law of nations was strictly binding in conscience and absolutely unchangeable in its form, and so it had universal application to all nations and states in the respect that no nation or state was at liberty to release itself, or any other nation or state, from the obligations which the law imposed.[40] Second, there was the voluntary law of nations. This was the law that Wolff explained as law deriving from the necessary law of nations and hence as having universal binding force for nations and states, but as comprising such adaptations of the necessary law of nations as were essential for the common interests of nations and states. The third part of the law of nations was the stipulative law of nations. This comprised the law established through the formal treaties, or stipulations, as were established by nations and states through agreement. The fourth part of the law of nations was the customary law of

nations. This comprised the law established through the long practice and observance of nations and states.[41]

To repeat, the voluntary law of nations was held by Wolff to derive from the necessary law of nations, and it was through this derivation that it had its foundation in natural law. However, it is to be emphasized that Wolff placed the voluntary law of nations with the stipulative and customary law as forming the positive law of nations, and this for the reason that he saw the voluntary law of nations as proceeding from the will of nations and states and as being based in their presumed consent.[42] In order to explain the status of the voluntary law of nations as law founded in natural law and yet involving the consent of nations and states, Wolff maintained that the source of this law, and the scope of its application, were to be understood as lying in a certain form of association which obtained among nations and states in the international sphere. This association of states Wolff called the *civitas maxima*, and with this being specified as a supreme state of which all nations and states were to be thought of as having membership or citizenship.[43]

For Wolff, the diverse nations and states were to be considered as having been brought together by nature, and by agreement, to form a single state, whose substantive purpose was directed towards the common good of the nations and states as secured through their combined powers. The supreme state so formed among nations and states was presented by Wolff as having certain of the characteristics belonging to the institution of the civil state, and with these including, most notably, a system of laws and a power of law-making. The laws particular to the supreme state were held to be binding on all nations and states, and to be supported through a general right vested in the supreme state to coerce such nations and states as failed to fulfil their obligations in law. This right of coercion was such that, in respect of it, the nations and states associated within the supreme state exercised a collective sovereign jurisdiction over the individual nations and states. Hence the supreme state was understood to have its own government, and with this being democratic in form as consistent with the collective nature of the sovereignty that was present in the supreme state and in the united body of the nations and states which comprised it.[44]

The supreme state was further understood by Wolff to embody the will of all nations and states, and to have a ruler who gave effect to this will. In accordance with the democratic basis for the government of the supreme state, the combined will of the nations and states was to be determined through reference to the will of the majority of nations and states, as this was reflected in the law of nations as followed by the

more civilized nations and states. Regarding the ruler of the supreme state, his office concerned the elaboration of the law through which the will of the nations and states found its expression. This law was to be assumed as binding on all nations and states, even while it was not identical in all respects with the natural law. For Wolff, the idea of the ruler of the supreme state was a fiction, but a fiction that was to be appealed to in order to account for the adaptations that had to be effected to the necessary law of nations such as to have this rendered consistent with the substantive purpose of the supreme state. The law that came into being through the adaptations made of the necessary law of nations stood as the voluntary law of nations. Thus it was that Wolff saw the voluntary law of nations as law whose origins were accounted for in terms of the fiction of its being law stipulated by the ruler of the supreme state, and so, in line with the meaning of this fiction, as law that was understood to originate in the will of nations and states. Nevertheless, the ultimate foundation of the voluntary law of nations lay in nature, rather than in the will of nations and states as such. For, as Wolff underlined, it was from the necessary law of nations that the voluntary law was derived.[45]

Wolff intended the idea of the *civitas maxima* to explain how nations and states were to be thought of as bound by a system of universal law, where this was based in a normative order embodied in nature. In addition to this, the idea of the *civitas maxima* was intended to explain how the universal law of nature, as binding on nations and states, required the will and consent of nations and states for its application, as law, to the actual condition of their relations in the international sphere, and how in being so applied the natural law was modified to accord with the defining status and attributes of nations and states. The voluntary law of nations was the very essence of the law that Wolff sought to account for with the idea of the *civitas maxima*, and this he presented as the law of nature that was specific, in its application, to nations and states and to their condition. Given that the voluntary law of nations, for Wolff, was the law of nations pertaining to the *civitas maxima*, then this form of the law of nations is appropriately to be viewed as comprising the principles of natural law applying in the international sphere that remained relative, or as it were hypothetical, to an institutional framework in the sort of respects which, as we have seen, Pufendorf expressly excluded from consideration. Regarding Vattel, he is notable in that he rejected the idea of the Wolffian *civitas maxima* in explanation of the bases of the law of nations, and, with it, the assumption as to the necessity of the presence of an institutional structure obtaining among nations and states to found the law of nations. Here, Vattel moved even further from Pufendorf than Wolff had done in

explaining how the law of nature gave rise to a system of the law of nations where principles of natural law applied to nations and states, but as in accordance with their own defining status and attributes.

Vattel wrote *Le Droit des Gens* with the purpose of providing a translation and popular version of Wolff's *Jus Gentium Methodo Scientifica Pertractatum*. In the event, however, *Le Droit des Gens* became accepted in its own right as an authoritative statement of the law of nations, as this was observed by the European states. In his treatise, Vattel adopted the four-part division of the elements of the law of nations as favoured by Wolff. First, there was the necessary law of nations, as comprising the law of nature in its direct and strictly binding application to nations and states and to their rulers.[46] Second, there was the voluntary law of nations, and with this involving the modifications made to the strictness of the law of nature in its application to the actual affairs of nations and states and of rulers.[47] Third, there was the law of treaties or the conventional law of nations, and, fourth, the customary law of nations or international custom.[48] The voluntary, conventional and customary forms of the law of nations presupposed the consent and agreement of nations and states as the condition for their establishment and application, and, as such, they comprised the sphere of the positive law of nations.[49]

If Vattel followed Wolff in the classification of the parts of the law of nations, he nevertheless diverged markedly from his predecessor in the account that he provided as to the voluntary law of nations and the basis for its determination. It was here that Vattel explicitly ruled out the idea of the *civitas maxima*, and with it Wolff's implication that there might exist a supreme state in the international sphere possessing rights and powers analogous to those of the civil state, and to which the separate nations and states were to be subordinated. For Vattel, no such supreme state was to be conceived of, and this for the reason, as he made it clear in the Preface to *Le Droit des Gens*, that the form of association specific to the state was not to be found obtaining among nations and states, given that nations and states were, and claimed to be, fully independent of one another.[50]

The idea of the *civitas maxima*, Vattel insisted, was irreconcilable with the fact of the independence belonging to nations and states, and it was, in his view, quite unnecessary to follow Wolff in making reference to some international governmental framework in order to explain the basis of the voluntary law of nations. According to Vattel, the principles of the voluntary law of nations were to be determined through reference to the purpose of the form of natural society which he saw as existing among nations and states, and through consideration of the general

laws which he saw as given in that form of society. Thus as he presented the matter, nations and states were to be thought of as seized of the moral status and attributes of free and independent persons, and hence as standing in the same condition of mutual relationship as individual men stood to one another in the state of nature that preceded the instituting of political society. In the natural condition of their co-existence, nations and states, as with the individuals comprising them, were to be viewed as the subjects of the obligations and rights which were stipulated in the law of nature. It was this law, and the obligations and rights that it defined, which constituted the foundation of what Vattel saw as the universal society established by nature among all men, and the foundation of what he saw as the universal society established by nature among all the various nations and states. These two forms of natural society were connected through the law which founded them, and which described their particular and respective ends. So it was that, for Vattel, men were united in a natural society where they were bound to assist one another to the end of perfecting themselves and their condition, in the same way that nations and states were to be thought of as being bound to assist one another in the realization of their own perfection, and that of their condition, as the ultimate end of the natural society which they formed together.[51]

In his *Jus Gentium Methodo Scientifica Pertractatum*, Wolff wrote of nations and states as forming a natural condition of society that was continuous with the society which nature had established among individual men. He wrote also of how the common good particular to the natural society of nations and states consisted in the nations and states assisting one another to advance the end of their own perfection, and that of their mutual condition. However, the full realization of the ends essential to the common good of nations and states was something that Wolff saw as presupposing the separate nations and states to have passed beyond the natural condition of their society, and to have come together within the structured institutional condition of political association as particular to the *civitas maxima*.[52]

This was not the position that Vattel took, for he insisted that the ends of the natural society obtaining among nations and states were given in certain general laws that he saw as lying at its foundations. These, as he explained them, were the laws by whose terms there was excluded the possibility of the separate nations and states being thought of as placed in subjection to the authority of a supreme international state. The first such general law was that nations and states were to contribute to the welfare and development of one another, to the extent that this was in

their power and consistent with the pursuit of their own individual welfare and development.[53] The second general law provided for the natural freedom and independence of nations and states, and required that the nations and states were to exercise their natural liberty consistent with the conditions of peace and to respect the rights which belonged to one another by nature.[54] As a further general law of the natural society of nations and states, there was the principle of the equality of nations and states. In explanation of this, Vattel affirmed that just as individual men were equals by nature and the subjects of the same naturally sanctioned obligations and rights, so also were the nations and states, when viewed as free persons or entities co-existing in the condition of nature, to be recognized as equals by nature and as bearing through nature the same obligations and the same rights.[55]

In the specification that Vattel provided of it, then, the natural society obtaining among nations and states was a form of society founded in general laws which worked to confirm, and to secure, the freedom, independence and equality of nations and states. The principle that nations and states were free, independent and equal was here critical. For it formed the basis for the derivation of the modifications to the strictness of the natural law, as these modifications were understood by Vattel to be essential for the establishing of a system of law appropriate for the regulation of the relations among nations and states in the actual condition of their society in the international sphere. To be more precise, it was the natural society of the nations and states as such, characterized as a society of free, independent and equal nations and states, which constituted the foundation of the voluntary law of nations. Thus, for Vattel, the voluntary law of nations was essentially the law of nature modified to stand as rules and principles that conformed with, and that gave effect to, the general laws that provided that the perfection of nations and states, and the perfection of their condition, required the advancement of their mutual welfare and development together with the maintenance of their mutual freedom, independence and equality.

The explanation that Vattel presented as to the mode of the derivation of the voluntary law of nations from natural law was intimately bound up with the appeal that he made to a particular classification of the different types of obligations and rights. This classification was based in a distinction between perfect obligations and rights and imperfect obligations and rights that ran closely along the lines of the one drawn by Pufendorf. According to Vattel, obligations were either internal obligations or external obligations. Thus obligations were internal when they were binding on men in conscience, and derived from rules and principles concerning

the duties of men as given in natural law. External obligations were obligations that involved rights that were held by other men. For Vattel, the category of external obligations was divided into perfect obligations and imperfect obligations, and with the rights relating to these being divided into perfect rights and imperfect rights. Here closely following Pufendorf in the analysis of obligations and rights, Vattel argued that perfect rights were rights where there existed a right to compel the performance of the obligations to which they corresponded. Imperfect rights were rights whose corresponding obligations were not capable of being so enforced. Perfect obligations were obligations where there was present a right to enforce the fulfilment of their terms. Imperfect obligations, by contrast, were obligations where there was present no right of enforcement as such in regard to their subjects, but only a right to request that the terms of the obligations were to be fulfilled.[56]

This classification of obligations and rights centrally concerned the matter of the voluntary law of nations in its derivation from natural law. Thus, for Vattel, the standpoint of the voluntary law of nations was one where the separate nations and states were to be thought of as unaccountable to one another for the intrinsic justice of their conduct, as this bore on the matter of what was owed in strict conscience under the law of nature. For the nations and states were to be considered as being at liberty to determine for themselves what was required of them before conscience in the discharging of their natural obligations, and, in consequence of this, the nations and states were also to be considered to possess a perfect equality in rights in their relations one to another. Vattel recognized that there remained significant limitations on the liberty of nations and states. He did so, however, only in the respect that nations and states were accountable to one another for violations of obligations and rights which were perfect external obligations and rights, and which, as such, were capable of enforcement as between their bearers. According to Vattel, then, the voluntary law of nations did not comprehend the law of nature in its entirety. Rather, it related to the obligations and rights of nations and states that were external and perfect obligations and rights, and where the conditions for their enforcement, as obligations and rights, remained consistent with the liberty and equality which belonged to nations and states by nature. Regarding the justification for the voluntary law of nations and the modifications of natural law that it involved, this Vattel presented as being based in the consideration that the means of force and coercion were not to be employed by, and as against, nations and states in circumstances where this served to undermine their natural liberty, independence and equality.

It was to this voluntary law that the nations and states were to be thought of having consented, as a body of rules and principles whose observance by nations and states stood as the precondition for the realization of the ends of the natural society which they formed together.[57]

The view of the law applying to nations and states as the natural law modified, so as to accord with the liberty, independence and equality belonging to nations and states, is one that is everywhere present in the statement of the substantive law of nations provided in *Le Droit des Gens*. Of particular importance, here, are those subject-matters of the law of nations where Vattel distinguished between the relevant principles given in the necessary law of nations and those given in the voluntary law of nations, and where, in doing so, he underlined that it was the voluntary law that embodied the law which had application to nations and states in their actual condition and circumstances. This was so, for example, with Vattel's treatment of the law of international commerce and also with his treatment of the law of war.[58]

In the matter of international commerce, Vattel maintained that the separate nations and states were assumed to possess a fundamental right, and to be subject to a fundamental obligation, to engage in commerce for the satisfaction of their mutual needs and interests. As for the basis of the right and obligation of nations and states to engage in commerce, this was understood to be given directly in the natural law. However, the rights and obligations involved in international commerce, as these were founded in natural law, remained imperfect rights and obligations, and hence rights and duties which were not capable of enforcement as between nations and states. For, as Vattel argued, nations and states were seized of natural liberty, and from this it followed that nations and states were free to determine for themselves whether, and if so to what degree and on what conditions, they were to enter into commercial relations with one another, as they were free also to make a determination of this in line with proper judgments concerning their general security and advantage. The freedom of nations and states to set the terms of their trade and commerce with one another in the international sphere was, for Vattel, the essential principle of the voluntary law of nations as it related to the law of international commerce. Thus it was provided for in the voluntary law of nations, as distinct from the necessary law of nations, that commerce among nations and states was to be governed by the law of treaties. This meant, of course, that commercial rights and duties as between nations and states could become perfect, and hence enforceable, only when they were based in treaty agreements formed by consenting nations and states and thereby given the standing of

conventional law. It was in these terms that Vattel saw the principle of freedom of commerce among nations and states as a principle based in natural law, yet as a principle that applied to nations and states only within the framework of a system of voluntary law which worked to define, and to preserve, the liberty, independence and equality of the individual nations and states.[59]

As for the law of nations relating to war, Vattel here presented the natural law, as forming the necessary law of nations, as founding the right of nations and states to wage war, and, at the same time, as limiting the occasions for the legitimate exercise of the right to those where some conventional just cause for war existed. However, it is to be underlined that while Vattel based the right of war in natural law, he nevertheless emphasized that it was not open to nations and states to act to enforce the terms of natural law in respect of one another in its full rigour. On the contrary, he held that when nations and states resorted to war, it was required that they were to conform with such rules and principles relating to the sphere of the voluntary law of nations as served to maintain an equality of rights as between belligerents. One aspect of this, for Vattel, was that the necessary law of nations was such that, from its standpoint, no war between nations and states was properly to be counted just on both sides, but that, in contrast, the voluntary law of nations was such that it provided that wars between nations and states were properly to be considered just on both sides as to the legal effects of war. As an example of this, Vattel took it to stand as a rule of war relating to the voluntary law of nations that the permissible instruments of war were to be regarded as allowed to belligerent nations and states on an equal basis, and irrespective of the intrinsic justice of wars as pertaining to cause. Thus it was that the voluntary law of nations was understood by Vattel to involve modification of the principles of the law concerning war as the means for enforcing the rights of nations and states that the natural law sanctioned, and with this being such as to reflect and to give effect to the equality among nations and states which stood as the fundamental principle of natural law as it applied to nations and states.[60]

As it is evident, the voluntary law of nations, for Vattel, was the law of nature in its application to nations and states which were recognized to stand as free, independent and equal entities. Hence the voluntary law of nations was law that gave recognition to, and that served to regulate, nations and states in their standing as sovereign nations and states. This was so for the reason that the freedom, independence and equality that Vattel took to belong to nations and states, and to dictate the various modifications to natural law that formed the voluntary law of nations,

were in themselves the essential elements of the sovereignty that he considered to be exercised by nations and states as subjects of the law of nations.[61]

It is the emphasis that Vattel placed on the sovereignty and independence of nations and states, as the subjects of the law of nations, that separates him off from Wolff. This is so, most particularly, with his rejection of the Wolffian conception of the *civitas maxima*. For, in this matter, Vattel maintained that the sovereign independence of nations and states was such that nations and states were to stand exempt from subjection to all external political authority, and with this exemption being something that was understood to be given in the terms of the law which applied to nations and states and which provided formal juridical definition for their sovereignty and independence.

Here, Vattel followed Pufendorf. As we have explained, Pufendorf saw nations and states as being exempt from external political authority in respect of such of their characteristics as those of supremacy and non-accountability. So also did he hold, as Vattel did after him, that nations and states were to be counted as free, independent and equal, and hence as sovereign, under the terms of the law of nature which had application to them. Even so, Pufendorf thought of nations and states as being sovereign in terms such that nations and states stood to one another in the international sphere in strict subjection to the absolute principles of natural law, but not in association within an institutional framework where the applicable law was based in their consent and agreement. Thus it was that there was no possibility admitted by Pufendorf that the law applying to nations and states was to be considered as being, as in his terms, hypothetical in form and hence sufficient to confer juridical perfection on the substantive rights and duties which the law stipulated. As opposed to Pufendorf, however, Vattel was prepared to recognize the presence of an institutional framework as setting the context for the co-existence of nations and states in the international sphere. The framework in question was not a political-institutional structure such as the Wolffian *civitas maxima*. Rather, it was the framework set through the laws that applied to nations and states in what Vattel took to be the condition of the natural form of their mutual society. This framework comprised the voluntary law of nations, and it was a framework that was institutional in being based in the consent and agreement of nations and states, and that, as such, provided for the perfecting of the rights and duties of nations and states as arising from the principles of natural law. In the light of this, it is pertinent to observe that with the voluntary law of nations, Vattel presented principles of natural law applying to

nations and states that had the form of what Pufendorf understood to be hypothetical principles of natural law, and that, in this sense, had the standing of natural law principles which were hypothetical to the condition of society obtaining among nations and states.

