THE RIGHTS OF STRANGERS

Georges Cavallar

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This study investigates the thinking of European authors from Vitoria to Kant about political justice, the global community, and the rights of strangers as one special form of interaction among individuals of divergent societies, political communities, and cultures. Taking an interdisciplinary approach, it covers historical material from a predominantly philosophical perspective, interpreting authors who have tackled problems related to the rights of strangers under the heading of international hospitality. Their analyses of the *civitas maxima* or the *societas humani generis* covered the nature of the global commonwealth. Their doctrines of natural law (*ius naturae*) were supposed to provide what we nowadays call theories of political justice.

The focus of the work is on international hospitality as part of the law of nations, on its scope and justification. It follows the political ideas of Francisco de Vitoria and the Second Scholastic in the 16th century, of Alberico Gentili, Hugo Grotius, Samuel Pufendorf, Christian Wolff, Emer de Vattel, Johann Jacob Moser, and Immanuel Kant. It draws attention to the international dimension of political thought in Thomas Hobbes, John Locke, Jean-Jacques Rousseau, David Hume, Adam Smith, and others. This is predominantly a study in intellectual history which contextualizes ideas, but also emphasizes their systematic relevance.

For Angelika
and our children
Clemens, Antonia and Valentina

The chief part of human happiness
arises from the consciousness of being loved.
Adam Smith

The Rights of Strangers

Theories of International Hospitality, the Global Community, and Political Justice since Vitoria

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Foreword

I have tried hard to avoid too many references to Kant, in an attempt to find a topic splendidly isolated from all Königsberg matters. I did not succeed. After having written two books about him,[1] this outcome was to be expected. I consider this volume a fine example of 'historicism and footnote scholarship ..., in which *doing* intellectual history becomes superior to *creating* it'.[2] People in southern California (where this study was mostly written) point out that monolingualism is a curable disease. Greek, Latin, Spanish, German and French quotations have been included in the text in order to show off a cosmopolitan attitude and profound learning. Longer quotations (roughly more than 50 words or three lines) usually offer an English translation in the text and give the original in the footnotes. Any emphases in quotations are as they appear in the original, unless otherwise indicated. Any cross references in the text refer to the main chapter in Roman numerals and the relevant subheading in Arabic numerals.

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Special thanks go again to my wife Angelika, for reminding me every now and then that Kant is indeed dead, and that some Hellenistic writers were absolutely right when they wrote: 'A big book is a big evil.'

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1 This is a splendid opportunity to mention them in the very first footnote: *Pax Kantiana. Systematisch-historische Untersuchung des Entwurfs 'Zum ewigen Frieden' (1795) von Immanuel Kant* (Wien, Köln, Weimar: Böhlau-Verlag, 1992), and *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999).

2 Randall Collins, *The Sociology of Philosophies. A Global Theory of Intellectual Change* (Cambridge, MA. and London: The Belknap Press of Harvard University Press, 1998), p. 521.

Introduction

We enter the future walking backwards. (Paul Valéry)

This study investigates the thinking of European authors from Vitoria to Kant about political justice, the global community, and international hospitality as one special form of interaction among individuals of divergent societies, political communities and cultures. All three topics are of contemporary relevance. There is widespread belief that an age of rapid global change, increasing transnational interaction, and economic and cultural globalization requires an acceptable theory of cross-cultural political justice, for instance in terms of human rights and the scope of state sovereignty. Some contemporary political philosophers – often influenced by John Rawls – have constructed theories of political justice distinct from utilitarian approaches, legal positivism, or historicist contextualization. This search for universal and globally applicable moral standards is often rejected as naïve and potentially dangerous. The Salman Rushdie affair illustrated intercultural differences and divergent standards of normative ideals. The government of Singapore declared itself 'unalterably opposed to countries which try to impose their views on other member states of the United Nations', and defended corporal and capital punishment, arguing that it was necessary for maintaining public order.[1] Critics claim that the insistence on state sovereignty and communal integrity is mistaken if basic human rights are involved. But what are basic human rights? Are there moral or legal constraints limiting any state's liberty to specify them? Do human rights trump state sovereignty? Do obligations towards one's fellow-citizens take precedence over humans in remote countries?

Questions of this sort lead us directly to the second topic of this study, the global commonwealth. Some international lawyers point out that international

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[1] Richard Falk, *On Humane Governance. Toward a New Global Politics* (University Park, PA: The Pennsylvania State University Press, 1995), pp. 65–70 offers a brief discussion of the Salman Rushdie affair following the infamous *fatwa* which decreed death to Rushdie for blasphemy. The Singapore statement is printed in United Nations, Press Release AG/SHC/149, 16 November 1994, p. 13; quoted in: Mario Bettati, 'The International Community and Limitations of Sovereignty', in *Diogenes*, 176, vol. 44/4 (1996), pp. 97. Mark R. Amstutz, *International Ethics. Concepts, Theories, and Cases in Global Politics* (Lanham et al.: Rowman and Littlefield, 1999) convincingly argues that moral norms and moral predicaments are essential to international relations, and that 'international politics is rooted in ethics' (p. xi).

law might currently be transformed in qualitative terms, developing from a law among states into a kind of global domestic law (*Weltinnenrecht*).[2] Political scientists are usually most enthusiastic, detecting a trend in current world politics which gradually moves us beyond the Westphalian system of independent nation-states towards a truly global 'community of fate'. Kant is often seen as the first champion of this cosmopolitan commonwealth that regards individuals rather than states as the primary normative unit. The world is perceived as a community of fate because there are pressing transborder issues, such as the deterioration of the environment, which cannot be solved by conventional nation-states. Migration and refugees are another case in point. Political developments like European integration and demographic changes have led to debates about immigration rights, multi-ethnicity, and the problems of integration and identity. Do native populations have a right to curb immigration? Is it morally acceptable to select immigrants, for instance, those with higher education or a certain ethnic background? Is it a matter of majority vote or of universal human rights, of mutual advantage or fairness? Are rich industrialized countries morally obliged to improve the situation of the economically disadvantaged by allowing immigration?

Assuming that the past helps us to understand the present, I have tried to relate past thinking to present problems. This study is thus interdisciplinary, covering historical material from a predominantly philosophical perspective. The authors interpreted here have tackled problems related to immigration rights and the rights of aliens under the heading of international hospitality. Their analyses of the *civitas maxima* or the *societas humani generis* covered the nature of the global commonwealth. Their doctrines of natural law (*ius naturae*) were supposed to provide what we nowadays call theories of political justice.

The *Oxford English Dictionary* defines hospitality as the '[o]ffering or affording welcome and entertainment' to strangers, visitors, or guests. Hospitality becomes international if it is extended to members of 'out-groups', of different cultures and communities. This phenomenon recurs in history. In the sixteenth century, Las Casas, for instance, praised the gentle hospitality of indigenous Americans, and compared it with the ruthless exploitation of this generous attitude by the Spaniards.[3] My focus is on international hospitality as

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[2] The term is Delbrück's; see for instance Jost Delbrück, 'Wirksameres Völkerrecht oder neues 'Weltinnenrecht'? Perspektiven der Völkerrechtsentwicklung in einem sich wandelnden internationalen System', in Winrich Kühne (ed.), *Blauhelme in einer turbulenten Welt: Beiträge internationaler Experten zur Fortentwicklung des Völkerrechts und der Vereinten Nationen* (Baden-Baden: Nomos Verlagsgesellschaft, 1993), pp. 102f. and 128f.

[3] J. A. Simpson and E. S. C. Weiner, *The Oxford English Dictionary*. 2nd edn (Oxford: Clarendon Press, 1989), vol. VII, pp. 414f. on the term 'hospitality' and

part of the law of nations, on its scope and justification. For Vitoria, Las Casas's compatriot, international hospitality was not a matter of benevolence or goodwill on the side of the natives, but a right foreigners could enforce if denied. It included the freedom of residence, nationalization, and citizenship in his account (see II, 6). But is this right really enforceable? Is it natural or part of customary law? Is it based on consent?

Kant's account of international hospitality is probably the best known nowadays. He granted a right to visit to foreigners, but specified that they must behave peaceably and hospitably themselves. In contrast to Vitoria, this right to visit is very limited. A special pact is required between visitors and those being visited for more extensive entitlements. Kant's third definitive article on 'universal hospitality' is nowadays often praised as the most progressive element of his philosophy of international relations. Some see his cosmopolitan right as a conceptual tool that helps to understand contemporary trends that seem to undermine the modern Westphalian system of a society of sovereign states. Individuals, like the foreigner who visits hospitable peoples abroad, and no longer states are the central normative units of the global community. International hospitality is then seen as a plausible compromise between the extremes of a splendid isolation of independent states on the one hand and a world government on the other. The theory of international hospitality is embedded in the endorsement of a cosmopolitan moral or juridical commonwealth or of a global civil society based on universal principles or norms. International hospitality can be interpreted as a means and vehicle to promote the evolution of this commonwealth. A theory of political justice has the task to evaluate the normative ideas of international hospitality and a global commonwealth.

Authors like to argue in favour of the originality of their studies. They usually follow two strategies. First, we can claim that there is no literature on the subject at all. Secondly, we can become polemical and point out that there is some literature, but that it is worthless or flawed. This usually leads to the inevitable conclusion that the present study 'breaks new ground', is 'the first book ever written on ...', offers 'a comprehensive and convincing account', etc. I only have to resort partly to the second strategy. There is excellent and valuable literature on the intellectual history of natural law, the precursor of contemporary theories of political justice. There is some literature on the modern European law of nations, but hardly any on concepts of international society, the global commonwealth, or hospitality. Some of the finer recent studies on the history of natural law are by Brian Tierney, Stephen Buckle and

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'hospitable'; Bartolomé de las Casas, *A Short Account of the Destruction of the Indies*, transl. Nigel Griffin (London: Penguin Books, 1992), passim, e.g. pp. 88f.

Annabel S. Brett.[4] Books on the history of *ius gentium*, the global commonwealth, or international society are more difficult to find. There are some excellent studies on the history of the European law of nations, such as Arthur Nussbaum's *A Concise History of the Law of Nations* (1954), Wilhelm G. Grewe's *Epochen der Völkerrechtsgeschichte* (1984) and Karl-Heinz Ziegler's *Völkerrechtsgeschichte* (1994). Emmanuelle Jouannet's French study of Emer de Vattel (1998) is a comprehensive study, covering international lawyers from Grotius well into the middle of the eighteenth century. Currently, works on globalization, the global civil society, the international community and international relations in general abound. However, studies about ideas of the global commonwealth with a profound historical dimension are hard to find. Walter Schiffer's excellent *The Legal Community of Mankind* (1954) and Andrew Linklater's short account in *Men and Citizens* (1982) come to mind.[5] Some publications promise more than they can offer. Kenneth W. Thompson, *Fathers of International Thought: The Legacy of Political Theory* (1994) is a disappointing general introduction to Western political thought from Plato to Marx, with only brief and sometimes anachronistic investigations into 'international relations'. Midgley's *The Natural Law Tradition and the Theory of International Relations* (1975), in spite of its promising title, also falls short of expectations. Though wider in scope than other studies including my own, covering European thought from the Middle Ages until the Second Vatican Council, this extended thesis is hampered by its Neo-Thomist perspective. For instance, Wolff, Vattel and Hume, despite their profound differences, are jumbled into a single chapter under the misleading heading of the

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[4] Brian Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150–1626* (Atlanta: Scholars Press, 1997), Stephen Buckle, *Natural Law and the Theory of Property. Grotius to Hume* (Oxford: Clarendon Press, 1991), Annabel S. Brett, *Liberty, Right and Nature. Individual rights in later scholastic thought* (Cambridge: Cambridge University Press, 1997).

[5] Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos Verlagsgesellschaft, 1984), and Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (München: Beck, 1994); Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris: Editions A. Pedone, 1998). See also Henri Legohérel, *Histoire du droit international public* (Paris: Presses universitaires de France, 1996) and Antonio Truyol y Serra, *Historia del derecho internacional público* (Madrid: Tecnos, 1998). Walter Schiffer, *The Legal Community of Mankind* (New York: Columbia University Press, 1954), and Andrew Linklater, *Men and Citizens in the Theory of International Relations* (New York: St. Martin's Press, 1982), part II. Howard Williams, *International Relations in Political Theory* (Buckingham: Open University Press, 1994) is a useful introduction to the 'great' Western philosophers from Plato to Marx and the international dimension of their thinking.

'subjectivizing of natural law'.[6] Finally, there is virtually no literature on international hospitality, in spite of more recent enthusiasm about Kant's cosmopolitan right.[7] Thus I do not have to abandon the moral perspective of impartiality when claiming *pro domo* that the present study is not only relevant – for reasons outlined above – but also highly original.

The present study covers selected authors from Vitoria to Kant. This restriction is in need of some explanation. The Spanish late Scholastics are nowadays accepted as the starting point of the 'classical' European law of nations. Their investigations were triggered by the troubling moral questions surrounding the events following Columbus's voyages. There are disagreements about the exact meaning of the terms 'modern' or 'classical'. I want to follow Grewe's terminology: the 'classical' law of nations starts with the late Scholastics and ends in 1918. It is followed by 'post-classical' or contemporary international law, characterized by the end of the *ius ad bellum*, the advent of international organizations such as the League of Nations, the gradual waning of the sovereign state, and a stronger emphasis on individuals, international organizations and non-governmental organizations (NGOs) as subjects of international law.[8] Even if we might disagree about terminology, all the authors discussed in the study can be assigned to the 'camp' of the natural lawyers. In some cases, especially in Hume, Rousseau and Kant, this claim must be qualified, as we shall see. One of the tasks of Chapter 5 is to show how the natural law tradition was transformed into something rather different: the beginnings of political economy, of historical or sociological accounts of human societies, especially of modern commercial society, and of legal positivism.

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[6] Kenneth W. Thompson, *Fathers of International Thought: The Legacy of Political Theory* (Baton Rouge and London: Louisiana State University Press, 1994), E. B. F. Midgley, *The Natural Law Tradition and the Theory of International Relations* (London: Paul Elek, 1975), p. 175.

[7] One rare example where my topic is the focus of some attention is Michael J. Shapiro, 'The Events of Discourse and the Ethics of Global Hospitality', *Millenium: Journal of International Studies*, 27 (1998), pp. 695–713. Ziegler, *Völkerrechtsgeschichte*, passim, has some short sections on what is nowadays called the rights of foreigners (*Fremdenrecht*). There are some specialized studies on specific issues related to this topic, such as Neufeld's *The international Protection of private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648–1815)* (Leiden: Sijthoff, 1971), but no comprehensive study.

[8] Wilhelm G. Grewe, 'Was ist "klassisches", was ist "modernes" Völkerrecht?' in Alexander Böhm, Klaus Lüderssen, and Karl-Heinz Ziegler (eds), *Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen. Festgabe für Wolfgang Preiser* (Baden-Baden: Nomos Verlagsgesellschaft, 1983), pp. 111–32 and his older 'Die Epochen der modernen Völkerrechtsgeschichte', *Zeitschrift für die gesamte Staatswissenschaft*, 103 (1943), pp. 38–66 and 260–94.

Why does this study end with Kant? Most agree that there is a rather clear watershed around 1800, even if not as clear as the one in 1918 (see VI, 5 for more). The Vienna era after 1815 was a genuine 'breakthrough to a new system' (Paul W. Schroeder), not simply a restoration of eighteenth century balance of power politics or a passing lull in international conflict and rivalry. England started to attempt a global, no longer regional, balance of power, and achieved maritime supremacy. The end of French claims to hegemony also terminated the French period in international relations and the history of the law of nations (1648–1815), a categorization endorsed by Grewe, Preiser, Ziegler and others. This was followed by the English period (1815–1918). Categorizations of this sort are always to some extent arbitrary, but inevitable. In the nineteenth century, the Europeans formed an exclusive society of civilized states. Intellectually, the idea of civilization became center stage, culminating in the clear-cut distinction between civilized nations and barbarians, who were considered unfit for membership in the European club. Charles Henry Alexandrowicz is among those who see a clear break between the sixteenth to the eighteenth centuries on the one hand and the nineteenth on the other. For him, the global commonwealth of the natural lawyers before the 1800s was truly universal, as opposed to the narrowing of international society in the 'analytic' or 'positive' school of the law of nations in the nineteenth century.[9] According to this interpretation, by the end of the nineteenth century, being 'European' was equated with being 'civilized', and it was assumed that international law either did not exist outside the sphere of civilized states or was solely generated by them (see VI, 5 below).

Trends towards positivism, historicism and nationalism were reinforced in the 1800s. Though it will be argued that positivist tendencies can be discerned in several natural lawyers, some kind of watershed is reached in the late eighteenth century with authors such as Vattel and Moser (V, 5). Because of its impact, Jeremy Bentham's *Introduction to the Principles of Morals and Legislation* (1789) was probably the key publication in the positivist transformation of the law of nations. The trend towards a historical understanding of law and society will predominantly be traced back to Montesquieu and the Scottish Enlightenment (V, 1). The end of the eighteenth century (1795)

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[9] Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967), especially pp. 224–37; 'Doctrinal Aspects of the Universality of the Law of Nations', *British Yearbook of International Law*, 37 (1961), pp. 506–15; cf. Wilhelm G. Grewe, 'Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des "europazentrischen" Bildes der Völkerrechtsgeschichte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 42 (1982), pp. 449–79, here pp. 450f. and Frederick G. Whelan, 'Vattel's Doctrine of the State' [1988], in Knud Haakonssen (ed.), *Grotius, Pufendorf and Modern Natural Law* (Dartmouth, Aldershot et al.: Ashgate, 1998), p. 406.

produced the first comprehensive history of the law of nations.[10] It also witnessed the rise of nationalist thinking, first as an attempt to combine it with cosmopolitanism. Rousseau, though advocating civic republicanism rather than nationalism, is seen as crucial in this development (V, 4). Finally, it makes sense (and is convenient) to finish with Kant. He is a climax and turning-point in the debate on natural law. His formal principle of justice both qualifies him as a modern natural lawyer (*Vernunft-* rather than *Naturrechtler*, to be precise; see VI, 1) and links this study with present discourses in political philosophy. In addition, Kant's cosmopolitan right is the last major contribution to international hospitality in this natural law tradition.

Why go back to the natural lawyers? Why not go back to the nineteenth century, for instance, which seems so much closer to our age? A part of the answer is included in the previous paragraph. According to a widespread interpretation shared by Alexandrowicz and others, eurocentric European international legal theory of the nineteenth century with its emphasis on positivism, sovereignty, civilization and an unfettered right to go to war was definitely on the wrong track. By contrast, the classical natural lawyers of the Spanish (1500–1648) as well as the French age (1648–1815) avoided all these nineteenth-century fallacies. As Alexandrowicz put it, they were simply 'the greatest lawyers of all time', assuming the universality of the law, developing a non-discriminatory, not eurocentric, but truly universal international legal theory which stressed the limits of state sovereignty, and the rights of the global community and of individuals.[11] This flattering assessment, and the joint debunking of nineteenth-century legal theory, will be qualified in the course of this study. If there might be a tendency among twentieth-century international lawyers to dissociate themselves from the nineteenth, and if this might come close to creating a convenient historiographical myth, this very tendency hints at a deep-rooted change in intellectual climate.

Contemporary or post-classical international lawyers have serious difficulties with international legal theory. There are several competing doctrines: among others those which stress the will of the states, for instance, common consent, neo-positivism, sociological approaches and deconstructivism. The twentieth century has also witnessed a renaissance of secular theories of natural law, to some extent definitely a reaction to the perceived shortcomings of legal positivism. This explicit return to the natural law tradition is symbolized

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[10] Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and the Romans to the Age of Grotius* [1795], with a new introduction and ed. by Carlisle Spivey (New York: Garland, 1973).

[11] Charles Henry Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Aspects)', *Recueil des Cours*, 123 (1968), I, pp. 117–214, the quotation p. 126.

by lawyers such as James Brown Scott or Alfred Verdross (see VI, 5). Those theorists who are not convinced by references to human nature rely on a sophisticated neo-Kantian, liberal legal philosophy. Within this tradition, Fernando Tesón has recently attempted a coherent account of international legal philosophy.[12]

There seems to be widespread pessimism that we will ever see a universal international law again. Be that as it may, there have been some conscious attempts in the twentieth century to recover some of the universalist visions of the natural lawyers. This holds especially true for the sources of international law. Independent of the various methodological approaches or legal theories mentioned above, contemporary international law has reintroduced some emphasis on nonconsensual sources. Put bluntly, for the natural lawyers the main source of the law of nations was human nature and natural justice. Nineteenth-century international law predominantly stressed treaties and custom. In the twentieth century, general principles of law, *ius cogens*, *erga omnes*-norms, and inalienable rights of individuals have played an increasingly important role in international law. The Statute of the International Court of Justice refers in Article 38 (1)(c) to 'the general principles of law recognized by civilized nations' the Court is obliged to apply – apart from treaties and custom. There is of course little agreement as to what these 'general principles' amount to; usually they are only used to fill gaps or to substantiate determinations.[13] More interesting is the notion of *jus cogens*, or peremptory law. The Vienna Convention on the Law of Treaties (1969) states that a treaty is void if it should conflict with *jus cogens*, that is:

> a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[14]

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12 Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998). See also I, 4 on theorists of political justice and Panos Terz, 'Die Völkerrechtsphilosophie, Versuch einer Grundlegung in den Hauptzügen. Pro scientia ethica iuris inter gentes', *Archiv für Rechts- und Sozialphilosophie*, 86 (2000), pp. 168–84. A brief account of current international legal philosophy is included in Knut Ipsen, *Völkerrecht. Ein Studienbuch*, 4th edn (München: Beck, 1999), pp. 7–16.

13 Mark W. Janis, *An Introduction to International Law*, 2nd edn (Boston et al.: Little, Brown and Company, 1993), pp. 54–8, especially p. 57.

14 Vienna Convention on the Law of Treaties, 23 May 1969, Art. 53; see also Art. 64. See Janis, *Introduction*, pp. 59–66, Ipsen, *Völkerrecht*, pp. 156–64, Gerd Seidel, 'Die Völkerrechtsordnung an der Schwelle zum 21. Jahrhundert', *Archiv des Völkerrechts*, 38 (2000), pp. 23–47, Jochen Frowein, 'Jus cogens', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (North-Holland: Elsevier, 1984), vol. 7,

For historical as well as systematical reasons, *jus cogens* can be seen as containing elements traditionally associated with natural law. Proponents of the idea of an unconditional obligation invalidating the will of contracting parties reacted to and rejected legal positivism and the belief that sovereign states are the sole sources of international law. Functionally, peremptory law – identical with Vattel's necessary law – is so fundamental that without it, the legal fabric of the international community would collapse. *Jus cogens* is nowadays accepted as an established general principle of international law, both among scholars and in practice. The law of treaties, international penal law, international humanitarian law and multilateral conventions for the protection of human rights (especially concerning genocide, slavery, torture and racial discrimination) are sections of international law where *jus cogens*-norms are relevant. *Jus cogens* brings us back to Roman law and its distinction between *jus strictum* and *jus dispositivum*, and the natural lawyers' attempt to distinguish between these two types of law. Which norms have to be respected under all circumstances and are not at one's disposal? When contemporary international lawyers are worried by a number of borderline questions and find themselves in a quandary, their predicament resembles that of the natural lawyers, at least since Grotius (see III, 1 and 3).

Although natural law is no longer considered a legitimate source of international law, the twentieth century saw the emergence of international human rights law. Human rights doctrines in turn are squarely rooted in the natural law tradition. In my account, they go back to at least Vitoria (see II, 2) and reach a climax in the eighteenth century. Apart from John Locke, who is usually mentioned in this context, Pufendorf, Wolff, Vattel, Kant and many others should get some of the credit. Whereas nineteenth-century theory perceived individuals as mere objects of the law of nations, they have come to be considered as at least partial subjects of public international law. The turning-point in this development was the decision of the allies to try individual National Socialists at Nuremberg (1945), and claim 'individual responsibility', *inter alia* for 'crimes against humanity ... whether or not in violation of the domestic law of the country where perpetrated'.[15] Again, we have an implied reference to nonconsensual, binding standards of justice. The most important

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pp. 327–30, and especially Stefan Kadelbach, *Zwingendes Völkerrecht* (Berlin: Duncker & Humblot, 1992) for the following.

[15] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Art 6, 59 Stat. 1544, 1547–1548, quoted in Janis, *Introduction*, p. 246. I am much indebted to his account ibid., pp. 241–65. In a recent essay, Ambos argues that current international law entails the duty to punish serious violations of human rights such as torture; see Kai Ambos, 'Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen', *Archiv des Völkerrechts*, 37 (1999), pp. 318–56.

contribution to international human rights law is probably the European Convention on Human Rights (1953), especially due to the attempt to provide for an effective legal machinery to enforce the specified rights. Arguments in favour of humanitarian intervention, pronounced during the Balkan wars following the disintegration of Yugoslavia, are symptoms of the shift away from a positivistic emphasis on state sovereignty towards a reliance on human rights perceived as inalienable and binding across borders. Here too, the intellectual roots go back to the natural lawyers. Again, many of the problems related to this issue have been with us since Vitoria (see II, 5).

There seems to be an increasing tendency among international lawyers to see hospitality rights, or the rights of aliens, in connection with human rights law. At the end of the nineteenth century, it was commonly accepted that states had a sovereign right to decide whether to accept immigrants or not, and which ones would be undesirable and thus refused admission (see VI, 5). The twentieth century has again moved beyond the preceding hundred years – or rather, beyond the last decades of the nineteenth century. In an excellent article, James Nafziger (1983) challenged a 1972 opinion of the US Supreme Court, which had referred to 'ancient principles of the international law of states' to maintain the power of the government to exclude all aliens if it so wanted. Nafziger pointed out that if there were any ancient principles, they suggested exactly the opposite, namely an obvious pattern of free movement. He suggested a qualified duty to admit aliens provided they pose no danger to 'public safety, security, general welfare, or essential institutions of a recipient state'.[16] Later statements of some international lawyers have occasionally been more daring. Although there are no signs that state sovereignty in terms of admitting aliens has been weakened, and free movement rights are partially realized only within the European Union, concerns for human rights have challenged conventional assumptions. Even international lawyers disagree about the proper relationship between the right to free movement and municipal law. In the fields of political science or legal philosophy, there is a wide range of opinions, from the endorsement of a closed society to guarantee cultural or ethnic homogeneity to the cosmopolitan imperative to see all humans as citizens of one world without borders.[17] What makes these debates interesting from a natural law perspective is that few authors can resist the temptation to label their accounts with words such as 'reason' or 'justice'.

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16 James A. R. Nafziger, 'The General Admission of Aliens under International Law', *American Journal of International Law*, 77 (1983), pp. 804–47, especially 808f. and 805 (with the quotation).

17 For current international law, see the report by Ulf Häußler, 'Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts: Bilanz und Ausblick an der Jahrtausendwende', *Archiv des Völkerrechts*, 38 (2000), pp. 48–62 and below, I, 5 and 6; VI, 5, and the Conclusion.

I have already quoted from the Vienna Convention which refers to the 'international community of states'. One of my topics in this study is the global commonwealth, and international law of the twentieth century has also abandoned key assumptions of the late nineteenth century here. Whereas lawyers then saw an exclusive European club surrounded by more or less barbarous nations, nomads and tribes (see VI, 5), the UN Charter accepted all 'peace-loving' states into the international community. The civilized/uncivilized dichotomy was abandoned, and authors like Alexandrowicz could argue that Europeans had finally returned to a non-discriminatory, no longer eurocentric understanding of the global commonwealth – as in the natural lawyers. International lawyers like Christian Tomuschat explicitly argue for an international community based on a constitution which is nonconsensual in character. Another crucial development was the introduction of obligations *erga omnes*. In the Barcelona Traction Case, the International Court of Justice drew 'an essential distinction ... between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State'.[18] Obligations *erga omnes* can be interpreted and justified analogous to *ius cogens*. According to the functionalist approach mentioned above, peremptory law is the sum of those norms which are a necessary condition of the international legal community. This community has two elements: a number of independent units such as states and secondly, an awareness of legal rules replacing the missing common superior authority. Although for legal positivists, the idea of an international community is still a nebulous concept, it is very likely that in the near future we will witness a progressive waning of the sovereign state, for instance, *vis-à-vis* the 'common concerns of humankind' such as international environmental law.[19] Our contemporary international community is faced with at least two problems: first, how to enforce norms such as *jus cogens* or standards of human rights, and secondly, how to avoid the

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18 Barcelona Traction Case, second phase, Judgment of 5 February 1970, ICJ Reports (1970), at § 33. On the idea of an international legal community, see Hermann Mosler, 'International Legal Community', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (North-Holland: Elsevier, 1995), vol. 2, pp. 1251–5, by the same author, *The International Society as a Legal Community* (Alphen aan den Rijn, Netherlands: Sijthoff and Noordhoff, 1980), Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, 36 (1998), pp. 529–619, and Christian Tomuschat, 'Die internationale Gemeinschaft', *Archiv des Völkerrechts*, 33 (1995), pp. 1–20.

19 The United Nations Assembly, Resolution 43/53 (1988), declared that 'climate change is a common concern of mankind.' See Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', *European Journal of International Law*, 4 (1993), pp. 447–71 and Frank Biermann, '"Common Concern of Humankind": The Emergence of a New Concept of International Environmental Law', *Archiv des Völkerrechts*, 34 (1996), pp. 426–81.

self-judgment of partially sovereign states. *Nemo debet esse judex in propria causa.* Is it not absurd that a legal subject is a judge of its own cause? We will see that natural lawyers like Grotius find themselves in similar quandaries (see ending of III, 6). Wolff and Kant have offered answers which I consider convincing and relevant for our age (IV, 5 and VI, 2). At any rate, this study shows that the ideas of an international community and peremptory law are key concepts of the natural lawyers from Vitoria to Vattel. As Antonio Gómez Robledo put it, 'Chez les classiques du droit international ... le droit naturel assume la fonction qui correspond dans l'actualité au *ius cogens*, et nous pourrions même dire qu'il le remplace avantageusement.'[20] It was Wolff who defended his notion of *civitas maxima* with the claim that there are obligations of all towards all, or *obligatione omnium erga omnes*. We may be closer to the natural lawyers than we think. It is as if in a process of collective learning, people in the twentieth century somewhat overcame the shortcomings of late nineteenth-century international legal theory, and partially returned to older concepts. After all, we may enter the future walking backwards.

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20 Antonio Gómez Robledo, 'Le *ius cogens* international: sa genèse, sa nature, ses fonctions', *Recueil des Cours*, 172, III (1981), p. 23f. See also Michael Schweitzer, 'Ius cogens im Völkerrecht', *Archiv des Völkerrechts*, 15 (1971/72), pp. 197–9 and Kadelbach, *Völkerrecht*, pp. 132–4.

Chapter 1

The Present and the Past: *Iustitia*, *Cosmopolis* and *Hospitalitas*

One of the basic tenets of this study is that the historian's, that is, my own, position and perspective is part of the historical investigation. Few would doubt this proposition. We usually disagree about the extent and the nature of this relationship. I leave matters open here and start with the field of research where my three topics are embedded. So the first section deals with issues of international ethics and law in contemporary debate, providing the framework for the following analysis. The second section outlines our present state of world politics, which is usually subsumed under the buzzword 'globalization'. I distinguish these economic and cultural trends from this study's intellectual framework, our current late modern and postmodern predicament in academic life, where certainties and standards of what constitute science are radically challenged. I will focus on basic issues, such as ethical relativism and pluralism. I argue that radical critiques are usually self-defeating and get us into argumentative circles. The third section anticipates possible criticism of this study. It might be argued that as a work in intellectual history, it does not, but should, keep history and philosophy apart. In addition, it may be criticized as an example of present-centered historiography, assuming an identity and continuity of thought or ideas that does not exist. The fourth section focuses on the search for minimal transcultural moral standards, and develops the idea of political justice as impartial and universal. The fifth section distinguishes among types of cosmopolitanism, especially between its thick and thin versions and between moral and institutional cosmopolitanism. It traces the roots of cosmopolitan thought back to the Greek Sophists and Stoics. It follows the evolution of the ideas of a global community (*societas* or *magna communitas humani generis*), of natural law (*ius naturale* or *ius naturae*), and of the complex *ius gentium* from classical antiquity into the late Middle Ages. I emphasize the understanding of *ius gentium* in Roman jurisprudence, the beginning of the Western legal tradition, and the concept of a Christian society. The sixth section offers a broad outline of European thought on issues of hospitality, trade, commerce and travelling, starting with Greek sources and

covering the time until Vitoria. I argue that these topics have remained controversial since the very beginning.

1. Issues of international ethics and law

The question that binds hospitality, global commonwealth and political justice together can be formulated as: can we find normative principles that bind us all alike and together even if we do not agree on a substantive highest good? Recent years have witnessed a search for these principles, and a rising interest in issues of international ethics, global justice and cross-cultural normative theories. Publications were almost non-existent in the 1970s, rare in the 1980s, and boomed in the 1990s.[1] Authors have embarked on a quest for reliable 'background theories'. Postmodernist theories have subsequently challenged this attempt and the search for reliable foundations. Most agree, however, that there is a growing number of pressing normative issues the global or international community (either seen as a fact, as fiction, or as a normative ideal) must face. A tentative list of questions relating to these issues would include:[2]

1 When are states entitled to go to war?
2 What are the rights and duties of states, of neutral parties, and of individuals in a war?
3 When is intervention in the domestic affairs of another state justified?
4 Is humanitarian intervention to protect human rights legitimate? Are there any universal human rights? If there are, which ones count?
5 Which kind of world society, international community, or international

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[1] The two eminent publications of the 1970s are Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977; 2nd edn 1992) and Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979). Recent publications like Chris Brown, *International Relations Theory. New Normative Approaches* (New York: Columbia University Press, 1992), Mervyn Frost, *Ethics in international relations. A constitutive theory* (Cambridge: Cambridge University Press, 1996), Christine Chwaszcza and Wolfgang Kersting (eds), *Politische Philosophie der Internationalen Beziehungen* (Frankfurt am Main: Suhrkamp, 1998), Mark R. Amstutz, *International Ethics. Concepts, Theories, and Cases in Global Politics* (Lanham et al.: Rowman and Littlefield, 1999), and Andrew Linklater, *The Transformation of Political Community. Ethical Foundations of the Post-Westphalian Era* (Columbia: University of South Carolina Press, 1998) offer lists of publications at the end of their works. My favourites are Chris Brown and Mark Amstutz.

[2] See Mervyn Frost, *Ethics in international relations. A constitutive theory* (Cambridge: Cambridge University Press, 1996), pp. 76f. for a similar list.

organization, is the best? Should we endorse some anarchical structure, a federation of sovereign states, or a world state with coercive authority?

6 Should we endorse and promote a global moral community of humankind, or our own community along ethnic, religious, or cultural lines?

7 When is secession justified?

8 What is the proper attitude of states in face of civil war, secession, or a war of national liberation in other countries?

9 What are appropriate rules of conduct for states when fighting against international terrorism?

10 How should states treat immigrants and refugees? Do states have a duty to admit aliens?

11 How should the resources of the world be distributed? Is redistribution necessary or justified? What should the economic fabric of world society be based on?

12 What should be done (and who should do it) to preserve the global ecology and 'save the planet'?

In many of the questions, states are the main actors and in the foreground. This reflects the fact that our international system is still predominantly the Westphalian system of sovereign states, though arguably things have begun to change. The Peace of Westphalia (1648) is usually seen as the symbolic origin of the modern international society of sovereign and equal states where order is established by a balance of power. Legitimacy is conferred upon states according to principles such as meeting the requirements of being 'civilized'. The society is 'anarchical' as there is no central authority defining and enforcing rules of conduct, but not necessarily 'anarchic' or chaotic. Voluntarily accepted rules and cooperation such as diplomacy and trade are designed to keep a precarious balance without sacrificing state freedom or sovereignty.[3]

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[3] See Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648–1989* (Cambridge: Cambridge University Press, 1991), ch. 2, pp. 25–42, Bardo Fassbender, 'Die verfassungs- und völkerrechtsgeschichtliche Bedeutung des Westfälischen Friedens von 1648', in Ingo Erberich et al. (eds), *Frieden und Recht* (Stuttgart et al.: Richard Boorberg Verlag, 1998), pp. 9–52, and Karl-Heinz Ziegler, 'Die Bedeutung des Westfälischen Friedens von 1648 für das europäische Völkerrecht', *Archiv des Völkerrechts*, 37 (1999), pp. 129–51 for the changes brought about by the 1648 peace agreement, and David Armstrong, *Revolution and World Order. The revolutionary State in international Society* (Oxford: Clarendon Press, 1993), pp. 14f. and 30–8 for central features of the Westphalian system. The classic study is Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* [1977], 2nd edn (New York: Columbia University Press, 1995). Stephen D. Krasner, 'Westphalia and All That', in Judith Goldstein and Robert O. Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993), pp. 235–64 as well as Heinz Duchhardt, '"Westphalian System" Zur Problematik einer

I have grouped the questions in a way so that the more recent problems are listed towards the end. The first two questions go back to (at least) St Augustine and were dealt with in the Middle Ages under the heading of *ius ad bellum* and *ius in bello*. Michael Walzer's excellent *Just and Unjust Wars* (1977) is conventional in this respect, as it addresses, above all, these two problems. Arguments about the legitimacy of war and warfare have prevailed since the rise of organized warfare, as Thucydides' Melian Dialogue or the debate accompanying the Gulf War of 1991 demonstrate. The third question on intervention is closely linked with the Westphalian system, but has been dealt with before 1648, for instance, by Vitoria. He argues for a form of humanitarian intervention, an issue hotly debated in the 1990s. A world state has been endorsed by writers across the centuries, starting with the Greek Stoics. Favouring a global moral community of humankind, they also founded the cosmopolitan tradition in the West. Questions 7 and 8 are again typical for a world divided into separate states. International terrorism, immigration and refugees are very recent problems. There have been refugees in previous centuries, but the numbers of refugees in the twenty-first century is unprecedented. The problem of global distributive justice, of how the resources of the world should be distributed, originated at the end of European colonialism with the establishment of sovereign, but poor and underdeveloped, countries in the Third World. Our global economic system of free-market industrial capitalism is predominantly the result of the last two hundred years, and the cause of many of today's ecological problems. Economic interdependence among states has increased dramatically since 1945, and attracted more attention, though some historians argue that interdependence itself is a much older phenomenon. Questions 5 and 6 on institutional and moral cosmopolitanism are one main focus of this book. Question 10 addresses one specific aspect of the more generic second issue of hospitality.