The specification that Vattel made of the voluntary law of nations serves to distinguish him from Pufendorf, and to underline his superiority in elaborating the concept of international law as in regard to his predecessor. In addition to this, it is the idea of the voluntary law of nations that brings out that which is most distinctive about the contribution of Vattel to the development of international law, in his standing as a modern natural law thinker. Here, it is to be emphasized that with his appeal to the voluntary law of nations, Vattel was in line with Grotius, Hobbes and Pufendorf in affirming that the law of nature stood as the foundation for the law applying to nations and states in the international sphere, and hence that it was the natural law that constituted the basic substantive principles of the law of nations. At the same time, however, the idea of the voluntary law of nations was such that, through the terms of his consideration of it, Vattel was able to expound the principles of natural law as being modified through the form of their application to nations and states. This meant, of course, that he was able to identify the principles of natural law that were particular to nations and states, as distinct from the principles of natural law that applied to individual men in the condition of society which obtained prior to nations and states and their formation. Thus it was that in exposition of the law of nations, Vattel looked beyond the undifferentiated natural law principles, such as self-defence, good faith and equality and equal recognition, to which Hobbes and Pufendorf had confined themselves. Thus it was also that in looking beyond the limits of undifferentiated natural law principles, Vattel carried forward the enterprise of Grotius in *De Jure Belli ac Pacis* through constructing a systematic doctrine of international law that, in accordance with the concept of the voluntary law of nations, involved reference to all the fundamental substantive elements of the law of nations as the law relating to states and rulers.[62]

3.5 The undermining of the natural law consensus on international law

The exposition that Vattel provided of the principles of the law of nations in *Le Droit des Gens* marks the culmination of the modern tradition of natural law theorizing, as this was directed towards the full elaboration of the concept of international law. In relation to the standard set

by Vattel, the exposition that Pufendorf gave of the law of nations and its core principles in terms of pure natural law is to be counted as defective, and it is here to be underlined that the defects of Pufendorf in regard to the concept of international law are in their essentials the same defects that are to be found with Hobbes. Thus there was a general neglect by Hobbes and Pufendorf of the law that derived from the will and agreement of states and rulers, and that as such related to the sphere of the positive law of nations. There was also the asserting of a contrast between civil law and the law of nations in terms where the law of nations was presented as inadequate, as a form of legal regulation, since it remained unsupported by the institutional machinery specific to civil law as the law maintained in states. Finally, Hobbes and Pufendorf failed to set out a complete system of the law of nations, and this in the particular respect that the principles of natural law that they took to comprise the substance of the law of nations were not modified so as to have proper application to states and rulers, as the subjects of the law of nations, in their actual condition and circumstances. In consequence of this failing, there was an evident falling short by Hobbes and Pufendorf in the matter of the vindication of the juridical perfection of the rights and duties as embodied in the law that they thought of as applying to states and rulers in the international sphere.

Notwithstanding the defects with the naturalistic view of the law of nations favoured by Hobbes and Pufendorf, it is still to be emphasized that the part played by the two thinkers was positive as regards the tradition of international law and its longer term development. For, as we have demonstrated, Hobbes and Pufendorf identified the natural law principles that were to be central in the conceptual framework for the law of nations set by Vattel, and with these being the principles that were to come to be central in what is the now existing system of international law. That this is so serves to confirm the commitment of Hobbes and Pufendorf to the ideals projected for international law which are to be found present in the modern natural law tradition as starting with Grotius.

The idealism of the modern natural law thinkers in relation to international law is bound up with two key claims advanced by the thinkers, as concerning the concept of law as such. First, there is the claim as to the essential unity of the spheres of law and morals, and with this being the claim to the effect that the law was to be thought of as incorporating within itself certain first-order principles of justice and political morality. The unity of law and morals formed a core claim of the modern natural law thinkers, and it is one that, in respect of international

law, was everywhere appealed to by Grotius, Hobbes, Pufendorf, Wolff and Vattel in their insistence that the principles of natural law, as these comprised the first-order principles of justice and political morality, stood as principles of law which had a direct application to states and rulers in their mutual external relations. As evidence for this, there are the principles of self-defence, good faith in agreements and equality and equal recognition as principles of justice and political morality stipulated in natural law, and with these principles being affirmed as integral parts of the law which was to set the basic terms of the relations among states and rulers in the international sphere.

The second of the key jurisprudential claims of the modern line of natural law thinkers relates to the standing and character of the first-order principles of justice and political morality which were presented as being incorporated within law. This is the claim that the principles of justice and political morality, as contained within law, were principles that possessed the objective validity and the universal application appropriate to them as principles of natural law and that, in this aspect, stood as laws which were to be thought of as being based in the order of nature itself. It was in these terms that the natural law thinkers held that the principles of justice and political morality pertaining to the natural law formed a sphere of law that carried a specific normative status, and a binding normative force, which were such as to distinguish it from the sphere of positive law, where law was understood to originate through decisive acts of will, consent and agreement.

The distinction between the spheres of natural law and positive law was critical as regards the elaboration of the concept of international law. For in the drawing of it, the natural law thinkers were able to affirm that the law of nations incorporated, as part of itself, rules and principles of conduct that, as rules and principles pertaining to natural law, were to be considered as standing apart and separate from the forms of the positive law of nations where the will, consent and agreement of states and rulers were engaged and involved. Thus it was that the general principles of justice and political morality belonging to the law of nations, as part of natural law, were recognized to be distinct from the law deriving from the customary practice of states and from the treaty stipulations of states and rulers. So likewise were the general principles of justice and political morality, as belonging to natural law, recognized to have direct and binding application to states and rulers without regard to the performance of acts establishing their consent and agreement to be bound, such as would be presupposed for the obligations of states and rulers under customary law and the law set through treaties.

After Vattel, the principles central to the modern natural law tradition in jurisprudence, and the key claims regarding law advanced within the tradition, were to be challenged with the emergence of successor schools in legal and political thought. The effect of this was the undermining of the natural law consensus on international law, and, in more particular terms, the bringing into question of the leading claims made by the modern natural law thinkers in respect of the formal juridical status and the normative authority belonging to international law. Here, there stand out for attention two philosophers, who, as they wrote during the final decades of the eighteenth century, were to play a decisive part in the subverting of the natural law standpoint in jurisprudence. The first of these is Kant. The second is Bentham, who is here to be considered together with his follower Austin.

Among the mainstream political philosophers in the Western tradition, Kant is distinguished for his focusing on politics in its international dimension, and for his determination to provide a solution to the problem that he associated with the fact of international politics. The problem presented through international politics as Kant understood it, and in this he followed Hobbes, lay in the consideration that states co-existed in a natural condition of society, where this natural condition of society was by definition a non-juridical condition of society and hence also a condition of war. For Kant, it was imperative, as a matter of reason and of justice, that the international state of nature considered as the condition of war should be overcome, and that the condition of peace should be established among men and states. As for the solution for the establishing of peace and so also for the international problem as such, this Kant saw as requiring that individual men were to be brought together under the rule of law within the condition of states, and that the principles of the rule of law were to be extended to states and to men in their mutual relations in the international sphere.

The law that Kant presented as essential for the establishing of peace comprised the municipal law of states, the law of nations or international law and the world or cosmopolitan law, as being what he identified as the three parts of public law, together with the three forms of constitutional relationship that he identified as serving to found the different parts of public law. Thus Kant held that the municipal law of states was to be founded in the republican form of civil constitution. This, in Kant's sense of it, was the constitutional form that provided for representative government based in the separation of powers and, through this, for the subjection of governmental powers in the state to the constraints and limitations of law such as worked to preserve the rule of law

and to give effect to the rights of men as citizens. The law of nations, as Kant specified it, was understood to include among its core substantive principles the faith of treaties, the security of states as from forcible external interference in their constitution and government, and the application of legal constraints and limitations to states and governments which were engaged in the waging of war. As for the constitutional foundation for the law of nations, this Kant held was to consist in a federation of free states. The federation was to be based in a treaty among states, where the parties to it committed themselves to the rule of international law through undertaking to refrain from war in making good their rights and security and so, by extension, to settle their disputes through peaceful means. Finally, there was the world or cosmopolitan law. This part of public law Kant envisaged as involving the realization of the ideal of a constitutional, or juridical, framework possessing application to all men and states within the international sphere. It was also envisaged that the establishing of this juridical framework would serve to make possible the mutual interactions of men and states through trade and commerce, and the universal recognition of all men and states as bearers of legal status and personality. The basic elements of the law of peace, as here referred to, are as they are to be found expounded by Kant in *Perpetual Peace*.[63]

Of the different elements of the law of peace, it is the federation of free states, as the constitutional foundation for the law of nations, that is central in accounting for the contribution that Kant made in the development of international law and in the undermining of the natural law consensus on international law as to its normative status and binding force. In this matter, it is to be emphasized that while the federation, as Kant projected it, was to set the terms of a constitutional relationship among states, the form of constitution that was to be embodied in the federation was fully distinguished by him from the form of constitution which was specific to the civil state. As Kant explained it, the civil constitution for the state provided for the subjection of individual men to legislative, executive and judicial authorities, and with these authorities comprising the institutional context for the exercise of the right of coercive enforcement of the laws which applied to men as citizens. Against this, however, Kant was clear that in contrast to individual men, states were not to be made subject to governmental institutions with law-making, executive and judicial capacities and exercising coercive powers in the enforcement of laws. For Kant, states were based in a lawful civil constitution that both enshrined and presupposed their freedom and independence as states, and, in consequence of this, there was no foundation in law and justice for states being placed in a position of

inferiority, as relative to some external political superior, in respect of the application and enforcing of the laws which were to regulate their relations in the international sphere. Thus it was that Kant emphasized, in *Perpetual Peace*, that the essence of the federation of free states consisted in a treaty agreement among states that was aimed at securing their lawful freedom and independence. The treaty form of the association among states adhering to the federation was critical, and with this it is underlined how Kant considered international peace to be conditional not on the presence of institutions of international government, but rather on the preparedness of states to act in conformity with the terms of international law, and to settle their disputes concerning it, on a voluntary basis.

The proposal for the law of nations to be based in a federation of free states, as Kant formulated it, serves to confirm what, as we have seen, was a fundamental claim about international law to which Hobbes, Pufendorf and Vattel all gave expression. This was the claim to the effect that the law of nations was formally distinct from civil law, and with this being so in the respect that the law of nations stood as law that, as it applied in the international sphere, was limited in its being devoid of centralized institutions of government of the sort which underwrote the form of law as maintained in the civil state. In the confirming of the distinction between the law of nations and civil law, Kant conveyed none of the sense, as is present with Hobbes and Pufendorf, that the law of nations remained steeped in juridical imperfection on account of its falling short of the condition of civil law. On the contrary, Kant very clearly accepted that the law of nations was to be thought of as having validity and hence perfection as law in its own right. Indeed, the acceptance of this by Kant was presupposed in his stipulation of a federation of free states as the constitutional foundation for the law of nations.

However, Kant allowed for the validity of the law of nations in terms where while he insisted, as in line with Hobbes, Pufendorf and Vattel, that the law of nations was not to be based in institutions of international government, he nevertheless insisted also, and in this departing from his predecessors, that the ultimate foundation of the law of nations, and the ultimate source of its binding normative force, lay entirely in the will and agreement of states. The voluntarism of Kant in the explanation of the law of nations, and of its normative authority, is of course everywhere evident with his appeal for a federation of free states to provide the constitutional basis for the law of nations, and it is this voluntarism that is most particularly indicative of his break with the modern natural law tradition in respect of the matter of international law. That this is so is underlined by the consideration that Kant himself

explicitly denounced the codes of international law expounded by Grotius, Pufendorf and Vattel, and that the occasion for this denunciation was the supporting discussion of the proposal for the federation of free states which comes in *Perpetual Peace*. Thus it may here be said that for the natural law thinkers, the law of nations was presented as comprising, in part (Grotius, Wolff and Vattel) or in whole (Hobbes and Pufendorf), a normative order that was understood to be given in the order of nature, and to be embodied in laws of nature which were binding on states and rulers without regard for their own will and consent. As for Kant, he presented the law of nations, as part of the law of peace, as pertaining to a normative order that was based in and constituted through the will and agreement of states and that as such stood in opposition to the sphere of nature, and with this normative order having its origin and its embodiment in the federation of free states and in the treaty convention through which the federation was to be instituted.[64]

The undermining of natural law in relation to international law, as this is reflected in Kant, is also something that is to be found carried through by Bentham as part of his endeavour in the establishing of the classic positivist tradition in Anglo-Saxon legal thought. The terms of the positivist jurisprudence that Bentham constructed are pointed to in such of his seminal works as *A Fragment on Government* (1776) and *An Introduction to the Principles of Morals and Legislation* (1780; first published 1789). However, the most detailed statement by Bentham of the positivist analysis of law comes in a work that he largely completed by 1782 as a continuation of the *Introduction to the Principles of Morals and Legislation*, but that was to be published in what stands as its authoritative form only in 1970 under the title *Of Laws in General*.[65]

In the setting out of the analytical framework for a fully positivist jurisprudence, Bentham opposed himself directly to the established tradition of natural law theorizing. Here, the issue of the connection between law and morality was of particular importance. For the natural law theorists, as we have remarked on, the spheres of law and morals were directly inter-connected, and with the law being understood to comprehend as part of its substance, and to presuppose as the basis for its proper statement and explanation, such general principles of justice and political morality as were contained within the laws of nature. As against this, Bentham held that the spheres of law and morals were to be treated as distinct and separate, and with this meaning that general normative considerations, such as were bound up with standard natural law principles, were to be excluded from the formal analysis of the elements of law as it actually existed as this comprised the particular subject-matter of

what he called expository jurisprudence. As part of the project of establishing such a normative-free exposition of the elements of law, Bentham adopted and applied an analysis of law that it is customary to refer to as the imperative analysis of law. Essential to this analysis was the explanation of law not as something founded in an antecedently given normative order, as was so with the natural law standpoint, but as something that was created through the acts of volition of its author. Hence the law as obtaining in the condition of the state was explained as forming a normative order which was brought into being, and maintained, through the will and volition of the sovereign as its source. It was in terms of this imperative analysis that Bentham purposed in *Of Laws in General* to identify and explain the basic formal aspects of laws, including such aspects as the source of laws, the subjects and objects of laws, the force of laws and the manner of their gaining expression as laws.[66]

Bentham was to give consideration to all the great range of the forms of law, and, in doing so, he came to address the subject of international law. So, for example, he considered international law in *An Introduction to the Principles of Morals and Legislation*. Thus he identified international law as the law specific to the branch of jurisprudence that related to the mutual transactions among sovereigns, and he observed, as in a well-known passage, that the sense of the law applying to the transactions among sovereigns was better expressed through its designation as international law than through the more customary reference to it as the law of nations.[67] Then again, there are important writings that date from the second half of the 1780s, where Bentham examined the different aspects of international law and the principles relating to it. In this matter, he treated of international law in respect of its objects and subjects, and in respect of the substance of the law as it concerned the causes and effects of war. At the same time, Bentham set out the principles that he saw as essential for the establishing of perpetual peace in the international sphere. Here, Bentham is to be linked together with Kant in the modernity of the principles that he stipulated as being fundamental for international legal order. These included the following principles as presented among the core proposals for lasting international peace: the giving up by states of their foreign dependencies, the maintenance of unrestricted freedom of trade among states, the limitation of armed forces, the founding of a common court of adjudication to settle international disputes, and the abandonment of the practice of secret diplomacy.[68]

Despite the attention that Bentham directed to international law, it is to be emphasized that the imperative analysis of law, as he formulated it, was in fact radically subversive of the ideal of international law. For

the imperative analysis was based in the definition of law as something that proceeded from the will of some or other sovereign. However, there was implied in this that international law came short of being law in its full sense and character, given the absence from the international sphere of some specific sovereign power through whose will the rule of law might be established and enforced. This implication was to be drawn out quite explicitly by Austin, as in the influential statement of the terms of the positivist jurisprudence deriving from Bentham that he provided with the command theory of law which he set out in his lectures on jurisprudence published as *The Province of Jurisprudence Determined* (1832).[69]

The command theory of law, as expounded by Austin, marks a crucial point of departure from the tradition of natural law theorizing. It is, here, pertinent to observe that Austin, as a command analyst of law, is to be distinguished from the Hobbes whose command analysis of civil law was placed within, and justified by reference to, the natural law framework. Thus the true province of jurisprudence, for Austin, was restricted to positive law (and to the exclusion of natural law), and with the rules of positive law that applied to the relations among men, as according with the sense of this restriction, being understood to consist in the commands which were set by a sovereign and supported at the level of enforcement with coercive sanctions. As for the person of the sovereign, this Austin understood to be the person that enjoyed the habitual obedience of subjects as their determinate political superior, and that, in doing so, provided for the establishing of a political society which was independent in the respect, among others, that the sovereign concerned was not in a condition of obedience to some superior political power.

It was in line with the terms of the command theory of law that Austin was brought to deny that international law, as the law purporting to regulate the relations as between independent political societies, was to be accepted as possessing the standing of positive law in the proper signification of this. For positive law, as Austin defined it, was law set and enforced by some sovereign as political superior. Yet as he insisted, there was no such political superior to which independent political societies were subordinate, and in consequence of this there was no proper authority to set and enforce international law and so fulfil for it the conditions essential for inclusion within the category of authentic positive law. In view of this, the rules of international law were to be thought of not as rules of positive law, but as rules belonging to the sphere of what Austin called positive morality. The latter rules were the rules set and enforced through general opinion rather than through political superiors. This meant that the rules of positive morality that, for Austin, were

improperly termed international law stood, in fact, as the rules of positive international morality. In the designation of international law as rules of positive international morality, Austin preserved something of the claims of the general principles of justice and political morality to be considered as applying to the realm of international politics: albeit that there was little that he said about the actual content of positive international morality that compares with the determination as to substantive principles which characterizes the natural law specifications of writers such as Hobbes and Pufendorf. Nevertheless, it is to be emphasized that if Austin preserved the claims of justice and political morality in their application in the international context, then he did this only at the enormous cost of denying all status of law to the rules and principles by which justice and political morality in that context were to be defined. The consequence of this was that Austin served to establish through his positivist jurisprudence, and in counteraction to the idealism of the modern natural law thinkers, the ultimate dissociation of law and morals in the international sphere.[70]

This dissociation of law and morals, as pointed to by Austin, was crucial for positivist jurisprudence as it related to international law, and, in the event, it was only to be confirmed by the legal positivist thinkers writing in the twentieth century who, reversing Austin, were prepared to recognize that international law possessed an authentic standing as law. So, for example, the Austrian jurist Hans Kelsen accepted the reality of international law, and did so in terms such that the international legal order was to be thought of as being inseparable from the municipal law systems as maintained within the particular states. Nevertheless, the acceptance by Kelsen of international law was undertaken from the extreme positivist standpoint afforded by what he called the pure theory of law. This, it is to be emphasized, was a positivism where the different parts of law, international and municipal, were considered to comprise a normative order that was distinct in logic, and as to substance, from the forms of normative order where principles of justice and political morality stood as the core constituent elements.[71] Then again, there is the case of H.L.A. Hart in England, who stands out as the most influential exponent of legal positivism in the Anglo-Saxon tradition in jurisprudence after Bentham and Austin. Hart is notable, for present concerns, for the reason that he quite explicitly defended the claims of international law to have standing as law, and with this being in open opposition to Austinian arguments to the contrary such as were bound up with the analysis of law as sovereign commands. At the same time, however, Hart insisted that rules of international law, as rules of law, were to be

distinguished from rules of morality. Here, the position that Hart took regarding international law very much reflected his strict adherence to what he endorsed as one of the cardinal tenets of the positivist jurisprudence associated with Bentham and Austin: the absence of any necessary or conceptually guaranteed connection between law and standards of justice and morality, both as to the substantive content of law and as to the conditions for its validation and recognition as law.[72]

The general philosophical context for the jurisprudence relating to the international law of the contemporary era is one that, to a great extent, has been set by the traditions in legal and political thought to whose establishing thinkers like Kant, Bentham and Austin so decisively contributed. However, it is to be understood that current international law is not adequately explained in accordance with the voluntarist and positivist assumptions which inform the view of law presented by Kant and by Bentham and Austin and their successors. On the contrary, international law in some of its aspects demands explanation from a jurisprudential standpoint that is closer to the one adopted by the modern natural law thinkers. In this connection, there is to be considered the body of rules and principles that belong to the international law of human rights. For here and in defiance of positivist dogma, the law incorporates within itself first-order principles of justice and political morality at the level of substantive law and at the level of its interpretation and application, and these, as we argued at the end of Chapter 2, include the principles that are to be found appealed to by Hobbes in the matter of the rule of law maintained within the state. There is also to be considered in regard to natural law and international law the fact of the acceptance, as an authoritative source for international law distinct from state custom and state treaties, of the general principles of law whose binding normative force for states is understood to be independent of their own will and agreement to be bound. Among the general principles that so stand as the non-voluntary principles of international law are principles such as reciprocity between states in respect of rights and duties, the equality and equal recognition of states and good faith in international agreements, and with these being, as we have seen, principles which were all affirmed by the modern natural law thinkers as fundamental principles of the law of nations. That this is so serves to underline the abiding relevance of the modern natural law thinkers in the conceptualization of international law in its present formulation, and, as consistent with what we have argued throughout, it serves also to underline the proper claims of Hobbes, as a leading natural law thinker, for a place within the tradition of international law.[73]

Conclusion

The main theoretical context that is assumed for the consideration of Hobbes in this volume is that of the international studies agenda, and the main burden of argument, in regard to that agenda, is that Hobbes is to be read as standing in a positive relation to the tradition of international law. As for the justification for the reading of Hobbes as positive in relation to international law, this lies in the status that belongs to him as a modern natural law thinker and in the place that he holds with the thinkers, such as Grotius, Pufendorf, Wolff and Vattel, who contributed decisively to the development of international law as the leading exponents of natural law theorizing in its modern form and tradition. Thus, as we have argued, Hobbes saw the essential principles of international law, or more properly the essential principles of the law of nations, as being given in what he identified to be the fundamental laws of nature. In doing this, he was brought to formulate in terms of natural law what have come to stand as the core principles of the system of public international law of the modern and still unfolding period in the history of international politics. In specific terms, the principles of natural law, as Hobbes expounded them, were such as to involve the affirming of the principles of peace, self-defence, good faith in agreements, sovereignty and equality, territorial allotments and embassies, together with the principles concerning adjudication and the peaceful settlement of disputes, that rank among the general principles which have central application in the legal regulation of the relations between states and governments in the international sphere. At the same time, there are the natural law principles that Hobbes laid down which relate to the form of legal order applying at the level of the internal domestic political organization of states. The principles at issue in this were such as to bear directly on the formal and substantive requirements of justice and political

morality as contained in the ideal of the rule of law, and, in being so, these were principles which serve to connect Hobbes, in the matter of the conceptualization of natural law, with the as now established international law of human rights.

The presentation that we have made of Hobbes, as positive in relation to the tradition of international law, is one that contrasts strongly with the reading of Hobbes that is standard in the province of international studies. This is the reading where Hobbes is picked out as being in the forefront of the exponents of the realist tradition in international thought and practice. The realist account of Hobbes is defective, and the reasons for this are to be found set out in detail in the final part of Chapter 2. Even so, it is appropriate to emphasize, here in this Conclusion, that the considerations that point to the de-linking of Hobbes from the realist tradition are also considerations that, as it would appear, point to the alignment of Hobbes with the tradition in international thought and practice that is generally taken to be the tradition which stands as the main rival and competitor to realism. This is the tradition of liberalism in international relations. The reference to the liberal tradition is inescapable for the purposes of this volume, as a study focused on Hobbes and the tradition of international law. For liberalism is the tradition in which the tradition of international law has ultimately to be situated, just as the system of international law itself, as it has developed to the present, has come to give concrete juridical embodiment to what stand as the defining principles of liberalism.

Of the factors that determine the opposition of liberalism to realism as distinct traditions in international relations, there are two which are of particular salience in understanding the accommodation extended by liberalism to international law. First, the liberal tradition is one where the co-operative endeavours and engagements of states and governments, rather than the fact of their conflicts and antagonisms, are focused on as to the identifying of the permanent and underlying condition of their actual relations. Second, the liberal tradition is one where states and governments are assumed to base, and to be disposed to base, their mutual relations in law and in the principles of justice and political morality essential to law, and with this law-structured framework for international relations being understood to impose normative constraints and limitations on states and governments in the pursuit of interests and in the exercise of powers. In addition, the laws and principles of justice and political morality that are so binding on states and governments are, for the liberal tradition, to be thought of as having universal application, and this supposed universal application of an

ideal normative order, as in the international sphere, is something that is itself bound up with the universality that is characteristically claimed for the defining value scheme of liberalism as by its defenders.

As for the leading concerns attended to within the liberal tradition, as regards the subject-matters of international politics, these include the concern for practical co-operation among states and governments. So, for example, the promotion of trade and commerce is pointed to, and affirmed, as the precondition for international peace and for the application of law in the regulation of the international sphere. There are also the concerns to do with the substance of international law. Thus there is emphasis on international law as enshrining principles, such as the faith of agreements, which enable states and governments to enter with one another into fully co-operative relations. Likewise, there is the emphasis on international law as setting the constraints and limitations applying to states and governments in the conduct of war, and as setting the institutional arrangements for the peaceful settlement by states and governments of their disputes and disagreements. Further concerns, as relevant to international law, are to do with the constitutional order of states. Here, the focus is on the form of state government in relation to subjects, and on the rights and powers of state government which determine the sovereignty and political independence of the separate states in respect of one another. All these various concerns, as characteristic of liberalism, were present with Bentham, and also with Kant, who, through his statement of the elements of the law of peace, has come to be associated with the liberal tradition in international relations as its principal representative exponent.[1]

The designation of liberalism as a tradition in international relations is something that belongs to the international studies agenda. However, it is to be understood that when it is considered in its place in the broad history of ethics and political thought, the liberal tradition has not been directed primarily, or even substantially, to the matter of politics in its international dimension and application. Rather, the tradition of liberalism is one where the first focus of attention has been with matters to do with the principles specific to the state as a form of association, and as these principles apply to the organization of the form of society as subject to states and to the form of the relations obtaining among the individuals who comprise political societies.

In this connection, the abiding concern in the liberal tradition has been the constitutional order of states. This, as we have noted, stands also as a concern in the liberal internationalist tradition. Nevertheless, the matter of constitutional order for the liberal tradition proper has been centrally

one to do with the sovereign rights and authorities of states in their internal aspect, rather than with the rights and powers of states as projected externally within the international sphere where states co-exist together. Thus the idea of constitutional order, as it is here referred to, is understood to comprehend within itself the principles of limited government as founded in consent and representation, the principles essential to the rule of law as the basis for the limiting of state governments as to rights and powers, and the formal and substantive rights that are held to belong to individuals in their status as the subjects of states as organized in accordance with the principles of limited government and the rule of law. The principles of limited government, the rule of law and the rights of individuals are the fundamental elements of liberal constitutional order, and, in common with the liberal principles of international order, they are understood to possess a universal aspect and application. This is so both with respect to the principles of constitutional order as they relate to the bare objective institutional structure of state government, and with respect to them as they relate to the considerations of justice and political morality which pertain to the normative foundations for government as it is conducted in the condition of the state.[2]

It is evident from this how Hobbes is to be read as being aligned with the liberal tradition. As to international politics, there is of course the statement that Hobbes provided as to the substance of the laws of nature that he saw as having application to commonwealths and their rulers. For here in the matter of the law of nations and to repeat the point once more, Hobbes made affirmation of principles which are foundational within modern public international law, and which, as such, go together to establish what are recognizable as the terms favoured within liberalism for lasting peace among states and government. Thus it was that Hobbes affirmed principles relating to restrictions on war, good faith in agreements, freedom of trade and commerce, the sovereignty and equality of states, and the arbitral settlement of disputes as principles that were essential component parts of the law which he envisaged as making for peace in the international sphere.

As to the view that Hobbes took of the association of men within states, there are to be considered the principles of law, state and government set out in his civil philosophy which we examined in Chapter 1. Here, certainly, Hobbes gave clear recognition to what we have picked out as the fundamental elements of liberalism as it is focused on the state and its constitutional order. Thus Hobbes adhered to the ideal of government as based in consent and representation, given that he presented the sovereign, as the bearer of the powers of government, as an

authority brought into being through covenant and discharging its functions through offices which remained representative in relation to subjects. So also did Hobbes confirm that government in the state was limited government, and government that was limited under the rule of law. For the powers of sovereignty, as he presented them, were governmental powers directed to the maintenance of law, and hence powers where the law served to set limitations as to the objects and the form of their exercise. As regarding the matter of individual rights, it is to be underlined that, for Hobbes, the rights of individuals were prior to government, as in accordance with the sense of the idea of covenants, and that he accepted that individuals possessed genuine rights in their status as subjects of government: and this both with respect to the retention of natural rights, and with respect to the rights which belonged to individuals in justice as associated together in the state under the form of the rule of law as maintained by government.

If Hobbes is to be thought of as standing in alignment with the liberal tradition, then it is still to be emphasized that he was a modern natural law thinker and, hence, that when he gave recognition to such general principles of law and political order as are bound up with liberalism, he did so in terms where these principles were expounded as principles which pertained to the laws of nature. This is a crucial consideration. For there are certain features of the natural law form of theorizing in respect to law and politics, and as relating to the two of its defining claims referred to in Chapter 3, where these features serve to bring out the natural law standpoint as being particularly appropriate for the vindication of the sort of value scheme which belongs to liberalism. The first such feature is the aspiration to base the sphere of law and politics in properly normative foundations, and with this involving the appeal to the idea of some internal connection as between the structure of legal and political order, as it exists within actual states and societies, and the principles of justice and political morality which are understood to be given in the natural law.

The aspect of this aspiration of natural law theorizing that is of primary importance is the endeavour to demonstrate, as from the natural law perspective, that law has an internal connection with justice and political morality as in respect of the principles of due process and procedural justice which are comprehended within the ideal of the rule of law. In this matter, there is an evident continuity as between the pre-modern and modern traditions of natural law, as witness the common concern for it that is present with Aquinas and Hobbes. So it was that Aquinas saw the natural law as grounding the justice of the laws stipulated by civil rulers,

and with the factors relating to the justice of laws, as implicit in the terms of natural law, being those of the authority of the laws, their objects and the form which the laws assumed. As for Hobbes, the natural law, in his specification of it, contained principles to do with the setting of conditions for the justice of the laws laid down by sovereign rulers, and with these principles relating to the procedural considerations essential to the rule of law and to the form of justice preserved through it. This was true of the principles that Hobbes took to be given directly in the laws of nature, as for example with the ones concerning equality in rights, equity in distribution and impartiality in adjudicative procedures. It was true also of the principles of legal order that, for Hobbes, were derived from natural law as in relation to the civil laws, and where factors of authority, object and form were very much in issue. Thus Hobbes here confirmed principles concerning the authority of laws, as with the principles to do with the conditions for validating the civil laws as laws which proceeded from the will of the sovereign. In addition, there were principles concerning the object and form of laws, as with, in the case of form, the principles of crime and punishment which excluded as unjust the retroactive application and enforcement of civil laws.

The position that Aquinas and Hobbes took on the rule of law, as from the natural law standpoint, was one that served to identify the normative foundations of the rule of law as the basic framework for association among men within political society, as it served also to identify the ethical substance of those normative foundations. Here, it is to be underlined how the principles of due process and procedural justice, such as Hobbes saw as being bound up with the rule of law, bore directly on the matter of the rights of individuals as the subjects of the law maintained by the state authorities. So also it is to be underlined how the specification provided by Hobbes as to the procedural conditions relating to the rule of law, and to the form of justice internal to it, was such as to involve him in the looking forward to of so much of the substance of the international law of human rights. This is so, in the present context of discussion, for the reason that the rights of individuals are fundamental among the requirements of justice, as within the liberal tradition in ethics and political thought, and it is in this the matter of individual rights that the natural law formulations of Hobbes bring him into alignment with what is one of the most prominent parts of liberalism as a general normative theory of justice and political morality.

The second feature of natural law theorizing to be focused on, as in relation to the matter of liberalism, is to do with what we may perhaps best refer to as the metaphysical standing of the principles of justice and

political morality that are pointed to, as by the natural law thinkers, as constituting the normative foundations for the sphere of law and politics. In this connection, it is to be emphasized that the principles of justice and political morality that were identified by the natural law thinkers, as being foundational in normative terms, were principles of natural law, and that, as such, they were principles that formed a normative order which was understood to be embodied directly in the order of nature itself. This meant, among much else, that the normative order that was for the natural law thinkers to be appealed to, as founding the sphere of law and politics, was an order that possessed an objective status, and an objective validity, which were sufficient to exempt it, as a normative order, from the condition of total determination as through the circumstantial contingencies of time and place.

The objectivity belonging to the normative order, as pointed to with natural law, is to be thought of as a function of the universality that was assigned to the fundamental laws of nature by the natural law thinkers. The aspect of universalism was central to the idea of natural law, and it is this that establishes the special credentials of the natural law form of theorizing to underwrite the value scheme prescribed within liberalism. For, as we have explained, the liberal tradition is one where a universal standing is assigned to its favoured principles of law and principles of justice and political morality, and this assignment of universality is evidently something that presents itself as being available for confirmation as through the terms of the natural law conceptualizations in their aspect as universalist conceptualizations. This was so both with the natural law as it was expounded in its relation to the state and its constitutional order, and with the natural law as it was expounded in its relation to politics in the international sphere. Thus in the case of the constitutional order of the state, the principles of natural law were taken, as they were by Hobbes, to describe the universal form of justice specific to the rule of law, and the universal form of the rights belonging to individuals as the subjects of the laws maintained within states. As to the case of international politics, the natural law was taken, as with Hobbes, to comprise the substance of the law of nations. Here, the crucial consideration is not that the natural law served to stipulate principles pertaining to what are recognizable as the liberal terms and conditions for international peace. It is rather that the natural law stipulated these principles as part of a system of international law that was understood to have universal application to states and rulers, in the sense that it was not conditional, as for its binding normative force, on the will and consent of states and rulers.

The universalism that distinguishes the natural law tradition of theorizing is intimately bound up with the consensus regarding international

law, as law possessing an objectivity guaranteed through its supposed basis in nature, which is present with Grotius, Hobbes, Pufendorf, Wolff and Vattel as modern natural law writers. As we explained in Chapter 3, the natural law consensus on international law came to be undermined towards the end of the eighteenth century by thinkers such as Kant and Bentham. In the longer run, the undermining of natural law was to go together with the breaking down of consensus as to the possibility of there being universal norms of international order as such. This, in its turn, was to involve the breakdown of consensus as to the possibility of there being a universal normative authority for the principles of justice and political morality which are associated with the tradition of liberalism in international politics. There was some paradox in the outcome here. For Kant and Bentham, as we have suggested, belong within the liberal internationalist tradition. However, the lines of thought that Kant and Bentham initiated left that tradition vulnerable as to the integrity of its defining normative claims. The key factor for consideration in this is the departure on the part of Kant and Bentham, and of their heirs, from the naturalist specifications of international law of the sort favoured by Grotius and Hobbes and the other modern natural law theorists.

As for Kant in regard to natural law, he was explicit in rejecting the legacy of the natural law theorizing of Grotius, Pufendorf and Vattel as relevant for the law of nations. Thus he argued that international law was to be based in the will and agreement of states and rulers, rather than in a body of law given within the natural order. This argument of course had the clear implication, as counter to the natural law standpoint, that states and rulers were through their own acts to determine the laws, and so also the principles of justice and political morality, to which they were to be thought of as standing in subjection. As for Bentham, the terms of the positivist jurisprudence that he set out were such that he was led to repudiate the entire thrust and direction of the natural law project. This was so in the respect, among others, that he maintained that law proper was something that was capable of adequate exposition, in its objective reality as positive law, without reference to normative standards relating to justice and morals. The positivist analysis of law elaborated by Bentham was one where the essential form of law proper was presented as being the law made by sovereigns. This did not, however, involve Bentham in excluding the claims of international law to have proper authenticity as law, albeit that he would make no appeal to the concept of natural law in the statement of its substantive requirements. The denial of authentic legal standing to international law was left to Austin, who applied the positivist model of law as sovereign commands such that he insisted that the rules and principles obtaining in the

international sphere stood as rules and principles of positive morality, but not as rules and principles of law as such.

The positivist tradition in jurisprudence was to play a major role in the discrediting of natural law theorizing in its endeavour to establish some universal normative foundation for law and politics. This was so most notably with Kelsen and the pure theory of law. For Kelsen held that theoretical purity in the understanding of law required a clear distinction between law and justice, since, as he claimed, all judgments concerning the ends of justice were based in purely subjective and hence relative judgments of value. The sense of the relativity of values was very strong in Kelsen, and the strength of this conviction was to lead him to emphasize the inescapably political character of natural law doctrines. It was also to lead Kelsen to argue for an essential connection between what he called philosophical relativism and what he extolled as the relativistic form of politics embodied in democracy, as it was to lead in addition to his insisting that the exposition of law, as forming a positive legal order, had to be exclusive of all partial judgments of value as the condition for its having scientific integrity.[3]

The sort of value-free positivism in the social sciences as represented by Kelsen has, in recent decades, been challenged through schools of thought that point to the necessity of recognition for the inherent normative dimension of all law and political organization. However, the schools of thought, as so opposing themselves to positivism, tend to affirm the inherence of the normative in terms such that objective foundation is denied to the different forms of normative order and universality is denied to the principles constitutive of normative order, and hence in terms where the basis of natural law and the claims and authority of liberalism are alike qualified and negated. This is true, for example, of the communitarian critique of liberalism. Here, the first-order principles of justice and political morality, as with those specific to liberalism, are presented not as universal principles, but rather as principles that are contingently related to, and founded in, the practices of the particular historic communities in which they originate and have their application.[4] There is likewise to be mentioned the constructivist school in international relations theory, where the guiding idea is the non-naturalist one to the effect that the forms of international politics, and the principles bound up with them, are understood to be the product of acts of social construction and hence, by definition, to be contingent on such acts.[5]

The communitarian and constructivist theories reflect something of the evident unavailability of the natural law position, and the ultimate fragility of liberalism, in the now existing situation in international

politics. In a stronger sense, these are theories that serve to underline the condition of present international politics as one that is distinguished by the absence of consensus as to the appropriate forms of law and political structure, and as to the appropriate principles of justice and political morality, which are to provide the basis for the institutional and normative organization of the international order. This absence of consensus defines the essential predicament of international politics, and it is a predicament that relates, as an issue, to the subject-matter and argument of this volume. For the features of international politics that are the manifestation of its current predicament are features that, among much else, are indicative of an underlying resistance to the sort of norms for international order which Hobbes specified with his statement of the fundamental laws of nature. This is so certainly in respect of the terms of the natural law that Hobbes saw as applying in the international sphere as in the form of the law of nations. As witness for this, there is, for example, the opposition to the evolving legal regimes for freedom of trade and commerce that has come to gain its expression in the movements of anti-globalization. There is also the fact of the material inequalities among peoples that are brought about through the system of international law as a system enshrining the sovereignty and territorial jurisdiction of states. As a further case, there is the sense as to the non-universality of international legal norms, such as those of human rights, as this is now articulated through the critique of international law as something which involves deep bias and weighting in favour of Western concepts and categories. Of greater consequence still, there are the factors present within international politics that point to the now much diminished standing of the modern state, as the basic institutional element of international order, and through this to the subverting of the pretensions of states in the modern world to be competent to establish the basis for proper and effective association among men within political society.