The list of questions shows that half of them have been dealt with in the past. In addition, many genuinely modern problems such as global distributive justice often lead us back to more basic and traditional ones, such as questions 5 and 6 about institutional and moral cosmopolitanism. This means that older authors can be of relevance today, especially in view of the fact that the more recent philosophical theory is not necessarily the better one.

Denkfigur', *Historische Zeitschrift*, 269 (1999), pp. 305–15 question the widely accepted belief in the importance of Westphalia as a dividing point. The excellent volume: Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: Johns Hopkins University Press, 1995) addresses the problem how far the contemporary international system has moved 'beyond Westphalia'.

2. Political and cultural contexts: Globalization, modern, postmodern and anti-postmodern confusions

> One of the most important contexts for reading texts is clearly our own – a context that is misconstrued when it is seen in narrowly 'presentist' terms. (Dominick LaCapra, 'Rethinking Intellectual History and Reading Texts')

Intellectual historians emphasize that ideas must be contextualized. The nature of this context is a matter of debate, ranging from economic conditions to social, linguistic and cultural contexts (see the next section). Often, however, we forget to embed our own thinking. This section will try to do just that. It provides the cultural framework, focusing on the contemporary intellectual climate, above all in academic life, where books like this one are usually written. At the same time, this section prepares the ground for an analysis of the concept of political justice by introducing debates such as the one between universalists and relativists. The following section will continue the embedding of this study in our present (Western) culture.

Most contemporary analysts agree with the claim that '[t]he international community is at a crossroads.'[4] They disagree whether the current global trends are merely ephemeral or signify a real structural change of world politics. Globalists refer to phenomena like the changing role of the UN, increasing economic interaction and ensuing interdependence, which might trigger cultural and/or political integration (often labelled 'globalization'). They point at the successful story of Western European integration, and the fact that many ecological problems which cross borders can no longer be solved by the traditional national state. They provide long lists of non-governmental organizations (NGOs), transnational or multinational corporations, and intergovernmental organizations and their activities. They suggest that the revolutions in information technology have helped in the formation or expansion of 'international public opinion' or a 'global civil society'.[5] Processes of democratization and globalization are said to undermine the the classic concept of the state and the 'Westphalian Model of World Order', the predominantly

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[4] David Held, 'Democracy and the New International Order', in Daniele Archibugi and David Held (eds), *Cosmopolitan Democracy. An Agenda for a New World Order* (Cambridge: Polity Press, 1995), p. 96.

[5] Cf. Archibugi and Held (eds), *Cosmopolitan Democracy. An Agenda for a New World Order*; Ken Booth and Steve Smith (eds), *International Relations Theory Today* (Cambridge: Polity Press, 1995), pp. 90–197; Richard Falk, *On Humane Governance: Toward a New Global Politics* (Oxford: Polity, 1995); Kalevi J. Holsti, *International Politics. A Framework for Analysis*, 7th edn (Englewood Cliffs, NJ: Prentice-Hall, 1995), pp. 52–82; John Macmillan and Andrew Linklater (eds), *Boundaries in question: new directions in international relations* (London: Pinter, 1995); Jessica T. Mathews, 'Power Shift', *Foreign Affairs*, 76 (1997), pp. 50–66.

anarchic system of sovereign states which do not recognize a common coercive authority.[6] The new problems, above all in ecological and economic matters, transcend political boundaries and thus urge states to find solutions together. The traditional concept of security, focused on the military dimension, has in turn been revised and expanded. Transnational problems pose yet another challenge to the concept of the nation-state as a fairly autarchic, independent unit.[7] Some analysts argue that a global, interdependent civil society has developed, structured horizontally as well as vertically: the network of relations among states intensify, coupled with the process of democratization. Civil society is defined as 'the space of uncoerced human association and also the set of relational networks ... that fill this space'.[8] It is usually assumed that this space is located between the economy, the government and its bureaucracy on the one hand, and the private sphere of family and intimacy on the other. Filled with enthusiasm about a global civil society, some authors assume that it challenges 'from below' the modern territorial state's claim to exclusive sovereignty. At the same time, this state often must delegate political authority to supranational, regional, or global organizations and institutions.[9]

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6 David Held, 'Democracy', p. 103; cf. David Held, *Democracy and the global order: from the modern state to cosmopolitan governance* (Cambridge: Polity Press, 1995); Lyons and Mastanduno, *Beyond Westphalia?*, pp. 13–8, 59–83, 191–227, 250–65, Holsti, *Politics*, pp. 42–50.

7 Cf. John Dunn (ed.), *Contemporary crisis of the nation state?* (Oxford: Blackwell, 1995), Yoshikazu Sakamoto (ed.), *Global transformation: challenges to the state system* (Tokyo: United Nations University Press, 1995), David Held (ed.), *Political Theory Today* (Cambridge: Polity Press, 1991), pp. 197–254, Archibugi and Held, *Cosmopolitan Democracy*, pp. 68–95, Held, 'Democracy and the New International Order,' in ibid., pp. 99–103, Booth and Smith (eds), *International Relations Theory Today*, pp. 129–53.

8 See, for instance, Michael Walzer, 'The Concept of Civil Society', in *Toward a Global Civil Society* (Providence, Oxford: Berghahn Books, 1995), pp. 7–27; the quotation ibid., p. 7; Terry Nardin, 'Private and Public Roles in Civil Society', ibid., pp. 29–40 and other essays in this volume. See Ernst-Otto Czempiel, *Weltpolitik im Umbruch. Das internationale System nach dem Ende des Ost-West-Konflikts*, 2nd edn (München: Beck, 1993), pp. 105–32 and Charles R. Beitz et al. (eds), *International Ethics. A Philosophy and Public Affairs Reader* (Princeton: Princeton University Press, 1985), pp. 282–311 on the (alleged) transformation of the state system.

9 Julian Nida-Rümelin, 'Zur Philosophie einer globalen Zivilgesellschaft', in Christine Chwaszcza and Wolfgang Kersting (eds), *Politische Philosophie der Internationalen Beziehungen* (Frankfurt am Main: Suhrkamp, 1998), pp. 223–43 is a reliable and dispassionate account. See also Winrich Kühne (ed.), *Blauhelme in einer turbulenten Welt: Beiträge internationaler Experten zur Fortentwicklung des Völkerrechts und der Vereinten Nationen* (Baden-Baden: Nomos Verlagsgesellschaft, 1993), pp. 25f., Booth and Smith, *International Relations*, pp. 136–47 and Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', *European Journal of International Law*, 4 (1993), pp. 447–71.

Certain international lawyers with a philosophic bent, among them Jost Delbrück, have spotted a 'new consciousness' about the role and importance of international law concerning a peaceful world order.[10] It has been claimed that contemporary international law is changing in five areas: security council resolutions and activities have undermined the nonintervention principle of the UN Charter (art. 2, para. 7); this is related to a subsequent reliance on 'humanitarian intervention,' and a questioning of traditional state sovereignty; similarly challenged is the principle of self-determination of peoples (art. 1, para. 2), for some a dangerous and outmoded right to self-destruction.[11] The security council has repeatedly extended the prohibition to use force (art. 2, para. 4) to domestic affairs. Finally, it might be asked whether ongoing changes transform international law in qualitative terms, turning it from a law among states into a kind of global domestic law.[12] Usually all analyses are followed by cautionary remarks, reminding the reader that there is change, but trends may be reverted, or less profound than assumed. For instance, it is pointed out that the states are still sovereign, even though they may have delegated some of their authority or sovereignty.

Common reactions to the apparently changing global situation are calls for a new kind of (international) morality or ethics, an urge to find or establish new norms of conduct or institutions, to promote global distributive justice, or provide a sound philosophical basis reflecting the new situation. The Club of Rome specified our tasks in times of the 'first global revolution': 'Our aim must be essentially normative: to visualize the sort of world we would like to live in, to evaluate the resources – material, human and moral – to make our vision realistic and sustainable.'[13] In a similar vein, philosopher Martha Nussbaum has pointed out that a concept of justice that can be called cross-cultural is urgently needed: 'Especially in light of the increasing interaction among diverse societies and the frequency of communications, cross-cultural debate about

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10 Jost Delbrück, 'Wirksameres Völkerrecht oder neues "Weltinnenrecht"? Perspektiven der Völkerrechtsentwicklung in einem sich wandelnden internationalen System', in Kühne, *Blauhelme*, p. 101. For the following, see Kühne, *Blauhelme*, pp. 26–51.

11 Kühne, *Blauhelme*, pp. 39–44; Antonio Cassese, *Self-determination of peoples. A legal reappraisal* (Cambridge: Cambridge University Press, 1995); Hanspeter Neuhold and Bruno Simma (eds), *Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konfliktes?* (Baden-Baden: Nomos Verlagsgesellschaft, 1996), pp. 16–9, 43–63.

12 The German term is 'Weltinnenrecht'. See Delbrück, 'Völkerrecht', pp. 102f. and 128f.; Kühne, *Blauhelme*, p. 26f.

13 Quoted in Edmund G. Primosch, 'Innovations in International Law: A Quest for Survival', *Austrian Journal of Public and International Law*, 49 (1995), p. 120; cf. Christine Chwaszcza, *Zwischenstaatliche Kooperation: Perspektiven einer normativen Theorie der internationalen Politik* (Wiesbaden: Deutscher Universitäts-Verlag, 1995), pp. 213–7.

questions of justice is both possible and actual.' She holds that many problems have nowadays turned into international, global challenges and require a common effort. The theologian Hans Küng has made the related claim that our world has a chance of survival only if humans agree on a set of norms, values and goals, even if religious convictions and ideologies may differ: 'This one world needs one basic ethic.'[14]

Various intellectual trends, especially in industrialized Western countries, have questioned the very effort of a cross-cultural theory of justice as illusory and conceptually naïve. The most important recent ones have been communitarianism and postmodernism (both movements are getting older, though: some French thinkers are already post-postmodern). In the following section, I will focus exclusively on postmodern criticism, especially Rorty, and one narrowly defined aspect, that of cultural or moral relativism, assuming that many of the arguments presented in the various 'camps' intersect and overlap. In addition, many tenets of cultural relativism have a long history in Western philosophy; postmodern positions are certainly not radically new in this respect (nor is communitarianism, for that matter).

Postmodernism is by no means a homogeneous phenomenon and is notoriously difficult to define (a difficult task by its own standards), resembling Lévi-Strauss's 'floating signifier'.[15] It would be unfair to label presumptive representatives as relativists, but their criticism of basic assumptions of

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[14] Martha Nussbaum, 'Aristotelian Social Democracy', in R. Bruce Douglass, Gerald M. Mara and Henry S. Richardson (eds), *Liberalism and the Good* (New York: Routledge, 1990), p. 207 and Hans Küng, *Global Responsibility. In Search of a New World Ethic* (New York: Crossroad Publishing Company, 1991), p. xvi. See also John Charvet, 'The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights', *Millenium. Journal of International Studies*, 27, 3 (1998), pp. 523–41 on international ethics, and Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Oxford: Polity Press, 1992) and 'Cultural Complexity, Moral Interdependence, and the Global Dialogical Community', in Martha C. Nussbaum and Jonathan Glover (eds), *Women, Culture, and Development. A Study of Human Capabilities* (Oxford: Clarendon Press 1995), pp. 235–7 on the intellectual climate in the West.

[15] On the current 'postmodern sentiment' and international relations, see Zaki Laidi, *A World Without Meaning. The Crisis of Meaning in International Politics* (London and New York: Routledge, 1998), and Brown, *Theory*, ch. 8. On postmodernism in general, see Christopher Norris, *The truth about postmodernism* (Oxford, UK; Cambridge, MA: Blackwell, 1993); *What's wrong with postmodernism: critical theory and the ends of philosophy* (Baltimore: Johns Hopkins University Press, 1990), Hans Bertens and Douwe Fokkema (eds), *International Postmodernism. Theory and Literary Practice* (Amsterdam and Philadelphia: John Benjamins Publishing Company, 1997), and Zygmunt Bauman, *Life in Fragments. Essays in Postmodern Morality* (Oxford: Blackwell, 1995), the follow-up volume of his *Postmodern Ethics* (Oxford: Blackwell, 1993).

Western culture, or Enlightenment modernity, clearly points in this direction. (Relativist positions often intersect with particularist ones. For the sake of convenience, I will refer to 'relativism' in the following.) Taking up this issue also helps me to embed the theory of justice presented later on. Cultural or moral relativism holds that no moral norm is universal in form, or valid for all cultures. Its tenets can be summarized as follows:[16]

1 We can no longer believe in some intrinsic human nature. The fallacy of essentialism has to be avoided.
2 It is impossible to transcend the values, norms and beliefs of one's own culture and/or community.
3 Ideas and norms prevalent in different cultures are radically incommensurable.

Abstract ethical principles are universal in form, such as golden rules or the proposition that 'promises must be kept.' If they are cosmopolitan in scope, they are cross-cultural, and valid for every person simply as a human being. 'Cosmopolitan' is usually synonymous with 'global'. Entities are global if they pertain to the whole world as a physical entity.[17] For Rorty, even the terms of the debate between relativism and universalism are outmoded, 'remnants of a vocabulary which we should try to replace'.[18] Sometimes the denial

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16 Klaus Peter Rippe, *Ethischer Relativismus. Seine Grenzen – seine Geltung* (Paderborn, München, Wien, Zürich: Schöningh, 1993), Gilbert Harman and Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* (Oxford: Blackwell, 1995), Alison Dundes Rentelen, *International Human Rights: Universalism versus Relativism* (London: Sage, 1990), and Thomas Rentsch, 'Aufhebung der Ethik', in Heiner Hastedt and Ekkehard Martens (eds), *Ethik. Ein Grundkurs* (Reinbek bei Hamburg: Rowohlt, 1994), pp. 114–43 offer good bibliographies and reliable analyses. One recent issue of *Journal of Anthropological Research* (vol. 53, no. 3, 1997) is devoted to cultural relativism and human rights. Hilary Putnam, *Reason, Truth and History* (Cambridge: Cambridge University Press 1981), pp. 119–26 is succinct and to the point. For a brief introduction to the topic, see Georg Cavallar, *Pax Kantiana. Systematisch-historische Untersuchung des Entwurfs 'Zum ewigen Frieden' (1795) von Immanuel Kant* (Wien, Köln, Weimar: Böhlau-Verlag, 1992), pp. 425–31, and the excellent article by John J. Tilley, 'Cultural Relativism, Universalism, and the Burden of Proof', *Millennium: Journal of International Studies*, 27, 2 (1998), pp. 275–97.

17 Onora O'Neill, 'Universalism in Ethics', in Edward Craig (ed.), *Routledge Encyclopedia of Philosophy*, 10 vols (London and New York: Routledge, 1998), vol. 9, p. 536.

18 Richard Rorty, 'The contingency of a liberal community', in *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press 1989), p. 44. The two theses can be found in his writings; see p. 189, pp. 187f., 'The contingency of selfhood', ibid., pp. 23–43 (there is nothing like a 'core self'), and passim. See also Honi Fern Haber,

of universal standards is linked to the epistemological impossibility of an Archimedean standpoint. (Pre-)modern authors are said to have looked for this standpoint 'which permits objective knowledge of permanent moral truths which bind the whole of humanity'.[19] This turns the quest for moral standards into a mistaken all-or-nothing affair, leaving us wondering whether people in the past were really as epistemologically naïve as we often assume, whether they really believed that some 'absolute truths' were dangling between heaven and the earth.

Arguments against cultural relativism usually follow two strategies. One is to establish some conceptual distinctions and claim that universalism is justifiable, but mistakenly associated with untenable positions, whereas cultural relativism is associated with positions that do not support it. The second strategy tries to show that relativists implicitly presuppose norms or principles they claim to deny. The most important conceptual distinction to keep in mind is among moral principles, moral rules and moral maxims.[20] Moral principles are the most basic and general ones, applying to a wide class of actions. An example would be 'humans should be treated as ends in themselves.' An example of a moral rule would be 'slavery is wrong,' justified by applying the principle mentioned before. A maxim is 'the subjective principle of volition';[21] for instance, 'I will treat my slaves with respect and try to avoid needless harm and unhappiness.' One way to defend universalism is to point out that moral principles across cultures may overlap, but differ on the levels of rules and maxims because of a different social context or situation. Thus universalists will point out that they should not be confused with moral absolutists who hold that moral rules are indefeasible, as they 'cannot be trumped by other moral considerations, even in extreme circumstances'.[22] Some universalists also point out that there is, at the level of norms, a significant overlap of moral views across cultures.[23] Ethical relativism, on the other hand, is associated with positions that do not support it, for instance, with descriptive relativism (norms across cultures vary) or with situational

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Beyond Postmodern Politics. Lyotard, Rorty, Foucault (London and New York: Routledge, 1994) and Brown, *Theory*, pp. 206–11 on Rorty.

19 Linklater, *Transformation*, p. 48.

20 I am partly following Tilley, 'Relativism', pp. 290f.

21 Immanuel Kant, 'Groundwork of the Metaphysics of Morals' in *Practical Philosophy*, transl. and ed. by Mary J. Gregor (Cambridge: Cambridge University Press, 1996), p. 56.

22 Tilley, 'Relativism', p. 291.

23 Margaret Mead, 'Some Anthropological Considerations Concerning Natural Law', *Natural Law Forum*, 6 (1961), pp. 51–64; Frances V. Harbour, 'Basic Moral Values: A Shared Core', *Ethics and International Affairs*, 9 (1995), pp. 155–70, and Tilley, 'Relativism', p. 283 for more references.

relativism.[24] Descriptive relativism establishes variations of moral norms, but distinguishes between their acceptance and validity. If a certain norm like 'ethnic cleansing is right' is widespread, it does not follow that it is universally valid. Few universalists would challenge situational relativism, agreeing instead that norms and maxims must be sensitive to circumstances. 'Slavery is wrong' is a norm that becomes implausible in a historical context where the only accepted alternative was killing prisoners of war (see II, 4).

I will now turn to the second strategy of universalists. Here the universalist tries to show that relativists do indeed endorse moral norms or principles, albeit not expressly. An interesting example is Edmund Leach's warning: 'Beware of moral principles. A zeal to do right leads to the segregation of saints from sinners, and the sinners will then be shut away out of sight and subjected to violence. Other creatures and other people besides ourselves have a right to exist.'[25] The admonition in the first sentence has the form of a moral imperative, while at the same time denying that they make any sense, and can be based on moral principles. We should stay clear of a zeal to do right, but also believe that it is wrong to exclude others, and right to respect them. Negating any form of universalism is self-defeating. If I claim that norms are culturally relative, and that they should therefore be all respected, then I can hardly establish the validity of this very respect. If I argue that ethnocentrism is morally bad because it excludes other cultures (see I, 4), then it must be asked if this judgement is more than arbitrary, one of the fads and fashions of our time. I would have to reject relativism in order to establish that the badness of ethnocentrism is universally valid. Andrew Linklater, after having established the fallacy of universalism, wants to provide 'ethical foundations' for our era based on the 'principle of respect for persons' and a rejection of 'unjust systems of exclusion'.[26] How do we get to some sort of justification for these normative principles without any claim that there are binding 'moral truths'? Postmodernism's radical claim about an end of 'absolute' foundations does not get us anywhere, and Linklater is aware of this. He points at the 'hidden universalism' in writers such as Derrida, Foucault and Rorty: they wrote about

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[24] Tilley, 'Relativism', pp. 277–83 with more associated positions such as methodological contexualism. There is also a fine discussion in Gertrud Nunner-Winkler, 'Moralischer Universalismus – kultureller Relativismus. Zum Problem der Menschenrechte', in Johannes Hoffmann (ed.), *Universale Menschenrechte im Widerspruch der Kulturen* (Frankfurt am Main: Verlag für Interkulturelle Kommunikation, 1994), pp. 79–103.

[25] Edmund Leach, *A Runaway World?* (New York: Oxford University Press, 1968), p. 54. Leach rejected universalism and endorsed cultural relativism at ibid., p. 48.

[26] Linklater, *Transformation*, p. 48. To avoid confusion, let me emphasize that Linklater is certainly not postmodern.

moral obligations, injustices and the desirability of cosmopolitan ideals. That way we find more congruence than disagreement between postmodernism and the 'Enlightenment project' of thinkers like Habermas.[27] But this claim of pure harmony may be an illusion, and hardly resolves the problem. The fact that a limited number of Western authors happen to share similar beliefs may be pure coincidence, so it does not prove anything. Rather, it gives the impression that some contemporary authors engage in a creative form of doublethink: denying universal standards when convenient, but also propagating their ideals at other times, implying that they are somewhat 'better' or closer to 'truth' than others. This is certainly not consistent, and it does not make sense to abandon the standard of consistency. The more elaborate arguments rejecting relativism as inconsistent usually follow the strategy of showing that relativists imply presuppositions that conflict with their overall claim. For instance, Putnam argues that the statement 'X is true relative to person P' (for example, slavery is justified relative to Aristotle) itself is usually taken to be 'absolute'.[28] If we take the statement to be relative, we lose all ground, though this conclusion would be consistent with a generic relativism. Attempts to limit one's own relativism to certain areas do not work. If there was no objective notion of rightness available, we would be unable even to make the relativist's distinction between being right and *thinking* one is right. The distinction would simply collapse. It is indeed very unlikely that relativists really believe that statements such as 'Torturing children for the fun of hearing them scream is wrong' or 'Ethnic cleansing is not so good' lack universal validity.[29] They will more likely be 'soft' relativists, assuming that a limited number of moral rules are not relative.

If we argue along these lines, applying the standard of consistency, the main tenets of relativism listed above cannot be sustained. It has been argued that cultural relativists (frequently with a communitarian background) often conceive cultures as 'closed' and hermetic, ignoring the sociological fact that they are never homogeneous, but, for instance, torn between tradition and modernity. They present an idealization of 'true' communities which is in fact based on imagination. Richard Rorty, for instance, concedes that the sole survivor of a 'slaughtered nation' has indeed lost all human dignity, but this does not really matter, as 'it is part of the tradition of *our* community that the human stranger from whom all dignity has been stripped is to be taken in, to be reclothed with dignity. This Jewish and Christian element in our tradition is

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27 Ibid., pp. 70–6. On the 'Enlightenment project', see V, 5 and John Gray, *Enlightenment's Wake. Politics and Culture at the Close of the Modern Age* (London and New York: Routledge, 1997). Gray claims that any contemporary political theory is a variation of this project.

28 Putnam, *Reason, Truth and History*, pp. 120f.

29 See the examples in Tilley, 'Relativism', pp. 287f.

gratefully invoked by freeloading atheists like myself.'[30] The last sentence is close to creating a myth, the illusion of a harmonious identity of values among atheists, Jews and Christians in contemporary US society. I do not deny that we can find some minimal moral consensus in Western societies, and it certainly covers his example of a lone child wandering in the woods. But we do not find agreement when we interpret the tradition of our community going beyond a thin conception of justice. Immigration laws are highly controversial in any Western society. Seyla Benhabib argues against Rorty that 'the belief that there may be one homeland, one language, and one culture which defines 'really' who we are may itself be part and parcel of the essentialism which Rorty otherwise so eloquently dispenses with.'[31] The argument of essentialism is thus turned against ethical or cultural relativism itself. This is a familiar strategy: critics of relativist positions try to show where they refer to 'absolute' values themselves, such as the notion of community.

Are ideas and norms prevalent in different cultures radically incommensurable? There is the logical argument against this claim: if this was true, we could not even arrive at the conclusion that they are incommensurable. Any such thesis implies that there are (at least) some elements, concepts, symbols we can identify and then describe as unintelligible. As Hilary Putnam pointed out, it is 'a matter of universal human experience' that we are able to 'interpret one another's beliefs, desires, and utterances so that it all makes some kind of *sense*'.[32] People living in the same culture may, after all, encounter similar problems in communicating with each other. We do not have to assume that there is an 'essential asymmetry between intercultural and intracultural disputes'.[33] Slavery as a social institution was challenged from within Greek society, as Aristotle admitted freely (see II, 2). The relevant paradigm may, after all, not be ethnically defined. Rather, it could be the divide between traditionalists and modernists across cultures and ethnic communities, for instance. We have no reason to assume that these communication problems cannot be overcome.

If postmodernists are pressed hard, most do not draw radical conclusions from their subversive positions. The meta-narratives of modernity are discarded, but not other stories about imperialism, patriarchy, and so on. They turn into soft postmodernists, weak relativists, or pale anti-foundationalists in

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30 Richard Rorty, 'Postmodernist Bourgeois Liberalism', in *Objectivity, Relativism, and Truth. Philosophical Papers vol. 1* (Cambridge, MA: Cambridge University Press, 1991), p. 202.

31 Benhabib, 'Complexity', p. 243; see also pp. 240f.

32 Putnam, 'Two conceptions of rationality', in *Reason, Truth and History*, p. 117. See also Benhabib, 'Complexity', p. 245.

33 Benhabib, 'Complexity', p. 246.

practice, if not in professed philosophical theory.[34] They may become liberal ironists, believing in liberal values without claiming that they are epistemologically defensible or universally valid. They want to convince us that we (only) have to downgrade our expectations, that intellectual nihilism is not a necessary outcome. Two of the espoused norms are open discourse and intersubjective agreement.[35] But this does not get us out of the circle. Why value consent? Why try to achieve 'as much intersubjective agreement as possible'?[36] Postmodernists will retort that these questions are typical for ways of thinking in the Enlightenment tradition. Incidentally, both moderate relativists and universalists often find some common ground in the emphasis on dialogue with other positions and debate, for universalists emphasize that moral reasoning, and the 'spelling out' of ethical principles, are in need of a learning process. They usually admit that moral debates are open-ended and unending, that the fusion of respective horizons is usually incomplete and an approach to, rather than finding, the truth. Self-reflective postmodernists in turn cherish debate and dialogue with divergent positions such as modern liberals because they understand that excluding the liberal 'other' would commit the same crime of unfair exclusion that modern thinking has allegedly practiced for so long.

A reflection on our way of thinking reveals a recurrent pattern: our thinking tends to be linear and binary, even among postmodernists, though they have a deepened awareness of this tendency. This thinking does not seem to be the sole feature of Western philosophy since Plato; it seems to be part of our mental structure. For instance, endorsing the above-mentioned arguments against relativism, we may accept universalism as the only viable alternative; or we do it the other way round. But this is a *non sequitur*, as both positions may be wrong. One way out of this impasse is circular thinking: moving from relativism to universalism and back again. Another route would be a compromise: basic principles of natural justice are universally valid, whereas derived, second- or third-order principles or applications in the real world (rules and maxims) are subsequently more relative.

This compromise is going to be my approach later on (see I, 4 below). There I will propose what may be called qualified universalism. The outcome of this section is more modest. The debate between universalists and relativists ends with a draw. Apart from this, there are three implications. First, our own context influences what we are able to see. For instance, an awareness of a possible post-Westphalian international system opens up new perspectives on

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34 Rorty, 'Liberalism', p. 198 on the notion of 'pale anti-foundationalists'.

35 See the list in Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), pp. 476–89.

36 Rorty, 'Solidarity or Objectivity?', in *Objectivity*, p. 23.

international thinking sometimes characterized as 'premodern' or by a lack of typical 'Westphalian' features. As a consequence, our interest in authors such as Vitoria or Grotius is not merely antiquarian, in the sense that there is nothing they can communicate to us. Second, we can reflect upon what we are doing. This is important in two respects. Methodologically, the question of how we should approach a text is by nature self-reflective (see I, 3). In terms of morality, self-reflection avoids easy solutions for the relationship between history and moral consciousness. For instance, we cannot simply claim (although this would make things easier for us) that 'for historians, morality is context-bound and relative.' We don't know for sure, as this section has shown. After all, universalists can argue that I try to offer an impartial analysis of the debate between universalists and relativists here, so that the 'deep structure' of this section entails the moral ideal of impartiality, an ideal also endorsed by a distant author such as Grotius, for instance (see III, 1). The practice of self-reflection leads us to the third implication: a minimal universalist assumption. As rational beings, we try to act and think consistently and coherently, no matter how we differ in our beliefs and assumptions. For the idea of justice, this entails the minimal moral standards of consistency and impartiality (developed in detail below, I, 4). For intellectual history, this means that we interpreters should stress the coherence and consistency of texts as they are embedded in various contexts, knowing that contexts never explain the texts themselves. The following section will take up this claim.

3. Intellectual history: Objectivity, methodology and the dialogical approach

> Every present has a past of its own, and any imaginative reconstruction of the past aims at reconstructing the past of this present. (R. G. Collingwood, *The Idea of History*)

This book is a study of the past, the present, and the relationship between the two. The key context is that of this study itself: it includes you, the reader, and me, the author. The reconstruction of the past goes hand in hand with, and is inseparable from, the reconstruction of our present. In this section, I will focus on problems related to writing history: the objectivity question, the proper methodology for intellectual history, the boundaries between disciplines, and presentism. For the sake of brevity, I can only present theses, postulates and ideas rather than complete arguments.

Over the last decades, the field of intellectual history has been undergoing profound changes, and some have spoken of a crisis. More than ever, issues of methodology and approach have been raised. Self-reflective intellectual historians have asked questions about the relevance of philosophies such as post-structuralism or postmodernism for their work. Certain methodologies,

in particular Foucault's archaeology of knowledge, Pocock's contextualism and Skinner's conventionalism, have become widely accepted, if not always followed in practice. They all stand for a general trend away from an isolated interpretation of the 'great' texts of the Western tradition to an emphasis on contextualizing thought. These contexts vary: they may be discursive formations, paradigms, linguistic structures, or social conventions. Roughly twenty years ago, Dominick LaCapra deplored these developments, arguing that they all amounted to putting less emphasis on the importance of interpreting complex texts. For him, the overall outcome was an 'anthropological bulldozer effect': the search for a collective discursive culture ploughs down the importance and specificity of interpreting intricate texts.[37] I am inclined to support LaCapra's assessment, and want to argue for a type of intellectual history that focuses on hermeneutic meanings as products of the creative, conscious and rational efforts of individuals, and which reconstructs their texts as consistent and coherent webs of belief.

Before I turn to these issues, however, we must deal with a more generic problem for the discipline of history, the so-called objectivity question. In the previous section, I have introduced contemporary postmodern philosophies. They have had their impact on the historical profession, and an often polemical debate ensued. Postmodernists have been criticized by members of the modernist camp for 'murdering our past', opening the door to irrationalism, or ignoring methodology.[38] It is useful (and appropriate for a historian) to approach the debate from a historical perspective, and tell a story.

We could start this narrative about historiography with Leopold von Ranke's belief (1824) that we historians should aim at and can achieve objectivity, telling of the past '*wie es eigentlich gewesen*' (as it actually was). Ranke criticized Hegel and German Idealism and their belief that there was a single coherent history, and that people, or at least the privileged philosopher, knew what it was. Hegel asserted that his grand narrative offered the authentic account of history in general. Ranke rejected this claim (attitude I) and replaced it by the more modest attitude II: Yes, there was a single history, but we cannot know it *a priori* in a philosophical manner. The goal of knowing the whole of history will have been attained after further research has been done.[39]

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[37] Dominick LaCapra, 'Rethinking Intellectual History and Reading Texts,' in Dominick LaCapra and Steven L. Kaplan (eds), *Modern European Intellectual History* (Ithaca and London: Cornell University Press, 1982), pp. 47–85, here p. 83.

[38] A polemical example is Keith Windschuttle, *The Killing of History: How literary Critics and social Theorists are murdering our Past* (New York: Free Press, 1997).

[39] Leopold von Ranke, *Aus Werk und Nachlass*, ed. Walther Peter Fuchs and Theodor Schieder (Munich, Vienna: Oldenbourg, 1975), vol. 4, pp. 297f. and pp. 411–3. My story follows Allan Megill, '"Grand Narrative" and the Discipline of History,' in Frank Ankersmit and Hans Kellner (eds), *A New Philosophy of History* (Chicago:

Ranke's rejection of Hegelian metaphysical speculations was essential for the establishment of history as a distinct and autonomous (*selbständige*) discipline pursuing professional research, but Ranke did not abandon Hegel's belief in historical objectivity (this was what later historians, for example, post-modernists, would do). This is a set of assumptions about historical facts as independent of and prior to interpretation, where truth is the correspondence between interpretation and reality, evidence, or the facts. Mind and reality, history and fiction, facts and value judgements can be clearly distinguished.[40] The volumes of the *Cambridge Modern History* (1902–12) and J. B. Bury's inaugural lecture at Cambridge in 1902 are typical examples of this search for objectivity, impartiality and the 'cult of facts'. Especially after World War I, these assumptions were gradually abandoned as naïve, and attitude III was adopted. Coherence shifted from the story told to the 'unified mode of thinking of the discipline'. This new emphasis on the subject of the historian as the crucial entity and 'the laws of historical investigation and knowledge' had been anticipated by Johann Gustav Droysen.[41] Typical adherents of attitude III held that the autonomy of history as a distinct discipline lay in the adherence to common methods. They tended to dissociate themselves polemically from attitude II, especially its belief in historical objectivity. Useful examples are the presidential addresses to the American Historical Association by Carl Becker ('Everyman His Own Historian', 1931) and Charles Beard ('Written History as an Act of Faith', 1933). Becker's notorious statement runs: 'It should be a relief to us to renounce omniscience, to recognize that every generation, our own included, will, must inevitably, understand the past and anticipate the future in the light of its own restricted experience, must inevitably play on the dead whatever tricks it finds necessary for its own peace of mind.'[42] Postmodern thinkers advise us to adopt attitude IV, so far the final stage in the development. The belief in distinct methods and the autonomy of the discipline are challenged. There may be no single history. Attitude IV is always in danger of becoming dogmatic ('there is no single history or methodology'), and should always try to be sceptical of its own scepticism (a requirement not all

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University of Chicago Press, 1995), pp. 151–73, on Ranke, ibid., pp. 157–60. See also Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (Cambridge: Cambridge University Press, 1988) and Michael Stanford, *An Introduction to the Philosophy of History* (Oxford: Blackwell Publishers, 1998).

40 Novick, *Noble Dream*, pp. 1f.; Stanford, *Introduction*, pp. 50–74.

41 Megill, 'Grand Narrative', p. 160 and Johann Gustav Droysen, *Historik* [1882], ed. Rudolf Hübner, 8th edn (Munich: Oldenbourg, 1977), Appendix 'Kunst und Methode', pp. 416–24.

42 Carl Becker, *Everyman His Own Historian. Essays on History and Politics* (New York: Crofts and Co., 1935), p. 253.

postmodernists are able to meet). Attitudes I, II and III are both challenged and embraced. Attitude III, for instance, could be entertained, if only ironically or heuristically. Needless to say that all four attitudes may overlap and shade off from one to the other.[43]

Contemporary controversies can be understood as debates between representatives of attitudes III and IV. Postmodernists, for instance, insist that there are no pure facts, because their perception is always related to and modified by some previous background theory. The result is that we have no direct access to the past, and can only create or construct pictures thereof. Hayden White is thus right in stressing the imagined or invented element included in historiography.[44] Modern defenders of attitude III point at the dangers looming behind an anything-goes relativism, try to find logical inconsistencies, and elaborate their own approaches. Geoffrey Roberts, for instance, relies on the standpoint of action (apparently going back to Vico): the past was peopled by purposeful and reasoning agents 'like us' who created events and facts, and we are therefore in a position to discover the past 'because the historical practice of historians is commensurate with the human practice that makes effective action and interaction possible.'[45] The charge of inconsistency can be raised against Becker's relativist statement quoted above (though I do not intend to assign him to the postmodern camp). He moves from renouncing omniscience to an acceptance of the relativity of historical knowledge. This follows well-known binary modes of thinking. Isn't a third position, or perhaps several others, possible in between those two extremes? Secondly, Becker uses the word 'inevitably' two times in his famous and playful sentence. Becker's own theory about our relative perspective is not relativist or perspectival. It seems to step 'outside' the contingencies of historiography. Becker not only assumes a clear-cut distinction between the

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43 Megill, 'Grand Narrative', pp. 163–5.