For Hobbes, as we have found, states were assumed to maintain the conditions for peace among men as through the exercise of their sovereign rights and powers, and to do this in accordance with the terms of natural law and with the terms of the principles of law, state and government that he took to derive from natural law. However, the conviction as to the competence of sovereign states, as this runs through Hobbes, stands negated in the contemporary world through the various phenomena to which states appear powerless to respond within the institutional framework set for the exercise of their sovereignty. Prominent among these are the ethnic conflicts among population

groups, the migrations of peoples occasioned through political and economic dislocations, the disintegration of established state structures in consequence of war and insurgency, the resort to centres of institutional authority and power lying above existing state jurisdictions, and, coupled with this, the search for governance forms which will be faithful to the local circumstances of existing societies and cultures obtaining at sub-state levels. Finally, it is appropriate to cite one other phenomenon in current international politics, which addresses itself both to the value scheme specific to liberalism and to the formulation of natural law principles as provided by Hobbes. This is the increasing resistance to secularism in law and politics that is made in the name of faith. The modern natural law tradition to which Hobbes belonged was a tradition where the substance of natural law was presented in secular terms, and where the terms of the natural law, as expounded, were such as to reflect the secularization of state and society. The cause of faith in the world today is something that is bound up with redefining, and in part with qualifying, the claims of the secular authority structure which has come to dominate the institutions of government in the state in its modern form. Thus it is that faith is understood to place itself at odds with the secular ethos of contemporary liberalism. As for Hobbes, it is to be observed, in concluding, that to the extent that the currently projected forms of law and politics based in faith constitute a challenge to the secularization of state and government, then to this extent there is a challenge to the general thrust and direction of the modern tradition in natural law theorizing and, with this, an underlining of the limitations of Hobbes and his formulation of natural law in regard to the international predicament which now confronts us.[6]

Notes and References

Introduction

1. Thomas Hobbes, *The Elements of Law, Natural and Politic*, edited with a Preface and Critical Notes by Ferdinand Tönnies (1889), 2nd edition with a new Introduction by M.M. Goldsmith (London: Frank Cass, 1969).
2. For the text of this work in the English version from 1651, see: Thomas Hobbes, *De Cive*, The English Version, entitled in the first edition *Philosophicall Rudiments concerning Government and Society*, ed. Howard Warrender, The Clarendon Edition of the Philosophical Works of Thomas Hobbes, Volume 3 (Oxford: Clarendon Press, 1983).
3. Thomas Hobbes, *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil, The English Works of Thomas Hobbes*, collected and edited by Sir William Molesworth, Volume 3 (London, 1839).
4. For the authoritative treatment of the modern natural law tradition, the status of Grotius as its founder, and the place of Hobbes within it, see: Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), especially Introduction, Chapters 3 and 6; *Hobbes* (Oxford: Oxford University Press, 1989); *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), especially Preface, Chapters 5 and 7.
5. For a general survey of the historical development of international law, see: Arthur Nussbaum, *A Concise History of the Law of Nations*, 2nd edition (New York: Macmillan, 1954), especially Chapters 4–5 for discussion of the principal writers on the law of nations of the seventeenth and eighteenth centuries.
6. Hugo Grotius: *De Jure Praedae Commentarius*, translation of the original manuscript of 1604 by Gwladys L. Williams with the collaboration of Walter H. Zeydel, The Classics of International Law, No. 22, Volume 1 (Oxford: Clarendon Press, 1950); *De Jure Belli ac Pacis Libri Tres* (1646 edition), trans. Francis W. Kelsey *et al*., The Classics of International Law, No. 3, Volume 2 (Oxford: Clarendon Press, 1925). These works are cited hereafter and respectively as *JP* and *JBP*. For Grotius in relation to international law, see: Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Year Book of International Law*, 23 (1946), pp. 1–53. For a collection of articles that go together to provide a detailed survey of the different aspects of Grotius' exposition of the law of war and peace, see: *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius*, ed. Yasuaki Onuma (Oxford: Clarendon Press, 1993).
7. Samuel Pufendorf: *Elementorum Jurisprudentiae Universalis Libri Duo* (1672 edition), trans. W.A. Oldfather, The Classics of International Law, No. 15, Volume 2 (Oxford: Clarendon Press, 1931); *De Jure Naturae et Gentium Libri Octo* (1688 edition), trans. C.H. and W.A. Oldfather, The Classics of International Law, No. 17, Volume 2 (Oxford: Clarendon Press, 1934); *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1682 edition), trans. Frank Gardner Moore, The Classics of International Law, No. 10, Volume 2 (New York: Oxford

University Press, 1927). These works are cited hereafter and respectively as *EJU, JNG* and *OHC*. On the political and legal thought of Pufendorf, see: Leonard Krieger, *The Politics of Discretion: Pufendorf and the Acceptance of Natural Law* (Chicago and London: University of Chicago Press, 1965), especially Chapters 4–5. For an account by the present author of Pufendorf in his relation to the tradition of international law, and one on which the argument set out in Chapter 3 of this volume is substantially based, see: Charles Covell, 'Pufendorf and International Law', *Tsukuba University Journal of Law and Political Science*, 32 (March 2002), pp. 55–130.

8. Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 edition), trans. Joseph H. Drake, The Classics of International Law, No. 13, Volume 2 (Oxford: Clarendon Press, 1934). Cited hereafter as *JGMSP*.
9. Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758 edition), trans. Charles G. Fenwick, The Classics of International Law, No. 4, Volume 3 (Washington DC: Carnegie Institution of Washington, 1916). Cited hereafter as *DG*. For a clear and informative treatment of Vattel and his statement of the elements of the law of nations, see: Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's Le Droit des Gens* (Dobbs Ferry, New York: Oceana, 1975).
10. Immanuel Kant: *Perpetual Peace: A Philosophical Sketch*, in Kant, *Political Writings*, trans. H.B. Nisbet, ed. Hans Reiss, 2nd edition, enlarged (Cambridge: Cambridge University Press, 1991), pp. 93–130; *The Metaphysical Elements of Justice*, Part 1 of *The Metaphysics of Morals*, trans. John Ladd (Indianapolis and New York: Bobbs-Merrill, 1965). On the international thought of Kant in general, and more particularly in regard to the view that he took of international law, see: F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press, 1963), Chapter 4; Charles Covell: *Kant, Liberalism and the Pursuit of Justice in the International Order* (Münster and Hamburg: Lit, 1994); *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (London: Macmillan, 1998).
11. The full texts of the source materials for current international law as cited are to be found in the appropriate official publications, and also through the numerous relevant internet sites as with the sites specified thus: the Charter of the United Nations (1945) (available at http://www.unhchr.ch/html/menu3/b/ch-cont.htm); the Statute of the International Court of Justice (1945) (available at http://www.yale.edu/lawweb/avalon/decade/decad026.htm); the Universal Declaration of Human Rights (1948) (available at http://www.unhchr.ch/udhr/lang/eng.htm); the Vienna Convention on Diplomatic Relations (1961) (available at http://www.un.org/law/ilc/texts/diplomat.htm); the International Covenant on Economic, Social and Cultural Rights (1966) (available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm); the International Covenant on Civil and Political Rights (1966) (available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm); the Vienna Convention on the Law of Treaties (1969) (available at http://www.un.org/law/ilc/texts/treaties.htm); the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970) (available at http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm).

For authoritative and comprehensive expositions of the system of international law of the period of the United Nations, see: J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edition, ed. Sir Humphrey Waldock (Oxford: Clarendon Press, 1963); L.F.L. Oppenheim, *International Law*, 9th edition, Volume 1: *Peace*, Introduction and Part 1, ed. Sir Robert Jennings and Sir Arthur Watts (Harlow, Essex: Longman, 1992); Malcolm N. Shaw, *International Law*, 4th edition (Cambridge: Cambridge University Press, 1997); Ian Brownlie, *Principles of Public International Law*, 5th edition (Oxford: Oxford University Press, 1998).

12. In the present volume, there is little or no reference made to the substance of the relevant critical commentaries on Hobbes. For the record, however, it is to be observed that there are brief discussions of Hobbes in relation to the issue of international politics in the two works as follows: Howard Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation* (Oxford: Clarendon Press, 1957), Chapter 6, pp. 118–20; David P. Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 1969), Appendix: 'Hobbes on International Relations'. Warrender is notable, in regard to the concerns that we address in this volume, in that he provided a strong natural law interpretation of Hobbes, where it was argued that Hobbes assigned a binding normative or moral force to the laws of nature, as laws having the status of the commands of God, and where it was pointed to explicitly that Hobbes recognized the reality of the obligations imposed on sovereign rulers under the laws of nature as obligations at international law. *The Political Philosophy of Hobbes*, Chapter 7, pp. 158–9. (The natural law reading of Hobbes provided by Warrender is akin to the one argued for in an earlier article by A.E. Taylor, in which article it was very clearly underlined how, for Hobbes, sovereign rulers were bound by the obligations set out in the laws of nature (albeit that Taylor did not as such refer directly to the question of international law): 'The Ethical Doctrine of Hobbes' (1938), in *Hobbes Studies*, ed. K.C. Brown (Oxford: Basil Blackwell, 1965), pp. 35–55.)

In contrast to Taylor and Warrender, Michael Oakeshott read Hobbes in terms such that Hobbes was taken as having denied to the laws of nature the status of laws proper, and hence as having denied that the laws of nature possessed the binding normative force sufficient for the imposing of real duties and obligations. So also did Oakeshott read Hobbes in terms such that he was taken to have restricted the category of laws proper to that of civil law. This, of course, was a reading where the natural law being denied recognition as law, there was no place for consideration of Hobbes in regard to the principles of the law of nations, or in regard to the tradition of international law and to the line of modern natural law thinkers belonging to it. It was also a reading that reflected the emphasis placed by Oakeshott, as in his own writings in political theory, as to the primacy of state law as the essential form of the rule of law (and with this being to the virtual exclusion on his part of the claims of international law to be considered to have standing as law). Thus, for Oakeshott, the rule of law was presented as the form of law that presupposed, in conceptual terms, the institutional structure of adjudication, lawmaking and executive powers that he associated with what he identified as comprising the office of government as this was to be found in the modern European state. For Oakeshott on Hobbes, see: 'Introduction to *Leviathan*' (1946; rev., 1974) and 'The Moral Life in the Writings of Thomas Hobbes'

(1960), in his *Hobbes on Civil Association* (Oxford: Basil Blackwell, 1975), pp. 1–74, 75–131. For Oakeshott on the rule of law as specific to the modern European state, see: *On Human Conduct* (Oxford: Clarendon Press, 1975), Essay II: 'On the Civil Condition'; 'The Rule of Law', in his *On History and Other Essays* (Oxford: Basil Blackwell, 1983), pp. 119–64.

For treatments of Hobbes from within the field of international studies where matters of natural law and international law are considered, see: Murray Forsyth, 'Thomas Hobbes and the External Relations of States', *British Journal of International Studies*, 5 (1979), pp. 196–209; Howard Williams, *International Relations in Political Theory* (Milton Keynes: Open University Press, 1992), Chapter 6: 'Hobbes: War and the Laws of Nature'; Cornelia Navari, 'Hobbes, the State of Nature and the Laws of Nature', in *Classical Theories of International Relations*, ed. Ian Clark and Iver B. Neumann (London: Macmillan, 1996), pp. 20–41. For an historical account of the work of the leading political theorists in the seventeenth and eighteenth centuries as in relation to issues in international law and politics, see: Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Clarendon Press, 1999). In his study, Tuck pointed to the central importance of Hobbes in the international thought of the period under review, and he powerfully underlined the Hobbesian dimensions of the arguments that were to be developed by Rousseau and Kant as regarding the problem of international order. Somewhat at odds with the view taken by Tuck, it is emphasized in this volume how Kant broke with Hobbes, and the other modern natural law thinkers, in the matter of international law, and with this being so in the respect that Kant made no appeal to natural law concepts as such in explanation of the normative foundation for the law of nations. For the position of this author as to the connections between Hobbes and Kant in the contexts of international law and international politics, see: Covell, *Kant and the Law of Peace*, especially Chapter 2, pp. 47–59; Chapter 4, pp. 93–100; Chapter 5, pp. 115–17; Chapter 6, pp. 139–41. For a statement of the position argued for in the present volume as to Hobbes as a natural law thinker in relation to international law, see: Charles Covell, 'Hobbes, Natural Law and the Law of Nations', *Historia Juris*, 9 (March 2001), pp. i–xlviii.

1 First Principles of Law, State and Government in Hobbes's Civil Philosophy

1. Aristotle, *Politics*, trans. Benjamin Jowett, in *The Complete Works of Aristotle*, The Revised Oxford Translation, ed. Jonathan Barnes, 2 volumes (Princeton, New Jersey: Princeton University Press, 1984), Volume 2, pp. 1986–2129. For Aristotle on the state as based in nature and established for the common good, and as existing prior to the individuals who formed it, see for example: *Politics*, Book I, Chapters 1–2.
2. Aquinas' discussion of law comes in Questions 90–97 of the first sub-part of the Second Part of the *Summa Theologiae* which is known as the Prima Secundae. For the original Latin text of this with an English translation by Thomas Gilby, see: *Summa Theologiae*, Blackfriars edition, Volume 28: *Law*

and Political Theory (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1966). The discussion of justices comes in Questions 57–62 of the second subpart of the Second Part of the *Summa Theologiae* which is known as the Secunda Secundae. For the original Latin text of this with an English translation by Thomas Gilby, see: *Summa Theologiae*, Blackfriars edition, Volume 37: *Justice* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1975). Concerning Aquinas' political thought, there is also the defence of monarchical government set out in the treatise *De Regimine Principum*, which Aquinas wrote between 1259 and 1269. For the original Latin text of Book 1 of this with an English translation by J.G. Dawson, see: Aquinas, *Selected Political Writings*, ed. A.P. D'Entrèves (Oxford: Basil Blackwell, 1959), pp. 2–83. As a general account of the political thought of Aquinas, see: John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998) – especially Chapters 7 and 8 for Aquinas on the first principles of law, state and government. For an illuminating exposition by Finnis of the natural law standpoint in ethics, jurisprudence and political theory as based substantially in the thought of Aquinas, see his: *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

3. For Aristotle on man as being by nature a political animal, see: *Politics*, I.2, p. 1987. Regarding the view of Aquinas on this, see for example: *De Regimine Principum*, Book I, Chapter I.
4. Aquinas, *Summa Theologiae*, Prima Secundae, Question 91, article 1; Question 93.
5. Ibid., Prima Secundae, 91.2; 94.
6. Ibid., Prima Secundae, 91.3; 95–97.
7. Ibid., Prima Secundae, 91.4–5.
8. Ibid., Prima Secundae, 94.2, pp. 81, 83.
9. Ibid., Prima Secundae, 95.2, pp. 105, 107.
10. Ibid., Prima Secundae, 96.4, pp. 131, 133.
11. In this connection, see the arguments of Aquinas concerning the specifically general or legal form of justice maintained in political society: *Summa Theologiae*, Secunda Secundae, 58.5, pp. 31, 33.
12. There were thirteen laws of nature stated in the Prolegomena to *De Jure Praedae*. The first and second laws were fundamental, and provided that men were permitted to defend themselves, and permitted to acquire and retain such things as were essential for the maintenance of life. From these two laws of self-defence there were derived further laws of nature, which set down the principles of just conduct limiting the exercise of the rights relating to the defence and preservation of men. So, for example, the third and fourth laws required that men were to refrain from injuring one another and from seizing one another's possessions. The fifth and sixth laws stated that evil acts were to be corrected, and that good acts were to be rewarded. Again, the ninth law stipulated that following the institution of the civil state, men as citizens were to enforce their rights against one another only in accordance with some judicial procedure. There is also the twelfth law, which related to the basic rights and duties of states and citizens within the international sphere, and with it being here provided that states and the citizens of states were to act in conformity with judicial procedure for the purposes of enforcing rights with respect to other states and the citizens of these. For Grotius'

statement and explanation of these various laws, see: *JP*, II: Prolegomena, pp. 10–11, 13–14, 15–18, 24–5, 27.

13. Grotius, *JBP*, Prolegomena, Section 8, pp. 12–13. See also Sections 6 and 7 of the Prolegomena for Grotius' explanation of what he saw as the impelling natural desire of men for society.
14. Grotius put the matter of pacts as basing state law thus in the Prolegomena to *De Jure Belli ac Pacis*: '[S]ince it is a rule of the law of nature to abide by pacts (for it was necessary that among men there be some method of obligating themselves one to another, and no other natural method can be imagined), out of this source the bodies of municipal law have arisen.' *JBP*, Prolegomena, 15, p. 14. For Grotius on the origin of political society in pacts, and for his arguments to the effect that state law was law based in the will and agreement of the individuals bound by it, and to the effect that the power of the civil ruler was to be thought of as deriving from a so-called contract of mandate, see: *JP*, II: Prolegomena, pp. 18–20, 23–4, 25–6. For Grotius on the law of nations as law based in the will and consent of nations and states, see: *JBP*, Prolegomena, 17. Note also the eighth of the nine basic rules of legal order that Grotius stipulated in the Prolegomena to *De Jure Praedae*: '*Whatever all states have indicated to be their will, that is law in regard to all of them*.' *JP*, II: Prolegomena, p. 26.
15. Hobbes, *Leviathan*, Part I, Chapter XIII, pp. 112–13, 113, 115.
16. Regarding the specification by Hobbes of the laws of nature, see also: *The Elements of Law*, Part 1, Chapters 15–17; *De Cive*, Chapters II-III.
17. Hobbes, *Leviathan*, I.XIV, pp. 116–17.
18. Ibid., I.XIV, p. 117.
19. Ibid., I.XIV, pp. 117–18.
20. Ibid., I.XIV, pp. 118–19.
21. Ibid., I.XIV, p. 121.
22. For the statement of position by Hobbes concerning these aspects of the right of self-defence, see: *Leviathan*, I.XIV, pp. 124–5, 127–8.
23. Hobbes, *Leviathan*, I.XV, p. 130.
24. Ibid., I.XV, pp. 130–1.
25. For Hobbes on justice and propriety as beginning with the institution of commonwealths, see: *Leviathan*, I.XV, p. 131.
26. Hobbes, *Leviathan*, I.XV, p. 138.
27. Ibid., I.XV, pp. 138–9.
28. Ibid., I.XV, p. 139.
29. Ibid., I.XV, p. 140.
30. Ibid.
31. Ibid., I.XV, pp. 140–1.
32. Ibid., I.XV, pp. 141–2.
33. Ibid., I.XV, p. 142. For Hobbes on the principle of distributive justice, see: *Leviathan*, I.XV, pp. 137–8.
34. Hobbes, *Leviathan*, I.XV, p. 142.
35. Ibid.
36. Ibid., I.XV, pp. 142–3.
37. Ibid., I.XV, p. 143.
38. Ibid.
39. Ibid.

40. Ibid., I.XV, pp. 143–4.
41. Ibid., I.XV, p. 144.
42. Hobbes, *The Elements of Law*, 1.16, Section 12. It should be noted that in *De Cive*, Hobbes stated it to be a principle of the law of nature that no promise or contract was to be entered into as between parties to disputes and such persons as were appointed to be the judge or arbitrator of the disputes in question. Also, it was stated to be contrary to the law of nature for men to indulge in drunkenness and gluttony, given that this prevented men from conforming with the laws of nature through weakening and destroying the faculty of reason. *De Cive*, III, Sections XXIV–XXV.
43. Hobbes, *Leviathan*, I.XV, p. 144.
44. For Hobbes on the laws of nature as always binding in conscience, but not so as binding in effect, see: *Leviathan*, I.XV, p. 145.
45. Hobbes, *Leviathan*, II.XVII, pp. 157–8.
46. Ibid., II.XVII, p. 158.
47. As regards Hobbes's explanation of natural and artificial persons, authority and authorization in respect of representative persons, and representation as the principle of unity among men in common association, see: *Leviathan*, I.XVI, pp. 147–8, 151.
48. For Hobbes on these various implications of the rights of sovereignty, see: *Leviathan*, II.XVIII, pp. 160–3.
49. Hobbes, *Leviathan*, II.XVIII, pp. 163–5.
50. Ibid., II.XVIII, p. 165.
51. Ibid., II.XVIII, pp. 165–6.
52. Ibid., II.XVIII, pp. 166–7.
53. Ibid., II.XVIII, pp. 167–8.
54. For Hobbes's arguments here, see: *Leviathan*, II.XIX, especially pp. 171, 173–7.
55. As regards Hobbes on the distinction between commonwealths formed through institution and commonwealths based in acquisition, and on the identity of the rights of the sovereign power as established in the two forms of commonwealths, see: *Leviathan*, II.XVII, pp. 158–9; II.XX, pp. 185–6.
56. Hobbes, *Leviathan*, II.XXI, pp. 198–9.
57. Ibid., II.XXI, pp. 201–2.
58. Ibid, II.XXI, pp. 204–5. It should be noted, in connection with the matter of the end of self-defence, that Hobbes held that subjects of commonwealths were freed from the duty of obedience owed to the sovereign in circumstances where the sovereign power was unable to render proper protection, or where the situation of subjects was such that they were no longer able to enjoy the protection of the sovereign. So, for example, subjects were absolved of their duty of obedience where the sovereign relinquished his powers, or where the sovereign became subject to some other authority. Likewise, subjects held prisoner by some enemy power, or those punished with banishment, were not bound by an obligation to the sovereign. *Leviathan*, II.XXI, pp. 208–9.
59. Hobbes, *Leviathan*, II.XXI, p. 206.
60. Ibid., II.XXI, pp. 206–7.
61. For Hobbes's specification of the different forms of the systems of peoples contained within commonwealths, and his explanation of the subjection of

the various systems to civil law, see particularly: *Leviathan*, II.XXII, pp. 210–11, 211–12, 221–2, 222–3, 224–5.

62. Hobbes, *Leviathan*, II.XXIV, pp. 232–4. For Hobbes, the distribution of land among the subjects of commonwealths for the purposes of private ownership was determined by the sovereign power. This had the effect that the ownership rights of subjects in property so established were exclusive rights as between subjects, but were not such as to exclude the rights of the sovereign power as the final source for the derivation of rules of propriety. *Leviathan*, II.XXIV, p. 235.
63. Hobbes, *Leviathan*, II.XXIV, p. 237.
64. For Hobbes on these various public officials, see: *Leviathan*, II.XXIII, pp. 226–30.
65. Regarding the contrast that Hobbes drew between command and counsel as running along the lines mentioned here, see: *Leviathan*, II.XXV, pp. 241–2.
66. Hobbes, *Leviathan*, II.XXVI, p. 251.
67. Ibid., II.XXVI, p. 252.
68. Ibid.
69. Ibid., II.XXVI, pp. 252–3.
70. Ibid., II.XXVI, pp. 254–5.
71. Ibid., II.XXVI, pp. 253–4. As Hobbes put it at the end of Chapter 26, in explaining the distinction between law and right: 'For *right* is *liberty*, namely that liberty which the civil law leaves us: but *civil law* is an *obligation*, and takes from us the liberty which the law of nature gave us.' *Leviathan*, II.XXVI, p. 276.
72. It is to be noted, in this connection, that while Hobbes accepted that civil law was to be thought of as being based in reason, he emphasized that this was so only in the respect that civil law was based in the reason of the representative person of the sovereign ruler in the commonwealth through whose command the civil law was made. *Leviathan*, II.XXVI, p. 256. For Hobbes on the division between natural law and positive law, see: *Leviathan*, II.XXVI, p. 271.
73. Hobbes, *Leviathan*, II.XXVI, p. 257.
74. Ibid., II.XXVI, pp. 257–9.
75. Ibid., II.XXVI, p. 259.
76. Ibid., II.XXVI, pp. 259–60.
77. For Hobbes on the interpretation of laws and on the office of judge, see: *Leviathan*, II.XXVI, pp. 261–9.
78. For the arguments of Hobbes here, see: *Leviathan*, II.XXVII, pp. 279–81.
79. Hobbes, *Leviathan*, II.XXVII, p. 281.
80. Ibid., II.XXVII, pp. 293–6.
81. Ibid., II.XXVIII, p. 297.
82. Ibid., II.XXVIII, pp. 297–8.
83. For Hobbes's specification of the principles of punishment, see: *Leviathan*, II.XXVIII, pp. 298–301.
84. For Hobbes on the forms of punishment, see: *Leviathan*, II.XXVIII, pp. 301–4.
85. Hobbes, *Leviathan*, II.XXVIII, p. 304.
86. Ibid., II.XXIX, pp. 309–10.
87. Ibid., II.XXIX, pp. 310–11.
88. Ibid., II.XXIX, pp. 312–13.
89. Ibid., II.XXX, pp. 322–3.
90. Ibid., II.XXX, pp. 323–4.

91. Ibid., II.XXX, pp. 326–7, 327–8.
92. Ibid., II.XXX, pp. 332–3.
93. Ibid., II.XXX, pp. 335–6.
94. For Hobbes on the office of sovereign rulers in respect of one another, and his identification of the law of nations with the laws of nature, see: *Leviathan*, II.XXX, pp. 342–3. See also: *The Elements of Law*, 2.10.10, p. 190; *De Cive*, XIV.IV, p. 171.

2 Natural Law, the Law of Nations and Realism in International Politics

1. Hobbes, *Leviathan*, I.XIII, p. 115. In *De Cive*, Hobbes described the condition of commonwealths in their mutual relations as follows: 'the state of Common-wealths considered in themselves, is natural, that is to say, hostile'. *De Cive*, XIII.VII, p. 159.
2. Hobbes, *Leviathan*, II.XXX, p. 342.
3. For general discussion of sovereign equality, political independence, territorial and personal authority and the other essential aspects of the position of states under current international law, see: Oppenheim, *International Law*, Chapter 3.
4. The same principle is affirmed and elaborated as Principle (a), as given in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. On the exclusion of the use or threat of force on the part of states as in accordance with Article 2, paragraph 4 of the United Nations Charter, see for example: Shaw, *International Law*, Chapter 19, pp. 781–5.
5. On the right of self-defence and its place in international law, see: Oppenheim, *International Law*, Chapter 3, Section 127; Shaw, *International Law*, Chapter 19, pp. 787–91.
6. Concerning the sovereignty and equality of states as a substantive principle of international law, see note 10 below.
7. The rule *pacta sunt servanda* is affirmed in Article 26 of the Vienna Convention on the Law of Treaties. For discussion of Article 26 of the Vienna Convention, see: Oppenheim, *International Law*, Chapter 14, Section 584; Shaw, *International Law*, Chapter 16, p. 633; Brownlie, *Principles of Public International Law*, Chapter 26, p. 620. It is to be noted that good faith in international agreements is specified as one aspect of the general principle of international law providing that states are to fulfil the obligations that are owed by them under law as in accordance with the United Nations Charter, as this is laid down as Principle (g) in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.
8. Hobbes put the matter in the following terms, and citing the case of the war between the Athenians and the Peloponnesians: 'It is also a law of nature, *That men allow commerce and traffic indifferently to one another*. For he that alloweth that to one man, which he denieth to another, declareth his hatred to him, to whom he denieth; and to declare hatred is war. And upon this title was grounded the great war between the Athenians and the Peloponnesians.

For would the Athenians have condescended to suffer the Megareans, their neighbours, to traffic in their ports and markets, that war had not begun.' *The Elements of Law*, 1.16.12, p. 87.

9. The general duty falling on states to co-operate with one another in the different areas of international relations is laid down as Principle (d) in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. On mutual intercourse and economic co-operation among states as from the standpoint of international law, see: Oppenheim, *International Law*, Chapter 3, Sections 134–135.
10. The principle of the sovereignty and equality of states is affirmed in Article 2, paragraph 1 of the Charter of the United Nations, and it is stated and elaborated as Principle (f) in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. In the Declaration, the elements of the principle of the sovereignty and equality of states are given as including those summarized as follows: states are equal in juridical terms; states hold all the rights inherent in full sovereignty; states are bound to respect the personality of one another as states on a mutual basis; states are to comply in full and in good faith with the international obligations to which they are subject, and to co-exist with other states in peace. Here, the principle of the sovereignty and equality of states plainly presupposes that states are required to recognize, and to accept, their possession of the rights essential to sovereignty on the basis of strict equality. It is to be observed that a requirement of this sort would, for Hobbes, appear to be laid on states under the terms of what in *Leviathan* he stipulated as the ninth, tenth and eleventh laws of nature, as when these laws are considered in their international application. For discussion of the various aspects and implications of the sovereignty and equality of states as a foundational constitutional principle of international law, see: Brierly, *The Law of Nations*, Chapter 4, Section 3; Oppenheim, *International Law*, Chapter 3, Sections 107–114; Shaw, *International Law*, Chapter 5, pp. 152–3; Brownlie, *Principles of Public International Law*, Chapter 14.
11. Regarding the territorial rights of states in relation to principles of sovereignty and jurisdiction, see: Oppenheim, *International Law*, Chapter 5; Shaw, *International Law*, Chapter 9; Brownlie, *Principles of Public International Law*, Chapters 6–8. For discussion of the principles of international law applying to the high seas, see: Oppenheim, *International Law*, Chapter 6; Shaw, *International Law*, Chapter 11, pp. 418–32, 444–50; Brownlie, *Principles of Public International Law*, Chapter 11.
12. Thus Article 29 of the Vienna Convention on Diplomatic Relations provides for the inviolability of the person of the diplomatic agent: he is not to be liable to arrest or detention in any form, and the receiving state is to extend to him due respect and to prevent attacks on his person, freedom and dignity. For discussion of the inviolability of diplomatic agents and the immunities and privileges belonging to them, see: Oppenheim, *International Law*, Chapter 10, Sections 492–509; Brownlie, *Principles of Public International Law*, Chapter 17, Sections 5–9.
13. Here, it is to be noted that Article 2, paragraph 3 of the Charter of the United Nations affirms that member states of the United Nations are to settle

international disputes through peaceful means, and to do this in such a way as not to endanger the ends of international peace and security and those of justice. Articles 33–38 concern the pacific settlement of international disputes, and with Article 33 providing that the parties to disputes are to seek a resolution of these through some peaceful means of their own choice, as, for example, through negotiation, mediation, arbitration or judicial settlement. The principle that states are to settle international disputes by peaceful means, so as to preserve international peace and security and justice, is also affirmed as Principle (b) in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. Concerning the procedures for the adjudication of international disputes, see Chapter 14 (Articles 92–96) of the Charter of the United Nations relating to the International Court of Justice and the Statute of the International Court of Justice. On the peaceful settlement of international disputes through adjudication and other procedures, see: Brierly, *The Law of Nations*, Chapter 8, Sections 1–4, 6; Shaw, *International Law*, Chapter 18; Brownlie, *Principles of Public International Law*, Chapter 31.

14. On the international law of human rights, see generally: Oppenheim, *International Law*, Chapter 8, Sections 431–444; Shaw, *International Law*, Chapters 6–7; Brownlie, *Principles of Public International Law*, Chapter 25, Section 6.
15. Regarding the various rights referred to here from the Universal Declaration of Human Rights, see also: the International Covenant on Civil and Political Rights, Articles 7, 9, 12, 14–16, 18–19, 21–23, 25–26.
16. Further to these rights as specified in the Universal Declaration of Human Rights, see also: the International Covenant on Social, Economic and Cultural Rights, Articles 7–13, 15.
17. In respect of Hobbes and the right of freedom of religion (and so indirectly the right of free assembly and association), it is to be noted that Hobbes specifically excluded the possibility of there being an unconditional freedom belonging to individual men in the matter of the public form of religious practice and observance as adopted in commonwealths, or, more precisely, in the matter of what he referred to as public worship. Thus, as Hobbes put it, public worship was the form of worship that the commonwealth performed in its unity as one person, and with this being, in his terms, worship that was engaged in by individuals in association as through and under the rights and direction relating to the form of public personality particular to commonwealths. (As for private worship as engaged in by individuals in their private capacities, this, Hobbes maintained, was free when it took place in secret, but not free as before other men, since it was then subject to the limitations imposed by the laws or by general opinion.) The form of public worship that Hobbes saw the commonwealth as performing in its own person was worship which he held was to be based in the principle of uniformity. Accordingly, it was for the sovereign power in commonwealths, as acting through the civil laws, to direct the relevant modes and organization of worship, as with, for example, the determination of the attributes of God that private individuals were to follow and make use of for the honouring of God in their worship. For Hobbes's arguments here, see: *Leviathan*, II.XXXI, pp. 350, 355–6.

18. For a classic statement of the principles of due process and procedural justice that are essential to the rule of law, see: Lon L. Fuller, *The Morality of Law* (1964), 2nd edition, revised (New Haven, Connecticut: Yale University Press, 1969). It is to be noted that Oakeshott wrote of the rule of law as possessing its own internal justice and morality, as based in such procedural considerations as the exclusion of retroactively effective rules and the independence of judicial proceedings, and that he held that the principles essential to the justice inherent in the rule of law were present in what Hobbes had picked out as the laws of nature. *On Human Conduct*, p. 153 fn1; 'The Rule of Law', pp. 140, 157–9.
19. The works of these various authorities that best reflect their alignment with the realist tradition are as follows: Edward Hallett Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (1939), 2nd edition as first published in 1946 (New York: Harper and Row, 1964); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948), 5th edition (New York: Alfred A. Knopf, 1973); George F. Kennan, *American Diplomacy: 1900–1950* (Chicago and London: University of Chicago Press, 1951); Henry A. Kissinger, *Nuclear Weapons and Foreign Policy* (New York: Harper and Brothers, 1957); Kenneth N. Waltz: *Man, the State and War: A Theoretical Analysis* (New York: Columbia University Press, 1959); *Theory of International Politics* (Reading, Massachusetts: Addison-Wesley, 1979).
20. For Martin Wight on what he specified as the realist or Machiavellian, the rationalist or Grotian and the revolutionist or Kantian traditions in international thought and practice, see his posthumously published lecture series from the 1950s: *International Theory: The Three Traditions*, ed. Gabriele Wight and Brian Porter (Leicester and London: Leicester University Press, 1991), especially Chapter 1. For Hedley Bull on what he identified as the Hobbesian-realist, Grotian-internationalist and Kantian-universalist traditions, see: *The Anarchical Society: A Study of Order in World Politics* (1977), 2nd edition (London: Macmillan, 1995), especially Chapter 2, pp. 23–6.
21. For general discussion of the realist tradition in international thought and practice, see: Robert O. Keohane, 'Realism, Neorealism and the Study of World Politics' and 'Theory of World Politics: Structural Realism and Beyond' (1983), in *Neorealism and its Critics*, ed. Robert O. Keohane (New York: Columbia University Press, 1986), pp. 1–26, 158–203; Michael Joseph Smith, *Realist Thought from Weber to Kissinger* (Baton Rouge and London: Louisiana State University Press, 1986); Steven Forde, 'Classical Realism', and Jack Donnelly, 'Twentieth-Century Realism', in *Traditions of International Ethics*, ed. Terry Nardin and David R. Mapel (Cambridge: Cambridge University Press, 1992), pp. 62–84, 85–111.
22. According to Waltz, the explanation for the causes of war among states in terms of the anarchic structure of international politics belonged to what he called the third image of international relations (as opposed to the first and second images where, respectively, human nature and behaviour and the internal political structure of states were appealed to in explanation of war). On this matter, see: *Man, the State and War*, especially Introduction, Chapters 6–7. For Waltz on the elements of international politics establishing this as an anarchic structure of politics, see also: *Theory of International Politics*, especially Chapters 5–6.