44 Among many publications, see Keith Jenkins, *On 'What is History?' From Carr and Elton to Rorty and White* (London and New York: Routledge, 1995), the fine volume edited by Ankersmit and Kellner mentioned above, Brian Fay, Philip Pomper and Richard T. Vann (eds), *History and Theory. Contemporary Readings* (Oxford: Blackwell, 1998), Stanford, *Philosophy*, ch. 9 (pp. 227–63), Joyce Appleby, Lynn Hunt, and Margaret Jacob, *Telling the Truth about History* (New York: W. W. Norton, 1994), G. R. Elton, *Return to Essentials: Some Reflections on the Present State of Historical Study* (Cambridge: Cambridge University Press, 1991), and Ewa Domanska, *Encounters: Philosophy of History after Postmodernism* (Charlottesville: University Press of Virginia, 1998). The significant works by Hayden White are *Tropics of Discourse* (Baltimore and London: Johns Hopkins University Press, 1978) and *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1987).

45 Geoffrey Roberts, 'Postmodernism versus the Standpoint of Action', *History and Theory*, 36 (1997), pp. 249–60, the quotation ibid., p. 251.

contingent and the inevitable, he also claims to know about the latter. In short, Becker seems to assume a bird's-eye view, 'looking down' at historiography, while at the same time claiming that this view is impossible. The upshot of the argument is that postmodern relativists do not get an upper hand in the debates. They want to have their cake and eat it, too. They can refine their positions, which usually implies moderation. For instance, a moderate postmodernist might point out that the emphasis is not on the past, but on our memory of it, and playing with those memories; that historiography is not rejected, but seen as limited because it makes us believe that nothing exists outside it; that there is a distinction between language and reality, but a blurred one.

Polemical attitudes and the inability to find a detached perspective lead to misunderstandings. Thus Frank Ankersmit's sentence 'we no longer have any texts, any past, but just interpretations of them'[46] has been read as a denial of the past distinct from the mind of the historian. Put in context, the sentence conveys a different message: Ankersmit deplores the fact that there are nowadays so many interpretations of Hobbes's *Leviathan* that debates no longer focus on the text itself and its possible meanings but on rival interpretations produced by an academic industry at an increasing speed. Similarly, Hayden White should not be seen as denying the importance of facts, sources, or competent research. He is simply fully aware of the problems encountered in writing history, stresses that rhetoric is 'also' crucial, and, above all, tells historians how they should *relate* to their discipline.[47]

The challenge is to find a position that avoids the fallacies of essentialism and objectivism, but also stays clear of irrational relativism and an excessive postmodern scepticism. Our binary thinking leads us to opt for either attitude III or IV – while it would be more worthwhile to keep an open stance towards all four attitudes. For the time being, we can settle for a weak concept of historical objectivity. As we cannot rely on pure facts, objectivity depends on comparing and evaluating rival theories in terms of agreed facts. Agreed facts are pieces of evidence almost anyone in a community accepts as true. This overlapping consensus enables members of the community to make reasonable comparisons and debate their rival theories while remaining open to criticism and following criteria such as consistency, comprehensiveness and accuracy.[48] The standpoint

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46 Frank R. Ankersmit, 'Historiography and Postmodernism', *History and Theory*, 28 (1989), p. 137.

47 Jörn Stückrath and Jürg Zbinden (eds), *Metageschichte. Hayden White und Paul Ricoeur* (Baden-Baden: Nomos Verlagsgesellschaft), especially Peter Burke, 'Die Metageschichte von "Metahistory" ', ibid., pp. 84f. and the symposium, 'Hayden White: Twenty-Five Years On', *History and Theory*, 37 (1998), number 2, specifically Frank R. Ankersmit, 'Hayden White's Appeal to the Historians', pp. 182–93.

48 This follows Mark Bevir, *The Logic of the History of Ideas* (Cambridge: Cambridge University Press, 1999), ch. 3, particularly pp. 96–104 and 116f.

of action helps us to stay clear of despairing of never ever being able to connect with the past.

It is now time to turn to methodological problems. Intellectual historians hope to recover the meaning of texts from a historical perspective. Some scholars distinguish between the history of ideas and intellectual history. The term 'history of ideas' dates from the work of Arthur O. Lovejoy. His classic *The Great Chain of Being* (1936) developed the notion of a 'unit idea' persisting throughout a variety of historical permutations.[49] From the Middle Ages into the early nineteenth century, Lovejoy claimed, people perceived the 'chain of being', that is, a picture of reality understood hierarchically, from the pure potentiality of matter upward through the vegetative, sentient and rational souls, into the realm of disembodied, angelic souls, culminating in pure actuality or Being, or God. The history of ideas differs from intellectual history by embracing the idealist tradition, claiming that all history is the history of human consciousness and rejecting materialist and determinist history. Critics have pointed out that Lovejoy's approach tends to hypostatize concepts, removes thought from its historical context, separates humans from their ideas, and overemphasizes continuity at the expense of discontinuity and authorial originality.

Intellectual history, by contrast, stresses more the context-bound nature of ideas, as well as the changes in these contexts over time. Intellectual history has been far more accommodating of materialist history, and has taken into account much of the new cultural and social history as well as literary criticism. Intellectual history often intersects, but is not identical, with cultural history and the study of concepts (conceptual history or *Begriffsgeschichte*). Culture is understood by Geertz as 'the fabric of meaning in terms of which human beings interpret their experience and guide their action'.[50] Cultural history frequently studies the link between culture and politics, and the fabrics of cultural identity. *Begriffsgeschichte* is above all associated with a group of historians in the Federal Republic of Germany and the reference works *Geschichtliche*

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[49] Arthur O. Lovejoy, *The Great Chain of Being. A Study of the History of an Idea* (Cambridge: Harvard University Press, 1936) and Sean Farrell Moran, 'Intellectual History/History of Ideas', in Kelly Boyd (ed.), *Encylopedia Of Historians And Historical Writing* (London and Chicago: Fitzroy Dearborn Publishers, 1999), vol. 1, pp. 589–92. Lovejoy's methodological approach is included in *Great Chain,* ch. 1 and 'Reflections on the History of Ideas', *Journal of the History of Ideas*, 1 (1940), pp. 3–23.

[50] Clifford Geertz, *The Interpretation of Cultures. Selected Essays* (New York: Basic Books, 1973), p. 145. Günther Lottes, '"The State of the Art." Stand und Perspektiven der intellectual history', in Frank-Lothar Kroll (ed.), *Neue Wege der Ideengeschichte. Festschrift für Kurt Kluxen zum 85. Geburtstag* (Paderborn et al.: Ferdinand Schöningh, 1996), pp. 27–45 provides a useful synopsis of new trends in intellectual history.

Grundbegriffe and *Historisches Wörterbuch der Philosophie*. In a manner comparable to Skinner and Pocock, the editors of the *Geschichtliche Grundbegriffe* combine the analysis of political concepts with structural social history, providing rich accounts of the continuities and shifts in the vocabularies of government and society. Specific words are placed in a wider linguistic field (*Sprachfeld*), including synonyms and opposites.[51] Rolf Reichardt's *Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680–1820* is the most recent attempt to establish new methodological standards of conceptual history.[52] For present concerns, however, the crucial methodological approaches are Foucault's archaeology of knowledge, Pocock's contextualism and Skinner's conventionalism.

Foucault emphasizes with his archaeology of knowledge 'discursive formations' rather than the ideas of individuals. He claims that 'discourse is not the majestically unfolding manifestation of a thinking, knowing, speaking subject, but, on the contrary, a totality, in which the dispersion of the subject and his discontinuity with himself may be determined. It is a space of exteriority in which a network of distinct sites is deployed.'[53] Discursive formations are fields of rules, a regularity between objects, concepts, or types of statements, a theoretical and linguistic structure which determines what an author can say. Foucault aims at debunking Western logocentrism and the intentionality of a constitutive subject. If authors only follow discursive practices, then the notion of a rational subject becomes redundant. Foucault's emphasis on discourse at the expense of decentered humans is open to criticism.[54] His language is often

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51 The definitive studies on the Germans are now Melvin Richter, *The History of Political and Social Concepts. A Critical Introduction* (New York, Oxford: Oxford University Press, 1995), especially chs 2 and 6, and Hartmut Lehmann and Melvin Richter (eds), *The Meaning of Historical Terms and Concepts: New Studies on Begriffsgeschichte* (Washington, DC: German Historical Institute, 1996). A recent volume on cultural history is Willem Melching and Wyger Velema (eds), *Main Trends in Cultural History. Ten Essays* (Amsterdam, Atlanta: Rodopi, 1994).

52 Rolf Reichardt, 'Einleitung', in Rolf Reichardt and Eberhard Schmitt (eds), *Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680–1820* (München: Oldenbourg, 1985), vol. 1, 2, pp. 39–148. Reichardt characterizes his approach as 'sozialhistorische Semantik als Mittelweg zwischen "Lexikometrie" und "Begriffsgeschichte" ', ibid., p. 60.

53 Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, transl. A. M. Sheridan Smith (New York: Pantheon Books, 1972), p. 55. See ibid., pp. 31–9, 135–40, and p. 38 for a definition of discursive formation. Interpretations are Robert Young, *White Mythologies: Writing History and the West* (London, New York: Routledge, 1990), ch. 5 and Mark Poster, 'The Future According to Foucault: *The Archaeology of Knowledge* and Intellectual History', in LaCapra, *Intellectual History*, pp. 137–52.

54 This follows partly Poster, 'Future', pp. 145–52 and Lottes, 'State of the Art', pp. 36–8.

quite vague, exemplified by the above quotation and its reference to 'totality' and 'space of exteriority'. Foucault presents only the rough outlines of his methodology, and his specifications are inadequate. It is not clear whether the archaeology of knowledge applies only to the history of science (Foucault's main area of research) or all types of discourses. It has been claimed that his concept of discourse is ahistorical, neglecting diachrony. Foucault seems to be logically inconsistent. As one interpreter puts it: 'Is it possible to argue without contradiction, as he attempts to do, that discourses are faceless objectivities and, at the same time, attempt consciously to establish such a discourse?'[55] This logical circle suggests that Foucault's assumptions, for instance about the dispersion of the subject, are unfounded. Postmodernism helps us to become aware of our tendency to think in binary oppositions, such as Foucault's between discursive formations and the subject. His dismissal of logocentrism leads him to fall into another, equally lopsided, extreme. Finally, implementing the archaeology of knowledge may lend itself to hypostatize the concept of discourse. An interesting example will be discussed in a later section, where Robert Williams interprets Vitoria and other natural lawyers as puppets who repeat the same totalizing, hierarchical, repressive and exclusive phrases in a Western legal discourse (see II, 5).

Much of what has been criticized in Foucault applies to Pocock's contextualism. He notes a change in intellectual history 'away from emphasizing history of thought (and even more sharply, "of ideas") toward emphasizing something rather different, for which "history of speech" or "history of discourse," although neither of them unproblematic or irreproachable, may be the best terminology so far found'.[56] As with Foucault and the post-structuralists, the emphasis is on discursive practices rather than on an author's creativity. In fact, Pocock leaves little room for such a concept, as language functions 'paradigmatically to prescribe what [the author] might say and how he might say it'.[57] Linguistic structures, forms of discourse, or paradigms

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55 Poster, 'Future', p. 152.

56 John Pocock, 'State of the Art', in *Virtue, Commerce, and History* (Cambridge: Cambridge University Press, 1985), pp. 1–34, the quotation p. 2. Hartmut Rosa, 'Ideengeschichte und Gesellschaftstheorie: Der Beitrag der "Cambridge School" zur Metatheorie', *Politische Vierteljahresschrift*, 35 (1994), pp. 197–223 focuses on Pocock as well as Skinner. My account is indebted to Bevir, *Logic*, pp. 34f., 'The errors of linguistic contextualism', *History and Theory*, 31 (1992), pp. 276–98, and 'Mind and Method in the History of Ideas', *History and Theory*, 36 (1997), pp. 167–89.

57 John Pocock, 'Languages and Their Implications: The Transformation of the Study of Political Thought', in *Politics, Language and Time* (London: Methuen, 1972), pp. 3–41, the quotation p. 25. See also his 'The History of political Thought: a methodological Enquiry', in Peter Laslett and W. Runciman (eds), *Philosophy, Politics and Society. Second Series* (Oxford: Basil Blackwell, 1962), pp. 183–202.

determine both the content and the form of utterances. A paradigm structures the way someone will act, speak, or think. In short, contextualism claims that historical meaning derives from linguistic structures, because they fix what authors may say. As in Foucault, this approach is not without problems. There is a difference between influence and determinism. Linguistic structures most certainly influence ideas or thought, but they do not inevitably determine them. Any belief in a necessary causal relationship between them amounts to dogmatism. Everyday experience shows that our way of using words is a creative act and not decided by their social meanings: 'The content of our mind and speech derives from our individual reasoning within a social context, not from the social context itself. A language provides us with words, but we use these words creatively to express our own beliefs.'[58] It makes more sense to assume an interplay between social contexts and the creative mind rather than a one-way causal relationship. As a consequence, attention should be shifted from languages to beliefs. In addition, there are differences between hermeneutic and semantic meanings. The latter, for instance, are abstract and general, the former concrete and specific.[59] This establishes a relative autonomy of hermeneutics, because the hermeneutic meaning of a proposition does not depend on its linguistic context the way semantic meaning does. More generally, any appeal to *the* context is problematic, as it may get hypostatized like the discursive formations. Complex texts usually have a set of contexts whose relationship is unclear.[60]

Quentin Skinner's main work, *The Foundations of Modern Political Thought* (1978), emphasizes the history of ideologies, social conventions and linguistic contexts, and focuses on neglected minor authors rather than the 'classic texts'. This is supposed to help us to understand them better. If John Locke does not appeal to the ancient English constitution in his *Two Treatises of Government*, then only the general context within which the text was written can help us to understand Locke's intention, Skinner claims.[61] We should try to recover an author's intention by first sketching the 'wider *linguistic* context' as

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58 Bevir, 'Mind and Method', p. 171.

59 The classic text on hermeneutics is Hans-Georg Gadamer, *Truth and Method* (New York: The Seabury Press, 1975). See also Georgia Warnke, *Gadamer, Hermeneutics, Tradition and Reason* (Cambridge: Polity Press, 1987), Bevir, *Logic*, pp. 37–40, and Stanford, *Philosophy*, pp. 192–200.

60 Bevir, *Logic*, pp. 38–40 and 'Mind and Method', p. 172; LaCapra, 'Intellectual History', pp. 57 and 70.

61 Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols (Cambridge: Cambridge University Press, 1978), vol. 1, pp. xi–xv. His methodological articles are included in James Tully (ed.), *Meaning and Context: Quentin Skinner and His Critics* (Cambridge: Polity Press, 1988), above all, 'Meaning and Understanding in the History of Ideas' [1969], pp. 29–67.

'the whole range of communications which could have been conventionally performed on the given occasion by the utterance of the given utterance'. In a second step, this context is related to the utterance in order to decode 'the actual intentions of the given writer'.[62] The way an author expresses his or her intentions is dependent upon established conventional meanings. If we want to understand an utterance, Skinner contends, we have to grasp the words' meaning as well as the intended illocutionary force. This is the point of an utterance. For instance, when doctors tell their patients that 'smoking is dangerous', their illocutionary intention might be to warn them. For Skinner, the contextualist method is required because we can only grasp an illocutionary intention if we have preceding knowledge of the pertinent social conventions. As in Foucault and Pocock, the figure of the author is left in 'extremely poor health'. We cannot dispose of it because we must account for challenges and subversions of conventions, but most of the time authors 'seem mere precipitates of their contexts'.[63] Again, we can argue that questions of hermeneutics are different from questions of linguistics. Linguistic meanings cannot fix hermeneutic meanings. The necessary and sufficient conditions of language are not identical with the conditions of communication on a certain occasion. Language presupposes existing social conventions, but this does not imply that authors always must obey or follow them. Again, there is some room for authorial creativity and spontaneity. Finally, it is no doubt legitimate to study texts as linguistic actions or illocutionary intentions. There is no reason, however, why we should not also study texts as expressions of hermeneutic meaning understood as individual viewpoints or expressed beliefs. When doctors talk about smoking, we may want to know whether they are issuing a warning, but we might also be interested in why they think smoking is dangerous. The resulting type of intellectual history would be distinct from the approaches discussed so far, and focus on a reconstruction of an individual's beliefs as a reasonably consistent web.

We are now in a position to draw some conclusions regarding methodology. Foucault, Pocock and Skinner all believe in one correct method. Skinner, for instance, holds that we have to study the linguistic context if we want to

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62 Skinner, 'Meaning and Understanding', pp. 63f. Again, my account is much indebted to Bevir, *Logic*, pp. 40–7 and 'Mind and Method', pp. 173–6. See also Preston King, 'Historical Contextualism: The new Historicism?', *History of European Ideas*, 21 (1995), pp. 209–33 and Lottes, 'Stand und Perspektiven', pp. 39–41. Pocock and Skinner are compared in Melvin Richter, 'Zur Rekonstruktion der Geschichte der politischen Sprachen', in Hans Erich Bödeker and Ernst Hinrichs (eds), *Alteuropa – Ancien Régime – Frühe Neuzeit* (Stuttgart: Frommann-Holzboog, 1991), pp. 145–63.

63 Skinner, 'A Reply to my Critics', in *Meaning and Context*, pp. 231–88, here p. 276.

understand a text: '[I]f we succeed in identifying this [linguistic] context with sufficient accuracy, we can eventually hope to read off what the speaker or writer in whom we are interested was doing in saying what he or she said.'[64] Postmodernism, however, which moves beyond attitude III and its concern with a coherent common method, suggests that we should not assume that there is one single legitimate methodology. The usefulness of method is limited, because it does not guarantee success. A correct method is neither a necessary nor a sufficient prerequisite of understanding utterances or texts, and thus of good intellectual history. We might start with a correct prior theory and wind up with wrong conclusions, or conversely, we start with an inaccurate prior theory and end up with adequate results. Consider Hans Medick's *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft* (1973), which follows the methodology of social history predominant in the 1960s and 1970s.[65] Nowadays we might consider this approach old-fashioned, inadequate and perhaps downright faulty. But there is little point in denying that the book is still an indispensable work of reference for anyone who deals with the natural lawyers, especially Pufendorf (see ch. IV). Robert Williams, on the other hand, tries to implement the more up-to-date methodology of Foucault, but to my mind winds up with mistaken conclusions. The reason why there cannot be a logic of discovery for intellectual history lies in the fact that we exercise our creative linguistic faculty in ways that cannot be predicted.[66] Skinner, for instance, assumes in the statement quoted above that the linguistic context leads us to the proper hermeneutic meaning of texts. However, hermeneutic meanings cannot be reduced to linguistic meanings. This is not an argument 'against method' in principle. Methods may be useful, and responsible historians will employ them. But they do not have to believe in the superiority or necessity of one specific method.

The kind of intellectual history I want to elaborate here has already been characterized as reconstructing an individual's beliefs as a reasonably consistent web. This is Mark Bevir's approach, especially in *The Logic of the History of Ideas* (1999). According to Bevir, intellectual historians should above all study hermeneutic meanings, which derive from the intentions of an author and are irreducible. As indicated above, these meanings are not identical with semantic or linguistic meanings. They are the result of the creative activity of individuals in the first place, not the product of social conventions, linguistic

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64 Skinner, 'A Reply to my Critics', p. 275.

65 Hans Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft. Die Ursprünge der bürgerlichen Sozialtheorie als Geschichtsphilosophie und Sozialwissenschaft bei Samuel Pufendorf, John Locke und Adam Smith* [1973], 2 Aufl. (Göttingen: Vandenhoeck & Ruprecht, 1981) and Lottes, 'State of the Art', pp. 29–32.

66 Megill, 'Grand Narrative', pp. 168f. and Bevir, *Logic*, pp. 80–9.

contexts, or forms of discourse (these are the indispensable background influencing, but not determining linguistic creativity). We study texts 'in order to recover hermeneutic meanings understood as expressions of belief'.[67] Philosophically, the proper attitude is to reject both atomistic individualism and determinism, and develop a concept of weak intentionalism and procedural individualism. Weak intentionalism holds that the meaning of a work derives from an author's individual viewpoint rather than her or his conscious, prior purposes (the thesis of strong intentionalism). Individual viewpoints consist of expressed beliefs. Procedural individualism, distinct from atomistic or methodological individualism, endorses the assumption that 'historical meanings are always meanings for specific individuals.'[68]

Intellectual historians should presume that beliefs are sincere, conscious and rational, unless historical research urges us to reject this initial assumption. In particular, rational belief is defined in terms of inner consistency or coherence. This thin concept of rationality avoids the two dangers of ethnocentrism or logocentrism and relativism. As our focus is on beliefs rather than dispositions or certain types of rationality such as instrumental reason, and we try to make sense of these beliefs by constructing them into coherent webs, we do not claim that one set of beliefs, say that of the secularized Hume, is more rational or logical than that of the Christian theologian Vitoria. We can avoid relativism by rejecting the thesis of incommensurability, following a strategy employed above (see I, 2 and the section on 'presentism' below). Consistency requires intelligibility: 'The anthropological practice of showing other beliefs to be rational in their own terms presupposes that they possess some features in common with ours.'[69] For instance, I might argue that Vitoria's theological world-view is so distant and alien to us that it can only be understood in its own terms. I would then proceed to provide an account or interpretation of his world-view or web of belief that showed its internal consistency, but also its incompatibility with our modern or postmodern webs of belief. Unless Vitoria's world was to some extent intelligible, I would be unable to make myself understood with my account among contemporary readers. We need a norm of consistency if we want to attribute beliefs to people.

Intellectual historians do not need the tools of the natural sciences to discuss aspects of mind. Folk psychology, a cluster of concepts such as belief, fear,

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67 Bevir, *Logic*, p. 28. What I present here are the key theses of this book, especially chapters 1–4.

68 Ibid., p. 54.

69 Ibid., p. 169. The priority of sincerity, of the conscious, and the rational is discussed ibid., pp. 142–71. The notion of our beliefs forming coherent webs goes back to Willard van Quine and J. S. Ullian, *The Web of Belief* (New York: Random House, 1970).

desire, or other human attitudes, does the job.[70] The grammar of folk psychology allows us to presume that people's beliefs are coherent (even though they may in fact sometimes be inconsistent), and this implies that the process of interpretation should be governed by a norm of coherence. We also assume that people do not change their mind unless they have reason to do so, for instance when new evidence is taken into account. We should thus presume the stability of beliefs over time, and, as intellectual historians, concern ourselves with the coherence of texts and the stability of beliefs in their authors.[71] We will see that all the interpretations offered in this study follow this double presumption of coherence or consistency and stability. Some examples might be useful. In Vitoria, the key problem of interpretation is whether he ultimately condemned or condoned Spanish conquest. In Grotius, it is the tension between the norms of natural law on the one hand, and customary law, implicit or explicit consent, and history on the other. In Pufendorf and Wolff, it is above all a conflict between the rights of sovereign states and those of the international community. Rousseau seems to endorse both nationalism and cosmopolitanism at the same time. Interpreters must find out whether Kant endorses a federation of states or a world republic (I can only present here rough and somewhat misleading outlines). In all cases, I presume a coherent web of beliefs on the side of the authors.

So far we have focused on hermeneutic meaning and the process of understanding a given text. In addition, we can also link beliefs to wider webs of belief, and explain beliefs by relating them to intellectual traditions and dilemmas. On this second level, an explanation is offered why a text has a certain meaning. The difference to the contextualists lies in the fact that we use traditions in order to *explain* a text, whereas contextualists rely on paradigms or discoursive practices in order to *understand* them. However, the hermeneutic meaning of a text can be grasped without any knowledge of the relevant webs of belief or traditions. Synchronic explanation attempts to 'present a web of beliefs as rational by relating it to the tradition from which it arose'.[72] As deterministic explanations are mistaken and we have good reasons to assume the possibility of agency, we should avoid the extremes of strong structuralism, but also of atomistic individualism, give due weight to both agency and social

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70 On the sufficiency of folk psychology for our explanations see Lynne Rudder Baker, *Saving Belief: A Critique of Physicalism* (Princeton: Princeton University Press, 1987) and Bevir, *Logic*, pp. 178–85.

71 Bevir, 'Mind and Method', pp. 180–5. To avoid confusion, we must distinguish between ontological coherence (endorse by historians of attitudes one or two) and our focus here on logical coherence of webs of belief.

72 Bevir, *Logic*, p. 29. Chapters 5 and 6 are devoted to synchronic and diachronic explanations respectively.

structure, and show how they interact. Traditions are not prisons, but rather initial influences on authors, and they should never be hypostatized. They are not faceless totalizing entities beyond human reach and determining our thinking, but powerful influences derived from and rooted in previous webs of beliefs endorsed by people against the background of earlier traditions. We thus arrive at the idea of 'a cycle of inherited traditions and individuals who hold beliefs'.[73] For instance, we can show how the theologians of the Second Scholastic built upon the tradition established by Thomas Aquinas, Summenhart, and others, and tried to improve their theories (I, 5 and II, 2). The webs of belief of the Second Scholastic turned into a powerful tradition for Grotius, who took it as a starting point to develop a comprehensive theory of natural rights (III, 1), and so on. If we assumed that discourses are faceless objectivities, we could not account for change.

The diachronic form of explanation investigates the impact of dilemmas on webs of belief. A dilemma is a new belief or understanding which puts one's existing beliefs in question simply because it is accepted as true. This requires an author to modify, extend, or even reject his or her existing web of belief in order to accommodate or incorporate the newcomer. The process of change itself must remain open and creative. A fine example of the impact of dilemmas is Grotius's attempt to meet the challenge of the sixteenth-century scepticism of Montaigne and Charron. Grotius did not dismiss scepticism out of hand, but tried to accomodate it as authoritative into his existing web of belief, predominantly influenced by the natural law tradition (see III, 1). Perhaps the standard example of a dilemma in intellectual history is the challenge Hume posed for Kant when he was still imbued with Wolffian metaphysics. Later in this work, I illustrate how Kant dissociated himself from previous natural lawyers because he held that they had not given due weight to the moral principle that humans are only subject to laws they have given themselves and that they are bound only to act in conformity with their own will (VI, 1). Here we are confronted with the interesting question of whether Kant's attempt to incorporate the newcomer into his existing web of belief amounts to its modification, extension, or even rejection. As intellectual historians, we can try to establish conditional links between beliefs. We postulate them when we explain beliefs as rational or consistent. Conditional links are neither necessary, as in the scientific concept of causation, nor arbitrary.

It is now time to turn to the relationship between philosophy and history. This study follows an inter- or transdisciplinary approach. Interdisciplinary approaches have been endorsed in theory but rarely followed in practice. As one observer put it, 'We gesture vaguely in the direction of interdisciplinary

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[73] Ibid., p. 195.

cooperation, rather in the way sovereign states put in polite appearances at the United Nations; reality, however, falls far short of what we routinely promise.'[74] My study is a one-man joint venture between philosophy and history, resulting in a study in intellectual history. Historians who stick to attitude III will most likely argue against the approach presented here that 'this is philosophy, not history' (philosophers will argue the other way round). If we try to understand them from a historical perspective, we could say that their worries about the transgression of disciplinary boundaries touches their very self-understanding of the historical profession. I will approach this cluster of problems from three angles: the links between the two disciplines, postmodernism, and finally in terms of methodology.

My account of the contemporary controversy among representatives of various methodologies has shown that at least under current circumstances, historians cannot isolate themselves from philosophical issues. Debates about the proper place of the study of ideas rely on divergent philosophical background theories. For instance, it is obvious that Foucault's archaeology of knowledge is indebted to the French post-structuralists and the *Annales* School. His theme of decentering humans links him with Jacques Derrida, Jacques Lacan and Gilles Deleuze. Skinner follows John Austin's theory of speech acts and Wittgenstein's dictum that 'meaning is use', and so on.[75] We must concern ourselves with the logic of our discipline, where logic is understood as 'a normative account of the forms of justificatory and explanatory reasoning appropriate to a given discipline'.[76] If we investigate how intellectual historians should reason about historical data, and we are not concerned with the historical data themselves, our task is philosophical. The construction of the logic of a discipline, for instance by elucidating the grammar of our concepts, is a philosophical enterprise. Intellectual history without philosophy is blind.

We have seen that from a postmodern perspective one of the key features of modern historiography since Ranke is its disciplinization and departmentalization.[77] However, the presumption of a methodological unity typical of attitude III is biased against different modes of understanding or thinking. Institutional barriers and structures are also limits, which ought to be considered. There are arguments in favour of a partial de-disciplinization of history. The

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74 John Lewis Gaddis, 'History, Theory, and Common Ground', in *International Security*, 22 (1997), pp. 75–85, the quotation p. 75. This essay is part of a special issue 'History and Theory'.

75 Poster, 'Future', pp. 140–4 on Foucault and Gary Gutting, 'Post-Structuralism', in Edward Craig, *Routledge Encyclopedia of Philosophy* (London and New York: Routledge, 1998), vol. 7, pp. 596–600 for an introduction; Bevir, 'Mind and Method', p. 173 and *Logic*, pp. 135–7 on Skinner.

76 Bevir, *Logic*, p. 16. See ibid., pp. 2–16 for the following.

77 My account is indebted to Megill, 'Grand Narrative', pp. 163–70.

political scientists Mattei Dogan and Robert Pahre claim that 'hybridization' between disciplines, where mixed or hybrid modes coexist with disciplinarity, is an effective way to achieve new knowledge.[78] Thomas S. Kuhn's *The Structure of Scientific Revolutions* (1962) is the work of a physicist who became a historian of science and pursued insights from yet another discipline, the philosophy of science.[79] His impact on various disciplines was tremendous. Hayden White crossed boundaries between history, philosophy and literary science. For some colleagues, he turned into a traitor because he was understood as having blurred or denied the difference between history and fiction. As in Kuhn, his influence on the profession has been considerable, and whatever we think about his merits, White has certainly made us rethink our approach to the discipline.[80] Finally, Robin George Collingwood, often seen as the typical representative of attitude III, demonstrates its conceptual instability. In his *The Idea of History* (1946), he emphasized the autonomy of historiography in two respects. First, he claimed that coherence was located in the mind of the historian, who was autonomous in relation to the sources. In opposition to attitude II, Collingwood had abandoned the belief in the coherence of the past. Secondly, he asserted that historiography was autonomous in relation to other disciplines, equipped with its own rules and methodology.[81] In his *Autobiography* (1939), however, Collingwood undermined the discipline's autonomy in the second sense, arguing that his life's work 'has been in the main an attempt to bring about a *rapprochement* between philosophy and history'.[82] History should become philosophical, and present problems should be the concern of both disciplines. What consequences can we draw from all this? We should distinguish between questioning and denying boundaries. Boundaries do not have to be denied (rather, they are presupposed) when we cross them, become temporary residents in other disciplines, and enjoy their hospitality. Boundaries are not necessarily arbitrary, but especially as historians, we should not see them as absolute. They also have their historical origins. The

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78 Mattei Dogan and Robert Pahre, *Creative Marginality: Innovation at the Intersections of Social Sciences* (Boulder, CO: Westview Press, 1990) and Megill, 'Grand Narrative', p. 166.

79 Thomas S. Kuhn's *The Structure of Scientific Revolutions* [1962], 2nd edn (Chicago: University of Chicago Press, 1970) and Megill, 'Grand Narrative', p. 170.

80 Peter Burke, 'Metageschichte', passim and the publications on White mentioned above.

81 Robin George Collingwood, *The Idea of History* (Oxford: Oxford University Press, 1946), pp. 266–302, and the interpretations in Megill, 'Grand Narrative', pp. 162f. and the special issue 'Reassessing Collingwood', *History and Theory*, 29 (1990).

82 Robin George Collingwood, *An Autobiography* (Oxford: Oxford University Press, 1939), p. 77, quoted in Megill, 'Grand Narrative', 162f. See also Collingwood, *Autobiography*, pp. 59, 147–67, and *Idea of History*, pp. 246f.

'historical turn' should be taken to its logical conclusion. We should look for the rootedness of past *and our own* thinking in historicity. We should never forget that sooner rather than later, the next generations will historicize our disciplinary boundaries.

My third approach to the connections between philosophy and history is suggested by the type of methodology I have presented and defended: that the intellectual historian should reconstruct an individual's web of belief as sincere, conscious and consistent. If we focus on the conceptual links that connect the beliefs of an author, and if philosophy is the study of the grammar of our concepts, then our job is philosophical: '[T]he reconstruction of a coherent set of beliefs is in part a philosophical task because it relies on the identification of intelligible connections between the beliefs concerned.'[83] Intellectual history merges history with philosophy. This applies to the whole of the discipline. It does not make sense to presume coherence in the so-called great authors, but not in 'minor' ones. Pocock has argued for a division of labour between the philosophers, who are concerned with rational coherence, and the historians, who just reconstruct historically and are 'concerned with the relation between experience and thought, between the tradition of behaviour in a society and the abstraction from it of concepts'.[84] However, this dichotomy breaks down, because a reconstruction of webs of belief in the past must do so in terms of inner consistency. The distinction we can keep is that between understanding a text and its explanation (see above). We could argue that explanation is the proper task of the historian, especially its synchronic form which deals with traditions. But traditions must be related to webs of belief. Consider that we would not be satisfied with a long list of traditions that supposedly influenced an author. We also want to know what this author did with them. This brings us back to the coherence of beliefs.

I will turn now to another methodological postulate implicit in this study. Intellectual history is not only the reconstruction of the past in a documentary fashion, but can in addition be understood as a dialogue or conversation between past and present. There are several reasons to do this. For a start, a '*purely* documentary conception of historiography is itself a heuristic fiction', simply because there are no pure facts or pure descriptions.[85] The results of a

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[83] Bevir, 'Mind and Method', p. 186. Richard H. Popkin, 'Philosophy and the History of Philosophy', in *The Third Force in Seventeenth-Century Thought* (Leiden et al.: Brill, 1992), pp. 325–32 argues that properly considered, the distinction between the ahistorical doing of philosophy and the historical reflection on 'what has been done' breaks down.

[84] Pocock, 'The History of Political Thought', p. 190. The distinction is criticized by Bevir, 'Mind', p. 186.

[85] LaCapra, 'Rethinking Intellectual History', p. 78. The 'dialogical approach' presented here is his idea, cf. ibid., pp. 78–81.

documentary approach may be extremely limited. If we want it or not, we are 'always already' engaged in a dialogue with the past the moment we start thinking or writing about it – there are neither pure facts nor are we atomistic individuals. It is apparently impossible to avoid that at least some of our present concerns enter into our descriptions of the past. Why not start a conversation openly and consciously, and in a self-reflective manner? This might allow us to keep one of the most important, if not *the* most important, context of understanding and explaining texts in mind: our own.

A dialogical relationship with the past in intellectual history is not necessarily 'presentist'. The following may help to support this claim. A number of meanings are associated with the term 'presentism'.[86] Presentism in the literature about utopias means the idealization of the present. It is analogous to Butterfield's 'Whig interpretation of history' and amounts to the fallacy of bringing current assumptions and expectations to bear upon a historical context far removed from the present. Present and often limited interests are imposed onto a situation in the past. The Whig historian, as Butterfield described him, hunts for the present in the past, 'studies the past with reference to the present', tries to find similarities rather than differences, constructs and invents a great narrative of linear progress, divides the world into followers and opponents of this progress while providing a caricature of the latter. Instead of making the past his present, he makes direct references across the ages and centuries. He is selective and assumes a false continuity, believes in great watersheds like the Reformation and in 'ultimate consequences' and clear causal connections instead of acknowledging the complexity of change.[87] Presentism in history presumes a direct causal lineage from the past to the present and studies only

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[86] Apart from Butterfield, see Adrian Wilson and T. G. Ashplant, 'Whig History and Present-Centred History', *The Historical Journal*, 31 (1988), pp. 1–16, T. G. Ashplant and Adrian Wilson, 'Present-Centred History and the Problem of Historical Knowledge', *The Historical Journal*, 31 (1988), pp. 253–275; David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York: Harper & Row, 1970); Gary L. Hardcastle, 'Presentism and the Indeterminacy of Translation', *Studies in the History and Philosophy of Science*, 22 (1991), pp. 321–45; Thomas Bender (ed.), *The Antislavery debate: capitalism and abolitionism as a problem in historical interpretation* (Berkeley: University of California Press, 1992), David Hull, 'In Defense of Presentism', *History and Theory*, 18 (1979), pp. 1–15, Johnathan L. Kranwig, 'Robert Adams on Actualism and Presentism', *Philosophy and Phenomenological Research*, 50 (1989), pp. 89–98; and Novick, *Noble Dream*.

[87] Herbert Butterfield, *The Whig Interpretation of History* [1931] (New York, London: Norton & Company, 1965), passim. The quotations are from p. 11. See also Peter Ghosh, 'Whig Interpretation of History', in Boyd, *Encylopedia*, vol. 2, pp. 1293–4 with more literature. Important presentists on the American scene (where presentism mainly developed) were Carl Becker, Charles Beard (mentioned at the beginning of the section) and John Dewey.

those components of the past which are applicable to or reflect present concerns. One type of presentism views the past in light of current opinion and perceived development, while the other regards the past and the present in terms of a search for ahistorical universals evidently illustrated by historical data. For Butterfield, Lord Acton is the symbol of the Whig historian. Claiming to be impartial, objective and merely rendering 'what happened', he did not see how he failed on all counts.

The criticism of presentism can in turn be criticized by challenging its own assumptions. Arguing that the 'hunt for the present in the past' is a fallacy presupposes that present and past are far removed from each other. There is no doubt that the historian's major task is to investigate change, and that the unlikeness of the past should be the starting point. But this does not exclude the possibility of some similarities. The dilemma can also be reformulated as: if temporally or spatially distant cultures are different, to what degree? This question links up with one contested hypothesis in the debate among ethical universalists, relativists, communitarians, and particularists: ideas and norms prevalent in different cultures are (not) incommensurable. I have also argued that a thin concept of rationality is plausible and avoids the two dangers of ethnocentrism or logocentrism and relativism (see I, 2 and above).

We do not have to remain on the level of abstract thinking here. Bernard Williams, for instance, points out in *Shame and Necessity* (1993) that we often simply assume that the Greeks are different, and we apply methods of cultural anthropology.[88] To some extent, Williams argues, their moral ideas were different from our own, in other respects, however, 'we rely on much the same conceptions as the Greeks.' My point is that we should not dismiss any approach that stresses similarities among cultures and epochs simply as anachronistic presentism or ahistorical, arbitrary universalism. I argue in favour of a more complex, differentiated picture, which moves beyond the binary juxtaposition of universalism versus relativism, presentism versus historicism. The dialogical approach endorsed here does not impose current interests, conceptions, concerns or ideologies on the past. Dialogue is by definition a two-way affair, and historians can also be good and attentive listeners.[89] Even if we are interested in a conversation with the past, we do not have to commit fallacies like constructing great narratives or false continuities, and assuming direct causal connections, provided that we reflect upon what we are doing.

The problem of moral judgements in history can also lead us into simple

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88 Bernard Williams, *Shame and Necessity* (Berkeley et al.: University of California Press, 1993), pp. 1ff. The following quotations ibid., p. 2, p. 4.

89 LaCapra, 'Rethinking Intellectual History', p. 80; King, 'Historical Contextualism', pp. 230–2.

dichotomies. We may juxtapose the Whiggish tendency to pass godlike verdicts with the opposite conviction that events and characters must be seen 'value-free' in their context, creating a historical world 'where everything is understood and all sins are forgiven'.[90] Whig historians, exemplified by Lord Acton and his inaugural lecture at the University of Cambridge (1895), pass judgement on the people of the past, based on their own values and a belief in ultimate consequences. They become a hung jury: Does not the passing of judgement assume that the present is morally more advanced than the past, and close enough in moral matters to be fit being judged? Is not the belief in ultimate consequences, say, of Columbus's voyages, mistaken? Do we judge European expansion and colonialism by the standards of our day or should we try to understand these phenomena by the standards of their time (a process which raises the question whether we can know what those standards were)? The problem could also be reformulated, not in terms of time, but in terms of space. If someone from the Euro-American world were to absolutize her or his own assumptions and judge Asian or African societies by those standards or presume to impose them, critics would quickly come up with the accusation of cultural provincialism, ethnocentrism, or cultural imperialism. Presentism in moral matters thus leads us back to the problem of normative and cultural relativism. The next section will try to offer a tentative solution. One suitable starting point has been touched upon in this section, a thin concept of rationality as inner consistency or coherence. In this respect, I have to admit that my approach is presentist: yes, we search for ahistorical universals.

4. *Iustitia*: Moral minimalism and political justice

In the previous two sections, I have outlined the open-ended running battles between various camps such as objectivists and perspectivists, universalists and relativists. A sceptical observer might conclude that the debates are dead-end roads. In this section, I argue in favour of a thin conception of political justice and a corresponding theory of moral minimalism as ways out of the deadlock. One way to overcome the impasse between universalist and relativist positions is a down-to-earth pragmatic approach. In this line of reasoning, we first point at our modern world of increasing economic, social and political

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[90] Butterfield, *Whig Interpretation*, p. 3. For a debate on judgments related to Spanish conquest, see James Muldoon, *The Americas in the Spanish World Order. The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994), pp. 3–4, and John Emmerich Acton, 'Inaugural Lecture on the Study of History' [1895], in *Lectures on Modern History* (London: Collins, 1960), p. 38 on the following.

globalization. We show that actions taken in one state or continent often have transnational impacts. We quote Brzezinski, who wrote as early as 1970 that '[t]ime and space have become so compressed that global politics manifest a tendency toward larger, more interwoven forms of cooperation as well as toward the dissolution of established institutional and ideological loyalties.'[91] The world moves in a certain direction; we have to follow suit and adapt our moral concepts to these changes. Some cosmopolitan thinkers quickly jump to a convenient conclusion. 'The idea of cosmopolitan theory, therefore, is one whose time has come.'[92] This kind of reasoning certainly appeals to many people. Moral philosophers will point out that it is based on the is-ought fallacy, as it illicitly infers an 'ought' from an 'is'.[93] But pragmatists do not worry about that. Another problem of this approach is that our interpretation of the current global situation is not as simple as it seems. Brzezinski, in the passage just quoted, also writes: 'The paradox of our time is that humanity is becoming simultaneously more unified and more fragmented.' For many, phenomena like the rise of nationalism and religious fundamentalism support this thesis. Our current global situation seems to be fraught with paradoxes, the smooth picture presented in the second section an oversimplification. We get various interpretations of it which are, to some extent, all convincing (and sometimes overlapping): Francis Fukuyama's enthusiasm about the victory of liberal democracy, shared by many defenders of the democratic peace proposition; Samuel Huntington's new paradigm of a clash of civilizations; Brzezinski's and Moynihan's grim picture of a world in anarchy, of failed states, medieval tribalism and the spread of international terrorism, or the reminder that economic globalization has been overrated, and that most multi-national corporations (MNCs) are firmly rooted in their home economies.[94] To put the

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91 Zbigniew Brzezinski, *Between Two Ages: America's Role in the Technetronic Era* (New York: Viking Press, 1970), p. 3.

92 Michael Freeman, 'Nation states and minority rights: A cosmopolitan perspective', in Moorhead Wright (ed.), *Morality and International Relations. Concepts and Issues* (Aldershot et al.: Avebury, 1996), p. 37.

93 David Hume's reflections on the fact–value distinction should not be confused with George E. Moore's naturalistic fallacy, the attempt to give normative concepts an empirical foundation in terms of pleasure or pain. See below, V, 3.

94 Francis Fukuyama, *The End of History and the Last Man* (Harmondsworth: Penguin, 1992); Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1997); Zbigniew Brzezinski, *Out of Control: Global Turmoil on the Eve of the Twenty-first Century* (New York: Scribner, 1993); Daniel Patrick Moynihan, *Pandaemonium: Ethnicity in International Politics* (Oxford: Oxford University Press, 1993); Paul N. Doremus, William W. Keller, Louis W. Pauly and Simon Reich, *The Myth of the Global Corporation* (Princeton: Princeton University Press, 1998); Ian Clark, *Globalization and Fragmentation: International Relations in the Twentieth Century* (Oxford: Oxford University Press, 1997). Howard

matter in a nutshell, the pragmatic argument from empirical evidence may work in everyday practice, but is philosophically unconvincing.

Common-sense morality may be a good and perhaps the only starting point. There is common-sense practical knowledge that one is obliged to keep one's promise; that laws should be enforced equally and impartially; that no one should be arrested arbitrarily; that those who are in danger should be helped. In the face of worldwide suffering, relativism 'might appear morally callous, humanely indifferent and politically pernicious'.[95] Most people would trust their moral intuitions and argue that totalitarian systems or some social structures in traditional societies are unjust. Problems arise when moral philosophers try to conceive the abstract principle underlying such judgements, or corresponding obligations, duties, or rights.[96] The cultural relativist/particularist would argue that intuitions are just that, moral scruples expressing feelings rather than moral principles of cross-cultural validity.

But matters are not that simple. I hope to illustrate this with the following examples. Consider first Brian Barry's case of personal impartiality in the relationship between parents and children.[97] Though some parents may prefer one child over another, they usually try to avoid favouritism, which is seen as unfair. Impartiality does not have to be applied rigidly or mechanically. Treating one's children as equals allows for some latitude, taking differences in personality or situations into consideration. As Barry puts it, 'impartiality can set certain constraints on conduct while leaving choice open in other directions.'[98] Impartiality may mean different things in different periods. Victorian upper-class parents apparently felt that they treated their children equally when sending the boys to public schools and university while providing the conditions for a 'good marriage' for their daughters. The methods for providing a future for one's children have changed in this respect, but the standard itself has arguably remained the same. Upper-class parents denying their daughters a university education in today's Britain while granting it to

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Williams, Gwyn Matthews and David Sullivan, *Francis Fukuyama and The End of History* (Cardiff: University of Wales Press, 1997) is a reliable analysis of Fukuyama's theory and its international ramifications. Michael E. Brown, Sean M. Lynn-Jones and Steven E. Miller (eds), *Debating the Democratic Peace. An International Security Reader* (Cambridge, MA: MIT Press, 1997) prints essays for and against the democratic peace proposition.

95 Benhabib, 'Complexity', p. 236.

96 Mary J. Gregor, 'Kant on "Natural Rights" ', in Ronald Beiner and William James Booth (eds), *Kant and Political Philosophy. The Contemporary Legacy* (New Haven and London: Yale University Press 1993), p. 52.

97 Brian Barry, *Justice as Impartiality. A Treatise on Social Justice Volume II* (Oxford: Clarendon Press, 1995), pp. 13–9.

98 Ibid., p. 17.

their sons would expose themselves to the charge of violating impartiality. Along these lines, impartiality as a significant aspect of procedural justice is expected from teachers, judges, or bureaucrats.

There are more examples which illustrate common-sense morality. During the 'magnificent year' 1989, people in Prague demonstrated against their Communist government. Some of their signs simply said 'Truth' or 'Justice', and most people all over the world identified with them.[99] We can assume that the demonstrators endorsed different conceptions of the just state, either more libertarian or interventionist, for instance. The same applies to the spectators around the world. Yet we can also argue that they all shared a minimalist or thin conception of justice. It is expressed, for instance, in the moral conviction that political despotism, arbitrary arrests and selective law enforcements are unjust.

The Sarajevo marketplace massacre in February 1994, a mortar bomb attack on civilians, is another incident when 'world opinion' was unanimous – condemning the attack as an 'atrocity', as 'cruelty, not to be condoned', or as a 'war crime'.[100] The unanimous moral outrage covered only the mortar attack itself; opinions were divided on what to do next, how to identify and punish the guilty. Moral consensus was universal in the sense that not even the Serbian side (the presumptive culprit) was willing to 'take responsibility'. They quickly came up with the story that the Muslim-Croat side had killed their own people in order to damage the Serbian reputation in the international arena.[101] This sounds a bit too fanciful for most of us. However, it is a matter that does not primarily concern us here. The interesting moral phenomenon is that all sides, both activists and spectators, held that civilians or non-combatants are off-limits. A limited form of ethical universalism, or thin concept of justice, corresponds with our moral intuitions of average justice. One of the goals of this study is the search for this structure in the past. A brief example must suffice here (others will follow): during the Colonial Conference between England and the United Provinces in 1613, Grotius's political antagonists

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99 This is the example of Michael Walzer, *Thick and Thin. Moral Argument at Home and Abroad* (Notre Dame and London: University of Notre Dame Press, 1994), pp. 1ff. See also 'Zwei Arten des Universalismus', in *Babylon. Beiträge zur jüdischen Gegenwart*, 7 (1990), pp. 7–25. The thin/thick dichotomy is borrowed from Geertz, *The Interpretation of Cultures*, ch. 1.

100 Those are quotations from British quality papers mentioned in Frost, *Ethics*, pp. 197f.

101 Laura Silber and Allan Little, *The Death of Yugoslavia* (New York: Penguin Books, 1995), pp. 343–5; See also Steven L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina. Ethnic Conflict and International Intervention* (Armonk, NY: M. E. Sharpe, 1998), and Susan L. Woodward, *Balkan tragedy: chaos and dissolution after the Cold War* (Washington, DC: Brookings Institution, 1995) for background information on the war.

wrote some very rude comments on the margin of his quite convincing legal exposition. The English held that the Dutch had actually forced the natives to sign contracts, and had 'defended' these oppressed people 'against their wills'. Moreover, the Dutch were accused of selling their merchandise at unreasonable prices. The comments concluded with the generic accusation: 'Neither have these nations been more distressed by the Spaniards then they are nowe by Hollanders as wee are informed.'[102] We can approach this text in different ways. For instance, we could argue that the English employed the rhetoric of morals for political purposes. There is no reason to deny that this may have been their intention. We could embark on a historical investigation whether these accusations were justified. However, it is also clear that the moral condemnation of Dutch colonial practices appeals to standards of justice: by implication, it is held that contracts should be signed freely, and that the consent of those involved is required if certain actions are taken.

The contemporary debate about relativism and universalism can be understood as a dispute about thin and thick concepts of justice. Few would argue that not even a thin concept of justice is universal. Most of us disagree about our thick conceptions of justice. One example is distributive justice. Walzer points out that it is relative to social meanings.[103] He illustrates this thesis with the difference between medieval and modern European society. Medieval Christendom attached extreme importance to the cure of souls and the social good of eternal life. Ways of repentance and salvation were made accessible for all members of society, irrespective of status or wealth. The requirements of thin justice (as equality or impartiality) were met in this respect. The cure of bodies was seen as less important, left in private hands, and allowed for considerable inequalities. In modern European societies, this relationship has been turned upside down. Religion and concerns for salvation have become a matter of privacy, whereas health and longevity have turned into increasingly valuable goods. The state has taken over the cure of the bodies. Distributive justice is a thick concept, because it is relative to social meanings, cultural understandings and metaphysical convictions. It would be anachronistic and a criticism based on cultural prejudices 'to wag our finger at medieval Christians, insisting that they *should have had* our understanding of life and death'.[104] Another interesting example is Vitoria's reasoning about self-defence (see also

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102 The conference is reported by G. N. Clark and W. J. M. van Eysinga, 'The Colonial Conferences between England and The Netherlands in 1613 and 1615', *Bibliotheca Visseriana*, 17 (1951), here p. 73. See also beginning of IV, 7.

103 Walzer, *Thick and Thin*, pp. 26ff., where he addresses some of the criticism related to this thesis; *Spheres of Justice. A Defense of Pluralism and Equality* (New York: Basic Books, 1983), ch. 1.

104 Walzer, *Thick and Thin*, p. 30.

II, 4). As a natural law theorist, he holds that any individual has a (permissive) right of self-defence in case of an attack. This might involve killing the attacker. But the Christian theologian Vitoria adds that it may be the work of moral perfection not to resist and get killed, because it gives the criminal the opportunity to repent his or her sins. Concern for the criminal's soul (thick justice) overrides considerations of thin justice.[105] That's where cultural pluralism comes in: we must allow for different forms of thick conceptions of justice, because we know that they are relative.

Support for Walzer's thesis that the concept of thin justice repeats itself in history comes from Aristotle. In the *Nicomachean Ethics*, he makes a distinction reminiscent of Walzer between conventions and natural justice, arguing that 'there is something that is just even by nature.'[106] This would mean that justice is partly natural ('absolute'), partly conventional ('relative'). As a consequence, we arrive at the position of qualified universalism: there are core universal moral principles, but also a 'grey zone' of relative norms in applying these principles. There is a sphere of legitimate moral disagreement, both individually and culturally or historically. We may disagree, for instance, in our evaluation of possible consequences when assessing a situation. A standard postmodern argument against the distinction between natural and conventional justice is the claim that it reflects Western modes of thinking in binary oppositions, that under close scrutiny the distinction itself breaks down. But the claim that binary thinking is exclusively Western is debatable. If it is, the criticism itself would be useless, as it is itself based on binary oppositions between Western and non-Western cultures. So we get into a circle and not very far again. Doubtless the distinction is problematic. We only get thin justice embedded in thick concepts, and the task of separating the two will remain a matter of dispute.

If we move from common or garden- variety justice to a philosophical theory of political justice, there are at least three major contestants in Western thought, revolving around the thinking of Aristotle, Kant and Hegel. Constitutive theory has been developed by Mervyn Frost and Chris Brown and is influenced by Hegelian concepts. It is the attempt to develop a coherent communitarian account of the individual as he or she is constituted by family, civil society and

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105 Francisco de Vitoria, 'De homicidio,' 24, in *Vorlesungen I (Relectiones). Völkerrecht, Politik, Kirche*, ed. Ulrich Horst, Heinz-Gerhard Justenhoven, and Joachim Stüben (Stuttgart, Berlin, Köln: Kohlhammer, 1995), pp. 484–7 and the discussion in Justenhoven, Heinz-Gerhard, *Francisco de Vitoria zu Krieg und Frieden* (Köln: Bachem Verlag, 1991), pp. 32–5.

106 Aristotle, *The Nicomachean Ethics*, transl. with an introduction by Sir David Ross (London: Oxford University Press, 1971), V, vii, 1334b29–30 (p. 124). For the following, see Nunner-Winkler, 'Moralischer Universalismus', pp. 80–91.

the state. Frost and Brown side with Hegelian *Sittlichkeit* as opposed to, or rather distinguished from, Kantian *Moralität*. *Sittlichkeit* (ethical life) is the body of social practices used as ethical principles by members of a certain community.[107] Kantian morality, by contrast, is said to rely on abstract, formal and universal moral principles. Hegel claims that in competitive civil society (here he builds upon Smith and others, see V, 1) the atomized individual feels alienated, because it experiences others as alien. The state is supposed to resolve this tension. There, citizens mutually recognize each other and fully actualize their individuality. Critics point out that constitutive theory, as an attempt to improve on communitarian positions with the help of Hegel, does not succeed. It cannot explain how we arrive at, let alone how we can justify, principles such as reciprocity, mutual recognition, or a settled body of rules in international law.

Martha Nussbaum, major proponent of the second tradition, has tried to develop a coherent system of distributive justice based on the 'capabilities' approach. The exercise of capabilities, the potentials to achieve a certain functioning, relies on effective institutions and on individual capacities such as talents and physical abilities. Nussbaum has outlined a 'thick vague conception' of a human being.[108] These functional capabilities specify vaguely what is constitutive of human life. It is the basis of an account of good human functioning. The task of social arrangements is to provide citizens with the material and institutional circumstances in which this functioning may be chosen. The main problem of Nussbaum's neo-Aristotelian ethics lies in the

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107 Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, transl. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), paras. 142–57 (pp. 189–98). Constitutive theory is developed in Mervyn Frost, *Ethics in international relations. A constitutive theory* (Cambridge: Cambridge University Press, 1996), especially chs. 4 and 5 (pp. 104–59), and Chris Brown, 'The ethics of political restructuring in Europe – The perspective of constitutive theory', in *Political Restructuring in Europe: Ethical Perspectives* (London and New York: Routledge, 1994), pp. 163–84.

108 Martha Nussbaum, 'Aristotelian Social Democracy', in R. Bruce Douglass, Gerald M. Mara and Henry S. Richardson (eds), *Liberalism and the Good* (New York: Routledge, 1990), pp. 205, 219–26, and 'Non-Relative Virtues: An Aristotelian Approach', in Martha C. Nussbaum and Amartya Sen (eds), *The Quality of Life* (Oxford: Clarendon Press, 1993), pp. 242–69. See also Amartya Sen, 'Capability and Well-Being', ibid., pp. 30–53 and the following commentary by Christine M. Korsgaard; Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon Press, 1981); Jean Dréze and Amartya Sen, *Hunger and Public Action* (Oxford: Clarendon Press, 1989); Nussbaum and Glover (eds), *Women, Culture, and Development*, especially pp. 61–115; 259–73; 360–95. On Nussbaum's understanding of Greek, particularly Aristotelian, philosophy and ethics, see Martha C. Nussbaum, *The therapy of desire: theory and practice in Hellenistic ethics* (Princeton: Princeton University Press, 1994).

transition from the specified human capabilities to rational insight into validity. What Seyla Benhabib, for instance, finds lacking is the space which 'allows one's understanding of the "human condition" in Aristotelian terms to be translated into actively generated moral insight on the part of human actors'.[109] In Humean terms, the is-ought gap has not been bridged. A second problem is the insistence on an objective Aristotelian account of the good human life. It faces at least two familiar types of criticism: the sceptic might point out that there may not be a best life and if there is, we cannot prove it. The sceptical historian, for instance, can argue that Aristotle's thick definition of the good life as contemplative is historically contingent, replaced by the concept of an 'active life' in modern times. Secondly, critics might claim that any thick definition undermines autonomy, and the proposition that a good life is characterized as 'being chosen and constructed by the person who lives it'.[110] The insistence on rational insight into validity leads us to Kant and Kantian approaches, such as those developed by Rawls, O'Neill, Barry, Höffe and Habermas.[111] Nussbaum's capabilities approach must be supplemented.

It is important to keep clear of misunderstandings, so my investigation starts

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109 Benhabib, 'Complexity', p. 255. See also the criticism of Onora O'Neill, 'Justice, Capabilities, and Vulnerabilities', in Nussbaum and Glover, *Women, Culture, and Development*, pp. 144f.

110 Christine M. Korsgaard, 'Commentary', in: Nussbaum and Sen, *Quality*, p. 56. Korsgaard calls it 'ethical individualism'. Nussbaum would probably reply that she specifies the conditions of autonomy.

111 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); *Political Liberalism* (New York: Columbia University Press, 1993). Onora O'Neill, *Towards Justice and Virtue. A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996) is her major recent work. See also *Constructions of Reason. Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1989). I have primarily used Barry's *Justice as Impartiality*. See also Brian Barry, *Democracy, Power and Justice: Essays in Political Theory* (Oxford: Clarendon Press, 1989); *Theories of Justice* (Hempstead: Harvester, 1989); *Liberty and Justice. Essays in Political Theory*, 2 vols (Oxford: Clarendon Press, 1991). The second volume contains an early version of justice as reciprocity (ch. 10) and two essays on international ethics and the compliance problem among states (chs. 8 and 9); with Robert E. Goodin (eds), *Free Movement: Ethical Issues in the Transnational Migration of People and of Money* (University Park, PA: Penn State Press, 1992). Otfried Höffe, *Political justice: foundations for a critical philosophy of law and the state*, transl. Jeffrey C. Cohen (Cambridge, UK and Cambridge, MA: Polity Press, 1995), is his main study. I have also used the German original version, *Politische Gerechtigkeit. Grundlegung einer kritischen Philosophie von Recht und Staat*, 2 Aufl. (Frankfurt am Main: Suhrkamp, 1994). See also his *Vernunft und Recht* (Frankfurt am Main: Suhrkamp, 1996), *Gerechtigkeit als Tausch? Zum politischen Projekt der Moderne* (Baden-Baden: Nomos, 1991); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1993); *The Philosophical Discourse of Modernity* (Cambridge: Polity Press, 1987).

with these and some vital differentiations. First, we must go beyond the modern empiricist view of action, where action is motivated by preferences. Pragmatic or instrumental reason chooses the most economic means to satisfy preferences and interests, or achieve a given end. This leads to a subjective account of the good which is in turn incapable of defining standards of justice, as personal preferences are usually adapted to one's circumstances.[112] A slave might prefer to remain one because he knows that he can't improve his condition by manumission. But we can't infer from his choice that he implicitly accepts slavery as a just social institution. Second, a coherent theory of justice avoids the fiction of the unencumbered self.[113] Criticism of contemporary liberalism by communitarians is partly justified. Both camps blur the distinction between autonomy, relating to minimal moral principles or a rational will, and independence or self-sufficiency of persons. Independence is not an unconditional value, as some forms of dependence and interdependence are unavoidable and even desirable (think of parent-child relationships). By contrast, autonomy 'is a matter of our principles being willable for all'.[114] The focus is on formal principles of universalizability, consistency, impartiality and reciprocity.

Third, prejudices against rules and principles must be revised. Many ethical accounts are hostile towards them. Rules or principles are indispensable (even particularists follow some); they are indeterminate and yet not empty. They do not function as mechanisms and 'do not prescribe rigidly uniform action or neglect of differences between cases'.[115] They provide the matrix of, and a framework for, judgement. Rules or principles and judgements interact. All rules are incomplete, because if one wants to follow them, they must be interpreted: 'Rules do not lay down complete answers.'[116] Fourth, we must keep abstraction and idealization apart. Abstraction, 'a matter of bracketing, but not of denying, predicates that are true of the matter under discussion', is

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112 O'Neill, 'Justice', pp. 141–4, 146f., 150. A commonsense definition of 'instrumental reason' is provided by Charles Taylor, *The Ethics of Authenticity* (Cambridge: Harvard University Press, 1991), p. 5. The standard analysis is Immanuel Kant, 'Groundwork of the Metaphysics of Morals', in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), pp. 67–71.

113 This stock criticism is raised by Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), against Kantians such as Rawls. The point to bear in mind is that Kant often differs from contemporary Kantians. See O'Neill, 'Justice', pp. 148–51.

114 O'Neill, 'Justice', p. 151 and below on (Kant's) universalizability.

115 O'Neill, 'Justice', pp. 4, 78, 84f., 180f.

116 O'Neill, *Justice*, p. 79. All this is, of course, highly Kantian. See Immanuel Kant, *Critique of pure reason*, transl. and ed. Paul Guyer and Allen W. Wood (Cambridge; New York: Cambridge University Press, 1998), A 132f./B171f. (pp. 268f.).

unavoidable in any kind of reasoning about action. Even particularists, taking for granted that standards of justice vary, assume that, when applied to varying cases, jury or judge must abstract. Idealization, by contrast, 'ascribes predicates ... that are false of the case in hand'.[117] Some contemporary communitarians and feminists claim that liberals assume ideals of the person, of rationality, or impartiality which are unfounded. Liberals retort that particularists in turn rely on 'ideals' of community or personal relationships.[118] Rawls, for instance, distinguishes between objective and subjective 'circumstances of justice'. Objective circumstances are that humans are mutually vulnerable and live together under conditions of scarcity. Subjective circumstances coincide with a 'thin' account of humans, who have limited cognitive powers, limited altruism, and differ in their basic convictions. For some, this may be a case of idealization. I cannot resolve this issue here, and will instead try to illustrate how successful abstraction differs from idealization.

Critics have argued that Hobbes's account of the state of nature is idealist in the sense that it ascribes features to humans that may be general, but are not global, or are apparently historically relative, and which relate to his age of civil wars and domestic unrest. One of these features is the 'generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death'.[119] Successful abstraction abstains from including psychological considerations of this sort, or what has been termed 'political anthropology', and conceptions of the good from the argument. Hobbes conflates abstraction and idealization. He defines the right of nature as 'the Liberty, each man hath, to use his own power, as he will himselfe, for the preservation of ... his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto'.[120] Most people aim at the preservation of their lives, but not all of them, so this good is general, but not universal. Hobbes includes a contestable

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117 O'Neill, 'Justice', p. 41. See also pp. 2f., 40f., 41–3 and her essay 'Abstraction, Idealization and Ideology in Ethics', in John David G. Evans (ed.), *Moral Philosophy and Contemporary Problems* (Cambridge: Cambridge University Press, 1987), pp. 55–69.

118 See the discussion in O'Neill, 'Justice', pp. 42–3. For complaints directed against (alleged) liberal idealization, see Sandel, *Liberalism* and Charles Taylor, *Sources of the Self. The Making of the Modern Identity* (Cambridge, MA.: Harvard University Press, 1989). See Rawls, *Justice*, pp. 126–30, David Hume, *A Treatise of Human Nature*, ed. L. A. Selby Bigge (Oxford: Clarendon Press, 1958), p. 495, and the discussion in O'Neill, *Justice*, pp. 98f. for the following.

119 Thomas Hobbes, *Leviathan* [1651], ed. Richard Tuck. Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1996), ch. 11 (p. 70).

120 Ibid., ch. 14 (p. 91).

conception of the good in his account. If we leave it out, we get an abstract analysis of the state of nature, its main features being one's external freedom to choose, judge and act while this freedom conflicts with the same freedom of others.[121] Historians also must abstract from the present, to which they (that is, we) are inextricably connected. One way historians connect to the past is by faithfulness to documents; another is by trying as best as one can to put oneself in the place of others, not imposing one's own assumptions. Those are again standards of impartiality. The principle of rationality or 'reason' is that of consistency or non-contradiction, which is not an empirical concept, and is the decisive criterion in ethics as well. Reason has a second meaning, reasoned argument, and again it should not be spelled with a big 'R'.

Within the principle of impartiality, further distinctions are necessary. Procedural justice refers to a set of rules which define the range of legitimate choices. If the rules are just, then justice can also be attributed to the outcomes. A good example is gambling in a lottery, where the justice of the outcome is established by looking at the way it was arrived at. As Rawls put it, '[a] distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out ... A fair procedure translates its fairness to the outcome only when it is actually carried out.'[122] First-level impartiality concerns the application of rules, second-level impartiality, their formulation. Personal justice refers to maxims or actions of individuals and their moral disposition or character, whereas political justice deals with (social) institutions such as slavery, the legal system, or the state.[123] My concern here is primarily with political justice and the formulation of rules consistent with this concept.

The central criteria or features of political justice are universalizability, impartiality, the idea of free and universal consent, and equality. Principles which are universalizable are followable by all in the relevant domain, or 'could coherently be adopted by all'.[124] This minimal standard is opposed to arbitrary claims or decisions. Thin justice entails the rejection of direct and indirect

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121 See the interpretation in Höffe, *Gerechtigkeit*, pp. 307–21; Wolfgang Kersting, *Thomas Hobbes zur Einführung* (Hamburg: Junius, 1992), pp. 124–6, and IV, 1 below.

122 Rawls, *Justice*, p. 86, who provides the example of the lottery; see also ibid., pp. 83–90 and Barry, *Justice*, pp. 213–6.

123 Höffe, *Justice*, pp. 24 and pp. 32f.; *Gerechtigkeit*, p. 45 and pp. 58–61; Barry, *Impartiality*, pp. 11f.

124 O'Neill, *Justice*, pp. 3, 5f., 51, 59, 125. Kant's two main texts on the categorical imperative as a moral principle of universalizability, 'Groundwork of The metaphysics of morals', and 'Critique of practical reason', are included in Immanuel Kant, *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996). See especially the succinct analysis 'Criteria of political justice' in Höffe, *Justice*, pp. 43–8, and Barry, *Justice*, chs 3 and 4 for the central features of impartial justice.

injury. It provides a framework within which judgements of appraisal (or appreciative judgements) are made.[125] One device to find impartial rules is Rawls's veil of ignorance, which filters out arbitrary elements because the persons in that situation lack the relevant information.[126] Possible uncoerced and universal consensus of the parties involved is the main feature of the discourse ethics of Apel and Habermas.[127] It is best understood as a rational feature and the result of abstraction. As justice as impartiality is inconsistent with claims to special privileges or advantages, it entails a commitment to the equality of all humans. In the modern language of subjective rights focusing on external juridical freedom, this means that '[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.'[128]

The underlying Kantian concept of practical reasoning is opposed to particularist, instrumental and 'Platonist' versions. Particularist reasoning assumes that 'reasoned action is informed by actual norms and commitments.' Instrumental is means-ends reasoning, motivated by subjective ends such as desires or fears. Platonist practical reasoning is also end-oriented, but ends are seen as objective, or as metaphysically grounded moral ideals.[129] Most authors provide a mixture of all kinds of practical reasoning. Vitoria, for instance, is close to the Platonist conception, but not exclusively, as my analysis will show

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125 O'Neill, *Justice*, pp. 180f., 86f. On the difference between direct injury (inflicted by killing or terror), and indirect injury see ch. 6, especially pp. 168ff. There are plenty of books on Rawls, some on the other authors. For Rawls, see the recent Otfried Höffe (ed.), *John Rawls: Eine Theorie der Gerechtigkeit*. Klassiker Auslegen vol. 15 (Berlin: Akademie-Verlag, 1998), with a comprehensive list of additional secondary literature; for Höffe, Wolfgang Kersting (ed.), *Gerechtigkeit als Tausch? Auseinandersetzungen mit der politischen Philosophie Otfried Höffes* (Frankfurt am Main: Suhrkamp, 1997); for Barry, Paul Kelly (ed.), *Impartiality, Neutrality and Justice. Re-reading Brian Barry's Justice as Impartiality* (Edinburgh: Edinburgh University Press, 1998); for Habermas, Werner Krawietz and Gerhard Preyer (eds), *System der Rechte, demokratischer Rechtsstaat und Diskurstheorie des Rechts nach Jürgen Habermas*. Rechtstheorie vol. 27 (Berlin: Duncker & Humblot, 1996).

126 Rawls, *Justice*, p. 140f. and para. 40, where he argues that the veil of ignorance is implicit in Kant's ethics. We might add that it is also implicit in other theories of justice. See also Rawls, *Justice*, pp. 131ff., where his features of the concept of right (principles should be general, universal in application, publicizable, etc.) coincide with the criteria outlined here.

127 See the discussion of the agreement element in Barry, *Justice*, pp. 164–8, which includes references to Rawls, Larmore and Habermas.

128 Rawls, *Justice*, p. 302, his first principle of justice. See also Barry, *Justice*, pp. 7f.

129 O'Neill, *Justice*, p. 50 and Höffe, *Gerechtigkeit*, pp. 53–5. The classical distinction among the three meanings of 'good' (good for something, good for somebody and good in itself) is developed in Kant, 'Groundwork', section II (pp. 61–93).

(II, 4). Instrumental reasoning is dominant, but not pervasive, in Hobbes (see IV, 1).

Let me anticipate some possible criticism of this position. In the first place, we could argue that the clear-cut distinction between thick and thin concepts is arbitrary, that we cannot draw a line between them. I concede that the concept of thin political justice is always embedded in conceptions of thick justice and maximal morality. As Walzer put it: 'The morality in which the moral minimum is embedded, and from which it can only temporarily be abstracted, is the only full-blooded morality we can ever have.'[130] Isolating thin justice is an artificial, but not arbitrary, philosophical and theoretical task of abstraction. Thin political justice appears independently in moments of extreme moral predicaments described above – such as the Sarajevo killings. Secondly, it might be claimed that distinctions or the principle of non-contradiction are culturally relative. This is a strong claim, and the burden of proof lies on the side of the critic. There is no reason to assume that Vitoria in the sixteenth century followed a different set of logics, as his reasoning remains comprehensible to us, even if we may not accept it. Third, it can be argued that we wind up with philosophical dualism, a theory that might be labelled 'metaphysical' and debatable. This would be a misunderstanding: the emphasis is on a procedure (isolating the embedded thin) rather than on entities. This leads to a final point of criticism, the possible fallacy of essentialism. Whenever authors write about 'universal' or 'absolute' principles, they can be sure that critics will eventually fall upon them with this charge. Walzer is very careful to avoid any statement that might invite it. 'Minimalism', he writes, 'consists in principles and rules that are reiterated in different times and places, and that are seen to be similar even though they are expressed in different idioms and reflect different histories and different versions of the world.'[131] This approach resembles Grotius's. The formulation 'are seen to be similar' emphasizes the perspectival approach and a hunch rather than essentialism. I am inclined to side with Walzer. His carefully worded phrases avoid misunderstanding, which would be invited by notions such as 'natural' or 'absolute'. However, we may suspect that reiterated rules or principles are close to or coincide with what older authors labelled 'absolute'. As in the case of Grotius, the problem with this empirical approach is that it can't avoid being selective, and selection requires rational principles.