23. Thus Morgenthau held that the essential concept of realism in regard to international politics was the concept of interest defined in terms of power. *Politics Among Nations*, Chapter 1, pp. 5–8.
24. Famously, Machiavelli argued that rulers were permitted to break their promises and agreements where interests and circumstances demanded this, and also that rulers, in order to maintain power, were frequently compelled to act treacherously, ruthlessly and without humanity and to offend against the principles of religion. For Machiavellis's statement of this position, see: *The Prince*, ed. Quentin Skinner and Russell Price (Cambridge: Cambridge University Press, 1988), Chapter 18, pp. 61–2, 62.
25. For Morgenthau on the inapplicability of abstract and universal moral standards in regard to the actions of states, and for his explanation as to how realism presupposed the autonomy of the political sphere, as based in interests and power, from the spheres of law and ethics, and thus stood opposed to the legalistic-moralistic approach to international politics, see: *Politics Among Nations*, Chapter 1, pp. 10–15. For Kennan on what he saw as the defects of the legalistic-moralistic approach in relation to the foreign policy of the United States, see: *American Diplomacy: 1900–1950*, Chapter 6.
26. Regarding the question of power as the basis for the foreign policies of states, there is the argument of Kissinger that the fundamental task for American policy-makers, as of the late 1950s, lay with the formulation of a strategic doctrine where available power and force capabilities were brought into proper and effective alignment with the core foreign policy objectives of the United States. *Nuclear Weapons and Foreign Policy*, Chapter 1. As for the question of the balance of power, there is the emphasis placed by Waltz on the balance of power between states as the foundation for the sphere of international politics, considered as an anarchic political structure organized in accordance with the principle of self-help. *Theory of International Politics*, Chapter 6, especially pp. 111–28.
27. Of particular relevance, for the present argument, is the contrast made by Wight and Bull as between Hobbes the realist and Grotius as representative of the modern tradition of international law. In this connection, see particularly: Bull, 'The Importance of Grotius in the Study of International Relations', in *Hugo Grotius and International Relations*, ed. Hedley Bull, Benedict Kingsbury and Adam Roberts (Oxford: Clarendon Press, 1990), pp. 65–93.
28. For background reference to Hobbes and realism, see: Smith, *Realist Thought from Weber to Kissinger*, Chapter 1, pp. 12–15; Forde, 'Classical Realism', pp. 75–7.
29. For Carr on Hobbes in relation to realism, see: *The Twenty Years' Crisis*, Chapter 5, pp. 64–5; Chapter 8, p. 112; Chapter 10, p. 176. For Wight on the same, see: *International Theory: The Three Traditions*, Introduction, p. 6; Chapter 1, p. 17; Chapter 3, pp. 30–1, 33–6; Chapter 11, p. 247. As for Bull, see: *The Anarchical Society*, Chapter 2, pp. 23–6, 44–9. For a more detailed discussion by Bull of Hobbes as a realist thinker, see: 'Hobbes and the International Anarchy', *Social Research*, 48 (Winter 1981), pp. 717–38.
30. Michael W. Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* (New York and London: W.W. Norton, 1997), Chapter 3; David Boucher, *Political Theories of International Relations: From Thucydides to the Present* (Oxford: Oxford University Press, 1998), Chapter 7, especially pp. 157–63.

A view of Hobbes, as familiar from the terms of the standard realist reading, is also implied by Alexander Wendt in his specification of what he calls the Hobbesian culture of anarchy in international politics, where states are thought of as representing themselves one to another as in the role of enemies. For the details of this, see: Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), especially Chapter 6, pp. 246–78.

31. It is perhaps the gravest defect of the standard realist interpretation of Hobbes, in relation to international politics, that this involves the presenting of Hobbes as having taken the position that the sphere of international politics remained devoid of moral and legal norms and principles, and that states and governments remained at liberty to act in their own interests without regard for the external constraints of law and justice. As Bull put it: 'The Hobbesian prescription for international conduct is that the state is free to pursue its goals in relation to other states without moral or legal restrictions of any kind.' *The Anarchical Society*, Chapter 2, p. 24. (See also: Carr, *The Twenty Years' Crisis*, Chapter 9, p. 153.) As against this and to make the point once more, it is to be emphasized that Hobbes maintained that the laws of nature had application to the sphere of international politics, that the laws of nature in this context for their application comprised the substance of the law of nations, and that the laws of nature considered as the law of nations embodied the moral and legal constraints and limitations to which states and rulers were to be thought of as being subject. Further to the question of Hobbes and realism, it is to be noted that the laws of nature, as he explained them, were laws that in their international application served to establish a framework appropriate for the development of co-operative relations among states and governments. The evident fact of beneficial co-operation among states and governments is often cited in challenge to the realist view of international politics as based only in conflict and antagonism. To the extent that such co-operation runs along the sort of lines that Hobbes pointed to with his elaboration of the laws of nature, then this too is a consideration that is to be reckoned as a check to the realist reading of Hobbes. For the classic work where international co-operation is focused on in response to realist assumptions in international relations, see: Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* (1977), 3rd edition (New York: Longman, 2001).
32. In his *Two Treatises of Government* (1690), Locke followed Hobbes in taking the state of nature, and the laws obtaining there, as the starting-point in explanation of the origin of political society (albeit that he diverged from his predecessor in the respect, among others, that he did not identify the state of nature as the state of war as such). In the present context, the crucial consideration is that, for Locke, it was one of the principal limitations of the state of nature, as relative to the condition of political society, that there was absent from it a power sufficient to give effect to judgments made as to the proper application of the laws of nature in the matter of disputes and controversies among men. It was to remedy this situation that the form of government established in commonwealths was to be empowered such that, as Locke put it, the force of the community would be employed in the execution of the laws. For the position of Locke here, see: *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), *Second Treatise: An Essay concerning the True Original, Extent, and End of Civil Government*, Chapter IX.

33. Regarding Kant, it is evident that he considered that agencies of power were essential to the rule of law maintained in the civil state, given what was his clear insistence as to the connection between law and the possibility of legitimate coercion being employed in the enforcement of law. In specific terms, Kant held that the normative foundation for the civil state, and for the rule of law obtaining there, lay in a principle that he referred to as the universal principle of justice, which principle provided for the freedom of all persons as in accordance with universal laws. However, he also held that the form of justice appealed to in the universal principle of justice was such that it implied, and gave rise to, the idea of an authority to apply external coercive force against those persons who violated justice and the rights of individuals which were defined through justice. As Kant explained it, the presence of an authority to exercise coercion to secure freedom under universal laws was essential for justice, and this was an authority that, as he claimed, was absent from the state of nature and to be found only in the condition of political society. Thus it was in the condition of political society that there were established adequate means of public lawful external coercion as embodied in, and applied through, the basic state institutions concerned with the legislative, judicial and executive offices. For Kant's arguments here, see: *The Metaphysical Elements of Justice*, 'Introduction to the Elements of Justice', Sections C-E; 'General Theory of Justice', Part II: 'Public Law', Section I: 'Municipal Law', especially sub-sections 44–49.

3 The Tradition of International Law

1. Aquinas' discussion of lawful authority, just cause and right intention as the essential conditions for justice in war in the *Summa Theologiae* comes in the Secunda Secundae, Question 40, Article 1. For the original Latin text of this with an English translation by Thomas R. Heath, see: *Summa Theologiae*, Blackfriars edition, Volume 35: *Consequences of Charity* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1972), pp. 80–5. For a summary exposition of the basic elements of classic just war theorizing, see: William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), Chapters 2–3.
2. Grotius, *JBP*, Book I, Chapter I, Section X, sub-section 1.
3. Ibid., I.I.XIII.
4. Ibid., I.I.XIV.
5. For Grotius on the right of men under natural law to defend themselves, and on this in relation to the right of private war, see particularly: *JBP*, I.II.I; I.III.I–II.
6. In the matter of Grotius on pacts as the basis for the state and the form of legal order maintained by states, see note 14 to Chapter 1 above.
7. For Grotius on the basic just causes for war, see particularly: *JBP*, II.I.I–II.
8. Regarding Grotius' argument here, see note 14 to Chapter 1 above and more specifically: *JP*, II: Prolegomena, pp. 26–7.
9. For Grotius on public war and the conditions for it, see: *JBP*, I.III.I, IV; III.III.
10. Grotius, *JBP*, II.XVIII.
11. Ibid., II.XIX.

12. Ibid., III.II.
13. Concerning the various rights of the parties to public war as picked out by Grotius, see: *JBP*, III.IV–IX.
14. For Grotius on the relevant principles of good faith, see: *JBP*, III.XIX–XXIV.
15. Grotius, *JBP*, Prolegomena, 17.
16. For Grotius on the distinction between the law of nature and the law of nations in connection with the rights of war, see: *JBP*, III.I.I.
17. Grotius maintained that a public war had certain effects which did not follow from the nature of war itself. *JBP*, III.IV.I. The rights of parties to public war, as understood from the standpoint of the law of nations, were for Grotius effects in this sense and were explained by him as such. For the discussion of the public war rights concerned, see variously: *JBP*, III.IV–IX.
18. Pufendorf, *JNG*, Book II, Chapter III; *OHC*, Book I, Chapter III.
19. Pufendorf, *OHC*, I.IV. There is no separate discussion in *De Jure Naturae et Gentium* of the duties owed by men to God under natural law.
20. Pufendorf, *JNG*, II.IV; *OHC*, I.V, Sections 1–4.
21. For Pufendorf, the right of self-defence was a foundational natural right in the respect that there was no criminal liability involved in killing in the performance of acts of innocent defence. Regarding Pufendorf on the natural right of self-defence, see: *JNG*, II.V; *OHC*, I.V.5–17.
22. Concerning the distinction that Pufendorf drew between absolute and hypothetical duties owed under natural law, see: *JNG*, II.III, Section 24; III.I.1; *OHC*, I.VI.1.
23. Pufendorf, *JNG*, III.I; *OHC*, I.VI.
24. Pufendorf, *JNG*, III.II; *OHC*, I.VII.
25. The common duties of humanity, as Pufendorf elaborated them, included the duties relating to such matters as the protection of visitors to foreign lands, and the maintenance of trade and commerce among men under the conditions of the market. For Pufendorf on the common duties of humanity, see: *JNG*, III.III; *OHC*, I.VIII.
26. For Pufendorf on the principles relating to promises and agreements and on the principles bound up with the duty of good faith, see: *JNG*, III.IV–IX; *OHC*, I.IX.
27. Pufendorf, *JNG*, III.IV.9; *OHC*, I.IX.4. It is to be noted that Pufendorf held that an imperfect promise was a promise where the promisor placed himself under an obligation, but where there was no right transferred to another man to require or compel the performance of what was promised. A perfect promise, in contrast, was a promise where the promisor created an obligation for himself and, in doing so, transferred a right to the promisee or promisees concerned to require or compel performance as according to the terms of the promise. *JNG*, III.V.6–7; *OHC*, I.IX.6–7.
28. Pufendorf, *JNG*, III.IX.8; *OHC*, I.IX.22.
29. For Pufendorf on the condition of men in the state of nature, see: *JNG*, II.II (and V.XIII.2); *OHC*, II.I.
30. Pufendorf, *JNG*, VII.I; *OHC*, II.V.
31. Pufendorf, *JNG*, VII.II; *OHC*, II.VI.
32. Pufendorf, *JNG*, VII.IV; *OHC*, II.VII.
33. Pufendorf, *JNG*, VII.V; *OHC*, II.VIII.
34. For the defining characteristics of sovereignty that Pufendorf identified, see: *JNG*, VII.VI: *OHC*, II.IX.

35. Pufendorf, *JNG*, VIII.I; *OHC*, II.XII. See also, in this regard, Pufendorf on the right of punishment in the state: *JNG*, VIII.III; *OHC*, II.XIII.
36. In connection with these matters, Pufendorf stated the principles relating to the law of war as such, the principles relating to pacts and agreements to do with war, and those relating to the pacts and agreements which served to restore peace. *JNG*, VIII.VI–VIII; *OHC*, II.XVI.
37. Pufendorf, *JNG*, VIII.IX; *OHC*, II.XVII.
38. For Pufendorf on the natural condition of society holding among states and rulers in the international sphere, see: *JNG*, II.II.4; *OHC*, II.I.6.
39. Concerning the identity of the law of nations and the natural law, Pufendorf put the matter with particular clarity in *Elementorum Jurisprudentiae Universalis*: 'Something must be added now also on the subject of the *Law of Nations*, which, in the eyes of some men, is nothing other than the law of nature, in so far as different nations, not united with another by a supreme command, observe it, who must render one another the same duties in their fashion, as are prescribed for individuals by the law of nature. On this point there is no reason for our conducting any special discussion here, since what we recount on the subject of the law of nature and of the duties of individuals, can be readily applied to whole states and nations which have also coalesced into one moral person. Aside from this law, we are of the opinion that there is no law of nations, at least none which can properly be designated by such a name.' *EJU*, Book I, Definition XIII, paragraph 24, p. 165. For a further statement of this position by Pufendorf where he explicitly referred to Hobbes as an authority, and where he explicitly denied that there was a positive or voluntary law of nations with the force of law proper, see: *JNG*, II.III.23, p. 226.
40. Wolff, *JGMSP*, Prolegomena, Sections 4–6.
41. For Wolff on the stipulative and customary law of nations, see: *JGMSP*, Prolegomena, 23–24.
42. Wolff, *JGMSP*, Prolegomena, 25.
43. Ibid., Prolegomena, 10.
44. Ibid., Prolegomena, 9, 11–15, 19.
45. Ibid., Prolegomena, 20–22. According to Wolff, the voluntary law of nations was not understood to proceed from the will of nations and states in the sense that nations and states established it through their arbitrary free will. Rather, the voluntary law of nations proceeded from the will of nations and states in the respect that the will of nations and states was present in the agreement that they were bound, as a matter of necessity, to render to a law whose basis of derivation was already contained in natural law. For Wolff's position here, see: *JGMSP*, Preface, p. 6.
46. Vattel, *DG*, Introduction, Sections 6–9.
47. For Vattel on the voluntary law of nations, see: *DG*, Preface, p. 10a.
48. Vattel, *DG*, Introduction, 24–26.
49. Ibid., Introduction, 27.
50. Ibid., Preface, p. 9a.
51. Ibid., Introduction, 4–5, 10–12.
52. Wolff, *JGMSP*, Prolegomena, 7–10.
53. Vattel, *DG*, Introduction, 13–14.
54. Ibid., Introduction, 15.

55. Ibid., Introduction, 18.
56. Ibid., Introduction, 17.
57. Ibid., Introduction, 20–21.
58. On the different contexts where Vattel explained the effects of the distinction between the necessary law of nations and the voluntary law of nations, see: Ruddy, *International Law in the Enlightenment*, Chapter 4, pp. 110–23.
59. Concerning Vattel on the law of international commerce, see: *DG*, Book I, Chapter VIII, and Book II, Chapter II.
60. For the arguments of Vattel here, see: *DG*, III.XII.
61. Thus, for Vattel, it was the essential condition for nations and states having full membership of the natural society of nations, and hence for their having status as subjects of the law of nations, that they were to stand as sovereign and independent entities and to govern themselves through their own authority and their own laws. *DG*, I.I, Section 4.
62. The comprehensiveness of the substantive law of nations, as Vattel stated it, is readily understood through a summary review of some of the principal subject-matters coming under the different heads treated of in the four books which comprise *Le Droit des Gens*. Thus in Book 1, Vattel discussed the law of nations as it applied to nations and states considered in and by themselves. Here, Vattel addressed such matters as the duties of nations and states in regard to themselves (I.II), the constitution of nations and states and the form of sovereign power established within them (I.III–V), and the principles relating to the maintenance of justice by nations and states and to their exercise of powers of public administration (I.XIII). In Book 2, Vattel turned to the law of nations as it had application to the external relations among nations and states. Included under this head were such matters as the dignity and equality of nations and states (II.III), the effects of their rights of territorial domain (II.VII–XI), the alliances and treaties formed by nations and states (II.XII–XVII), and the procedures for the settlement of disputes among them (II.XVIII). In Book 3, Vattel set out the principles of the law of war, and here expounded the law as it concerned, for example, the just causes of war (III.III), declarations of war (III.IV), the aspects of neutrality (III.VII), the rights of belligerent nations and states regarding the person and property of the enemy (III.VIII–IX), conventions made by belligerents during wartime (III.XVI), and civil war (III.XVIII). Lastly, there is Book 4, where Vattel set out the law of nations as it concerned procedures for the restoration of peace by belligerent nations and states (IV.II–IV), and the principles relating to embassies and the rights and immunities of ambassadors (IV.V–IX). As it is evident, the exposition of the law of nations that Vattel provided in *Le Droit des Gens*, in regard to its scope and detail, went far beyond the accounts of the substance of the law which are to be found in Hobbes and Pufendorf.
63. Kant stated what he saw as the basic substantive principles of the law of nations in the form of the six preliminary articles of perpetual peace which are laid down in the First Section of *Perpetual Peace*. The provisions of the articles were as follows: 1. Peace treaties were to be counted as invalid if they were made with secret reservations as to material causes for future war; 2. Independently existing states were not to be acquired by other states through inheritance, exchange, purchase or gift; 3. Standing armies were to be abolished on a gradual basis; 4. States were to be barred from incurring

national debts in connection with their foreign policies; 5. States were to be prohibited from forcible external interference in the matter of the constitution and government of one another; 6. States at war were to refrain from acts of hostility likely to destroy the basis for mutual confidence among themselves during a future time of peace, with such acts including the use of assassins and poisoners, breaches of agreements and the instigation of treason in enemy states. The constitutional forms that Kant saw as founding the different parts of public law are described in the three definitive articles of perpetual peace which are presented in the Second Section of *Perpetual Peace*, and with these articles providing as follows: 1. States were to adopt the republican form of civil constitution; 2. The law of nations was to be founded in a federation of free states; 3. Cosmopolitan law was to be based in the principle of universal hospitality. Further to Kant on the law making for peace in the international sphere, there is also his statement of the substantive principles of the law of nations in their relation to the rights of war. For this, see: *The Metaphysical Elements of Justice*, 'General Theory of Justice', Part II: 'Public Law', Section II: 'The Law of Nations', sub-sections 54–60.