I admit that my position is highly Kantian. Kant's practical philosophy is the most refined attempt in Western philosophy to develop a thin conception of political justice and a theory of cross-cultural moral minimalism or qualified

130 Walzer, *Thick and Thin*, p. 11; see also ibid., p. 3.
131 Walzer, *Thick and Thin*, p. 17.

universalism. It is not necessarily identical with what is often labelled 'Kantian'. My claim in this book is that a look at writers starting with Vitoria shows what a minimalist position amounts to, and that we can discover thin justice in some of these positions. So far I have argued that a case can be made for a core morality and a thin conception of justice. We should expect to encounter the universal and the relative in historical texts, while knowing that we share the same predicament. My approach does not claim to have found a 'God's-eye view' or Archimedian point, and I think it unfair to assume that all universalists believed it was possible to find it. Moral universalism works with a more modest approach just as well. Hilary Putnam wrote, 'We can only hope to produce a more rational *conception* of rationality or a better *conception* of morality if we operate from *within* our tradition.'[132] This makes sense: we cannot step 'outside' our traditions, but we aren't enslaved by them either. I agree with Rorty that the relativist claim that 'every tradition is as rational or as moral as every other'[133] assumes the God's-eye view it claims to reject. A relativist statement of this kind can only be made from a viewpoint that is somehow beyond every tradition, from which it can compare. We should be familiar with this kind of circle by now.

As a consequence, we can assume that it is possible to enter into a conversation with members of different ethnic communities or historical periods. This constitutes a community of conversation, certainly with 'a shifting identity and no fixed boundaries'.[134] Our shared concepts of thin justice will make dispute possible, our divergent thick concepts of justice will make conversation difficult, and a never-ending enterprise.

5. *Cosmopolis*: Ancient and medieval foundations

Cosmopolitanism comes in thin as well as thick versions. The latter entails the belief that the content of a single concept of the good can be determined precisely, and should be adopted on a global scale. Thin cosmopolitanism is linked with a thin conception of justice as impartiality. Impartiality on a global scale entails that 'if and when one raises questions regarding fundamental moral standards, the court of appeal that one addresses is a court in which

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132 Putnam, *Reason*, p. 216.

133 Rorty, 'Liberalism', p. 202.

134 Benhabib, 'Complexity', p. 247 – I must admit one limitation (or shortcoming for some) of this study: there are three categories of impartialist theory (anthropocentric, ecocentric and zoocentric; see Barry, *Justice*, pp. 20–2). This study is exclusively anthropocentric, for pragmatic reasons. I cannot possibly cover all aspects of justice where space is limited.

no particular individual, group, or country has *special* standing.'[135] Thin cosmopolitanism is above all an inclusive and non-perspectival point of view. It is inclusive because it transcends local and particularistic points of view, and non-perspectival because it is in principle impartial and tries to see 'each part of the whole in its true relative size'.[136] Moral cosmopolitanism holds that our norms and institutions should be based on an impartial consideration of the claims of all humans irrespective of race, colour, religion, or sex. In this sense, moral cosmopolitanism is identical with normative individualism or 'individualist moral egalitarianism'.[137] The crucial normative units are individuals and their duties and rights. As moral cosmopolitanism is inclusive, it tends to be critical about state boundaries or boundaries of political communities such as the Greek *polis*. In case of conflict, normative individualism would, for instance, trump formal state sovereignty, as in the case of humanitarian intervention (II, 5). Humans are seen as members of a universal community where state boundaries are of derivative significance.

Moral cosmopolitanism can be distinguished from institutional cosmopolitanism which advocates some form of world government or organization limiting state sovereignty. The historical roots of both forms of cosmopolitanism can be traced back to the Greek Sophists and Stoics. Hippias, Antiphon, Anaxagoras, Chrysippus and others endorsed the idea of a community greater than the πόλις (polis), comprehending the κόσμος (kosmos; the order of

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135 Thomas E. Hill, Jr, 'The Importance of Autonomy', in Eva Feder Kittay and Diana T. Meyers (eds), *Women and Moral Theory* (Totowa, NJ: Rowman and Littlefield, 1987), p. 132; cf. Andrew Linklater, *The Transformation of Political Community. Ethical Foundations of the Post-Westphalian Era* (Columbia: University of South Carolina Press, 1998), p. 49. I follow Hill and the illuminating remarks in Charles R. Beitz, 'Cosmopolitan liberalism and the states system', in Chris Brown, *Political Restructuring in Europe: Ethical Perspectives* (London and New York: Routledge, 1994), pp. 123–7. See also Pauline Kleingeld, 'Six Varieties of Cosmopolitanism in Late Eighteenth-Century Germany', *Journal of the History of Ideas*, 60 (1999), pp. 505–24, and Brian Barry, 'International Society from a Cosmopolitan Perspective', in David R. Mapel and Terry Nardin (eds), *International Society. Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998), pp. 144–63. The volume by Nussbaum, Martha C. et al. (eds), *For Love of Country: Debating the Limits of Patriotism* (Boston: Beacon Press, 1996), contains Nussbaum's 'Patriotism and Cosmopolitanism', ibid., pp. 2–17 and various responses by critics and supporters.

136 Beitz, 'Cosmopolitan liberalism', p. 124.

137 Ibid. and *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 54f., 64, 81, 119 and 181f.; cf. Fernando R. Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), pp. 1f., 8f., 21 and passim. On individualism, see Tibor R. Machan, *Classical Individualism. The Supreme Importance of Each Human Being* (London and New York: Routledge, 1998); Lorenzo Infantino, *Individualism in Modern Thought. From Adam Smith to Hayek* (London and New York: Routledge, 1998).

Nature or universe) and all human beings. For most Stoics, its foundation was ethical universalism and universal humanism. They developed the theory of natural law, and referred to the principle of equality (as opposed to ethnic origin) and the universal ability of reason. Founding the tradition of institutional cosmopolitanism in political thought, Zeno advocated a world state. He argued that 'we should regard all men as our fellow-citizens and local residents, and there should be one way of life and order, like that of a herd grazing together and nurtured by a common law.'[138] The phrase 'one way of life' points at a thick concept of cosmopolitanism. Diogenes of Sinope may have coined the word *kosmopolites*, or citizen of the cosmos. Many basic cosmopolitan notions developed by Vitoria and those following him go back to Greco-Roman thought. A passage from the Roman emperor and Stoic Marcus Aurelius reads like an anticipation of Wolff's universal commonwealth (IV, 5). Marcus Aurelius argues that the faculty of thinking and practical reasoning is universal among humans, that thus 'the law ... is common to us', which in turn means that we are all fellow-citizens and 'share a common government; if so, the universe is, as it were, a city.'[139] Marcus Aurelius derives universal citizenship from a generic intellectual and moral capacity of humans and then in turn bases law on this citizenship. This ideal universal citizenship takes over the task of justifying norms and institutions.

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138 Plutarch, *On the Fortune of Alexander*, 329 A–B, in A. A. Long and D. N. Sedley, *The Hellenistic Philosophers* (Cambridge: Cambridge University Press, 1987), vol. 1, p. 429. This is of course a very impressionistic and thus misleading picture of Stoic cosmopolitanism. For instance, Zeno's *Republic* can be seen as the founding work of the natural law tradition, although he did not develop a set of immutable moral rules or codify them. In fact he adhered to a dispositional model that stressed 'special circumstances'. See Paul A. Vander Waerdt, 'Zeno's *Republic* and the Origins of Natural Law', in *The Socratic Movement* (Ithaca, NY and London: Cornell University Press 1994), pp. 272–308. A more comprehensive and non-perspectival picture of Ancient Stoicism can be found in Andrew Erskine, *The Hellenistic Stoa: Political Thought and Action* (London: Duckworth, 1990) and Malcolm Schofield, *The Stoic Idea of the City* (Cambridge: Cambridge University Press, 1991). The standard study of Greek cosmopolitan thought is H. C. Baldry, *The Unity of Mankind in Greek Thought* (Cambridge: Cambridge University Press, 1965). A brief sketch is offered in Mark V. Kauppi and Paul R. Viotti, *The Global Philosophers. World Politics in Western Thought* (New York: Lexington Books, 1992), pp. 96–105, Derek Benjamin Heater, *World Citizenship and Government. Cosmopolitan Ideas in the History of Western Political Thought* (Houndmills et al.: Macmillan, 1996), pp. 1–21; article 'Kosmopolit, Kosmopolitismus', in Joachim Ritter and Karlfried Gründer (eds), *Historisches Wörterbuch der Philosophie*. Vol. 4 (Basel, Stuttgart: Schwabe & Co., 1976), col. 1155–8.

139 Marcus Aurelius, *The Meditations* (Indianapolis: Hackett Publishing Company 1983), 4.4, pp. 26f. There is a discussion of Aurelius's cosmopolitanism in Heater, *Citizenship*, pp. 19f.

Christianity supported many beliefs of Stoicism, such as the vision of a universal community. As in the case of some Stoics, the overall picture is ambivalent. On the one hand, St Paul endorsed the vision of a universal brotherhood where all differences – such as between Greek and Jew, barbarian and Scythian – disappear (Colossians 3:11). But Christians also kept the widespread distinction between the civilized Greeks or Romans and the 'pagans' alive – the latter were often identified with the 'barbarians' outside 'the world'.

Classical antiquity and the Middle Ages laid the foundations of the modern European idea of a global legal community (or *Rechtsgemeinschaft*, as Walter Schiffer called it) of humankind (*magna communitas humani generis*). The idea encompassed two elements: the concept of a law of nature or natural law (*ius naturale*, *ius naturae*), and the notion of a law binding all humans (*ius gentium*). In Greek thought, natural law did not play a central role in legitimizing legal coercion or positive laws. We get a wide range of opinions and theories, anticipating the plurality since the sixteenth century in European philosophy. Callicles and Thrasymachus equated justice with the powerful, whereas Epicurus identified natural law with usefulness. Plato insisted on objective standards independent of particular circumstances. Aristotle in turn subscribed to a general law binding for all, but abandoned the concept of natural equality in his treatment of slavery (see II, 2).[140] Cicero summarized a conviction that would dominate medieval Europe and shape the discussion of the subsequent centuries: 'True law [*lex vera*] is right reason [*recta ratio*] in accordance with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands.' There was a distinct difference between justice and expediency, Cicero claimed, and the sceptic Carneades was wrong in arguing

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140 This summary follows Kristian Kühl, 'Naturrecht', in Ritter and Gründer (eds), *Historisches Wörterbuch der Philosophie*, vol. 6, col. 563–70. For a systematic treatment and contemporary natural law theories, see Alessandro Passerin d'Entrèves, *Natural Law* (London: Hutchinson University Library, 1951), Leo Strauss, *Natural right and history* (Chicago: University of Chicago Press, 1953), John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), and Josef Seifert (ed.), *Wie erkennt man Naturrecht?* (Heidelberg: Universitätsverlag C. Winter, 1998). John Finnis (ed.), *Natural Law*, 2 vols (New York: New York University Press, 1991) is a collection of essays stating the case for and against natural law theory. Charles S. Edwards, *Hugo Grotius: The Miracle of Holland. A Study in Political and Legal Thought* (Chicago: Nelson-Hall, 1981), ch. 3 contains a brief history of the law of nature. David J. Bederman, 'Religion and the Sources of International Law in Antiquity', in Mark W. Janis (ed.), *The Influence of Religion on the Development of International Law* (Dordrecht, Netherlands, Boston, London: Martinus Nijhoff Publishers, 1991), pp. 3–29 covers ancient India, the Near East, the Greek city-states and the Roman republic up to 168 BC.

that 'there was no natural law.'[141] Cicero's comprehensive treatment was important for two reasons. It set the stage for a running battle between natural law positions and sceptic counterparts since Grotius. Secondly, natural law thinking intruded into Roman jurisprudence. Though the latter followed a positivistic approach in deriving law (*ius*) from existing precepts (*ex iure quot fit*) rather than from abstract rules (*regula*) or principles, it was important to stress the connectedness if not derivation of public and private law from the ideas of justice, goodness and fairness.[142]

Roman law has been called Rome's most significant legacy and contribution to modernity. It forged basic distinctions such as between positive law (*ius posit[iv]um*) based on the ruler's will, and customary law, referring to the will of the people. The doctrine of freeing a slave (*manumissio*) entailed a complete metamorphosis of a person's identity from a mere object or thing (*res*) to citizenship and the subject of rights, and thus implicitly challenged Aristotle's theory of natural slavery (II, 2).[143] The writings of eminent jurists such as Ulpian, Gaius and Hermogenian were later incorporated into Emperor Justinian's monumental *Corpus Juris Civilis* – a term coined by medieval scholarship – consisting of three separate parts. The *Digest* was a compendium of legal writings, statutes and decrees; the *Institutiones* a 'handbook' for

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141 Marcus Tullius Cicero, 'The Laws', in *The republic; and, The laws*, transl. Niall Rudd; intro. and notes Jonathan Powell and Niall Rudd (New York: Oxford University Press, 1998), 1.18, p. 103; 'The Republic,' in *De re publica, De legibus*, transl. Clinton Walker Keyes (Cambridge, MA: Harvard University Press, 1970), 3.22, p. 211. See also Marcus Tullius Cicero, *On Duties*, ed. M. T. Griffin and E. M. Atkins (Cambridge [England]; New York: Cambridge University Press, 1991), 1.14–18, pp. 7f. and 3.5–8, pp. 102f.

142 Alan Watson (ed.), *The Digest of Justinian*, Latin text ed. Theodor Mommsen with the aid of Paul Krueger (Philadelphia: University of Pennsylvania Press, 1985), 50.17.1 and 1.1.1.

143 Alan Watson, *The Law of the Ancient Romans* (Dallas: Southern Methodist University Press, 1970) is the classic study. Ch. 5, pp. 44–8 covers slavery. See also Bernard Williams, *Shame and Necessity* (Berkeley et al.: University of California Press, 1993), p. 108 and Anthony Pagden, *Lords of all the World. Ideologies of Empire in Spain, Britain and France, c. 1500–c. 1800* (New Haven, London: Yale University Press, 1995), p. 22 on slavery and Wolfgang Kunkel, *An Introduction to Roman legal and constitutional History*, transl. J. M. Kelly, 2nd edn (Oxford: Clarendon Press, 1973); Max Kaser, *Römische Rechtsgeschichte*; 3rd edn (Göttingen: Vandenhoeck & Ruprecht, 1982); Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (London: Sources of History, 1975), pp. 53–79 on Roman law in general. The two articles by Eckart Olshausen, 'Das politische Denken der Römer zur Zeit der Republik', and Rolf Rilinger, 'Das politische Denken der Römer: Vom Prinzipat zum Dominat', in Iring Fetscher and Herfried Münkler (eds), *Pipers Handbuch der Politischen Ideen*, vol. 1 (München und Zürich: Piper, 1988), pp. 485–519 and pp. 521–93 offer reliable introductions and extensive bibliographies.

students and lawyers, and the *Code* enlisted the decrees of the later empire.

Justinian's *Digest* is of utmost importance here, as it contained the relevant passages on the law of nations (*ius gentium*) which would influence and shape the thinking and debates of almost all early modern European international lawyers. The term 'international law' is a neologism created by Jeremy Bentham (1780/89) which became prominent after the 1840s.[144] Authors like Vitoria used the Latin term *ius gentium*, later translated as 'the law of nations'. Sometimes parallel terms were adopted: Richard Zouche (1650) referred to *ius inter gentes*, Kant (1797) suggested the word *Staatenrecht* or *ius publicum civitatum*.[145] Kant's recommendation indicated a major shift in the scope and meaning of *ius gentium*, prepared above all by writers like Hobbes and Pufendorf. Nowadays the law of nations is predominantly understood as a body of norms that primarily encompasses the relations among states. Although this understanding has been challenged since the middle of the twentieth century, along with the Westphalian concept of world order (I, 1 and 2), it is different from the Roman comprehension. The notion *ius gentium*, first used by Cicero, was taken over by Roman jurists such as Ulpian and Pomponius. Their statements were incorporated into the *Digest*, but did not fit together. In principle, the law of nations encompassed a legal sphere that was not covered by domestic law (*ius civile*) but had to be regulated: the position of non-Romans in Rome (among themselves and with Roman citizens), and Roman relations to other political communities (*civitates*) or peoples (*gentes*), including commercial relations (*commercium*), the status of ambassadors (*legati*), and the right of war (*ius belli*).[146] The contributors to the *Digest* disagreed about the

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144 See Mark W. Janis, 'Jeremy Bentham and the "Fashioning of International Law"', *American Journal of International Law*, 78 (1984), pp. 408–10 and Heinhard Steiger, 'Völkerrecht', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cottta, 1992), vol. 7, p. 134. See especially this article, pp. 97–103 and Edwards, *Grotius*, p. 147 for etymology and Roman usage.

145 Richard Zouchaeus, *Iuris et iudicii fecialis, sive, iuris inter gentes, et quaestionum de eodem explicatio* [1650], ed. Thomas Erskine Holland (Washington: Carnegie Institution, 1911); Immanuel Kant, *Kant's gesammelte Schriften*, ed. Preußische Akademie der Wissenschaften (Berlin, Leipzig: de Gruyter, 1900ff.), vol. 6, p. 343.

146 *Digest* 1.1.5 on the scope of *ius gentium* (Hermogenian); 50.7.18 covers the protection of ambassadors. For the whole section, see Steiger, 'Völkerrecht', pp. 100–3, Max Kaser, *Das römische Privatrecht*, 16th edn (München: Beck, 1992), and especially *Ius gentium* (Köln, Weimar, Wien: Böhlau, 1993); Wolfgang Graf Vitzthum, 'Begriff, Geschichte und Quellen des Völkerrechts', in: *Völkerrecht* (Berlin, New York: Walter de Gruyter, 1997), pp. 1–100; Karl-Heinz Ziegler, 'Die römischen Grundlagen des europäischen Völkerrechts', *Ius Commune*, 4 (1972), pp. 1–27; Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), pp. 10–16, and

exact scope, but also about the foundation of *ius gentium*. Ulpian claimed that it was not identical with natural law, but observed by all humans (*gentes*), whereas Gaius, following Cicero, equated the law of nations with natural law based on 'natural reason'.[147] Roman lawyers thus provided the framework of modern discussion. There is the idea of a legal commonwealth, a 'law common to all humans' (*ius commune omnium hominum*), the conviction that natural law and the law of nations are identical, but also the realization that humans *create* law, as in the case of the freeing of slaves.[148] Subsequent international lawyers would be troubled by the tricky problem of where to draw the line between positive and natural law within *ius gentium*. Thus there are four meanings of *ius gentium* in Roman jurisprudence, and the distinctions between them are often blurred:

1 the law administered by a special magistrate (*praetor peregrinus*) for litigation between foreigners or between a Roman citizen and a foreigner
2 the basic norms of conduct shared by (almost) all (civilized) nations
3 natural law
4 the norms governing relations among political communities or 'nations' (*ius inter gentes*).

In the following chapters, I will use the terms 'international' or 'transnational' in a broad sense, encompassing relations between political communities and those of individuals belonging to them, without favouring a narrow focus on 'states'. Though the terms 'international' and 'transnational' are anachronistic,

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Anthony Pagden, 'The Legacy of Rome', in *Lords*, pp. 11–28; Donald Kelley, *The Human Measure. Social Thought in the Western Legal Tradition* (Cambridge, MA and London: Harvard University Press, 1990), pp. 48f. on Gaius and pp. 61–4 on Byzantine *ius gentium*.

147 *Digest* 1.1.1.4; 1.1.9, and Marcus Tullius Cicero, 'Oratio De Haruspicum Responsis [The Speech concerning the Response of the Soothsayers]', in *Cicero in Twenty-Eight Volumes*, vol. 11, transl. Clinton Walker Keyes (Cambridge, MA: Harvard University Press, 1970), 14.32, p. 357; *Duties* 3.23, p. 108 and 3.69, p. 126. The most reliable discussion of the various meanings of *ius gentium* in Roman jurisprudence is now Kaser, *Ius gentium*, in particular pp. 3–14, 23–39 and 52–4. It is sometimes argued that classical writers endorsed the dichotomy of *ius civile* and *ius naturale*, which coincided with *ius gentium*, and that Justinian introduced the trichotomy where *ius naturale* and *ius gentium* are distinct; see the analysis in Kaser, *Jus gentium*, pp. 66–70.

148 *Digest* 1.1.9 (Gaius); 1.1.4 (Ulpian, who assigns manumissions to the *ius gentium*). The importance of Roman jurisprudence for the transition to the modern natural law tradition before and with Grotius is emphasized by Merio Scattola, *Das Naturrecht vor dem Naturrecht. Zur Geschichte des 'ius naturae' im 16. Jahrhundert* (Tübingen: Max Niemeyer Verlag, 1999). Scattola points out that the jurists and their legal tracts, commentaries and dissertations were one major source of Grotius.

I use them for the sake of convenience. I also want to comment on an argument often heard nowadays, that law has always been an instrument of oppression and conquest, and should be seen as dangerous ideology rather than a tool to establish peaceful relations among people. It is then pointed out that authors like Cicero, while writing about *ius gentium* and natural justice, endorsed Roman imperialism. As in the related problem of Vitoria and Spanish conquest (II, 1 and 7), I would first emphasize that a totalizing Roman discourse of oppression is probably more fiction than fact. Put polemically, what has Ulpian (who died in 228) got to do with Caesar's slaughtering of one million Gauls, or Justinian's attempt to reconquer the empire? So I suggest a division between legal theory and imperial practice, though I admit that both also overlap. An outstanding and for this study highly relevant example is the *Lex Rhodia* included in the *Digest*, stipulating that the Roman emperor was lord of the world (*dominus mundi*). It had tremendous influence on medieval Europe and the emperors following Charlemagne until perhaps as late as the nineteenth century.[149] It claimed sovereignty (*imperium*) over other kings and rulers, including non-Christian ones (see II, 1 and 3). The importance of Roman law for the Western legal tradition can hardly be overestimated. The notion of the *princeps* being 'exempt from the laws' (*legibus solutus*) shaped modern theories of sovereignty in Bodin, Hobbes and others. The three meanings of the term *imperium* – independent or 'perfect' rule; absolute sovereignty of the ruler, and territory encompassing at least two political communities – survived with the ideology of a universal empire into the eighteenth century. Legal philosophers like Kant drew from the *Digest* for their theories.[150]

Writing about ancient and medieval Europe in one section of this book is a delicate matter, and inevitably will be selective and limited. For the Middle Ages, I want to highlight some aspects I consider important for the overall study: the concept of *ius gentium*; the idea of a universal Christian society; the beginnings of the Western legal tradition, especially mercantile law. From the eleventh century onwards, the term *ius gentium* was increasingly used, though its specific meaning was usually left dubious. Thomas Aquinas attempted a systematic treatment, especially in terms of the relationship between *ius gentium* and *ius naturale*. Natural law, defined by Aquinas as 'participation in the eternal law by rational creatures', was considered a body of self-evident

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[149] *Digest* 14.2.9. See also Justinian's decree *Bene a Zenon* (*Codex* 7.37.3) and Pagden, *Lords*, esp. chs. 1 and 2, pp. 11–62 for their impact.

[150] *Digest* 1.3.31 ('the emperor is not bound by statutes' is another translation); Pagden, Lords, p. 17; *Digest* 1.1.10 (Ulpian) and Immanuel Kant, 'The Metaphysics of Morals', in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), pp. 392f.; *Akademieausgabe* vol. 6, p. 236f.

first principles.[151] Aquinas offered a sort of compromise. The law of nations, he claimed, was rooted in natural law and right reason, but also positive and oriented towards existing conditions.[152] This kept the tension, and Vitoria as well as Gentili, Suárez and Grotius had to struggle hard to find an acceptable solution (II, 4; III, 3 and 5). Bartolus and Ockham took steps away from natural law and towards a doctrine that can be labelled 'positivistic' with reservations. The jurist Bartolus de Sassoferrato from Perugia (1314–57) asserted that *ius gentium* had two distinct parts and sources, natural reason (*ratione naturali*) and custom (*usus gentium*). William of Ockham went even further, stressing the consent of all (*consensus omnium*) as a distinct and independent source of legitimacy.[153] Consent based on the will of the parties involved pointed at a genuinely new approach, though we can hardly say that the move towards consent solved any of the systematic problems, and if it did, it created new ones (see III, 2). From the fourteenth century onwards, a growing number of publications developed *ius gentium* in the sense of *ius inter gentes*. Roman legal principles were adopted, applied and developed, and new ones created, especially in three areas: the law of war, the law of treaties and the status of ambassadors. Just-war theory dominated the field; there was a certain preoccupation with the *ius ad bellum* and the *ius in bello* at the expense of other

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151 Thomas Aquinas, *Summa Theologica*, 1st complete American edn in 3 vols (New York: Benziger Brothers, 1947), Ia IIae, qu. 91, art. 2, p. 994. For the whole section, see Steiger, 'Völkerrecht', pp. 103–8; Charles S. Edwards, *Hugo Grotius: The Miracle of Holland. A Study in Political and Legal Thought* (Chicago: Nelson-Hall, 1981), pp. 43ff. on Aquinas and the law of nature, pp. 71ff. on the history of *ius gentium* since Roman times; Kelley, *Human Measure*, pp. 121ff.; Leslie Claude Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), pp. 143–59 on the rights of non-Christians in medieval Church doctrine, pp. 161–73 on Aquinas and the transition to the modern age; Michel Bastit, *Naissance de la loi moderne: la pensée de la loi de saint Thomas à Suárez* (Paris: Presses Universitaires de France, 1990); Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (Leiden, New York, Köln: Brill, 1998), chs. 1 and 2; Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1982), pp. 705–84 with articles on politics, natural law, natural rights, the state and the just-war doctrine; Anthony Black, *Political Thought in Europe 1250–1450* (Cambridge: Cambridge University Press, 1992).

152 Thomas Aquinas, *Summa Theologica*, vol. 1, 1, 2, qu. 95, art. 4, p. 1016; vol. 2, 2, 2, qu. 57, art 3, pp. 1432f.; 2, 2, qu. 40 'De bello', pp. 1359f.

153 Bartolus de Sassoferrato, *Commentaria in primam digesti veteris* (Lyon, 1547), p. 9 and William of Ockham, *Dialogus* [1328], 2.2.28, quoted in Steiger, 'Völkerrecht', to whom these passages are much indebted. On Bartolus, see Ullmann, *Law and Politics*, pp. 108–12, with additional literature p. 108, and Black, *Political Thought*, pp. 115f. and 127–9.

issues (see I, 1).[154] Authors tended to see war as a para-legal process, resorted to when other procedures or means of determining right and wrong were not available. In addition, it was stressed that war could only be declared and waged by the sovereign (*princeps*) as a legitimate authority. Both tenets were taken over and fully developed by modern international lawyers.

The beginning of the Western legal tradition was the background of these developments in the theory of *ius gentium*. Roman law was developed and refined, especially at the university of Bologna, the 'citadel of all legal studies,' from the eleventh century onwards.[155] Canon law became the first 'modern' Western legal system, and secular ones followed, such as feudal, manorial, royal and mercantile law. The distinct features of this legal tradition were legal institutions, legal professionals, a distinct 'body' (*corpus*) of law, its supremacy over political authorities, and legal pluralism, the fact that within the same community diverse legal systems and jurisdictions often coexisted. Natural law predominated, and the idea of the 'rule of law' came to center stage. It meant that the heads of the ecclesiastical and the secular spheres had to rule *by* law, enacting laws, for instance, but were also obliged to rule *under* law, being bound by it unless they changed it lawfully.[156] The beginnings of integrated

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154 Steiger, 'Völkerrecht', pp. 107f. and Walter Ullmann, *The Growth of Papal Government in the Middle Ages* (London and Northampton: Bradford and Dickens, 1962), p. 450. On the just-war theory, see James A. Brundage, 'The Holy War and the Medieval Lawyers', in Thomas P. Murphy (ed.), *The Holy War* (Columbus: Ohio State University, 1974), pp. 99–140; Jonathan Barnes, 'The Just War', in Kretzmann, *Cambridge History*, pp. 771–84, and Black, *Political Thought*, pp. 90f. Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975) is the classic study. See also Theodor Meron, 'The authority to make treaties in the late Middle Ages', *American Journal of International Law*, 89 (1995), pp. 1–20 on treaty law and Gerhard Beestermöller, *Thomas von Aquin und der gerechte Krieg* (Köln: Bachem, 1990) on the most prominent philosopher and theologian of the period.

155 Ullmann, *Law and Politics*, p. 83; see the whole chapter 3, pp. 83–116. The classic study on medieval legal thought is Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge, MA and London: Harvard University Press, 1983). See also the commentaries on Berman's work: Howard O. Hunter (ed.), *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO: Westview Press, 1996); William E. Butler, Peter B. Maggs and John B. Quigley, Jr (eds), *Law after Revolution: Essays on Socialist Law in Honor of Harold J. Berman* (New York: Oceana Publications, 1988); John Witte, Jr and Frank S. Alexander, *The Weightier Matters of the Law: Essays on Law and Religion. A Tribute to Harold J. Berman* (Atlanta, GA: Scholars Press, 1988), and the reliable review essay by Hauke Brunkhorst, 'Die Verrechtlichung des Sakralen', *Leviathan. Zeitschrift für Sozialwissenschaft*, 25 (1997), pp. 241–50, with a valuable comparison with Max Weber. A general introduction is O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History. Sources and Institutions* (London, Dublin, Edinburgh: Butterworths, 1994), chs. 2–9.

156 Berman, *Law and Revolution*, pp. 7–10; 292f.

bodies of mercantile law or the law merchant (*lex mercatoria*) were closely connected with what has been called 'the commercial revolution'.[157] Mercantile law was transnational, and bilateral treaties became frequent. It aimed at reciprocity of rights, at procedural and substantive fairness and equality. The Magna Carta (1215) stipulated that merchants of the enemy state could keep their goods and were guaranteed 'safe conduct' provided that 'our merchants are treated the same way'.[158]

It has been claimed that the beginnings of the Western legal tradition coincided with the Papal Revolution (1075–1122), which established the supremacy or supreme authority (*auctoritas*) of the pope and the independence of the clergy from the secular sphere, causing a separate ecclesiastical community with its own law for the first time and paving the ground for the rise of the modern state and modern legal systems.[159] If this was a long-term outcome, it was certainly not intended or dreamt of. The Papal Revolution led to a shortlived 'papal world monarchy' (Ullmann) where the gap between sacred papal authority and actual executive power (*potestas*) became smaller. A precarious unity of Western Christianity could be maintained.[160]

If 'society' is understood as an association based on shared rules, practices and perhaps common interests, three notions of international society can be distinguished.[161] The universal state or society can take the form of an empire, world hegemony of one state, or world government. It tries to 'copy' key features of statehood such as a central source of authority and legal dependence of subunits. Together with the Chinese and Roman empires, the medieval papacy approximated this universal society, though it fell short in terms of actual global extension like all other aspirants. In any case, medieval papacy claimed worldwide moral, political and spiritual authority derived from God, as Innocent IV did in letters to Guyak, the Great Khan of the Mongols in the

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157 Robert Sabatino Lopez, *The Commercial Revolution of the Middle Ages, 950–1350* (Englewood Cliffs, NJ: Prentice-Hall, 1971), ch. 3; Berman, *Law and Revolution*, ch. 11. Rudolf Meyer, *Bona fides und lex mercatoria in der europäischen Rechtstradition* (Göttingen: Wallstein, 1994) is an introduction to the law merchant in European legal thought.

158 Magna Carta, 17 John (1215), chaps. 41, 42, 45, quoted from Berman, *Law and Revolution*, pp. 293 and 343, with an excellent analysis pp. 341–6.

159 This is one of the central claims of Berman, *Law and Revolution*, ch. 2.

160 David Armstrong, *Revolution and World Order. The Revolutionary State in International Society* (Oxford: Clarendon Press, 1993), pp. 13f., 16–23; Ullmann, *Growth of Papal Government*, pp. 20–2, 281–301 (on Gregory VII) and 447–51; Walter Schiffer, *The Legal Community of Mankind* (New York: Columbia University Press, 1954), ch. 1.

161 See the definition in J. A. Simpson and E. S. C. Weiner, *The Oxford English Dictionary. 2nd edn* (Oxford: Clarendon Press, 1989), vol. 15, p. 913 and Armstrong, *Revolution*, ch. 1 for the following.

1240s.[162] Towards the end of the Middle Ages, writers referred to the *respublica Christiana* (the Christian commonwealth) as a point of reference for princes and popes in the face of common enemies (*hostes communes*) such as the Turks. A considerable number of publications defended the emperor as 'lord of the world' and advocated a universal monarchy. Dante Alighieri (1265–1321) is the most prominent example, but certainly not the only one.[163] The story of this book is the movement away from this hierarchical conception of world order towards two other models: the great community of humankind and the society of states. The great community of humankind (*magna communitas humani generis*) could also be called cosmopolitan, as all persons are included by virtue of being members of the human race. Relations are supposed to be regulated by the norms of natural law and *ius gentium*. They are not dependent on a formal structure of authority. Following the Roman principle that any society is based on law (*ubi societas ibi lex*), adherents replaced the universal society of Christianity by, or integrated it into, the 'great community'. Typical representatives are Vitoria, Suárez, Grotius and Wolff.

There are boundaries, but fuzzy ones, to the third model, that of a society of states or the 'Westphalian conception of world order' (see I, 1 for a definition). Its theory is usually connected with authors such as Pufendorf and Vattel, and the notion of state sovereignty. Again, foundations were laid in the Middle Ages, especially by Bartolus of Sassoferrato, who held in his commentary on the Roman *Digest* that the city is 'sovereign to itself [*civitas sibi princeps*]'.[164] Ultimately the idea of natural law binding all humans is abandoned in favour of positive or customary law. The rights or interests of individual states trump those of the global community. Two qualifications are important. There is no unambiguous, linear development towards the triumph of positivism and the

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162 The episode is reported in Robert A. Williams, *The American Indian in Western Legal Thought. The Discourses of Conquest* (New York, Oxford: Oxford University Press, 1990), pp. 3–6. Heater, *Citizenship*, ch. 2 discusses the renewal of the Roman Empire and the idea of a universal monarchy in medieval times.

163 Dante Alighieri, *Monarchy* [1314], transl. and ed. Prue Shaw (Cambridge: Cambridge University Press, 1996). Other less well-known authors are Engelbert of Admont (c. 1250–1331), Lupold of Bamberg (c. 1297–1363), Nicholas of Cusa, William of Ockham, and Aeneas Sylvius Piccolomini (1405–64), discussed in Black, *Political Thought*, pp. 92–108. An analysis of Dante's political thought is Heater, *Citizenship*, pp. 38–47. See Franz Bosbach, *Monarchia Universalis. Ein politischer Leitbegriff der frühen Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1988) on the career of the universal monarchy as a key concept of European foreign policy.

164 Bartolus of Sassoferrato, *On Digest* (Turin, 1577), 48.1.7 and 50.9.4, quoted in Black, *Political Thought*, p. 116, with an excellent summary ibid., pp. 115f. Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), pp. 89 and 95–107 refers to 'proto-sovereignty' in the late Middle Ages when the ruler's legitimacy was partly rooted in secular sources.

society of states. Most authors analysed in this study shrink back from a wholesale endorsement; even Vattel and Moser are cases in point (see V, 5). They are usually wavering. Secondly, even if the society of civilized (European) states and legal positivism prevailed in the nineteenth century (see VI, 5), this outcome was not inevitable or all-pervasive. Its philosophical and moral merits are a different matter anyway.

6. *Hospitalitas*: Interaction, commerce, and trade

In the 'Introduction', hospitality has been defined as offering or affording welcome, protection, or entertainment to strangers, visitors, or guests. Hospitality becomes international if it is extended to members of 'out-groups', of different cultures and communities.[165] Throughout history, we encounter a wide variety of attitudes towards strangers, from open hostility or mistreatment to avoiding contact, enthusiastic reception into one's household or community, veneration of the stranger as a deity, utilitarian reciprocity, and protection for the helpless or persecuted, which amounted to a form of asylum. Forms of hospitality varied, though we can also detect some similarities. Often hospitality was temporally limited; among Islamic and Germanic communities to three days, for instance. Granted or denied hospitality towards unknown visitors is a stock component of many legends and stories in various cultures. The *Odyssey*, for example, contains twelve elaborate hospitality scenes.[166] Long-distance trade between Asians and Greeks since the fifth century BC made special lodgings for travellers necessary. They seem to have existed in the Near East long before that period.

Commerce, often also called 'merchandise', has a narrow meaning, where it is identical with trade and business. Its broader meaning encompasses any form of interaction, communication, and interchange among humans, for instance of ideas. It is often not clear which meaning authors refer to; the predominance of the narrow meaning is at any rate a rather recent development. Throughout

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165 For the following, see Hans Conrad Peyer, *Von der Gastfreundschaft zum Gasthaus: Studien zur Gastlichkeit im Mittelalter* (Hannover: Hahnsche Buchhandlung, 1987), pp. 1–20, with an extensive bibliography pp. ix–xxxiii; Hans Conrad Peyer and Elisabeth Müller-Luckner (eds), *Gastfreundschaft, Taverne und Gasthaus im Mittelalter* (München: R. Oldenbourg, 1983); Otto Hiltbrunner, 'Gastfreundschaft', in *Reallexikon für Antike und Christentum*, 8 (1972), cols. 1061–1123; Willi Heffening, *Das islamische Fremdenrecht bis zu den islamisch-fränkischen Staatsverträgen* (Hannover: H. Lafaire, 1925).