64. For Kant in explanation of the federation of free states as the constitutional foundation for the law of nations, see: *Perpetual Peace*, pp. 102–5. For discussion of Kant on the federation of free states and in his relation to the modern natural law tradition, see: Covell, *Kant and the Law of Peace*, Chapter 4, pp. 93–100; Chapter 6, pp. 124–41.
65. Jeremy Bentham: *A Fragment on Government*, ed. J.H. Burns and H.L.A. Hart, with an introduction by Ross Harrison (Cambridge: Cambridge University Press, 1988); *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart (London: Athlone Press, 1970); *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970).
66. Regarding the basic terms of Bentham's imperative analysis of law, see particularly: *Of Laws in General*, Chapter 1. For an indication as to the general approach followed by Bentham in jurisprudence, see: *A Fragment on Government*, Preface; *An Introduction to the Principles of Morals and Legislation*, Chapter 17, Concluding Note.
67. Bentham, *An Introduction to the Principles of Morals and Legislation*, Chapter 17, Section 2, sub-section 25, p. 296.
68. Bentham prepared the manuscripts for four essays on international law between 1786 and 1789. The subject-matters of the essays were respectively the objects of international law, the subjects of international law, the law of war, and the plan for a universal and perpetual peace. The essays were published posthumously in 1843 under the title *Principles of International Law*. For the full text of this, see: *Works of Jeremy Bentham*, published under the superintendence of John Bowring (Edinburgh, 1838–1843), Volume 2, pp. 535–60. It is to be noted, in regard to Bentham breaking with the modern natural law tradition, that he made no reliance on the conceptual framework of natural law in his exposition of the elements of international law. In this, Bentham stands in contrast not only to Hobbes, but also to the thinkers who came after Hobbes, including, for example, Hume as in the discussion of the law of nations that comes in his *Treatise of Human Nature* (1739–40). Here, Hume accepted the reality of a law of nations that was distinct from natural law, and with this comprising the rules which he held bore on matters such

as embassies, war and commerce among the different societies. However, Hume maintained that the rules of the law of nations were, as he put it, superadded to the laws of nature, but without this meaning that the laws of nature were entirely negated or abolished as in reference to the conduct of rulers. For Hume, the principles of natural law had proper application to rulers in the international sphere, and so accordingly he claimed that rulers were reliably to be considered as subject to the duties as imposed through the rules of justice set out in what he identified, and treated of, as the three fundamental laws of nature relating to the condition of men in society: the stability of property, the transference of property only through consent, and the law requiring the performance of promises. Concerning the position of Hume on the law of nations and the laws of nature, see: *A Treatise of Human Nature*, ed. L.A. Selby-Bigge, 2nd edition with text revised and variant readings by P.H. Nidditch (Oxford: Clarendon Press, 1978), Book III, Part II, Section XI, pp. 567–8.

69. John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995).
70. For Austin on international law as a form of positive morality, as opposed to its being a form of positive law, see: *The Province of Jurisprudence Determined*, Lecture 1, p. 20; Lecture 5, pp. 112, 123, 124–5; Lecture 6, p. 171.
71. Regarding Kelsen and international law, see particularly: *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Massachusetts: Harvard University Press, 1945), Part 2, Chapter 6; *Pure Theory of Law* (1934; 2nd edition, 1960), trans. Max Knight (Berkeley and Los Angeles: University of California Press, 1967), Chapter 7.
72. For the views of Hart concerning international law, see: *The Concept of Law* (1961), 2nd edition (Oxford: Clarendon Press, 1994), Chapter 10.
73. In regard to the general principles of law as a source for international law, it is to be noted that the general principles of law as recognized by the civilized nations are cited as a source for the law to be applied by the International Court of Justice, as in Article 38, paragraph 1, Section C of the Statute of the International Court of Justice. For discussion of the general principles of law in relation to the sources of international law, see: Oppenheim, *International Law*, Chapter 1, Sections 9, 12; Brownlie, *Principles of Public International Law*, Chapter 1, pp. 15–19.

Conclusion

1. On the liberal tradition in international politics generally, see: Doyle, *Ways of War and Peace*, Part 2 – especially Chapter 8 for discussion of Kant in his relation to liberal internationalism. Regarding Kant and the liberal conception of international law and international relations, see: Covell, *Kant and the Law of Peace*, Conclusion, pp. 174–87. A key point of reference for the liberal internationalist tradition after Kant comes in the form of the Fourteen Points as enunciated, at the start of the final year of the First World War, by the as then President of the United States Woodrow Wilson (1856–1924). Thus Wilson followed Kant in specifying conditions for international peace that are now accepted to be essential to the terms of the liberal form of international

peace, as with, in his case, such conditions as those of freedom of commerce among nations, reductions in national armaments, and international institutional arrangements for the provision of mutual guarantees for the political independence and territorial integrity of states. For the full particulars of the Fourteen Points, see: Address of President Wilson on the Conditions of Peace Delivered at a Joint Session of the Two Houses of Congress, 8 January 1918, in *Official Statements of War Aims and Peace Proposals: December 1916 to November 1918*, prepared under the supervision of James Brown Scott (Washington, DC: Carnegie Endowment for International Peace, 1921), pp. 234–9.

2. As an indication of the position of limited government, the rule of law and individual rights as fundamental ideas in liberal political thought, there is the common emphasis placed on them in the very different contributions to the development of liberalism as made during the twentieth century by Michael Oakeshott, F.A. Hayek and John Rawls. For Oakeshott, the principles of limited government, law and individual rights were theorized in relation to the state as bearer of sovereign rights and powers, whereas for Hayek the theoretical focus related to the free market order and for Rawls to the modern welfare state institutions. Despite the differences as to theoretical foci and contexts, Oakeshott, Hayek and Rawls were united in conceiving of the rights of individuals as secured through limited government based in the rule of law, and in conceiving of the form of law and government essential for individual rights as being that given in the constitutional order specific to states. The contribution of Oakeshott comes most powerfully in *On Human Conduct*, for the details of which see note 12 to the Introduction above. Regarding Hayek, see his studies from the 1970s on rules and order, social justice and the political order for free peoples as published in single-volume form as: *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge and Kegan Paul, 1982). As for Rawls, see his seminal work: *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1971). On Oakeshott, Hayek and Rawls in their relation to liberalism, see: Charles Covell, *The Defence of Natural Law: A Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshott, F.A. Hayek, Ronald Dworkin and John Finnis* (London: Macmillan, 1992), Chapter 3. (It is to be noted, in passing, that international law was not of central concern in the versions of liberalism set out by Oakeshott and Hayek. This is not so, however, with Rawls, who, from the late 1980s onwards, was to address the matter of international law in a generally Kantian-liberal spirit. For Rawls on international law, or, as he referred to it, the law relating to peoples, see: *The Law of Peoples with 'The Idea of Public Reason Revisited'* (Cambridge, Massachusetts: Harvard University Press, 1999).)
3. Regarding Kelsen's arguments here, see: *General Theory of Law and State*, Part 1, Chapter 1, Section A: 'Law and Justice'. As to the connections that Kelsen argued for as between philosophical relativism and the political form of relativism that he associated with democracy, see his essay: 'Absolutism and Relativism in Philosophy and Politics' (1948), in his *What is Justice? Justice, Law, and Politics in the Mirror of Science* (Berkeley and Los Angeles: University of California Press, 1957), pp. 198–208.
4. For classic texts that set much of the mainstream agenda for the communitarian critique of liberalism, see: Alasdair MacIntyre, *After Virtue: A Study in Moral*

Theory (1981), 2nd edition with a Postscript (London: Duckworth, 1985); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

5. The exponents of the constructivist approach to international politics include Wendt, as in his *Social Theory of International Politics*. For the landmark contribution to the establishing of constructivism as a distinct school in international relations theory, see: Nicholas Greenwood Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia, South California: University of California Press, 1989) – especially Chapter 1 for an explanation of the essential ideas bound up with the constructivist position.
6. Hobbes reflects the secularization of the institutions of law, state and government in the respect that he insisted that the state authorities were supreme in matters of religion and as relative to the form of ecclesiastical organization as maintained in commonwealths. Thus he held that when the sovereign in the commonwealth was a Christian sovereign, then the sovereign exercised not only civil rights and powers but also ecclesiastical rights and powers. The rights and powers belonging to the sovereign in ecclesiastical matters were stated and explained at great length by Hobbes in Chapter 42 of *Leviathan*, and these included the authority to determine doctrine, the authority to appoint the ministers of religion having pastoral functions, and the authority to appoint the persons responsible for the interpretation of the Scriptures. For the details of this, see: *Leviathan*, III.XLII, pp. 537–47.

   For Hobbes, the civil and ecclesiastical rights and powers of sovereigns were consolidated rights and powers, and so in Christian commonwealths the State and the Church stood to each other in the condition of unity. There was not, in this, the sense of the official neutrality of the state in regard to religion, and of the withdrawal of the state authorities from the direction of ecclesiastical organization, which were essential features of the process of secularization as it became bound up with the liberal tradition in politics. However, it is to be emphasized that Hobbes did certainly point towards the de-linking of the state from issues of faith and religion, as consistent with the later currents of secular liberalism. This was so, not least, with the specification that he provided of principles of natural law which were understood to be foundational for the legal and political order particular to states, and which, as to their substance, were understood to be compelling in reason and without dependence on presuppositions drawn from the sphere of faith and religion. Here, Hobbes was in line with the terms of the natural law enterprise as undertaken by Grotius. So also did he here look forward to the emergence of one of the leading concerns in liberal theory, with this being the concern to identify principles of justice and political morality that will have proper application to societies which are distinguished by diversity in religion, and in religious practice and observance, as among their members. As an example of this focus of concern in liberal theory, there is the attempt of Rawls to expound a political conception of liberalism, as based in the idea of a just constitutional democratic order which will be accepted by citizens who remain divided through their adhering to reasonable but incompatible religious, philosophical and moral doctrines. For Rawls's account of this, see: *Political Liberalism* (New York: Columbia University Press, 1993).

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Index

absolute and hypothetical duties under natural law
  Pufendorf on the distinction between, 110–11, 113, 134–5
acquisition, commonwealths by
  Hobbes on, 32
adjudication
  Grotius on in relation to natural law, 14–15, 161–2(n12)
  Hobbes on as a right of sovereignty and on the principles of in relation to human rights law, 31, 43–4, 49–50
  Pufendorf on as a right of sovereignty, 116
administration
  Hobbes on the powers of as relating to the rights of sovereignty, 31, 36–7
agreement
  Pufendorf on the act of as essential for the founding of the state, 115
anarchy as the condition of international politics, 86–7, 168(n22)
  Hobbes and, 89–90, 91
Aquinas, St Thomas, 2, 11–14, 15, 16–17, 37, 102, 150–1
arbitration
  Hobbes on the principles of as the basis for the settlement of disputes as under natural law and in relation to the law of nations, 25–6, 27, 39, 49–50, 71–2, 82–3, 163(n42)
aristocracy, as a form of government
  Hobbes on, 32
  Pufendorf on, 116
Aristotle, 2, 10, 11, 14, 15, 16–17
assembly, freedom of
  see under: association, freedom of
association, forms of
  Hobbes on as present among men in commonwealths, 35
association, freedom of, 75
  Hobbes and, 79–80
Austin, John, 5, 138, 143–5, 153–4

Bentham, Jeremy, 5, 9, 100, 138, 141–3, 144–5
Boucher, David, 89, 169 (n30)
Brierly, J.L., 158–9(n11), 166(n10), 166–7(n13)
Brownlie, Ian, 158–9(n11), 165(n7), 166(n10), 166(n11), 166(n12), 166–7(n13), 167(n14), 176(n73)
Bull, Hedley, 86, 88–9, 168(n20), 169(n27), 169(n29)
Burlamaqui, Jean-Jacques, 2
Bynkershoek, Cornelius van, 5, 106

Carr, E.H., 86, 89, 168(n19), 169(n29)
Charter of the United Nations, 6, 64, 65, 158(n11), 165(n4), 166(n10), 166–7(n13)
civil law
  Aquinas on, 12, 13–14
  Hobbes on, 31, 33, 34–5, 35–6, 40–6, 51, 52, 62–3, 79–80, 97–8, 136
  Pufendorf on, 109, 115–16, 116–17, 136
  see also: municipal law
civitas maxima as basis for the law of nations
  Vattel and, 127, 128–9, 134
  Wolff on, 126–7
coercion, the right of
  Kant on the presence of, as the right of public lawful external coercion, as within the civil state as the precondition for the securing there of the rights of individuals under law and justice, 139, 171(n33)

command model/analysis of law
Austin on, 143–4
Hobbes on, 40–1, 143
commerce, freedom of
Bentham on, 142
Hobbes on as a principle given in natural law, as subject to the rights of sovereignty and as in relation to the law of nations, 27–8, 36, 68–9, 165–6(n8)
Kant on, 139
Vattel on, 132–3
commerce, law of
Vattel on, 132–3
common duties of humanity
Pufendorf on, 111–12, 112–13, 119, 172(n25)
common holdings of things
Hobbes on as based in natural law and in relation to the law of nations, 26, 70–1
communitarian critique of liberalism, 154
conscience, freedom of
Hobbes on, 51, 79
constitutional order of the state as a concern of liberalism, 148–9
Hobbes and, 149–50, 152
constructivist school in international relations theory, 154
contract
Grotius on in relation to natural law, 14–15
contumely
Hobbes on the refraining from as a duty under natural law and in relation to the law of nations, 24–5, 38–9, 67
cosmopolitan law
Kant on, 139, 174–5(n63)
counsel
Hobbes on as distinguished from laws as commands, 40–1
Covell, Charles, 157–8(n7), 158(n10), 160(n12), 175(n64), 176(n1), 177(n2)
covenant
Hobbes on: as act instituting commonwealths, 29–30, 58, 59, 61; as act involving the transference of rights, 21–2
covenants
Hobbes on: the performance of as the foundation of justice, and this as a principle of natural law and in relation to the law of nations, 22–3, 28–9, 38, 66–7; the validity and binding force of as depending on the existence of commonwealths, 22, 28–9, 30
crime and criminal responsibility
Hobbes on the principles of and in relation to human rights law, 44–5, 49–51, 83–4, 151
crimes
Hobbes on the specification of, 45
custom, law of
Hobbes on, 41–2
customary law of nations
Vattel on, 128
Wolff on, 125–6

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 6, 64, 158(n11), 165(n4), 165(n7), 166(n9), 166(n10), 166–7(n13)
Democracy, as a form of government
Hobbes on and in relation to human rights law, 32, 80, 81
Kelsen on and in relation to political relativism, 154
Pufendorf on, 116
diplomatic relations, the principles of under international law, 6, 71, 166(n12)
Hobbes and, 71
divine law
Aquinas on, 12
Pufendorf on, 109
Donnelly, Jack, 168 (n21)
Doyle, Michael W., 89, 169(n30), 176(n1)

due process, the principles of
see under: justice, procedural

ecclesiastical rights and powers as belonging to sovereigns
Hobbes on, 178(n6)
equality
as an attribute belonging to men by nature: Hobbes on, 17–18, 25, 39; Pufendorf on, 111, 114–15
the recognition of as belonging to men as a duty owed under natural law, and the recognition of the same as belonging to states under the law of nations: Hobbes on/and, 25, 39, 69–70, 82, 111; Pufendorf on/and, 111, 119; Vattel on, 130, 131–2, 133–4, 135
equity
Hobbes on as a principle governing the arbitration of disputes and required as a duty under natural law, and on the same as in relation to the law of nations, 25–6, 39, 49–50, 53, 69–70
eternal law
Aquinas on, 12, 13
executive powers of government
Hobbes on as rights of sovereignty, 31–2

faith of treaties as a principle of international law, 5, 66–7, 165(n7)
Hobbes and, 66–7, 72
Kant on, 139
Pufendorf and, 120
federation of free states
Kant on as the constitutional foundation for the law of nations, 139, 139–40, 140–1, 174–5(n63)
Finnis, John, 160–1(n2)
force, the prohibition on the threat or use of as a principle of international law, 64, 165(n4)
Hobbes and, 64, 72
Forde, Steven, 168(n21), 169(n28)
Forsyth, Murray, 160(n12)
Fourteen Points, 176–7(n1)
freedom
see under: liberty
Fuller, Lon L., 168(n18)

Gauthier, David P., 159(n12)
general principles of law as a source for international law, 145, 176(n73)
Gentili, Alberico, 4, 99
good faith in agreements as a principle of natural law
Grotius on, 104
Hobbes on/and, 22–3, 38, 66–7
Pufendorf on, 112–13
government in the state
see under: sovereign/sovereign power; sovereignty
gratitude
Hobbes on as a duty owed by men under natural law and in relation to the law of nations, 23–4, 38, 67
Pufendorf on as the basis for the common duties of men owed under natural law, 112
Grotius, Hugo, 2, 4, 5, 6, 8–9, 14–16, 86, 89, 99–100, 101–7, 108, 109, 122–3, 125, 136–7, 141, 146, 153, 161(n12), 162(n14)

Hart, H.L.A., 144–5
Hayek, F.A., 177(n2)
Hegel, G.W.F., 6, 85
high seas, the legal regime relating to the, 71
Hinsley, F.H., 158(n10)
human law
Aquinas on as opposed to natural law, 12, 13–14
human rights, the international law of, 8, 53, 73–85 (*passim*), 145, 151
civil and political rights, 74–5: Hobbes and, 79–85 (*passim*), 151
social, economic and cultural rights, 76: Hobbes and, 80–85 (*passim*)
Hume, David, 6, 85 175–6(n68)

imperative model/analysis of law
Bentham on, 141–3
independence as an attribute of states/commonwealths
Austin on, 143–4
Hobbes on, 53–4, 56–7, 58, 59–60, 62
Kant on, 139–40
Pufendorf on, 116, 120
Vattel on, 128, 128–9, 130, 131–2, 132–3, 133–5
innocents, the punishment of
Hobbes on the exclusion of, 50–1, 84, 96
institution, commonwealths by
Hobbes on, 32
interdependence as a condition of international society, 68–9
international commerce
Hobbes and, 68–9
Vattel on, 132–3
international co-operation as an objective of international law, 169(n9)
Hobbes and, 68–9, 170(n31)
International Court of Justice, 72, 176(n73)
International Covenant on Civil and Political Rights, 6, 73, 158(n11), 167(n15)
International Covenant on Economic, Social and Cultural Rights, 6, 73, 158(n11), 167(n16)
international government
Hobbes and, 59
Kant and, 140
Vattel on, 128–9, 129–30
Wolff on, 126–7
international law
the general character of: Austin on, 143–4, 153–4; Hart on, 144–5; Kelsen on, 144
the imperfection of as a form of legal order, 63, 92–3, 97–8, 124, 140
the modern system of and its defining principles, 5–6, 8–9, 55, 60, 63–85 (*passim*), 99–100: Bentham and, 142; Hobbes and, 8–9, 55, 60, 63–72, 76–85, 91–2, 97–8, 149; Kant and, 138–41; Pufendorf and, 100, 120, 121–4, 136
the tradition of, 3–4, 6, 8–9: Hobbes and, 1–2, 6, 8–9, 98, 99–100, 107, 146–7
international state of nature
see under: natural condition of society; state of nature
interpretation of laws
Hobbes on in relation to civil law, 43–4

just war theorizing, the tradition of, 101–2
Aquinas and, 101–2
Grotius and, 100–1, 102
Hobbes and, 107–8
Pufendorf and, 118
justice
distributive: Hobbes on, 26
procedural, the principles of, 74–5, 150–1, 168(n18): Aquinas and, 13–14, 150–1; Hobbes on and in relation to human rights law, 8, 81–4, 95, 151
in its relation to law: Austin on, 143–4, 153–4; Bentham on, 141–2, 153; Hart on, 144–5; Kelsen on, 144
justice in war, the conditions for
just cause: Aquinas on, 101–2; Grotius on, 102, 104; Hobbes and, 107; Pufendorf and, 118
lawful authority: Aquinas on, 101–2; Grotius on, 102; Hobbes and, 107; Pufendorf and, 118
right intention: Aquinas on, 101–2; Grotius on, 102; Hobbes and, 107–8