166 Steve Reece, *The Stranger's Welcome. Oral Theory and the Aesthetics of the Homeric Hospitality Scene* (Ann Arbor: University of Michigan Press, 1993). The story of Philemon and Baucis in Ovid, *Metamorphoses* 8, 618–724 is another case in point.

history to the present, contrasting attitudes towards and views of travelling, interaction and trade can be found.[167] On the one extreme, there have been reservations about these activities, for various reasons. Some were suspicious of merchants and traders because they were not engaged in the production of goods, were seen as greedy, or performing an inferior and vulgar task. In Plato's *Laws*, the pursuit of money ranks below the care of soul and body. Retail trade for the sake of money is outlawed, and imports are restricted to merchandise necessary for defense. Aristotle followed suit, writing that 'citizens must not lead the life of artisans or tradesmen, for such a life is ignoble and inimical to excellence.'[168] Early Christian authors such as St Augustine or St Ambrose shared similar reservations, believing that commerce promoted avarice and a worldly attitude. St Ambrose wrote the poetic lines, based on a teleological interpretation of the world, that 'God did not make the sea to be sailed over, but for the sake of the beauty of the element. The sea is tossed by storms; you ought, therefore, to fear it, not to use it ... use it for purposes of food, not for purposes of commerce.'[169] Linked to the suspicion about merchants and traders was the fear that any interaction, but especially commerce, might have detrimental non-economic effects, undermining the moral fabric of society. In Plato's *Laws*, an Athenian stranger (presumably either Plato himself or Socrates) voices the fear that the ocean 'infects a place with commerce and the money-making that comes with retail trade, and engenders shifty and untrustworthy dispositions in souls'. For others, self-sufficiency was better than dependency on others. Trade should therefore be limited to the necessary, but not encouraged.

The second intellectual tradition underlined the blessings of trade and communication. Plutarch pointed out that trade brought civilization, economic benefits, 'mutual assistance', and thus, 'cooperation and friendship'.[170] In the fourth century, Libanius eloquently advocated what has been called the 'doctrine of universal economy'.[171] He wrote:

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167 See Douglas A. Irwin, *Against the Tide. An Intellectual History of Free Trade* (Princeton: Princeton University Press, 1996), pp. 11–22; *Essays on the Intellectual History of Economics* (Princeton: Princeton University Press, 1996); John H. D'Arms, *Commerce and Social Standing in Ancient Rome* (Cambridge: Harvard University Press, 1981); Richard Rosecrance, *The Rise of the Trading State. Commerce and Conquest in the Modern World* (New York: Basic Books, 1986). The etymology and meaning of the term 'commerce' can be found in J. A. Simpson and E. S. C. Weiner, *The Oxford English Dictionary. 2nd edn* (Oxford: Clarendon Press, 1989), vol. III, p. 552.

168 *The Laws of Plato*, transl. with notes Thomas L. Pangle (Chicago and London: University of Chicago Press, 1988), 743d–e, p. 131, and 847d–e, p. 240. 949e–953e, pp. 351–6 covers hospitality laws; Aristotle, *Politics*, book VII, 9, 1328b 40.

169 Quoted in Irwin, *Free Trade*, pp. 17f. The following quotation in *Laws of Plato*, 705a, p. 90.

170 Plutarch, 'On Whether Water or Fire is More Useful', *Plutarch's Moralia*, vol. 12 (Loeb Classical Library, 1927), p. 299; quoted in Irwin, *Free Trade*, p. 11.

> God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another. And so He called commerce into being, that all men might be able to have common enjoyment of the fruits of earth, no matter where produced.[172]

According to Viner, the elements of this doctrine are the stoic-cosmopolitan belief in a universal commonwealth, the conviction that the exchange of goods is beneficial in a world where resources are distributed unequally, and finally the religious faith that God arranged all this to promote peaceful cooperation and social relationships. The thinking of both Ambrose and Libanius is teleological: both assume that the way God created the world had a clear objective. But both argue for opposed claims, suggesting that teleology mixed with theology does not provide a secure foundation for either. Their evaluation of the moral dimension is also incompatible. Either interaction is seen as subversive, undermining social or cultural homogeneity by exposing the native population to unknown and divergent ways of life, or it is considered as having positive impacts by promoting charity, hospitality, friendship, or other virtues.

Many attitudes were located between those two extremes. Scholastic theology in the Middle Ages would ultimately help the second tradition to succeed. It is apparently a historiographical misperception, based especially on writings of Max Weber, to assume that Christian teaching before the Reformation was opposed to the profit motive. From the late eleventh and twelfth centuries onwards, the economic activities of merchants were regarded as acceptable, provided they conformed with certain principles and ends. A new system of commercial laws was designed to guarantee that the souls of merchants were not endangered.[173] Thomas Aquinas was fully aware of the moral ambivalence of commerce, or professional trading. It all depended on the motivation and conduct of the trader. Pecuniary gain, 'though not implying, by its nature, anything virtuous or necessary, does not, in itself, connote anything

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171 Irwin, *Free Trade*, pp. 15f. and Jacob Viner, *The Role of Providence in the Social Order* (Philadelphia: American Philosophical Society, 1972), pp. 27–54.

172 'Deus non omnia omnibus terra partibus concessit, sed per regiones dona sua distribuit, quo homines alii aliorum indigentes ope societatem colerent. Itaque mercaturam excitavit, ut qua usquam nata sunt iis communiter frui omnes possent.' Libanius, *Orations*, III; quoted in Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, Vol. II, transl. Francis W. Kelsey, 3 vols (Oxford: Clarendon Press 1925; reprint New York: Oceana Publications, 1964), 2.2.13, pp. 199f.

173 Odd Langholm, *Economics in the Medieval Schools. Wealth, Exchange, Value, Money and Usury according to the Paris Theological Tradition 1200–1350* (Leiden: E. J. Brill, 1992), especially ch. 1: 'Economics and the Schools' (pp. 1–36), and pp. 573–7; Berman, *Law and Revolution*, pp. 336–9; Jacob Viner, *Religious Thought and Economic Society* (Durham, NC: Duke University Press, 1978).

sinful or contrary to virtue: wherefore nothing prevents gain from being directed to some necessary or even virtuous end, and thus trading becomes lawful.'[174] A trader could degenerate into a greedy sinner winning the world but losing his soul, but that was not necessarily the case. Aquinas and other medieval theologians helped to open the way for a pro-trade attitude. After all, proponents of inter-regional trade could always point out – as had been done before – that the moral benefits prevailed: promoting 'mutual assistance' and giving humans the opportunity to 'come to the aid of another part of the earth' while abiding by the principle that 'the buyer gives as much as he receives.'[175] Trade could be mutually beneficial while at the same time meeting the requirement of justice, that is, equality of value between things exchanged, even if an exact definition of this just equality was difficult. By the time of Vitoria, the view that trade was a morally neutral occupation, but always in danger of corrupting the soul, seems to have been widespread. Vitoria himself elevated the right to travel and trade into a rule or norm of the law of nations (see II, 6). He saw commerce as useful, rooted in human sociability, as not necessarily immoral even if directed at profit, but specified that it must not be linked with injustice.[176] Francisco Suárez followed suit, writing while discussing the differences between natural law and *ius gentium* of 'the freedom to contract commercial agreements with persons not actively hostile or unfriendly in sentiment'. By standards of the law of nations, 'commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause.'[177] It was an idea that pointed to the future, and anticipated the writings of Hugo Grotius. He and subsequent authors were troubled by the problem of how to specify 'reasonable causes' which could limit free commercial intercourse. In a nutshell, the intellectual history of cosmopolitan law up to Kant is an attempt to draw a line between 'reasonable' and 'unreasonable' constraints.

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174 Thomas Aquinas, *Summa Theologica*, 1st complete American edn in 3 vols (New York: Benziger Brothers, 1947), vol. 2, 2, 2, qu. 77, art. 4, p. 1517.

175 Richard of Middletown, *Quodlibeta* (Brescia 1591), II, 23, 1, quoted in Langholm, *Economics*, p. 333f. On Scholastic attitudes towards commerce, see also Raymond de Roover, *La Pensée economique des scholastiques. Doctrines et Methodes* (Montréal: Inst. d'études médiévales, 1971); *Business, Banking and Economic Thought in Late Medieval and Early Modern Europe. Selected Studies*, ed. Julius Kirshner (Chicago: University of Chicago Press, 1974).

176 See the excellent analysis in Deckers, *Gerechtigkeit*, pp. 260–72.

177 Francisco Suárez, 'On Laws and God the Lawgiver' (1612), in *Selections from Three Works of Francisco Suárez*, Vol. II: Translation (New York: Oceana Publications, 1964), 2.19.7 (that is, book II, chapter XIX, section 7), p. 347.

Chapter 2

Vitoria and the Second Scholastic

1. European colonialism and Amerindian rights

All the peoples of the world are humans and there is only one definition of all humans and of each one, that is that they are rational ... Thus all the races of humankind are one.
(Bartolomé de Las Casas, *A Short Account of the Destruction of the Indies*)

The quincentenary of Columbus's first voyage to America in 1992 was an interesting time for the moral philosopher. Books, films, conferences, exhibitions and celebrations focused on the past, but above all told him or her about the predominant Western 'spirit of the time'. They reflected what Anthony Pagden has called the current condition of Western European and liberal white North American conscience.[1] Most people had a bad conscience indeed. Colonialism (like apartheid) had been a very bad thing. There was no place for distinctions (such as between 'discovery' and 'encounter') or shades of grey. But there was willingness to create a recycled myth of the '*bon sauvage*' living in a paradise before the conquest of the greedy and evil Europeans.[2]

Historians are hardly satisfied. It is too obvious that one set of clichés (widespread European arrogance towards the primitive 'barbarians') has been replaced by its opposite. The contemporary representation is highly selective, and caught in a dilemma. It is polemically moralistic (condemning the past), but highly sceptical about morality in postmodern times. It believes that

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[1] Anthony Pagden, '1492–1992: Five Hundred Years of Anxiety', in *The Uncertainties of Empire. Essays in Iberian and Ibero-American Intellectual History* (Aldershot: Ashgate, 1994), section XVI, pp. 1–7; the quotation ibid., p. 2. See also James Muldoon, *The Americas in the Spanish World Order. The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994), pp. 1–3 and Kirkpatrick Sale, *The Conquest of Paradise: Christopher Columbus and the Columbian Legacy* (New York: Knopf, 1990) for a list of common accusations.

[2] It is recycled because the anti-colonial writers of the Enlightenment such as Diderot shared a similar perspective; see Pagden, 'Anxiety', pp. 3f. and V, 2 below. Ridley Scott's popular film *1492. The Conquest of Paradise* captures this myth, and the present-day spirit of embarrassment and remorse, nicely, if unintentionally.

colonialism was intrinsically bad, but knows that the belief in intrinsic values of Western Christianity and civilization made conquest legitimate. Imagine the following discussion. John claims that the Europeans had no right to impose their values on other peoples, even if these happened to be cannibals, or burned their widows. After all, the non-Europeans believed they were doing the right thing, and norms are relative. Kathy retorts that by the same token, we have no right to judge our own past. Medieval or early modern European culture was very different from our own. People then believed they were doing the right thing when going on a crusade, setting up the Inquisition, burning witches, or Christianizing the unbelievers. John is not happy with this. He thinks the comparison does not hold, because those Christians can be judged internally by their own standards. Though he has only a vague knowledge about Christian doctrine, he remembers that Christianity asks you to love your neighbour, and this standard was violated by crusaders and others. Kathy in turn points out that the Gospel of the Mountain allows for some latitude of interpretation. Medieval theologians like Thomas Aquinas realized it and argued that Christians do not violate God's law when defending themselves, or reconquering the holy land previously overrun by non-Christians, or saving souls from damnation. In addition, Kathy claims, we do not know for sure if all the conquerors were true Christians; they may have been hypocrites. Conquest itself might not have been that bad, as it had some good consequences in the long run.[3] This imaginary debate might go on forever, eventually winding up with familiar alternatives: an arbitrary stopping of the discussion, arguing in circles, or an impasse reached by the clash of dogmatic statements.

There is little point in denying that Spanish conquest and rule in the New World amounted to indigenous depopulation, repression, devastation and local genocide – what Las Casas called 'the wholesale slaughter' of innocent people, in spite of some later attempts by the crown to stop it by means of legislation.[4]

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[3] This ambivalence of modern consciousness is nicely captured in an amusing episode from *Monty Python's The Life of Brian* (screenplay published Eyre Methuen, London, 1979, p. 20; see also Brown, *Theory*, p. 188): Roman conquest of Judea may not have been that bad, because, as even members of the Peoples' Front of Judea have to admit, it brought everything from better sanitation to peace.

[4] Bartolomé de las Casas, *A Short Account of the Destruction of the Indies*, transl. Nigel Griffin (London: Penguin Books, 1992), pp. 11–3, 32, 81, 129 and passim, the quotation ibid., p. 14. See John Huxtable Elliott, *The old world and the new 1492–1650* (Cambridge [England], New York: Cambridge University Press, 1992), *Imperial Spain 1469–1716*, 2nd edn (Harmondsworth: Penguin, 1970); Luciano Pereña, *Genocidio en America* (Madrid: Editorial MAPFRE, 1992), *Carta Magna de los indios: fuentes constitucionales, 1534–1609* (Madrid: Consejo Superior de Investigaciones Cientificas, 1988); Robert A. Williams, *The American Indian in Western Legal Thought. The Discourses of Conquest* (New York, Oxford: Oxford University Press, 1990), pp. 81–93 (with more literature ibid., pp. 335–41), and the works of Anthony Pagden on the

But this is rarely the subject of debates. Rather, they revolve around the issues introduced in the first chapter: historical judgements, incommensurability of cultures, relativism, presentism and so on. If culture is 'the fabric of meaning in terms of which human beings interpret their experience and guide their action' (Geertz), then this chapter provides the cultural framework of the Second Thomists' writings.

The academic community in sixteenth-century Spain was not homogeneous. Scholars were divided on the question of Native American rights. The revolutionary contribution of the Spanish Second Thomists to the emerging theory of international law was, first, their doctrine of human rights, and second, the willingness to apply standards of impartial justice universally, including the native Americans. In Sections III and IV, I will focus primarily on Vitoria and his law of nations. I reject theories of an all-pervasive European ideology of conquest as prejudiced, and especially ill-suited to do justice to Vitoria. Section V shows in particular that Vitoria's arguments in favour of humanitarian intervention are relevant for our present discourse for systematic reasons, rather than being another example of European moral arrogance. Section VI provides a detailed analysis of the passages on the right of hospitality. My major point of criticism is that Vitoria proves internally inconsistent in not integrating consent into his theory. Vitoria's overall achievement, however, is impressive. But first I will finish this introduction by providing the intellectual context of the neo-Thomist lectures and publications, turning to the writings of Las Casas, Cortés and Sepúlveda.

Bartolomé de Las Casas, known as the 'Apostle to the Indians', tried to establish in his writings that the Native Americans were 'men like us', that they had rights and owned property, were legally equal to the Spaniards, and that only first-hand experience could establish an accurate account of the life of the Amerindian peoples and their destruction.[5] His *Brevisima relación de la destrucción de las Indias* (1552) tells the story of this destruction, arguing that the almost defenseless Native Americans were invaded, not conquered.

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intellectual history of the relationship between Spain and the 'new world': Pagden, *Uncertainties* and *European Encounters with the New World. From Renaissance to Romanticism* (New Haven and London: Yale University Press, 1993). Karen Ordahl Kupperman (ed.), *America in European Consciousness, 1493–1750* (Chapel Hill and London: University of North Carolina Press, 1995), contains essays that discuss Europe's response to American realities. A recent work on the Spanish conquest is Colin M. MacLachlan, *Spain's Empire in the New World: The Role of Ideas in Institutional and Social Change* (Berkeley: University of California Press, 1988), with an extensive bibliography.

[5] Anthony Pagden, '*Ius et Factum*: Text and Experience in the Writings of Bartolomé de Las Casas', in *Uncertainties of Empire*, section VI, pp. 147–62; Pagden, *Encounters*, pp. 69–83.

Spanish 'victories' were in fact massacres, whereas 'pacification' amounted to 'killing God's rational creatures with cruelty worthy of the Turk'.[6] Las Casas tried to provide evidence for what he saw as a gross injustice. He used legal analogues in the *History of the Indies*, and referred to his religious moment of illumination to support his claim that he was the only reliable 'witness' in the affair. He got caught up in a dilemma: 'His polemical objectives were always too stridently in evidence.'[7] As a Spaniard who overcame his cultural and ethnic partiality up to a point, he seemed to take sides rather than remaining the neutral, impartial witness.

A matter different from the exploitation of a subjugated population was the question of the legitimacy of conquest. As the Castilian crown saw itself as the guardian of universal Christendom, it was crucial that uncertain moral issues were explicitly addressed and solved. In Vitoria's somewhat dramatic terms, the 'salvation of our princes' was at stake.[8] Las Casas also carefully analysed the thinking of the conquistadors. They liked to compare their deeds to those of the Romans and the Christians of the *Reconquista.* Cortés took pains to emphasize that Moctezoma's domains were an 'empire', that the Spanish had fought a 'worthy enemy', and above all, that they had conquered, and not simply invaded, the 'Aztec empire'.[9] The overall goal of his account is obvious: he wanted to argue that the conquest had been legitimate. This becomes particularly clear in the episode when Moctezoma presumably recognized Charles V as the 'Great Lord' and donated his empire to him. Moctezoma is supposed to have said:

> For a long time we have known from the writings of our ancestors that neither I, nor any of those who dwell in this land, are natives of it, but foreigners who came from very distant parts; and likewise we know that a chieftain, of whom they were all

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6 Bartolomé de Las Casas, *A Short Account of the Destruction of the Indies* [1552], transl. Nigel Griffin (London: Penguin Books, 1992), p. 43.

7 Pagden, 'Ius et Factum', p. 158.

8 Vitoria, 'On the American Indians', in *Political Writings*, ed. Anthony Padgen and Jeremy Lawrance (Cambridge, Cambridge University Press, 1991), p. 277. For the ideological background, see Anthony Pagden, 'Dispossessing the barbarian: the language of Spanish Thomism and the debate over the property rights of the American Indians', in *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), pp. 79f. A similar version is 'Dispossessing the Barbarian: Rights and Property in Spanish America', in *Spanish Imperialism and the Political Imagination. Studies in European and Spanish-American Social and Political Theory 1513–1830* (New Haven and London: Yale University Press, 1990), pp. 13–36, henceforth abbreviated 'Dispossessing the Barbarian'.

9 Anthony Pagden, '"Con titulo y con no menos merito que el de Alemania, que Vuestra Sacra Majestad posee": Rethinking the Conquest of Mexico', in *Uncertainties of Empire*, section XIII, pp. 1–16.

> vassals, brought our people to this region. And he returned to his native land ... And we have always held that those who descended from him would come and conquer this land and take us as their vassals. So because of the place from which you claim to come, namely, from where the sun rises, and the things you tell us of the great lord or king who sent you here, we believe and are certain that he is our natural lord, especially as you say that he has known of us for some time. So be assured that we shall obey you ....[10]

Historians have demonstrated how implausible these words are, reflecting the Gospels and standard European legal formulas rather than the authentic speech of an Amerindian 'emperor' (he was, in fact, 'chief among those who speak', the leader of a loose alliance of three tribes).[11] Cortés attempted to establish that Moctezoma had agreed to a peaceful translation of power and empire, parallel to the equally fictitious Donation of Constantine. That donation (a forgery, as Lorenzo de Valla demonstrated in the fifteenth century) had transferred sovereignty over the world from the Roman emperors to the Papacy. The Apostolic See in turn 'donated' the Empire to Charlemagne, and finally America to Ferdinand and Isabel in 1494.[12] Cortés's account was, in short, an attempt to legitimize the conquest as morally and legally rightful, to justify his actions to others 'on grounds they could not reasonably reject', to use the language of modern contractualism.[13]

Cortés had a very clear awareness of what is right and what wrong, what is just and what unjust. Like Las Casas or Vitoria, he knew that there are minimal standards of justice. His careful manipulation of the historical record intended to demonstrate that these standards had not been violated in this particular case. Moctezoma's alleged speech turned facts upside down: the Native Americans are the real 'foreigners', the Spaniards the true natives who 'return' to their lands. This sounds and is preposterous, but nevertheless a necessary strategy in the sense that there was no other way to avoid open conflict with minimal standards of justice. Las Casas attempted to tear this veil of hypocrisy and distortion apart. He distinguished between conquest and invasion. Conquest was conducted against enemies who had taken away what was not rightly theirs, whereas the Spanish invasion was nothing but 'a series of violent incursions into the territory by ... cruel tyrants'. The Native Americans had in

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10 Hernán Cortés, *Letters from Mexico*, transl. and ed. Anthony Pagden (New Haven and London: Yale University Press, 1986), pp. 85f.

11 John H. Elliott, 'The Mental World of Hernán Cortés', *Transactions of the Royal Historical Society*, 17 (1967), pp. 41–58.

12 Pagden, 'Conquest of Mexico', pp. 13f.

13 T. M. Scanlon, 'Contractualism and Utilitarianism', in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), p. 116.

fact been overrun and invaded, had been redescribed as 'worthy enemies' although their weapons were a 'joke'.[14]

Las Casas's writings offer the rudimentary elements of a theory of aggression, of collective self-determination or political independence, and of self-defence. This is more fully developed in Vitoria, to whom we will now turn.

2. Natural law and human rights

> In international law, there is really only one problem, what to do about natural law. (Philip Allott, 'Language, Method and the Nature of International Law', *British Yearbook of International Law*, 45 (1971))

Nowadays we often tend to see the struggle between Las Casas, Vitoria and the Second Thomists on the one hand and Juan Ginés de Sepúlveda, Vasco de Quiroga and others, on the other as a fight between more liberal, humanistic and progressive Spaniards and their reactionary foes. As usual, matters are not that simple. The 'bad guys' were committed to the Roman law tradition and thus privileged positive over natural law. As a consequence, they showed little respect for (allegedly) uncivilized, pre-social peoples like the Native Americans. The struggle between the two groups concerned 'competing views of the origin of rights'.[15] For one group, they were innate, self-evident and natural; for the other, they were the result of civilization. This dilemma about the origin of rights is familiar for us, nowadays repeated in juxtapositions such as transcendentalism versus historicism, idealism versus naturalism, political liberalism versus communitarian positions, Kantian morality versus Hegelian ethical life (*Sittlichkeit*), and so on. Investigating into natural law and human rights is a complex enterprise. We have to distinguish among various problems: the origin and status of natural rights, their scope, the question when the idea

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[14] Bartolomé de las Casas, *A Short Account of the Destruction of the Indies*, pp. 6, 43 and 109.

[15] Anthony Pagden, 'The Humanism of Vasco de Quiroga's "Informacion en derecho" ', in *Uncertainties*, ch. V, p. 135. Lewis Hanke, *All Mankind is One. A Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (De Kalb: Northern Illinois University Press, 1974) is the classic study of the famous 1550 dispute. See also Leslie Claude Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), pp. 185–214; Antonio-Enrique Pérez Luño, *La polémica sobre el Nuevo Mundo: Los clásicos españoles de la filosofía del derecho* (Madrid: Editorial Trotta, 1992), and the essays by Eduardo Andújar and Rafael Alvira and Alfredo Cruz in Kevin White (ed.), *Hispanic Philosophy in the Age of Discovery* (Washington, DC: Catholic University of America Press, 1997), pp. 69–110.

developed, the connection between natural rights and natural law, and the relationship between individuals and the community.[16] I start with the theory of natural law and continue with natural rights in neo-Thomist thought.

The 'School of Salamanca' or 'the Second Scholastic' was a body of professors of theology in Salamanca, Coimbra and Alcalá. The most important ones were Francisco de Vitoria (1486–1546), Domingo de Soto (1494–1560), Melchor Cano (1509–60), Bartolomé de Carranza (1503–76), Juan de la Peña (1523–65), Luis de Molina (1535–1600) and Francisco Suárez (1548–1617).[17] The theologians of the Second Scholastic built upon the tradition established by Thomas Aquinas (see I, 5). Natural law is a body of self-evident principles, a 'function of reason' rather than an 'act of will'.[18] Natural law was believed to consist of two parts, so-called 'first principles' which are self-evident to everybody like axioms or the Golden Rule. The process of *synderesis*, similar to Aristotle's practical syllogism, translated the first principles into secondary

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16 See the excellent 'Introduction: Modern problems and historical approaches', in Brian Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150–1626* (Atlanta: Scholars Press, 1997), pp. 1–9.

17 Anthony Pagden, 'The Preservation of Order: The School of Salamanca and the "Ius Naturae" ', in *Uncertainties*, ch. III, pp. 155–66 and 'Introduction', in Vitoria, *Political Writings*, pp. xiii–xvii; Luciano Pereña, *La Escuela de Salamanca. Conciencia critica de America en el Centenario de la Reconciliación* (Salamanca: Catedra V Centenario, 1992); Reyes Mate and Friedrich Niewöhner (eds), *Spaniens Beitrag zum politischen Denken in Europa um 1600* (Wiesbaden: Harrassowitz Verlag, 1994); Marcelino Rodríguez Molinero, *La doctrina colonial de Francisco de Vitoria o el derecho de la paz y de la guerra: un legado perenne de la escuela de Salamanca* (Salamanca: Cervantes, 1993); J. A. Fernández-Santamaria, *The State, War and Peace. Spanish Political Thought in the Renaissance 1516–1559* (Cambridge: Cambridge University Press, 1977); White, *Hispanic Philosophy in the Age of Discovery*, and the older, but reliable study by Bernice Hamilton, *Political thought in Sixteenth-Century Spain: A Study of the Political Ideas of Vitoria, De Soto, Suárez and Molina* (Oxford: Clarendon Press, 1963). More titles are listed in Vitoria, *Political Writings*, pp. 383–7, and in Francisco Castilla Urbaño, *El Pensamiento de Francisco de Vitoria. Filosofía política e indio americano* (Barcelona: Editorial Anthropos, 1992), pp. 347–62, who also offers a short history of the interpretation of Vitoria's works, ibid., pp. 13–33. Biographical information on Vitoria is included in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934), ch. III. The standard work on Renaissance political thought is Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols (Cambridge: Cambridge University Press, 1978).

18 Vitoria, 'On Law', in *Political Writings*, pp. 155f. On Aristotle's tremendous influence, see the essays in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1982), especially pp. 43–98, 657–72 and 723–37. For Aristotle's importance in fifteenth-century Spain, see Anthony Pagden, 'The diffusion of Aristotle's moral philosophy in Spain c. 1400 – c. 1600', in *Uncertainties*, ch. I, pp. 287–313.

ones. Positive law is constituted by these derived principles, otherwise it is not just and binding. It can vary from community to community and can also change. It should be reshaped if it 'contains a manifest injustice'.[19]

The scope and content of natural law and its theological framework distinguish Vitoria's reasoning from our own. His main focus is not a post-sceptical thin concept of justice but a rich notion of the good Christian life. For Vitoria, the argument that natural inclinations cannot be 'towards evil' because they come from God is a valid proof. Like Augustine and Aquinas, he believed that the first principles were implanted by God '*in cordibus hominum*'.[20] But natural law theory is not merely a part of theology. It gains a certain independence with the Second Thomists, as they often argued that natural law is founded in reason and thus free from the will of any being, even the will of God. However, most tried to find a middle ground between realists and nominalists, unlike Grotius later on (see III, 1). What unites us with Vitoria is the fact that we share a similar moral predicament. Most of us assume that there are first, self-evident precepts or principles (*praecepta*) such as 'humans have inalienable rights.' We just do not know for sure if there is a secure foundation for them. But we also cannot afford not to have them. The distinction between first and second (or third, etc.) principles points at the systematic problem of moving from a thin conception of impartial justice to more concrete rules or maxims while staying clear of arbitrary precepts. First principles, Vitoria writes, are 'unchangeable', but 'things which are not first principles may well be changed.'[21] The distinction between and the transition from first to secondary principles has remained troublesome and controversial, as can be seen in the case of humanitarian intervention (see II, 5). Another disquieting legacy is the systematic function of the 'general consensus of men'.[22] It is designed to guarantee the validity of derived second- or third-order principles. As a Thomist, Vitoria cannot argue, any more than a contemporary representative of discursive ethics, that any consent will do; consent must be rational and reflect natural law (see the discussion in III, 2). How do we guarantee that consensus is rational? How does consent relate to natural law or justice? Finally, Thomas Aquinas reasoned that 'each has a natural inclination to preserve its own being, and each is therefore obliged to preserve himself', and Vitoria considers the argument well-founded.[23] Following Hume, we nowadays claim that the inferrence from inclination to moral obligation amounts to an

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19 Vitoria, 'On Law', pp. 170, 184 and 172.

20 Ibid., p. 171 and Augustine, *Confessions*, ed. James J. O'Donnell, Vol. 1: Introduction and Text (Oxford: Clarendon Press, 1992), book II, ch. 4 (pp. 18f.).

21 Vitoria, 'On Law', p. 171.

22 Ibid., p. 160. See also Pagden, 'School of Salamanca', p. 161f.

23 Vitoria, 'On Law', p. 170.

invalid is-ought fallacy. What, then, are the grounds of obligation, if they cannot be found in human inclinations? This problem will harrass authors after Vitoria up to the present.

Vitoria takes the Roman law distinction between *dominium* or ownership (the right to a thing) and *possessio* (control of a thing, irrespective of rightful claims), for granted. It is usually assumed that the theory of natural, subjective human rights was developed by authors after the Second Scholastics, especially Grotius.[24] This interpretation has been challenged in recent years.[25] Vitoria – like Summenhart before him, or Suárez and Grotius after him – distinguishes between two concepts of *ius*. The dominant understanding is the conventional one, defining *ius* as an objectively given *iustum*. It is complemented by (and coexists with) the new concept of *ius* being a personal *potentia* or *facultas utendi re*. *Dominium* is a natural right of each human being. The relationship between individual rights and objective natural law was understood as (and in fact is) symbiotic and correlative. Medieval jurists, and theologians like Summenhart and Vitoria, perfectly understood that 'Thou shalt not steal' as a command of natural law implies that others have a right to acquire property. The doctrine of individual rights is embedded in a framework of natural law. This law defines an area of subjective rights, as 'right is that which is licit in accordance with the laws.'[26] Right is a faculty, and describes a sphere of free choice allowed by permissive natural law. Subjective right is grounded in, derived from, and limited by natural law, the standard of what is objectively

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24 See Richard Tuck, *Natural rights theories. Their origin and development* (Cambridge: Cambridge University Press, 1979), p. 47; Pagden, 'Dispossessing the barbarian', pp. 80f.

25 Alternative and more convincing interpretations have been developed by Tully, *Approach*, pp. 103–7; Tierney, *Rights*, passim, especially pp. 33ff and ch. XI; Marcelo Sánchez-Sorondo, 'Vitoria: The Original Philosopher of Rights', in White, *Hispanic Philosophy in the Age of Discovery*, pp. 59–68; Luciano Perena Vicente, 'La Charte des droits des Indiens selon l'Ecole de Salamanque', *Revue internationale de la Croix-Rouge*, 74 (1992), pp. 484–506, and Annabel S. Brett, *Liberty, Right and Nature. Individual rights in later scholastic thought* (Cambridge: Cambridge University Press, 1997), ch. 4. Brett argues that there are two different senses of 'subjective' or natural right, one developed in the lecture 'On Civil Power', the other dominant in the commentary on the 2a2ae. See Brett, *Liberty*, pp. 136f.

26 Francisco de Vitoria, *Commentarios a la Secunda secundae de Santo Tomás*, ed. Vicente Beltrán de Heredia, 6 vols (Salamanca: Biblioteca de teólogos españoles, 1932–52), q. 62 article 1, no. 54, p. 110, transl. in Tierney, *Rights*, p. 259, and henceforth abbreviated *Commentarios* II II q. 62, a. 1, no. 54. See Daniel Deckers, *Gerechtigkeit und Recht. Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)* (Freiburg und Wien: Herder, 1991), p. 234, pp. 153ff., and p. 164; Tierney, *Rights*, pp. 33f., 259f., pp. 50f. (on Suárez and Grotius), and pp. 242–52 (on Summenhart); Tully, *Approach*, pp. 104f. Comprehensive bibliographies in Tierney, *Rights*, pp. 349–67 and Brett, *Liberty*, pp. 236–49.

right. This sounds anachronistic, but Vitoria explicitly brings 'liberty', 'licence' and 'right' together in his example of hunting. People must not be prevented from hunting, he argues, even if it might amount to a waste of time and result in a neglect of farming, as 'liberty is more useful than that private good' (*quia libertas est magis utilis quam illud bonum privatum*).[27] Freedom or liberty prevails over conceptions of the good, with regard to acts considered at least not morally bad. Right pertains only to rational beings endowed with intellect and will. The distinction between objective law and subjective natural right is a basic assumption of Vitoria's lecture on the Native Americans, supporting all ensuing arguments. The distinction itself, and the nascent theory of human right, is not revolutionary. Vitoria's originality lies in his uncompromising application of the theory to a new context, that of the American 'barbarians': 'Vitoria ... was not using a new language of rights; he was deploying an old language in a new context.'[28] A comparison with John Mair is illuminating. He dislikes the idea that human beings, created by God in His image and bound to look on heaven, should be sold like cattle to slave-owners. He is glad that the institution of slavery is no longer practised in his native Britain. But this belief in human dignity (with a clear theological basis) is selective in application. For Mair, the Native Americans are slaves by nature and a knockdown proof of Aristotle's theory. In anthropological terms, this can be read as an example of the widespread tendency to distinguish between in-group and out-group members. Most societies used to be disinclined to enslave their own members.[29] Vitoria does not buy this distinction. For him, natural rights are universal in form, and cosmopolitan in scope.

3. Vitoria's lecture 'On the American Indians'

I will begin with an analysis of Vitoria's lecture 'On the recently discovered Indians' (*De Indis Recenter Inventis*), using it as a springboard to filter out his key concepts pertaining to the law of nations. The role of Christianity within

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27 Vitoria, *Commentarios*, II II q. 64 'On homicide', a. 1, no. 9, p. 273, translated in Brett, *Liberty*, p. 132; cf. Brett, *Liberty*, pp. 132f. and Tierney, *Rights*, pp. 261f.

28 Tierney, *Rights*, p. 262. Wolfgang Schmale, *Archäologie der Grund- und Menschenrechte in der Frühen Neuzeit.Ein deutsch-französisches Paradigma* (München: Oldenbourg, 1997), pp. 442–4 and 247–93 credits Vitoria with the first human rights debate in Europe, but emphasizes that the history of the *ius hominum* is much older.

29 See David Eltis, 'Europeans and the Rise and Fall of African Slavery: An Interpretation', *American Historical Review*, 98 (1993), pp. 1399–1423. For John Mair, see Tierney, *Rights*, p. 254, quoting from John Mair, *Quartum Sententiarum* (1519), CIIV and *In secundum Sententiarum quaestiones* (Paris, 1519), fol. CLXXVIIr.

this legal framework will decide if Vitoria arrives at a thin conception of justice and how it relates to the Christian understanding of the good.

Vitoria's famous lecture starts with an introduction, and then tackles three questions.[30] The first and most important one, whether the native 'barbarians' had true public and private dominion, or right of ownership, is answered in the affirmative. The second question lists the seven 'unjust titles' of the Spaniards, followed by eight 'just titles' of conquest. The term *titulus* had two meanings. On the one hand, it simply referred to captions of sections or arranged arguments. At the same time, it meant legal possession of something. The second and third sections often overlap. Unjust titles are reformulated and reappear as just titles. I will deal with them as an interwoven and related

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30 Vitoria's *relectio* has been the focus of several authors. See, for example, Pagden, 'Dispossessing the Barbarian', pp. 18–22; Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* [1950], 3rd edn (Berlin: Duncker & Humblot, 1988), pp. 69–96; Deckers, *Gerechtigkeit*, pp. 226–41. Anthony Pagden, *Lords of all the World. Ideologies of Empire in Spain, Britain and France, c. 1500 – c. 1800* (New Haven, London: Yale University Press, 1995), pp. 91–5 gives some background information, focusing on the dilemma of Spanish claims. A comprehensive account of the wider debate in Spain is Joseph Höffner, *Kolonialismus und Evangelium. Spanische Kolonialethik im Goldenen Zeitalter*, 2nd edn (Trier: Paulinus-Verlag, 1969), a shorter one Urbano, *El Pensamiento*, ch. VI, with a discussion of *De Indis*, ibid., pp. 295–316. Alberto A. García Menéndez, *Francisco de Vitoria y el Derecho Internacional* (Hato Rey, Puerto Rico: Ediciones Antillas, 1986) is a very short and rather superficial study. Roberto O. Irigoyen, *Francisco de Vitoria y la Politica Internacional Argentina de Hipolito Yrigoyen* (Argentina: Pre Rot S. R. L., 1993) compares Vitoria's thinking with that of the Argentine statesman and president (1852–1933). Also reliable is Ma. Lourdes Redondo Redondo, *Utopia Vitoriana y Realidad Indiana* (Madrid: Fundación Universitaria Española, 1992), especially part II. Redondo also includes an updated bibliography (pp. 343–63). A general introduction is Martin C. Ortega, 'Vitoria and the Universalist Conception of International Relations', in Ian Clark and Iver B. Neumann (eds), *Classical Theories of International Relations* (Houndmills et al.: Macmillan Press 1996), pp. 99–119. Heinz-Gerhard Justenhoven, *Francisco de Vitoria zu Krieg und Frieden* (Köln: Bachem Verlag, 1991), ch. IV puts the *relectio* into the wider context of Vitoria's *ius gentium* and just-war theory. He also offers the most comprehensive list of secondary literature on Vitoria, ibid., pp. 188–213. Authors that deserve being mentioned are Camilo Barcia Trelles, Vicente Beltrán de Heredia, Venancio D. Carro, Luis G. Alonso Getino, Ramón Hernández (who wrote about Vitoria's docrine of human rights in the 1980s), Yves de La Brière, Luciano Pereña Vicente, Carl Schmitt, James Brown Scott, Antonio Truyol Serra, Teófilo Urdánoz and Alfred Verdross (finally, an Austrian!). See also Francisco Titos Lomas, *La filosofía política y jurídica de Francisco de Vitoria* (Córdoba: Monte de Piedad y Caja de Ahorros de Córdoba, 1993), and the older analysis in Scott, *Spanish Origin*, chs. IV (on the often underrated first part about *dominium*), V and VI. James Muldoon, *The Americas in the Spanish World Order. The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994), pp. 30ff. discusses the term 'title', and also offers a brief introduction.

whole. I also divide all titles into theological and secular ones, starting with the first.

The theological titles include four claims: (1) the Papal donation to the Spanish kings, (2) sinners and (3) unbelievers cannot be true masters and claim dominion, and finally (4) America is a 'special gift from God'. The incomplete separation of civil or temporal from spiritual power underlies Vitoria's arguments.[31] The Pope has only power within the church, but is 'not lord of the whole world' and has therefore no *dominium* in America. As a consequence, he cannot give it to princes like the Catholic monarchs (actually done with the five Bulls of Donation in 1493). The Pope 'gives no power to kings and princes, because no one can give what he does not have'.[32]

Vitoria distinguishes between spiritual and civil matters to argue later on that they overlap. The Pope does have some temporal power, but only 'insofar as it concerns spiritual matters; that is, as far as is necessary for the administration of spiritual things'.[33] Vitoria does, after and above all, endorse a thick conception of justice: the political sphere is subordinate to the spiritual one. The Pope has, for example, the right to 'infringe any civil laws which promote sin', and depose heretical rulers or 'make new princes' when the spiritual welfare or 'happiness' of the subjects is in danger.[34] This gives him some 'indirect' temporal power. Vitoria is not a champion of the strict separation of church and state, though he advances some arguments that come close to it.

Vitoria rejects the second theological argument that 'sinners, or at least those who are in a state of mortal sin, cannot exercise dominion over anything.' This is the mistaken opinion of 'heretics' such as John Wycliff, Jan Hus and the Lutherans, who made rights dependent on God's grace rather than God's law. Vitoria argues that rights such as dominion over one's own body or the right of self-defence are natural and inalienable,[35] and that they would be valid even if God didn't exist (see II, 2). The third theological claim, that unbelievers cannot be true masters, is rejected along these lines. The last argument, that the 'barbarians' are a special gift from God, is related to the second one, building upon God's grace. For Vitoria, this 'prophecy' is unfounded and contradicts common law and the Scriptures, and is therefore potentially heretical.[36]

The secular arguments defending the Spanish invasion almost all relate to

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31 See, for instance, 'Power of the Church', p. 88 and Urbano, *El Pensamiento*, ch. IV on church and the state.

32 Vitoria, 'Power of the Church', p. 85; cf. 'American Indians', p. 261. See also 'Power of the Church', pp. 83f.; 'American Indians', pp. 260f., and Pagden, *Lords*, p. 32.

33 Vitoria, 'American Indians', p. 261.

34 Ibid., pp. 261f. and 'Power of the Church', p. 93.

35 Vitoria, 'American Indian', p. 240 and p. 242. See Pagden, 'Dispossessing', pp. 83f. for the theological background.

36 Vitoria, 'American Indian', p. 276.

Aristotle's theory of natural slavery. The claim that Emperor Charles V was 'master of the whole world' was distinct from the others. It was based on Justinian's *Digest*, his decree *Bene a Zenon* and the 'livery of seisin' or *traditio*, the handling over of (imperial) possession (see I, 5). For Vitoria, this theory contradicts historical facts, logical reasoning, natural law and canon law. If the emperor had any dominion at all, then it was only by jurisdiction, but not by property.[37] Vitoria's rejection of imperial universal monarchy implies accepting a plurality of states and communities.

Aristotle's theory of natural slavery was the most serious threat to Vitoria's concept of natural rights and the claim that the 'barbarians' had true dominion or ownership.[38] Vitoria offers empirical evidence: the Native Americans 'have judgment like other men', they 'have some order in their affairs' which shows that they use their reason. Vitoria's description aims at defeating Aristotle with his own weapons; his list is a modified version from Aristotle's *Politics*, outlining the necessary conditions of a civil society.[39] Vitoria's empirical claim was supported by some Europeans such as Las Casas or the Franciscan Jacobo de Testera, who admired the Mexican Indians' skills, customs and buildings, and their intellectual and social capacities.[40] But there were differences between the culture of the Inca, the Maya and the Mexica on the one hand and that of nomadic tribes on the other. Vitoria admits that some natives 'seem to us insensate and slow-witted', even 'foolish'. He quickly adds that this can be attributed to their 'evil and barbarous education'.[41] Vitoria engages in a balancing act, arguing that they are 'like us', that is, human beings, but also

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37 Ibid., pp. 253, 255, and 258. See Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (London: Sources of History, 1975), pp. 57f.; and Pagden, *Lords*, pp. 29–62 on the idea of a 'universal monarchy' in modern Europe, especially in Spain.

38 The other challenge came from Juan Ginés de Sepúlveda, *Democrates segundo, o de las justas causas de la guerra contra los indios*, ed. Angel Losada (Madrid: Consejo Superior de Investigaciones Científicas, 1951). He argued that property relations are the product of civil societies, and that native communities had failed to establish them. See the discussion in Anthony Pagden, *The fall of natural man. The American Indian and the origins of comparative ethnology* (Cambridge: Cambridge University Press, 1982), pp. 109–18 and 'Dispossessing', pp. 90–3.

39 Vitoria, 'American Indians', p. 250; Aristotle, *The Politics*, Book VII, 1328b 5 – 1329a 35 (pp. 165–9); Pagden, *fall*, pp. 68–79, and Redondo, *Utopia Vitoriana*, pp. 144f.

40 Cf. Pagden, *fall*, pp. 75f. See also the testimony of Diego de Covarrubias, ibid., p. 96; Pagden, *Encounters*, pp. 17–49, and the comprehensive study Stephen F. Brett, *Slavery and the Catholic Tradition: rights in the balance* (American University Studies: Series 5, Philosophy; 157) (New York, Vienna, et al.: Lang, 1994), which covers, apart from Vitoria, Thomas Aquinas and Domingo de Soto.

41 'American Indians', p. 250.

different at the same time. The differences are seen as marginal, and explained by reference to contingent historical factors such as education.

Vitoria also tries to show that Aristotle's account of natural slavery is self-contradictory. The crucial sentence is that 'the potential [*potentia*] which is incapable of being realized in the act [*actus*] is in vain [*frustra*]'.[42] Vitoria supports Aristotle's teleological principle that 'nature makes nothing incomplete, and nothing in vain.'[43] Suppose the Native Americans were really natural slaves capable of some reasoning (understanding, carrying out orders), but not of *phronesis* (practical reason) and giving commands (Aristotle's theory),[44] then nature has indeed created something 'incomplete' and 'in vain', a being that is forever potentially human, but never achieves its goal (*telos*), which is actuality. The additional consideration that, from a theological point of view, God would have created an imperfect being, unable to realize its potential, does not carry the burden of the argument.

The upshot of the reasoning is that the theory of natural slavery is internally inconsistent. Melchor Cano, also a Dominican theologian and Vitoria's pupil, improved on his teacher's argument, pointing out in 1546 that Aristotle had confused a psychological disposition with a legal concept. Incidentally, this resembles Rousseau's later claim that the words 'slavery' and 'right' are mutually exclusive.[45] By rejecting the concept of natural slavery, Vitoria arrives at a theory of natural rights: '*homines non nascuntur servi, sed liberi*' (humans are not born enslaved, but free).[46] Once Vitoria has established that the natives are humans, he has to explain why they have a way of life apparently inferior to urban Spaniards, but similar to peasants. They lack 'many ... things useful, or rather indispensable, for human use'.[47] Vitoria winds up comparing them to children, though he concedes that our evaluation may be mistaken. Like children, they can possess dominion and be 'true masters'. At the same time, they are in need of tutelage which might be required by Christian charity. But Vitoria is quick to add that these are hypothetical considerations made 'for the

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42 Ibid. See Pagden, *fall*, pp. 94f. for a succinct analysis.

43 Aristotle, *Politics*, Book I, 1256b 20 (p. 11).

44 Ibid., Book I, 1254b 20f. (p. 7), and Aristotle, *The Nicomachean Ethics*. Transl. with an introduction by Sir David Ross (London: Oxford University Press, 1971), 1143a 8–9 (p. 151) on the distinction between 'understanding' and 'practical wisdom'.

45 Melchor Cano, 'De dominio indorum', Biblioteca Vaticana MS Lat. 4648, fols. 30r–31v, quoted in Pagden, 'Dispossessing', pp. 88f.; Jean-Jacques Rousseau, 'On Social Contract', I, 4 in Alan Ritter and Julia Conaway Bondanella (eds), *Rousseau's Political Writings* (New York: Norton, 1988), p. 89.

46 Vitoria, *Commentarios* II II q. 63, a.1, no. 12, p. 228. See Redondo, *Utopia Vitoriana*, pp. 144–50 and the discussion in the previous section, especially the studies by Tierney and Brett.

47 'American Indians', p. 290.

sake of argument'. In any case, tutelage must respect the rights of those tutored. Therefore, everything must be done 'for the benefit and good of the barbarians, and not merely for the profit of the Spaniards'.[48] Vitoria is sure that this condition has not been met by his compatriots.

Let me conclude this section by adding some short remarks on slavery and contemporary thinking. Few would nowadays support Aristotle's theory of natural slavery, but it might be pointed out, that, after all, the arguments of Vitoria or subsequent natural law theorists are no more convincing. But this is mistaken. Aristotle's theory is internally inconsistent (as Vitoria pointed out), and makes dubious empirical claims about physical differences between slaves and masters, and the latters' mental superiority. The crucial sentences in this respect are: 'Nature would like to distinguish between the bodies of freemen and slaves, making the one strong for servile labour, the other upright, and ... useless for such services ... But the opposite often happens – that some have the souls and others have the bodies of freemen.'[49] As Bernard Williams points out, the last sentence is a disaster. Aristotle's artificial binary juxtaposition of slaves and masters breaks down when confronted with the real world. Put forward as an empirical claim, natural inequality can be dismissed as downright false. His claim does not meet the standards of internal consistency. He only succeeds in showing that chattel slaves in ancient Greece were necessary for the good life in the *polis*, given the technological standards and the conception of the good in that society. But the argument that slaves are economically necessary (apparently shared by most Greek citizens) is pragmatic, and a far cry from Aristotle's philosophical aim, justifying slavery as a social institution in principle. Again, we do not impose our moral standards on a different culture. There is evidence that at least some Greeks held that slavery was a mere convention, an arbitrary institution, and unjust because it is imposed by force and violates natural freedom.[50] These arguments are more or less identical with, or at least very similar to, our own common-sense rejection of slavery on moral grounds.

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48 Ibid., pp. 249 and 291.

49 Aristotle, *Politics*, Book I, 1254b 27 (p. 17). My analysis is indebted to Bernard Williams, *Shame and Necessity* (Berkeley et al.: University of California Press, 1993), pp. 110–16; see also Pagden, *Lords*, p. 21, and Barry, *Justice*, pp. 208f. with more examples of inconsistent attempts to undermine human equality.

50 Divergent opinions are listed by Aristotle himself, see *Politics*, Book I, 1253b 20–23 (p. 15), 1255a 3–32 (pp. 17f.) and in Williams, *Shame*, pp. 109f. See also M. I. Finley, *Ancient Slavery and Modern Ideology* (New York: Viking Press, 1980).

4. Vitoria's law of nations as a theory of political justice

There is disagreement among interpreters whether Vitoria was really that critical of his compatriots. Some argue that his talk about universal rights and justice is mere rhetoric and dissolves into nothing when it comes down to Castilian practice. Others, especially Catholic, Spanish and Latin American authors, are more favourable. They see Vitoria's idea of an 'international' community at the heart of his innovative theory. Robledo appreciates Vitoria as the prophet of contemporary *ius cogens* norms and legal cosmopolitanism. Irigoyen writes: '*Pueblos libres e iguales, unidos por la solidaridad internacional, son la base conceptual de la comunidad juridicamente organizada que preconiza Francisco de Vitoria.*'[51] The cornerstones of Vitoria's theory, Irigoyen claims, are popular sovereignty, equality and liberty of *pueblos* or the peoples, and 'international solidarity'. Historians will quickly jump to the conclusion that this interpretation is anachronistic; Irigoyen also uses the term 'international democracy' while writing about Vitoria. This section focuses on an assessment of Vitoria's *ius gentium*, and these problems.

The law of nations (*ius gentium*) is defined by Vitoria as a body of norms which has the force of 'positive enactment' (*lex*).[52] Vitoria's major systematic problem is: is the law of nations part of natural law or positive human law?[53] The Roman jurists Ulpian and Gajus provided conflicting definitions, and Thomas Aquinas took them over. Vitoria is not willing to follow Aquinas blindly, and tries to find a conclusive interpretation. Vitoria's major obstacle is his definition of natural law, and the belief that it is rooted in the invariant

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51 Irigoyen, *Francisco de Vitoria*, p. 113; Antonio Gómez Robledo, 'Le *ius cogens* international: sa genèse, sa nature, ses fonctions', *Recueil des Cours*, 172, III (1981), pp. 23–5 and 189–91. Redondo, *Utopia Vitoriana*, p. 156 arrives at a similar conclusion. See also Molinero, *La doctrina colonial*, and Antonio Truyol Serra et al., *Actualité de la pensée juridique de Francisco de Vitoria* (Bruxelles: Bruylant, 1988), and Scott, *Spanish Origin*, p. 137 about equality of peoples and states being the cornerstone of Vitoria's theory.

52 The important primary sources are, apart from the *Relectio De Indis*, the commentaries to questions 52, 57, and 62 of St Thomas's *Summa*, Secunda Secunda. Cf. Francisco de Vitoria, *Commentarios a la Secunda secundae de Santo Tomás*, ed. Vicente Beltrán de Heredia, 6 vols (Salamanca: Biblioteca de teólogos españoles, 1932–52). Question 57, article 3 is translated as Appendix E in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934. The best studies on the topic are Deckers, *Gerechtigkeit*, especially pp. 344–57, and Redondo, *Utopia Vitoriana*, parts I and II. See also Scott, *Spanish Origin*, ch. VII on natural law and *ius gentium*, and the short but reliable passages in Skinner, *Foundations*, II, pp. 152–4. Justenhoven, *Vitoria*, pp. 64–71 and 95–108 is a recent summary of Vitoria's law of nations.

53 See Deckers, *Gerechtigkeit*, pp. 358–87 for some of the following.

structure of the universe. All that is not located there (such as the law of nations) has to be positive law by implication. Sometimes Vitoria hints at this: '*ius gentium* ought to be placed more under positive law than under natural law',[54] a position more forcefully repeated by authors like Soto and Suaréz. The binary juxtaposition of positive and natural law would have to be abandoned to find a way out of this impasse. To some extent, Vitoria's compromise abandons this juxtaposition, and the premise that the law of nations must be either natural or positive law. The compromise entails that we can see the law of nations from two perspectives. In terms of content, it is close to natural law. In terms of origin and its features, it is positive law.[55] It is 'like' positive law because its sources are a pact (*pactum*) and consent (*consensus*). The original ownership of all (*dominium omnium*), Vitoria argues, was abandoned by a 'virtual consent of the whole world' (*virtuali consensu totius orbis*), not by natural or divine positive law.[56] The unwritten law of nations is binding because a violation would contradict this 'common consent' and the law (*ius*) derived from it (the written law of nations binds us in conscience). The law of nations 'has the validity of a positive enactment [*lex*]'[57] because of its legitimate authority (the consent of all) and because it promotes the common good; promulgation as the third criteria is not mentioned by Vitoria.

This line of reasoning is aptly summarized in the following passage:

> The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations ... No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.[58]

Our first reaction to the claim that the whole world is a commonwealth might be that this is fiction in the sense of not being rooted in anything real. Vitoria's global commonwealth is the normative ideal of the actual or hypothetical

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54 Vitoria, *Commentarios* II II q. 57 a. 3, no. 2, p. 13; Scott, *Spanish Origin*, Appendix E, p. cxii. For Suaréz, see *Selections*, pp. 347, 351 and 459, where the *ius gentium* is 'simply ... the result of usage and tradition'.

55 Vitoria, *Commentarios* II II q. 57, a. 3, pp. 12–17 and q. 66, a. 2 no. 5, p. 326. See Deckers, *Gerechtigkeit*, pp. 367f.

56 Vitoria, *Commentarios* II II q. 57, a. 3, no. 5, p. 16; Scott, *Spanish Origin*, Appendix E, p. cxiii.

57 Vitoria, 'On Civil Power', question 3, article 4, in *Political Writings*, p. 40. The Latin original is included in *De potestate civili*, eingeleitet und übersetzt von Robert Schnepf (Berlin: Akademie Verlag 1992).

58 Vitoria, 'On Civil Power', ibid., p. 40: 'Habet enim totus orbis, qui aliquo modo est una res publica, potestatem ferendi leges aequas et convenientes omnibus, quales sunt in iure gentium. ... In rebus tamen gravioribus, ut est de incolumitate legatorum, neque licet uni regno nolle teneri iure gentium; est enim latum totius orbis auctoritate.'

consent of human beings concerning rules governing their actions. The basis of Vitoria's law of nations is identical with the features of impartial political justice focusing on universalizability and the free, possible, or virtual consent of all people who are equal in a normative sense (see I, 4 and IV, 5). Vitoria has moved the idea of a global commonwealth espoused by ancient Stoics and medieval Christianity from its ethical context to the sphere of international law. '*Totus orbis habet potestatem legis ferendi*' ('The whole world has the power to enact laws') underlines that Vitoria's viewpoint is cosmopolitan and universalist, and expresses the idea of impartial justice. Vitoria does not focus on the state (like Machiavelli), or on the relation among Christian European states, like many authors of peace projects. Materially Vitoria proposes diplomatic immunity, the inviolability or sanctity of non-combatants, the freedom of the seas, the right of hospitality, and 'that prisoners of war should be enslaved' as basic elements of the *ius gentium*.[59] The first three have become integral parts of the modern law of nations. The right of hospitality will be discussed extensively in another section (II, 6). Enslaving POWs seems old-fashioned and unacceptable nowadays, but was proposed by Roman lawyers whom Vitoria followed. A debated alternative was killing all prisoners indiscriminately.[60] Vitoria endorsed the lesser of two evils.

Vitoria engages in a balancing act. On the one hand, *ius gentium* is based on and supports natural law. The latter cannot be preserved without the former. Ambassadors, for instance, have the task to bring about peace if war breaks out, therefore they must be inviolable. If they were not, one norm of natural law (establishing peace) could not be fulfilled. This is necessary law, has the virtual consent of the whole world and cannot be abrogated. The descending argument is counterbalanced by an ascending one, the latter limited to parts of *ius gentium*. Christians, Vitoria argues, have the right to abrogate it, establishing among themselves by consent that POWs do not become slaves. So Vitoria tries to preserve international law's normative character (rooted in natural law) as well as its consensual quality. This sounds paradoxical, and resembles a modern dilemma, the friction between natural justice and implicit, virtual or explicit consent (see II, 5 and III, 2). Here it suffices to point out that this systematic tension will dominate the right of hospitality. Vitoria points out that in 'serious matters' (*rebus gravioribus*), the *ius gentium* must not be changed,[61] which implies that it is not based on consent. Hospitality is one of these immutable rights, and the consent of the natives is thus not relevant (see II, 6). Vitoria's reflection on the status of prisoners can also be read as an account of customary law. The practices of communities in their relations are subject to change. This

59 Vitoria, 'American Indians', p. 281; 'Law of War', p. 315.
60 Vitoria, 'Law of War', p. 316 and pp. 321f.
61 Vitoria, 'On Civil Power', p. 40, translation changed.

raises a systematic problem Vitoria did not discuss, but which is implicit. Where do we draw the line between necessary law that can't be changed and consensual agreement?

Following Walter Ullmann and Martti Koskenniemi, I have just written about ascending and descending patterns of justification. In the descending version, the normative ideal is anterior/superior, overriding interests, consent, or state practice. By contrast, the ascending pattern assumes that the people themselves and their consent in domestic law, and state practice or interests in the sphere of international law determine the law.[62] As the concept of the will is ambiguous (referring either to *Willkür* or practical reason, see VI, 1), it does not fit neatly into this opposition. As an empirical notion, will pertains to the ascending version, as a normative one, to the descending pattern.

Vitoria's basic claim is that relations among communities should be governed by the rule of (natural) law. At the beginning of the lecture on the Indians, Vitoria asks the decisive question: 'by what right [*ius*] were the barbarians subjected to Spanish rule?'[63] This does not mean that Vitoria is a naive idealist (a widespread *non sequitur*). With some sarcasm, he writes in a letter that 'Kings often think from hand to mouth, and the members of their councils even more so.' He takes it for granted that at least some Peruvian conquerors were motivated by the 'desire to be rich'.[64] But Vitoria does not derive from these observations a full-blown theory of human nature that serves as a foundation of the law of nations. This is a major advantage, as these attempts prove to be highly abortive. Vitoria develops a thin conception of justice – his argument is descending, starting from natural law, not ascending, starting from individual interests, preferences, and an account of the good.

Vitoria successfully overcomes a Spanish bias. He tries to assume an impartial viewpoint that considers the rights of foreigners such as the Native American 'barbarians' as if they were French fellow Christians or even Spaniards. For instance, he compares the Peruvian natives with the inhabitants of Seville. When the conquistadors plundered American dwellings and towns, this was as if Salamanca had been pillaged: 'If those who committed the robbery sincerely wished to make restitution, we all know whom they should repay.'[65] Vitoria adopts a cosmopolitan or inclusive and non-perspectival point of view (see I, 5). He is willing to apply the principle of natural equality

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62 Walter Ullmann, *Law and Politics in the Middle Ages: An introduction into the sources of medieval political ideas* (London: Sources of History, 1975), pp. 30f.; Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), pp. 40–2.

63 Vitoria, 'American Indians', p. 233.

64 Vitoria, *Political Writings*, pp. 335 and 332.

65 Ibid., pp. 332, 333.

universally: all people are 'equal in essence and in their rational nature, which conferred on them rights, property and free will'.[66] This equality extends to peoples and communities as well.[67] By standards of impartiality, Christian princes have no greater authority or legal power over non-Christian princes than over fellow Christians: 'if Christian princes can punish unbelievers or wage war on them, by the same token unbelievers can punish Christians.'[68] Reciprocity thus forbids a punitive war of Christians against 'barbarians' if the latter are supposed to have sinned against nature. Vitoria points out that both Christians and non-Christians are sinners, because 'every country is full of sinners.'[69] He finds that from the perspective of moral theology, the non-Christians have the better arguments in this fictitious debate. Christians hold crimes like murder in abomination, but 'it is actually worse to commit a sin knowingly than to do so out of ignorance.' Vitoria denies any moral superiority of Christians here, allegedly a central belief of early modern Europeans. In fact, he points out that the claim of European cultural superiority does not meet the standards of an impartial judge: 'Even amongst ourselves we see many peasants [*rustici*] who are little different from brute animals.'[70] We cannot draw a clear line between culture and barbarism, as it is a matter of degree and heavily dependent on contingent factors such as education. Vitoria clearly perceives that certain claims, if applied impartially, have consequences that are self-defeating. Spanish propaganda justified intervention in Italy on grounds of alleged Italian practices of sodomy. By the same token, Vitoria counters, 'France has a perfect right to conquer Italy.'[71] Vitoria understands that we must engage in hypothetical thinking if we want to arrive at impartial, just principles. This is a familiar feature of common-sense morality, imagining to put oneself in others' shoes ('How would you like it if someone did the same?'). International law must be a consistent whole based on principles and reasoning that can be shared by all involved parties.

This feature also holds true for the concept of injury (*iniuria*, *laesio*). This is a legal concept denoting the violation of rights, and must be distinguished from the conventional understanding of 'harm', the infliction of bodily injury or violation of interests. If we include interests in our argument, we wind up with a circle: we accept that interests among people vary, but add that individuals

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66 Ortega, 'Vitoria', 114.

67 Scott, *Spanish Origin*, p. 137 calls this 'the very life and soul' of Vitoria's law of nations. With minor exceptions, 'the right and the duty are correlative and reciprocal' (p. 144). See also p. 152 and passim.

68 Vitoria, 'On Dietary Laws', p. 218.

69 Vitoria, 'American Indians', p. 274.

70 Ibid., p. 250.

71 Vitoria, 'On Dietary Laws', p. 225.

sometimes have 'real' interests even if they do not acknowledge them. But this presumes that we have a clear notion about real, objective, or natural interests distinct from particular empirical wills. Thus we face the charge of essentialism or metaphysics.[72] Thin justice starts with minimalist assumptions, with an abstraction from human interests or other empirical features (but not with an idealization of humans; see I, 4). Again, the impartial application of the legal concept of injury leads Vitoria to the conclusion that the Spaniards were the wrongdoers. Neither Atahualpa nor his people, Vitoria points out, 'had ever done the slightest injury to the Christians, nor given them the least grounds for making war on them'.[73] Following traditional just-war theory of Augustine and Thomas Aquinas, he holds that 'the sole and only just cause for waging war is when harm has been inflicted.'[74] Vitoria finds that the standard of impartiality and the concept of injury applied to Spanish titles in the Americas rules out any legitimate ones in the first place. The only permissible way to establish legitimacy would be to argue that the Spanish have been injured, having ruled out the typical justifications for conquest (difference of religion, enlargement of empire, personal glory and the 'unjust titles' in the second part of the Indian *relectio*). Vitoria is aware of the tendency to construct injuries, to sanction a policy of 'might makes right after the fact' (Cortés was doing exactly that: his creative reinterpretation of the conquest tried to establish that the Spaniards were merely 'defending themselves'). Thus his tentative approach in the third section. He winds up with two serious arguments in favour of the Spanish conquest: humanitarian intervention and the right of hospitality.

If we try to avoid extremes and keep the different levels of thick and thin, primary and secondary principles apart, then Vitoria's writings offer the outlines of what Walzer has called the legalist paradigm, 'the fundamental structure for the moral comprehension of war',[75] revolving around the notions of territorial integrity, collective self-determination and of self-defence. One of the basic principles of twentieth-century international law is self-determination of peoples: people should be allowed to govern themselves. We can argue that it is much older than our century, and has been reiterated in various cultures and periods, making it a candidate for moral minimalism. Gauls and Jews defended the integrity of their communities against Roman imperialism. Whenever

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72 Koskenniemi, *Apology*, pp. 65f., mentioning Hobbes, Locke and Rousseau as authors who got stuck in this circle.

73 Vitoria, *Political Writings*, p. 332.

74 Vitoria, 'Law of War', p. 303.

75 Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), pp. 61f. See also the analysis in Frost, *Ethics*, pp. 131–5 and Brown, *Theory*, pp. 133f. An evaluation of Walzer's political philosophy can be found in Michael Haus, *Demokratischer Kommunitarismus: Michael Walzers politische Philosophie* (Bern: Lang, 1998).

Amerindians had the chance to speak out, they were as devoted to political independence as the Europeans. They were interested in visitors and potential allies, not in overlords. One of the natives of Tabasco rejected submission to the Spaniards, arguing that they already had 'a Lord of their own, and did not know why they who were just come should offer to impose another Lord upon them'.[76] Las Casas, Vitoria and other Spaniards defended this right of their 'enemies' against the claims of fellow-countrymen: the barbarians had true *dominium*, or ownership of their territory.

The second principle is that of self-defence, the right to 'resist force with force' (*Vim vi repellere licet*). Cortés justified the massacre at Cholula on these grounds. According to his account, the Cholulans had attempted to ambush him.[77] Vitoria conceded that the Spaniards had a right to 'blameless self-defence' if attacked by the natives.[78] But Vitoria is fair enough to grant this right to the natives in the first place. Modern international law has added the ideas of collective security, of collective law enforcement, and of a theoretically independent international court of justice. In addition, it is heavily state-centered, and defines injury as aggression against the political sovereignty or territorial integrity of states. In the UN Charter, only aggression and nothing else can justify war. The structure of the argument is similar: communities have a right of self-preservation and thus of self-defence if attacked. By contrast, the list of possible injuries is much longer in early modern European writers, including Vitoria.

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76 Quoted in Green and Dickason, *The Law of Nations and the New World*, p. 232, with more evidence ibid., pp. 231–3, and in Raquel Chang-Rodríguez, 'Cultural Resistance in the Andes and its Depiction in the Tragedy of Atahualpa's Death', in Francisco Javier Cevallos-Candau et al. (eds), *Coded Encounters. Writing, Gender, and Ethnicity in Colonial Latin America* (Amherst: University of Massachussetts Press, 1994), pp. 115–34; Michael Walzer, *Thick and Thin. Moral Argument at Home and Abroad* (Notre Dame and London: University of Notre Dame Press, 1994), pp. 67f. He draws upon Julius Caesar, *War Commentaries* (New York: New American Library, 1960), pp. 29–30 and 74; Josephus, *The Jewish War*, newly transl. with extensive commentary and archaeological background illustrations (Grand Rapids, MI: Zondervan Pub. House, 1982), VIII, 323–88 (pp. 494–9), which includes Eleazar's speech at Masada. Antonio Cassese, *Self-determination of peoples. A legal reappraisal* (Cambridge: Cambridge University Press, 1995), is a reliable introduction.

77 Hernán Cortés, *Letters from Mexico*, transl. and ed. Anthony Pagden (New Haven and London: Yale University Press, 1986), pp. 70–4. See Pagden, 'Conquest', p. 14 and Alan Watson (ed.), *The Digest of Justinian*, Latin text ed. Theodor Mommsen with the aid of Paul Krueger (Philadelphia: University of Pennsylvania Press, 1985), 1.1.3. and 10.5.12.18.

78 Vitoria, 'American Indians', p. 282; 'Law of War', pp. 296f. 'Law of War', pp. 299f. and his lectures in ST II-II. 40. 1, in Scott, *Spanish Origins*, Appendix F: cxvi–ii, gives a right to declare and wage war in self-defence to anyone, even a private citizen, in contrast to earlier theory, which had reserved this right to political authorities.

Vitoria was a theologian of the Dominican order, a member of the Catholic Church, and he lived in a country where people were persecuted and killed for their religious beliefs. Where does Christianity come into the picture? Does Vitoria consistently live up to thin standards of justice like reciprocity and impartiality, or do they get 'contaminated' by the thick, Christian one? Again, opinions are divided on this issue. Scott devoted one enthusiastic chapter of his book to Vitoria's liberalism, wondering why the churchman 'was so liberal that even in our day his views seem ahead of the times'.[79] Nussbaum has dismissed this praise, with equally strong, albeit opposed, emotions. Vitoria was in fact illiberal, authoritarian, medieval, 'a staunch, if not extreme, advocate of ecclesiastic and papal authority'.[80] This is a strange evaluation in light of the fact that Vitoria did criticize those authorities in important respects in his Indian lecture. In addition, Vitoria seems to be the victim of an understandable prejudice: up to the middle of this century, almost everyone outside Spain apparently assumed that whatever (had) developed in that backward and reactionary country must be of a similar cast. Resolving the issue depends on how we define liberalism. Both Scott and Nussbaum apply a twentieth-century understanding, and this is certainly anachronistic (see III, 6 for more).

Vitoria's main aim is to evangelize the natives and bring salvation to the unbelievers. However, he assumes that belief cannot be forced upon anybody because it is 'an act of will', and civil power does not extend to coercing the will.[81] This seems to reserve some sphere of freedom to the individual, and later on Vitoria even claims that one of the many advantages of Christianity is 'the freedom of choice which it has always given to potential converts'.[82] This is certainly a bit too rosy as an account of church history, but underlines how Vitoria wanted things to be. Christianity should be introduced 'reasonably and in a tolerable manner', without violence and oppression. The Pope does not have authority over unbelievers. Force can only lawfully be employed if the missionaries of the faith are hindered, an entitlement Vitoria grounds in the right of self-defence.[83] This is an interesting example where thin and thick justice, or impartial justice and a particular conception of the good, clash.

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79 Scott, *Spanish Origin*, p. 275.

80 Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), p. 83. The debate was revived when the academic world celebrated the four hundreth anniversary of Grotius's birth in 1983. See Karl-Heinz Ziegler, 'Hugo Grotius als "Vater des Völkerrechts" ', in Peter Selmer and Ingo von Münch (eds), *Gedächtnisschrift für Wolfgang Martens* (Berlin, New York: de Gruyter, 1987), pp. 851–8. Ziegler himself sides with Nussbaum and Wolfgang Preiser against Scott, Wilhelm Grewe, and Pierre Haggenmacher.

81 Vitoria, 'Dietary Laws', p. 218, emphasis deleted.

82 Ibid., p. 229. The following quotation ibid., p. 228.

83 Ibid., p. 223; *Political Writings*, p. 341; p. 344.

Granting the right of self-defence makes sense; deducing from it the right to resort to force in order to defend one's 'spiritual interests' seems to be too far-fetched and out of proportion. (This is of course a modern evaluation; Butterfield might argue that we are too judgmental and do not try to understand and forgive.) There is another example where thick justice prevails. A prince who has become a Christian, Vitoria claims, can force his subjects to give up 'any sins whatever against divine law or even against revealed law'.[84] Vitoria's proof takes recourse to the prince's duty to make his subjects good and happy, 'good' in turn being defined along Christian, theological lines. It is easy to find more examples of this kind. Vitoria's conception of thin justice is embedded in a thick concept of the good, and the latter often, but not always, overrides or trumps considerations of thin justice. Incidentally, this tension is repeated in the writings of other Spaniards, such as Suárez and Solórzano (III, 5).

So far I have presented a rather benign interpretation of Vitoria's thinking. If the main features of political justice are universalizability, impartiality, possible universal consent and equality, Vitoria was all in all successful in applying just standards. In the crucial question of native rights, thin justice constrains the pursuit of the good. Vitoria's main achievement is successful abstraction, putting himself in others' shoes in order to concentrate his mind on what he should think is just while wearing his own shoes. This hypothetical thinking does not take place in the no-man's-land of an unencumbered self, but in the mind of a Catholic theologian.[85] However, so far I have left out two of Vitoria's strongest arguments against leaving the Native Americans alone. The last two sections are thus devoted to these arguments, and to a more unfavourable interpretation of Vitoria.

5. The problem of humanitarian intervention

Vitoria's fifth 'just title' touches upon the problem of humanitarian intervention. Hersch Lauterpacht claimed that Grotius's *De Jure Belli ac Pacis* contained 'the first authoritative statement of the principle of humanitarian intervention – the principle that the exclusiveness of domestic jurisdiction stops

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84 Vitoria, 'Dietary Laws', p. 219f., emphasis deleted. For more examples of thick justice see Deckers, *Gerechtigkeit*, p. 384 and pp. 239f. As he points out, missionary rights *de iure divino* impair natural law as well as *dominium* as a natural right, suspending the distinction between spiritual and temporal spheres typical for Vitoria's overall theory. The upshot is that Vitoria is logically inconsistent.