Kant, Immanuel, 5, 9, 89, 97, 100, 138–41, 142, 153, 171(n33), 174–5(n63)
Kelsen, Hans, 144, 154
Kennan, George F., 86, 88, 168(n19), 169(n25)

Keohane, Robert O., 168(n21), 170(n31)
Kissinger, Henry A., 86, 88, 168(n19), 169(n26)
Krieger, Leonard, 157–8(n7)

Lauterpacht, Hersch, 157(n6)
law of nations, the principles of the
  Aquinas on, 12
  Grotius on, 4, 15–16, 102, 103, 104–7, 108
  Hobbes on as embodied in natural law, 8–9, 53–4, 55, 57–8, 62–3, 63–72 (*passim*), 91–2, 97–8, 107–8, 136, 146–7, 149
  Hume on as embodied in natural law, 175–6(n68)
  Kant on, 138–9, 140–1, 174–5(n63)
  Pufendorf on as embodied in natural law, 4, 9, 117–21, 122–4, 136, 173(n39)
  Vattel on, 4, 125, 127–35, 174(n62)
  Wolff on, 4, 125–8, 129
  see also: international law; natural law
law/laws of nature
  see under: natural law
legal order, the principles of
  see under: rule of law
legislation/law-making
  Hobbes on as a right of sovereignty, 31, 41–2, 51
  Pufendorf on as a right of sovereignty, 115–16
liberalism
  as a tradition in ethics and political thought, 148–52 (*passim*), 177(n2): Hobbes and, 149–50, 151, 154–6
  as a tradition in international thought and practice, 147–8, 152–3, 176–7(n1): Bentham and, 148; Hobbes and, 149; Kant and, 148
liberty
  Hobbes on: as an attribute belonging to men by nature, 17–18, 19–20, 21, 58, 78–9; as an attribute belonging to men as subjects of commonwealths and there subject to the sovereign power, 32–5, 78–9; as an attribute particular to commonwealths as by nature and from the standpoint of the law of nations, 56–8, 59–60, 62
  Pufendorf on as the natural attribute of men, 114–16
  Vattel on as the natural attribute of nations and states, 130, 131–4, 134–5
limited government, the principles of
  see under: rule of law
Locke, John, 2, 97, 170(n32)
lots
  Hobbes on the different forms of as the basis for the distribution of things provided for in natural law, and the relation of this to the law of nations, 26, 70–1

Machiavelli, Niccolò, 6, 85, 86, 88, 169(n24)
MacIntyre, Alasdair, 177–8(n4)
Marx, Karl, 6, 85
monarchy, as a form of government
  Hobbes on, 32
  Pufendorf on, 116
Morgenthau, Hans J., 86, 87, 88, 168(n19), 169(n23), 169(n25)
municipal law
  Grotius on, 102, 103, 108
  Kant on, 138
  see also: civil law
mutual accommodation
  Hobbes on the duty of as owed by men under natural law and in relation to the law of nations, 24, 38, 67

natural condition of society
  as obtaining among men: Hobbes on, 16–17, 17–18, 56–7, 58; Locke on, 170(n32); Pufendorf on, 114–15; Vattel on, 128–9, 129–30

natural condition of society – *continued*
as obtaining among nations and states in the international sphere: Hobbes on, 17, 53–4, 55, 56–8, 89–90, 107, 138, 165(n1); Kant on, 138; Pufendorf on, 119, 123–4; Vattel on, 128–9, 134–5; Wolff on, 126, 129
see also: state of nature
natural law, the principles of
Aquinas on the status and core forms of, 12–14
Grotius on: as contrasted with the law of nations, 104–6; as contrasted with volitional law, 103, 105, 108; as dictates of right reason, 103; as in their international application, 4, 103–4, 105, 162(n14); as law of self-defence, 14, 102, 103, 161–2(n12); as principles of social order, 14–15, 102–3, 161–2(n12), 162(n14)
Hobbes on: as always binding in conscience, but as binding in effect only in conditions of security, 28–9, 30, 93–4; as contrasted with positive law, 42–3, 44–5; as defining the conditions for the rule of law and the principles of justice essential to it, 37–40, 49–51, 81–4, 95, 150–1; as embodying the principles of the law of nations (and hence as applying to sovereigns), 8–9, 53–4, 55, 56, 57–8, 62–3, 63–72 (*passim*), 91–2, 97–8, 108, 136, 146–7, 149, 152, 155; as prohibiting drunkenness and gluttony, 163(n42); as in relation to civil law, 42–3, 44, 45, 62–3, 151; as rules and principles of reason, and as involving limiting constraints on action, 16, 18, 19–20, 42; as stating the conditions for peace among men, 18–19, 20–8, 30; as in their status as the commands of God, 159(n12)
Hume on in relation to the law of nations, 175–6(n63)
Pufendorf on: as comprising the principles of the law of nations, 4, 8–9, 108, 117–21, 122–3, 124, 136, 173(n39); as contrasted with positive law, 109; as forming the law of self-defence, 109; as hypothetical principles and in relation to the institution of the state, 113–17, 120–2; as made perfect in the state through being supported by coercive power, 112–13, 113–14, 116–17, 123–4; as principles of social order, 109; as stating the duties owed by men to God, 109–10; as stating the duties owed by men to one another, 109, 110–12; as stating the duties owed by men to themselves, 109, 110
Vattel on in relation to the law of nations, 4, 8–9, 125, 128, 129–35
Wolff on in relation to the law of nations, 4, 8–9, 125–7
natural law school of writers on the law of nations
Austin and, 143–4, 153–4
Bentham and, 5, 100, 141–2, 153
Kant and, 5, 100, 140–1, 153
natural law tradition
the classical-medieval tradition, 2, 11–14, 150–1: Hobbes and, 2, 10, 16–17
the modern tradition, 2–4, 8–9, 14–17, 76–7, 99–100, 125, 136–7, 150–1: Grotius as founder of, 2, 4, 14, 100, 136; Hobbes and, 2, 8–9, 10, 16–17, 76–7, 100, 136–7
as in relation to liberalism, 150–3
Navari, Cornelia, 160(n12)

necessary law of nations
  Vattel on, 128, 132–3
  Wolff on, 125
neo-realism/structural realism, 87
Nussbaum, Arthur, 157(n5)
Nye, Joseph S., 170(n31)

Oakeshott, Michael, 159–60(n12), 168(n18), 177(n2)
O'Brien, William V., 171(n1)
Onuf, Nicholas Greenwood, 178(n5)
Onuma, Yasuaki, 157(n6)
Oppenheim, L.F.L., 159(n11), 165(n3), 165(n5), 165(n7), 166(n9), 166(n10), 166(n11), 166(n12), 167(n14), 176(n73)

pacta sunt servanda as a principle of international law, 67, 165(n7)
  Hobbes and, 67
pacts, the principle of
  Grotius on as relating to the origin and basis of political society and as founding the voluntary law of nations, 15–16, 103–4, 162(n14)
pardon(s)
  Hobbes on the willingness to extend the same as a duty owed under natural law and in relation to the law of nations, 24, 38, 67
peace
  Hobbes on the endeavouring of as a principle of natural law and in relation to the law of nations, 21, 38, 64–5, 91
peace, the rights of
  Hobbes on as rights of sovereignty, 31
  Pufendorf on as rights of sovereignty, 116
Peace of Westphalia, 99
perfect and imperfect rights and duties
  Pufendorf on, 112–13, 172(n27)
  Vattel on in relation to the voluntary law of nations, 130–1, 132–3
perpetual peace, the conditions of and principles for
  Bentham on, 142
  Kant on, 138–9, 174–5(n62)
Plato, 2, 10
positive law, the attributes of
  Austin on, 143–4, 153
  Hobbes on, 42–3
  Pufendorf on, 109
positive law of nations, the sphere of the
  Grotius on, 103, 104–6
  Hobbes and the exclusion of, 9, 62–3, 108, 122–3
  Pufendorf and the exclusion of, 9, 108, 122–3
  Vattel on, 125, 128
  Wolff on, 125, 125–6
positivism, as a tradition in jurisprudence, 5, 141–5, 153–4
positivist school of writers on the law of nations, 5, 106–7
power
  Hobbes on the possession of, and application of, by the sovereign authority within commonwealths as the precondition for giving effect to the principles of natural law, 22–3, 28–9, 30, 31, 39–40, 45–7, 93–4, 94–7
  Locke on as belonging to civil government as the precondition for the application of the laws of nature, 170(n32)
  Pufendorf on the availability of the means of within the state as the precondition for the perfecting of rights and duties, 114, 117
property (propriety)
  Grotius on in relation to natural law, 14–15, 161–2(n12)
  Hobbes on the rights of men in as depending on commonwealths and as there subject to the sovereign power, 23, 31, 35–6, 79, 164(n62)
public war, the principles of
  Grotius on, 102, 104, 105–6, 172(n17)

Pufendorf, Samuel, 2, 4, 5, 6, 8–9, 63, 99–100, 108–24, 125, 127–8, 130–1, 134–5, 136, 137, 140–1, 146, 153
punishment
  the object of: Hobbes on as being for the sake of future good as a principle of natural law, and this in relation to the law of nations, 24, 38, 49–50, 67–8
  the principles of: Grotius on in relation to natural law, 14–15; Hobbes on and in relation to human rights law, 45–51, 83–4, 95–6
  as a right of sovereignty: Hobbes on, 31–2
punishments
  Hobbes on the specification of, 50

Rachel, Samuel, 5, 106
rationalist, or internationalist, tradition in international thought and practice, 88–9
Rawls, John, 177(n2), 178(n6)
realism as a tradition in international thought and practice, 6–7, 85–98
  the main lines of argument advanced within: anarchy as the condition of international politics, 86–7, 89–90, 168(n22); the balance of power as the basis for international order, 88, 169(n26); interests and power of states as determinants of international politics, 87–8, 92–3, 169(n23); international politics as state-centred and conflict-based, 86; neglect of law and principles of justice and morality in application to international politics, 87–8, 88–9, 169(n24), 169(n25); self-help as the basis for the defence and security of states, 87, 90, 91
  Hobbes in relation to, 6–7, 8, 55, 85–6, 89–98, 147, 170(n31)
  see also: neo-realism/structural realism
reciprocity
  Hobbes and in respect of the laying aside of natural right as a principle of natural law and in relation to the law of nations, 21–2, 38, 66
regulation of opinions and doctrines
  Hobbes on as a right of sovereignty, 31, 79
relativism in philosophy and politics
  Kelsen on, 154
religion, freedom of, 75
  Hobbes on, 79, 167(n17), 178(n6)
republican form of civil constitution
  Kant on, 138–9, 139–40, 174–5(n63)
restitution
  Grotius on in relation to natural law, 14–15
retroactive effect
  Hobbes on the exclusion of in relation to law, criminal responsibility and punishments, 44–5, 49–50, 151
revolutionist, or universalist, tradition in international thought and practice, 86, 89, 97
right of nature
  Hobbes on as belonging to men as a right of self-defence, and as involving the freedom and liberty of men and in opposition to law and obligation, 7, 17–18, 19–20, 21–2, 29, 33–4, 35, 38, 46–7, 56, 58, 65, 76–7, 78–9
rights
  Hobbes on the non-exclusive reservation of as contrary to the principles of natural law, and on this in relation to the law of nations, 25, 69, 82
rights of individuals
  as affirmed within the liberal tradition, 149
  as affirmed within the modern natural law tradition, 3, 16, 76–7
  as based in nature: Grotius on, 14–15, 102–3, 161–2(n12);

rights of individuals – *continued*
Hobbes on, 17–18, 18–21, 33–4, 76–7, 150; Pufendorf on, 110, 111, 119
as secured through the rule of law within states: Hobbes on, 34–5, 81–4
Rousseau, Jean-Jacques, 6, 85
Ruddy, Francis Stephen, 158(n9), 174(n58)
rule of law, the principles of the
Aquinas on, 13–14, 150–1
Hobbes on/and: as the basis and framework for the sovereign power in commonwealths, 7–8, 37–8, 47–51, 94–7; as implicit in the principles of natural law, 7–8, 37–40, 81–3, 150–1; in relation to human rights law, 8, 81–5

safe conduct for mediators of peace
Hobbes on as a principle of natural law and in relation to the law of nations, 27, 71
Sandel, Michael J., 177–8(n4)
secularism/secularization in law and politics
Hobbes and, 156, 178(n6)
self-defence
as a just cause for war: Hobbes and, 107
the right of as belonging to men by nature and under natural law: Grotius on, 14–15, 102–3, 161–2(n12); Hobbes on, 17–18, 19–20, 21, 33–4, 35, 38, 46–7, 56, 58, 65, 76–7, 78–9, 163(n58); Pufendorf on, 110, 114, 172(n21)
the right of as belonging to nations and states and as justifying the resort to war: Grotius on, 103, 104; Hobbes on, 60, 61, 65, 90–1, 107; Pufendorf on, 118, 119; Vattel on, 125; Wolff on, 125
the right of as recognized in international law: Hobbes and, 65, 72; Pufendorf and, 120
self-preservation, the natural right of as belonging to men and to states
see under: self-defence
Shaw, Malcolm N., 158–9(n11), 165(n4), 165(n5), 165(n7), 166(n10), 166(n11), 166–7(n13), 167(n14)
Smith, Michael Joseph, 168(n21), 169(n28)
sovereign/sovereign power, as in the state/commonwealth
Austin on as the source of laws, 143–4, 153–4
Bentham on as the source of laws, 142–3, 153
Grotius on, 102, 103, 104, 105–6
Hobbes on: as an absolute and exclusive authority within commonwealths, 7–8, 31–2, 32–3, 35–7, 59–61; as an artificial person possessing representative status in relation to the commonwealth, and acting through offices, 29–30, 36–7, 59, 60, 164(n72); as comprising an authority structure based in and directed towards the maintenance of laws, 34, 37–40, 40–2, 47–51, 94–7, 149–50; the duties relating to the office of, 52–4, 59, 81; as established through covenants, 29–30; as exempt from subjection to legal constraint and limitation and liability to punishments, 31, 41, 48–9, 52; as a power essential for giving effect to natural law, 30–2, 39–40, 42, 45–6, 59, 93–4, 94–5
Pufendorf on, 115–17, 117–19
sovereignty
Hobbes on the rights of within commonwealths, 30–2, 35–7, 40–2, 45–7, 48–9, 51, 52–3, 59–61, 79–80, 94–5, 166(n10), 178(n6)

sovereignty – *continued*
Pufendorf on the rights of within states, and on the supremacy, non-accountability and exemption from civil law of the governmental authority bearing it, 115–17, 117–19, 121
Vattel on as an attribute of states as subjects of the law of nations, 133–4, 134–5, 174(n61)
sovereignty and equality of states as a principle of international law, 66, 166(n10)
Hobbes and, 60, 66, 69–70, 72, 166(n10)
Pufendorf and, 120
Spinoza, Benedict de, 6, 85
state
Aquinas on, 12, 13–14, 15
Aristotle on, 11, 15
Grotius on, 14–16, 102–8 (*passim*), 161–2(n12), 162(n14)
Hobbes on in relation to the commonwealth, 16–17, 29–54 (*passim*), 59–62
Kant on, 139–40, 171(n33)
Locke on, 170(n32)
Pufendorf on, 109, 110, 113–17, 120–1
state, the position of, and principles relating to, the as under international law, 60, 165(n3)
Hobbes and, 60
Pufendorf and, 121–2
state law
see under: civil law; municipal law
state of nature
Hobbes on, 16–17, 17–18, 55, 56–7, 58, 89–90, 107
Pufendorf on, 114–15
Vattel on, 128–9
see also: natural condition of society
Statute of the International Court of Justice, 6, 158(n11)
Suarez, Francisco, 3, 99
subjects
Hobbes on the condition of within commonwealths, 29–30, 32–6, 78–9

Taylor, A.E., 159(n12)
territory/territorial rights and jurisdiction as relating to states under international law, the principles of
Hobbes and, 60, 70–1
Pufendorf and, 120
Thirty Years' War, 99
Thomasius, Christian, 2
thought, freedom of
Hobbes on and in relation to human rights law, 79
Thucydides, 6, 85
trade, freedom of
see under: commerce, freedom of
trade, law of
see under: commerce, law of
treaties, law of, 67
Kant on, 140
Pufendorf on, 118
Vattel on, 128
Wolff on, 125
Tuck, Richard, 157(n4), 160(n12)

United Nations Organization, 5, 64, 65
unity of law and morals as presupposed in the natural law standpoint, 136–7
Universal Declaration of Human Rights, 6, 73–6, 77–8, 82–3, 158(n11), 166(n15), 166(n16)
universal principle of justice
Kant on, 171(n33)

Vattel, Emmerich de, 2, 5, 6, 8–9, 63, 100, 106, 124, 125, 127–35, 135–6, 137, 138, 140–1, 146, 153
Vienna Convention on Diplomatic Relations, 6, 71, 158(n11), 166(n12)
Vienna Convention on the Law of Treaties, 6, 158(n11), 165(n7)
Vitoria, Francisco de, 3, 99
volitional human law
Grotius on municipal law and the law of nations as the forms of, 103, 104–5, 108

voluntary law of nations, the sphere of the
  Grotius on, 104–6, 108, 122–3
  Vattel on, 128, 130–4, 134–5
  Wolff on, 125, 126–7, 173(n45)

Waltz, Kenneth N., 86, 87, 88, 168(n19), 168(n22), 169(n26)
war
  the law of: Grotius on, 102, 104, 104–5, 105–6, 173(n36); Vattel on, 133
  as the natural condition of the society among men and among states: Hobbes on, 16–17, 17–18, 56–7, 58, 89–90, 107, 138; Pufendorf and, 114
  the right of as a right of nature: Grotius on, 103, 104, 105; Hobbes on, 17–18, 21, 56–7; Vattel on, 133
  the right of as a right of sovereignty: Grotius on, 105–6; Hobbes on, 31, 61–2, 107–8; Pufendorf on, 116, 118; Vattel on, 133
Warrender, Howard, 159(n12)
Weber, Max, 6, 85
welfare state, the principles of in relation to human rights law, 80
  Hobbes and, 80–1
Wendt, Alexander, 169–70(n30), 178(n5)
Wight, Martin, 86, 88–89, 168(n20), 169(n29)
will, consent and agreement
  as the basis for the laws maintained in states: Bentham on, 142; Grotius on, 15–16, 103–4, 162(n12); Hobbes on, 16–17, 29–30
  as the basis for the law of nations/international law: Grotius on, 15–16, 103, 104, 105, 122–3, 162(n14); Hobbes and, 62–3, 136, 152; Kant and, 140–1; Pufendorf and, 122, 123–4, 134–6; Vattel on, 128, 134–5; Wolff on, 126, 126–7
Williams, Howard, 160(n12)
Wilson, Woodrow, 176–7(n1)
Wolff, Christian, 2, 4, 5, 6, 8, 63, 100, 106, 124, 125–8, 129, 134, 137, 141, 146, 153
worship (public and private) in commonwealths
  Hobbes on, 167(n17)