85 I am following Brian Barry, *Justice as Impartiality. A Treatise on Social Justice*, Vol. II (Oxford: Clarendon Press, 1995), pp. 56f., where the reader can find a more profound philosophical analysis.

where outrage upon humanity begins'. More recent studies have emphasized that this modern right figured prominently in the studies of Suárez and Gentili before Grotius, who was reluctant to admit his debt to those authors.[86] I suggest that we acknowledge Vitoria's originality in this respect. He took a first and authentic look at the problem, though those after him made important contributions in thinking the problem over. Vitoria might not have liked to be labelled as an original thinker, and some claim from a contemporary perspective that his original just titles were exactly the ones open to abuse.[87] In this section, my emphasis is on humanitarian intervention as a problematic right in *ius gentium.*

For Robert Williams, this title as well as the first one on hospitality reveals Vitoria's real purpose and attitude: 'Victoria's Law of Nations provided Western legal discourse with its first secularly oriented, systematized elaboration of the superior rights of civilized Europeans to invade and conquer normatively divergent peoples.'[88] According to Williams, Vitoria offered an apology of and ideology for Spanish colonial practice, endorsing Eurocentric norms: 'While the normative foundation of Victoria's Law of Nations was constructed according to a secularized, as opposed to an ecclesiastically dictated, vision of reason, it was a vision no less totalizing and hierarchical in its outlook than the medieval response to radical difference.'[89] Vitoria is modern in

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86 Hersch Lauterpacht, 'The Grotian Tradition in International Law' [1946], in Elihu Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 1975), vol. 2, pp. 307–65, the quotation at p. 357. Theodor Meron, 'Common rights of mankind in Gentili, Grotius and Suárez', *American Journal of International Law*, 85, (1991), pp. 110–16 is a more comprehensive evaluation, though he does not cover Vitoria.

87 It is worth noting that the term *inventis* in the title of Vitoria's lecture could either mean 'invention' or 'discovery' of the Americas; see John Christian Laursen, 'De Indis Recenter Inventis: descubrimientos e invenciones legales y políticas en Vitoria, Las Casas y Fuentes', in Ana Maria Hernández de López (ed.), *Narrativa hispanoamericana contemporanea: entre la vanguardia y el posboom* (Madrid: Editorial Pliegos, 1996), pp. 102–4.

88 Williams, *American Indian*, p. 106. Paul Keal, '"Just Backward Children": International Law and the Conquest of Non-European Peoples', *Australian Journal of International Affairs*, 49 (1995), pp. 191–206 partly follows a similar approach, referring to Western 'universalising discourse' and 'cultural imperialism' (ibid., p. 192), but is more considerate with the natural lawyers. However, he is too dependent on what Lindley, Todorov, and others write *about* them instead of listening to what the natural lawyers themselves have to say. Keal's criticism of nineteenth-century international lawyers is largely justified (cf. VI, 5), but tends to project their thinking back to earlier periods (a flaw he detects in Lindley).

89 Ibid., p. 107; cf. p. 103. In a similar vein, Maravall argues that Vitoria provided an ideology of colonialism and early capitalist interests. José Antonio Maravall, *Estado moderno y pensamiento social (Siglos XV a XVII)* (Madrid: Revista de Occidente, 1972), vol. I, pp. 193 and 212, seeing parallels between Sepúlveda and Vitoria.

the sense that his thinking is more secularized, but this thinking's pattern has remained unchanged: it's still totalizing, hierarchical, Western, repressive and exclusive. Vitoria turns out to be a typical apologist of 'the West', which has, according to Williams, tried to impose its vision of truth on other cultures since the Middle Ages, believed in its superiority and the corresponding inferiority of 'others', and used (international) law as an effective instrument of empire, genocide and exploitation.[90] Those are strong accusations. Incidentally, they are representative of a powerful current in contemporary Western thinking (see I, 2 and II, 1). But there are other possible interpretations. Apart from arguing that Vitoria put forth an imperial ideology, it could be claimed that Vitoria's considerations are merely hypothetical (assuming, for example, cannibalism for the sake of argument), that Vitoria kept silent on certain issues pertaining to the Native Americans, but was implicitly undermining Spanish rule, or that occasionally, but not always, thin justice conflicts with a thick conception of the good (for example, when favouring the propagation of the Christian faith).

This discussion of Vitoria's two most important titles investigates whether Williams's interpretation has some textual basis. I argue that a totalizing 'Western legal discourse' is an illusion, and that this interpretation unwittingly commits the fallacy of constructing a meta-narrative of modern history. What we really get is a complex picture: the small story that is being told here about Vitoria is not necessarily part of a bigger one. The fallacy lies in assuming a false continuity and connectedness that is in fact the work of the interpreter's mind. Rather than arguing that Vitoria's title is part and parcel of a comprehensive totalizing Western discourse of oppression, I claim that Vitoria pointed at and tried to solve a systematic problem of any coherent philosophical theory of international relations. The upshot of this section is that humanitarian intervention is not merely of historical interest, but has systematic quality. For most of eighteenth- and nineteenth-century international law, non-intervention was the norm. It was espoused by Christian Wolff, and Vattel later popularized it.[91] In both writers, we find a tension typical for this issue: states have a duty of mutual assistance and aid. On the other hand, state sovereignty entails non-intervention. The contemporary debate has 'inherited' this structure of

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[90] Ibid., pp. 6–8. Vitoria's thinking on intervention has been widely neglected; an exception is Redondo, *Utopia Vitoriana*, pp. 160f.

[91] Christian Wolff, *Ius gentium methodo scientifica pertractatum* (1749), in James Brown Scott (ed.), *The Classics of International Law*, vol. 13 (New York: Oceana Publications 1964), para. 269, pp. 137f.; Emer de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (transl. Charles G. Fenwick), in James Brown Scott (ed.), *The Classics of International Law* (Washington: Carnegie Institution 1916), Introduction, paras. 15 and 16 (pp. 6f.), and book II, ch. IV, paras. 54ff. (p. 131), where the duty of non-interference is qualified. See also the discussion in Onuf, *Legacy*, pp. 139–62.

the problem. The adjective 'humanitarian' may qualify the character of the intervention in various ways. It could be understood to describe the quality of the intervention itself, but might also relate less to the action involved than to the purpose sought by it. In our context, it signifies the use of unilateral or collective force in order to protect persons from human rights violations, without asking for the consent of the state, community, or other entity affected.[92]

In recent years, the Security Council has widely interpreted the concept of 'threat to the peace' (Article 39 of the UN Charter), including cases of grave and systematic violations of human rights. In its practice of intervention for the protection of human rights, the UN Security Council has frequently justified its action by stressing the transborder effect of massive human rights violations.[93] This link to an international context stems from the requirement of Article 39 of the UN Charter. According to this provision the Security Council may only act (including intervention in the domestic affairs of its member states) after having determined the 'existence of a[ny] threat to the peace, breach of the peace, or act of aggression'. UN practice has remained controversial. Authors who favour humanitarian intervention usually advocate moral universalism, arguing that the legitimacy and not the mere existence of states counts, that Rawls's difference principle should be applied globally, that human rights logically precede state rights or sovereignty, that common ends or goods override sovereignty, and that state sovereignty reverts to the people in some cases. They are often cosmopolitan in attitude and endorse the notion of a moral community of humankind reminiscent of the Stoics and Vitoria (see I, 5 and II, 4).[94] Christopher Greenwood, for instance, claims that the law of

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92 Otto Kimminich, 'Der Mythos der humanitären Intervention', *Archiv des Völkerrechts*, 33 (1995), p. 433; Adam Roberts, 'Humanitarian war: military intervention and human rights', *International Affairs*, 69 (1993), p. 445.

93 Helmut Freudenschuß, 'Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council', *Austrian Journal of Public and International Law*, 46 (1993), p. 36; see Roberts, 'Humanitarian war', pp. 436ff. and Onuf, *Legacy*, pp. 149–52. Koskenniemi, *Apology*, pp. 445–9 interprets liberal thinking on intervention as an example of the failure of legal formalism.

94 Martin Griffiths, Iain Levine and Mark Weller, 'Sovereignty and suffering', in Harriss, John (ed.), *The Politics of Humanitarian Intervention* (London and New York: Pinter, 1995), pp. 59–61; Véronique Zanetti, 'Ethik des Interventionsrechts', in Christine Chwaszcza and Wolfgang Kersting (eds), *Politische Philosophie der Internationalen Beziehungen* (Frankfurt am Main: Suhrkamp, 1998), pp. 299–302, 305f., 315–17; Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn (Irvington-on-Hudson, NY: Transnational Publishers, 1997), pp. 117–29, and again in *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), ch. 2. More literature and a discussion from a historical perspective (Atlantic republicanism) is included in Onuf, *Legacy*, pp. 139–62. Brown, *Theory*, ch. 5 stresses that the problem of intervention is embedded in the wider issue of state sovereignty

humanitarian intervention has changed in our time: 'It is no longer tenable to assert that whenever a government massacres its own people or a state collapses into anarchy international law forbids military intervention altogether.'[95] Critics who oppose a right of intervention point out that states are sovereign in domestic matters, as specified in the UN Charter (Article 2, 7). One UN resolution (1981) explicitly claims that states must 'refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States'.[96] Humanitarian intervention is seen as an illegitimate instrument of power politics. The so-called Westphalian model of state relations (see I, 1 and 2) distinguishes between domestic and interstate spheres, arguing that domestic affairs are a matter of 'privacy'. States can injure each other only by actions or deeds on an international level. Taken to its extreme, this position would imply that no state's form of government, its ideology, religion, or similar feature, nor any domestic activity can ever justify intervention. Others think that humanitarian intervention violates the spirit of just-war theory.[97] Most critics agree, however, that in grave cases, intervention is permissible. But they quickly add that a right of intervention is subject to abuse, and that other modes of interference (embargoes, for instance) are more effective.[98] The tricky problem is how to define 'grave cases' or 'massive' human rights violations. Where do we draw the line? Where does Lauterpacht's 'outrage upon humanity' begin?

I have outlined the current debate at some length to show that we face a moral dilemma which is of a systematic nature and defies easy solutions. If we believe that human rights are universal and override state sovereignty, our

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or 'autonomy'. A recent collection of essays in German is Brunkhorst, Hauke (ed.), *Einmischung erwünscht? Menschenrechte und bewaffnete Intervention* (Frankfurt am Main: Fischer, 1998). See also Georg Cavallar and August Reinisch, 'Kant, Intervention, and the "Failed State"', *Kantian Review*, 2 (1998), pp. 91–106 and Georg Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), ch. 5.

95 Christopher Greenwood, 'Is there a right of humanitarian intervention', *The World Today*, 49 (1993), p. 40. The German international lawyer Matthias Herdegen, 'Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State"', in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 34 (Heidelberg: C.F. Müller Verlag, 1995), p. 60 argues that the use of force for humanitarian purposes would be consistent with UN Charter specifications and purposes.

96 Resolution 36/103, 9 December 1981, quoted in Onuf, *Legacy*, p. 151, with additional UN documents.

97 Jonathan Barnes, 'The Just War', in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy. From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600* (Cambridge: Cambridge University Press, 1982), pp. 778f., quoting Suárez in support.

98 See Kimminich, 'Mythos' for a rather traditional defence of non-intervention.

critics will point out that we try to impose our moral standards on cultures with different and incommensurable ones. If our critics argue that moral universalism is a fiction and states should be left alone, they expose themselves to the accusation that they turn two blind eyes on human rights violations when even the criminals involved can arguably be perceived as unjust. We have come full circle. We are back at the dilemma of moral particularism and universalism (I, 2 and 4). For the time being, I will leave the matter unresolved and now turn to how Vitoria presents and tries to fix the problem.

Like most Europeans of his time, Vitoria was both shocked and fascinated by the reports on native cannibalism. Las Casas, for instance, who usually sided with the natives, saw it as a crime that violated human nature and thus entitled the Spaniards to force the Native Americans to abandon this custom.[99] In 1538, Vitoria delivered a lecture called 'On Dietary Laws, or Self-Restraint' which included his most extensive evaluation of the phenomenon.[100] Vitoria offers four arguments against cannibalism. One is theological: 'eating human flesh is forbidden in divine law.'[101] The second one is based on a Thomist metaphysical interpretation of nature as a 'great chain of being'. Humans have a precisely defined position in the order of nature. Their food should be 'confined to organisms which exist on levels of being *lower* than that of the consumer'. The third argument is that cannibalism is immoral and antisocial. It usually involves homicide and murder, which violate one of the first principles, and undermine the very fabric of any community.[102] Cannibalism constitutes an 'injury (*iniuria*) to other men', who cannot renounce their rights and must therefore be helped. This is Vitoria's strongest and most modern argument. Vitoria's fourth argument is based on the consent of 'all nations who have a civil and humane way of life'. As they all reject cannibalism, it must be part of natural law: 'The deduction from the premiss is proved because a thing is said to be against natural law when it is universally held by all to be unnatural.'[103] Vitoria takes a

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99 Bartolomé de las Casas, *Los tesoros de Peru*, transl. Angel Losada (Madrid: Consejo Superior de Investigaciones Cientificas, 1958), p. 385, quoted in Pagden, 'Forbidden Food', p. 17.

100 Francisco de Vitoria, 'De temperantia', in Teófilo Urdáñoz (ed.), *Obras de Francisco de Vitoria* (Madrid: Editorial Catolica, 1930), pp. 995–1069. An extract in English can be found in Vitoria, *Political Writings*, pp. 205–31. Reliable articles are Anthony Pagden, 'The Forbidden Food: Francisco de Vitoria and Jose de Acosta on Cannibalism', in *Uncertainties*, section VII, pp. 17–29, and 'Cannibalismo e contagio', in ibid., section VIII, pp. 32–45; see also Pagden, *Fall*, pp. 80–90.

101 Vitoria, 'Dietary Laws', p. 208.

102 Pagden, 'Forbidden Food', p. 24 and Arthur O. Lovejoy, *The Great Chain of Being. A Study of the History of an Idea* (Cambridge: Harvard University Press, 1936), pp. 59–66; Vitoria, 'Dietary Laws', p. 210.

103 Ibid., p. 209.

standard of 'humane' and 'civil' behaviour for granted. This exposes him to the criticism of being ethnocentric. A similar dilemma can be found in Article 38 (1) (c) Statute of the International Court of Justice (ICJ), which refers to 'the general principles of law recognized by civilized nations' as one of the five sources the ICJ has to apply in disputes. It might be read as a relic of nineteenth-century European law of nations and its crucial distinction between (European) 'civilized' and (non-European) 'uncivilized' nations. Nowadays all nations of the world may be considered civilized, but this does not solve the problem. As the debate on humanitarian intervention illustrates, lawyers cannot avoid referring to notions like civility in a normative rather than descriptive sense in order to argue that certain forms of state behaviour are not acceptable. Post-modern deconstruction would argue that any binary distinction, such as between 'civilized' and 'uncivilized,' will ultimately break down. But we are faced with an unacceptable consequence if we abandon the distinction. Any form of behaviour would then be permissible.

Vitoria mentions two conditions that might justify intervention: 'personal tyranny' and 'tyrannical and oppressive laws against the innocent, such as human sacrifice practised on innocent men or the killing of condemned criminals for cannibalism'.[104] Vitoria uses the conditional 'posset', so the fifth title is only a possible just one. In 'On Dietary Laws', native cannibalism is a fact for Vitoria; intervention is no mere possibility there.[105] Vitoria's arguments in favour of intervention are based on those against cannibalism analysed above. The most convincing one is that helping innocent victims who suffer an injustice or injury where they cannot renounce their rights is a moral and Christian duty. The 'barbarians are all our neighbours', and the Spaniards are therefore responsible for them. Humanitarian intervention thus turns into a just war on behalf of the natural rights of a third party. A reasoning that is more in line with Roman law might point out that continued practices such as cannibalism pose a threat to the existence of the global moral commonwealth or 'fellowship of the human race'.[106] Vitoria holds that Europeans are entitled to change forcibly native culture and traditions: the Europeans 'may also force the barbarians to give up such rites altogether',[107] even against their will. However,

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104 Vitoria, 'American Indians', p. 287f. Salamancan theologians teaching and writing after Vitoria usually followed these arguments; cf. Pagden, 'Dispossessing', pp. 94f., who mentiones Melchor Cano, Juan de la Pena, and Francisco Suárez.

105 Vitoria, 'On Dietary Laws', p. 225.

106 See Pagden, *Lords*, pp. 98f. relying on Marcus Tullius Cicero, *On Duties*, ed. M. T. Griffin and E. M. Atkins (Cambridge, UK, New York: Cambridge University Press, 1991), 3.21, p. 108, and Saint Augustine, *The City of God*, transl. Marcus Dods; with an introduction by Thomas Merton (New York: Modern Library, 1993), book XIX, ch. 13 (pp. 690f.).

107 Vitoria, 'American Indians', p. 288.

war aims must be limited to this task. Thin justice demands that humanitarian intervention is not a pretext for seizing goods or lands, even if inhabited by non-Christians, a limitation repeated by Suaréz.[108]

Vitoria's advantage in dealing with this problem is that he is not restricted by what has been called the Hobbesian dogma of state sovereignty: 'For Vitoria, "statehood" is no starting-point for normative deductions.'[109] Vitoria did not talk about states but about communities (*communitas*), and defined perfect ones as 'complete in themselves'. A perfect community or commonwealth 'is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrates'.[110] Vitoria's definition emphasizes what modern theory calls external sovereignty, political independence from other communities. But this entity is subordinate to natural law and the *ius gentium*. The notion of the whole world as a commonwealth is Vitoria's background theory. If communities are not isolated, but form an international society and share a common natural law, helping each other as 'neighbours' and enforcing these norms across cultures and communities seems plausible. As outlined above, divergent opinions on humanitarian intervention are rooted in different background theories. The static, state-centered approach, and the approach that values divergent cultures and communities and their right of self-determination, will tend to favour non-intervention. The cosmopolitan approach in turn, referring to a moral or hypothetical community of humankind, will rather opt for the opposite.

I have argued that Vitoria did not conceptualize the state in a modern sense. This is part of a more fundamental difference. We have come to distinguish between three levels of human activities. The most basic one is that of rights-bearing individuals; the second consists of states; the third is the system of states' relations. By contrast, thinkers like Vitoria had no clear conception of state sovereignty, though the concept of the modern state evolved from the thirteenth to the sixteenth century. But their frame of reference is not a world of states.[111] Modern authors like Nussbaum used to see this as a serious

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108 Vitoria, 'On Dietary Laws', p. 226f.; Francisco Suárez, 'Disputation XIII: On War', in: *Selections from Three Works of Francisco Suárez. Vol. 2: Translations* (Oxford: Clarendon Press, 1934), p. 826.

109 Koskenniemi, *Apology*, p. 79. See also pp. 76 and 79f. on the role of the prince, whose authority was 'delegated competence', always subordinate to the normative order. In a similar vein, Justenhoven, *Vitoria*, p. 71 points out that Vitoria's originality lies in his idea of the unity of humankind, rather than in defining the law of nations as a law among states.

110 Vitoria, 'Law of War', p. 301.

111 Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols (Cambridge: Cambridge University Press, 1978), vol. I, pp. IX; Onuf, *Legacy*, pp. 193–219 discusses the three 'levels of analysis', starting with Kenneth Waltz's and David Singer's now famous studies.

shortcoming. Attitudes have again changed, and the current trend, not only shared by post-modernists, is to challenge state sovereignty and this neat distinction between levels of analysis. The discussion of humanitarian intervention is a case in point. If authors argue that states have rights, then they usually ground them in the rights of individuals. The legitimacy of states is grounded in the rights-bearing individuals living within their borders. Another line of reasoning assigns primacy to the normative international society over the contingent rights of states. We can find both types of reasoning in Vitoria's lectures. Vitoria's thinking is relevant because his *ius gentium* is not state-centric.

We have moved in our understanding of cannibalism beyond Vitoria and his age. We perceive that accusations of this kind have helped to establish a distinction between 'us' and 'them', ever since the Greeks went on voyages into the Mediterranean. We also understand that the accusation makes it easier to dehumanize the outside group. We also have come to realize that most of the European horror stories were unfounded, with the exception of survival cannibalism and incidents of extreme revenge. But the tales helped to make European conquest morally acceptable, though scholars like Vitoria and Suaréz were not willing to accept those tales at face value.[112] What we share with Vitoria is the moral predicament: we know that there is a moral duty to help victims of aggression in other communities, to prevent 'the slaughter of innocent people', if necessary by force. We nowadays often doubt that we can establish objective standards of defining and evaluating aggression and victimization. Do we impose our own way of life on others if we intervene in the name of humanitarian standards, thus practicing 'cultural imperialism'? Where do we draw the line?

We have nowadays a clear advantage over Vitoria's time. We can refer to what is usually called the 'international community' and argue that it will act as a political unit in crisis situations.[113] The identity of intervenors has changed. Collective judgement and intervention are beneficial for the legitimacy of the cause. When the concept of sovereignty dominated international law, governments were exclusively responsible for the common good. As they are apparently beginning to lose their monopoly on agency, they now must share it with organizations and institutions below and above the state level (see I, 2).

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112 Pagden, *fall*, p. 81 and 83. Suaréz, 'Disputation XIII: On War', p. 826 sees indigenous communities where people live 'like wild beasts ... and ... go about entirely naked, eat human flesh' and so on as mere possibilities, not as facts. The following quotation ibid.

113 Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: Johns Hopkins University Press, 1995), pp. 12f., 21ff., 40f., 60f., 120–2.

Some contemporary authors have outlined principles of humanitarian intervention. They suggested that the territorial integrity of the target state should be preserved, and there should be a two-thirds majority in the General Assembly that approves of the intervention; all the issues, including the decisions of the Security Council, should be subject to the jurisdiction of the International Court of Justice.[114] So establishing fair procedures, trying to turn reasonable and impartial principles into positive norms of international law, seems to be the way out of the dilemma. This is made possible by fairly recent, though precarious, changes in world politics. Critics will not cease to point out that decisions on humanitarian intervention might still remain partial and biased. However, fair procedures and judicial control would make abuse more unlikely. Vitoria's achievement was to provide us with one of the first insights into the tricky normative problems involved.

6. The right of hospitality

The scope of Vitoria's 'first just title, of natural partnership and communication' is not clear at first sight. It might be interpreted as a very sweeping and encompassing right, including the right to travel and to trade, the freedom of the seas, and the right to colonization and immigration.[115] Vitoria claims that there is a right 'of natural partnership and communication' as part of the law of nations rooted in the notion of a global moral commonwealth. Interpreters like Scott or Redondo see it as revolutionary: '*La fuerza de este derecho es precisamente la que obliga a adoptar a los hombres determinados tipos de conducta que conocemos como normas de hospitalidad.*'[116] But we must specify the exact scope of this right of hospitality. For Vitoria, it encompasses:

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114 Griffiths, Levine and Weller, 'Sovereignty and suffering', p. 41; Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn (Irvington-on-Hudson, NY: Transnational Publishers, 1997), pp. 121f.; Paul Taylor, 'Options for the reform of the international system for humanitarian assistance', in Harriss, *Politics*, pp. 107 and 132–8; Zanetti, 'Ethik des Interventionsrechts', pp. 322–4.

115 Menendez, *Francisco de Vitoria*, p. 17 winds up with seven rights and principles. For a brief discussion of the right of hospitality, see Pagden, 'Dispossessing the Barbarian', pp. 21f. More extensive are Deckers, *Gerechtigkeit*, pp. 382–5; Redondo, *Utopia Vitoriana*, pp. 156–9, Justenhoven, *Vitoria*, pp. 95–108; Scott, *Spanish Origin*, pp. 137–53. Scott comments on Vitoria's 'fourteen points' or arguments in para. 2 one after the other. I think that they should be grouped, and that scope and justification should be kept apart.

116 Redondo, *Utopia Vitoriana*, p. 157 and Scott, *Spanish Origin*, p. 141.

1 the right to travel (*ius perigrinandi*),
2 the right to dwell in the countries or territories visited,
3 the right to trade,
4 the freedom to use common property,
5 the *ius solis*, or freedom of residence, nationalization and citizenship, and
6 the negation of a right of expulsion without just cause

Usually the first and third right are associated with hospitality. The right to dwell is problematic as Vitoria assumes that it is a natural right that does not require consent (see below). Historically, there were pragmatic reasons for linking the first and second right. Staying in another country for an extended tract of time was inevitable for travellers, merchants and traders as seasons, winds and other natural events or unfavourable circumstances often forced them to remain in a certain place for weeks, months, or even years.

The freedom to use common property is rooted in the notion of an original possession. Vitoria does not draw a clear line between natural resources which are common property or 'do not belong to anyone' and the property belonging to the Native Americans.[117] It seems artificial to argue that 'gold in the ground or pearls in the sea or anything else in the rivers has not been appropriated' by the natives and are therefore *res nullius* and become property of the first taker. Vitoria is consistent in terms of the sea and rivers as he has declared them common property before. But even here we can claim that there is a difference between using a river as a route of transportation and digging in it for precious metals. Likewise, it makes sense to see coastal regions (how far they extend is debatable) as parts of the adjacent territory; and that's where pearls are usually found. Even more, gold in the ground should be seen as part of the territory Vitoria claims the natives truly possessed: 'the goods in question here had an owner.'[118] The upshot is that Vitoria did not differentiate carefully enough, which is understandable because he was one of the first European authors writing on the law of nations who tried to develop a coherent account of the right of hospitality. It is true that more or less in passing Vitoria establishes the principle of the freedom of the seas which Grotius later elaborated (see III, 4 and 6). But it is also obvious that we only get the unrefined outlines of this right in Vitoria.

The fifth right, following Roman law (Codex X. 40. 7), resembles modern *ius soli*, or freedom of residence, nationality and citizenship. Vitoria claims that 'if children born in the Indies of a Spanish father wish to become citizens

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117 Vitoria, 'American Indians', p. 280. Scott, *Spanish Origin*, pp. 145f. sees this as an anticipation of the 'favoured nation' clause.

118 Vitoria, 'American Indians', p. 265.

(*cives*) of that community, they cannot be barred from citizenship or from the advantages enjoyed by the native citizens born of parents domiciled in that community.'[119] Vitoria's proof is succinct. Humans are social beings (Aristotle's thesis) and therefore must belong to a community. If the *ius soli* was not applied, some might not be citizens of any community, which contradicts the law of nations. This is a plausible argument, but hardly applicable to the Spaniards, who could usually return to their home country as full citizens. In addition, the argument presupposes that the Spaniards were entitled to live in those native communities in the first place. Redondo argues that these titles are '*susceptibles de modification*',[120] but Vitoria does not state this explicitly. We do not know if, let alone when, consent becomes relevant. It is excluded from the exposition.

Vitoria's last three propositions of the first just title go together. He denies a right of expulsion without just cause, and claims that the right of hospitality may be enforced by the Spaniards, as anyone whose right has been infringed upon is entitled to resort to war. This raises the issue of justification of the right of hospitality. Vitoria rejected the Emperor's ownership of the world on grounds of what may be called original communism. This is his first argument. We must assume, Vitoria reasons, that 'in the beginning of the world ... all things were held in common.' As a consequence, everybody was entitled to move around freely. Vitoria's claim of a 'natural partnership and communication' among all humans is rooted in his understanding of the whole world as a kind of commonwealth, the basic axiom of his *ius gentium* (see above, II, 3). Thus the Spaniards have hospitality rights in the New World, provided that 'they do no harm to the barbarians.'[121] This emphasizes that these rights must be compatible with the more fundamental legal norm of not injuring (causing *laesio* or *iniuria*) the people being visited. As Scott put it, right and duty are correlative in the additional sense that they are 'present in the same party'.[122] Vitoria claims that the later division of property in the course of establishing communities did not abrogate hospitality rights. As we shall see, this claim cannot be sustained in its entirety. The establishment of communities conferred rights to them, which in turn requires that they consent if visited by travellers.

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119 Ibid., p. 281, emphasis deleted. See the extensive discussion in Scott, *Spanish Origin*, pp. 147–9. Scott is too enthusiastic in seeing parallels between Vitoria and the fourteenth amendment of the US constitution; there are also differences. On the differences between *ius sanguinis* and *ius soli*, see Ignaz Seidl-Hohenveldern, *Völkerrecht*, 8th edn (Köln: Carl Heymanns Verlag, 1994), pp. 281ff.

120 Redondo, *Utopia Vitoriana*, p. 158.

121 Vitoria, 'American Indians', p. 280.

122 Scott, *Spanish Origin*, p. 139.

Vitoria's second argument takes the fact into account that humans who travel can only survive if seas, shores and harbours are open to all. They have been exempted from the original division of property, are still common public property. That gave the Spaniards the right of access to the Indies. We might add here: but nothing more. Do humans really have to travel and trade? Vitoria argues that trade or commerce (*commercium/negotiatio*) are no ends in themselves, but means to promote natural partnership (*societas*) and communication. Humans are dependent on communities in various respects: in order to survive, in order to develop understanding, the will and language, in order to act morally.[123] So the second argument is supported by Vitoria's political anthropology, by reflections about the social nature of humans. A human being is not a 'wolf to his fellow man', but a fellow.[124] Absolute independence of humans is an illusion, as they are in need of community and communication. If we think of the debate between communitarians and liberals/cosmopolitans, it is interesting how Vitoria's communitarian premise (dependency of the individual on community; the fact of cultural and social embeddedness) arrives at cosmopolitan or global conclusions transcending given communities: a rudimentary theory of global commerce, hospitality and interdependence.

A third source of hospitality rights is custom. In his 'first proof', Vitoria confuses the law of nations (in the sense of what follows from natural reason) with customary law. We might after all argue that what is customary among nations does not coincide with the precepts of reason. Be that as it may, Vitoria considers customary practice a major argument: 'Amongst all nations it is considered inhuman to treat strangers and travellers badly without some special cause, [and considered] humane and dutiful to behave hospitably to strangers.'[125] Vitoria's evidence for this practice is slim: he quotes four verses from Virgil, Roman law, and scripture, but there is no reason to doubt that most cultures have endorsed some form of hospitality. Vitoria concludes that amity (*amicitia*) and welcoming strangers is part of the law of nature and prescribed by Christian charity.[126] Vitoria also adds that the natives have practiced hospitality by admitting 'other barbarians', and that by standards of reciprocity and equality the Spaniards must be admitted as well.

Any attempt to deprive humans of their natural rights constitutes an injury. Following Aquinas, Vitoria argued that the vindication of injuries was a

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123 Vitoria, 'On Civil power', in *Political Writings*, question 1, article 2 (pp. 6–9), and Deckers, *Gerechtigkeit*, pp. 264f. as well as Urbano, *El Pensamiento*, pp. 61–70 for Vitoria's anthropology.

124 Vitoria, 'American Indians', p. 280.

125 Vitoria, 'American Indians', p. 280, translation altered.

126 Ibid., pp. 279f.

sufficient ground for waging a just war.[127] This has some plausibility, but Vitoria does not live up to his own standards completely. The principle of equality is not adhered to, because the right to travel can be enforced against the Native Americans, whereas the Christians actually did not grant it to each other unconditionally. Vitoria cannot explain why other European nations are excluded from using harbours and rivers. Finally, it is not clear why the consent of the natives as the party involved and affected is ruled out. As Las Casas put it, the emperor's only legitimate title in the Americas would be based on the consent of the majority of natives, following the Roman legal principle: 'what touches all must be agreed by all.'[128] In the same vein, Vitoria holds that the natives have the right to change princes based on a majority decision. The underlying principle is that 'in matters which concern the good of the commonwealth, the decisions of the majority are binding.'[129] However, Vitoria ignores the political will of the native community, legitimate according to his own account, concerning hospitality. Incidentally, other authors (among them Vitoria's pupils) like Bartolomé de Carranza, Diego de Covarrubias, Las Casas and Domingo de Soto were willing to draw this logical conclusion. Soto argued that the common property of a community, even if they did not happen to make use of it, could not be seized by others 'without the consent of those who live there'. As Vitoria had done so often, Soto compared the situation in America with that in Europe, implying that the same legal standards hold true for the Native Americans: 'For neither can the French enter into Spain for the same purpose, nor can we enter France without the permission of the French.'[130] The purpose Soto refers to is mining for precious metals. Exclusive natural mining rights for the Castilian crown conflict with the principle of reciprocity and the universality of rights. As part of positive law, exclusive rights would have to be based on contract and consent. If the natives really enjoyed rights of *dominium*

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127 On Vitoria's theory of just war, see especially 'On the Law of War', passim; Justenhoven, *Vitoria*, passim, especially pp. 85–95 (on the *ius ad bellum*) and ch. V (on the *ius in bello*); Urbano, *El Pensamiento*, pp. 172–87; Scott, *Spanish Origin*, ch. IX.

128 Bartolomé de Las Casas, *De regia potestate* (1554), ed. Luciano Pereña et al. (Madrid: Consejo Superior de Investigaciones Científicas, 1969), p. 171, quoted in Pagden, *Lords*, p. 51. See also Deckers, *Gerechtigkeit*, pp. 382f. for a discussion of these tensions in Vitoria's account of hospitality.

129 Vitoria, 'American Indians', p. 288.

130 Domingo de Soto, *De Iustitia et Iure* [1556], ed. Venancio Diego Carro (Madrid: Instituto de Estudios Politicos, 1968), book 5, question 3, article 3, vol. 3, p. 423, trans. in Pagden, *Lords*, p. 52. See Brett, *Liberty*, pp. 137–64 for a fresh account of de Soto's theory of natural law and natural right, and p. 137 for additional secondary literature, Ramón Hernández, 'The Internationalization of Francisco de Vitoria and Domingo de Soto', *Fordham International Law Journal*, 15 (1991–92), pp. 1031–59, and Leslie Claude Green and Olive P. Dickason, *The Law of Nations and the New World*, p. 195 for references of the other authors mentioned.

rerum, then there was no point in appealing to the right of nations overriding these rights. It was, after all, left to the owner what he or she liked to do with property. Why not leave gold and silver in the earth? Given the principle of reciprocity (what holds good for the Spanish must also hold good for the natives) and the centrality of consent in Vitoria's theory, here was no way to ignore 'the consent of those who live there'.

Melchor Cano exposed this weakness of Vitoria's right of hospitality in similar terms. Like his teacher, he was not sure about the status of the law of nations: was it part of natural law or part of positive law? If it was natural law, it could only be so in the third degree and thus subject to change and abrogation. But it was more likely positive law, as the king of Spain had a right to deny the French entry to his country – according to what we would now call customary law of nations and according to the positive laws of Castile.[131] Like Vitoria, Cano is hampered by the distinction between positive and natural law. He does not see that the law of nations could encompass both spheres: partly realized and thus like positive law and changeable, and partly based on normative first principles. The law of nations as part of natural law leaves room for pacts and the actual consent of the majority. Like the French, the natives were entitled to prevent travellers from exercising their natural right to visit and live in their communities. As the Native Americans possessed *dominium*, they could abrogate or limit the right of hospitality.

Cano's second criticism of Vitoria's account of hospitality culminates in the succinct statement: 'We would not be prepared to describe Alexander the Great as a "traveller" '.[132] There is a wide gap between hospitality and an invasion, between the right to travel and the might of the conqueror. But this difference is a commonplace for Vitoria. Simple invasion aimed at 'enlargement of empire' cannot seriously be considered as a cause of just war.[133] Cano's second argument is invalid criticism of Vitoria's doctrine. The same holds true for Williams's debunking of Vitoria's article as inviting Westerners to exploit indigenous populations in the name of mutual self-interests and the profit motive, backed up 'by sending in the conquistadores wherever Spanish trade was not welcomed'.[134] Vitoria's theory of hospitality may have been abused by Europeans (provided that they cared to listen to him). But this is hardly an argument against the theory itself, which is probably no more prone to misappropriation than other theories. In addition, early modern capitalist thinking revolving around profit does not seem to be operative in Vitoria's lectures.

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131 Melchor Cano, 'De dominio indorum', Biblioteca Vaticana MS Lat. 4648, fol. 39v. My interpretation follows Pagden, 'Dispossessing', p. 89.

132 Cano, 'De dominio', fol. 39v; quoted in Pagden, 'Dispossessing', p. 89.

133 Vitoria, 'Law of War', p. 303.

134 Williams, *American Indian*, p. 102.

7. An assessment of Vitoria's achievement

Williams has claimed that Vitoria's law of nations 'justified the extension of Western power over the American Indians as an imperative of the European's vision of truth'.[135] As my previous analysis has shown, this assessment is too sweeping and therefore mistaken. Williams ruthlessly and in an unfair way debunks all things European. With considerable moral arrogance, he considers his standards the only relevant ones and holds them applicable to the past. Reasoned argument is not necessarily totalizing. It may become so, and one example could be Williams's monolithic picture of Western law as an instrument of oppression, conquest, exploitation and ethnocentrism. Our first job as historians is to 'historicize' our *own* thinking, and not just that of past writers. A total moral condemnation of spatially or temporally distant cultures never works. It is debatable whether rejecting presentism must lead to total moral relativism. Again, we must be careful not to fall prey to our own binary thinking. A favourable interpretation of Vitoria shows that he succeeded at least in part to develop a concept of thin justice as impartiality, forming an uneasy relationship with his Christian, thick conception of the good. If Vitoria's main aim was to evangelize the natives and bring salvation to the unbelievers, its precondition was that gross injustices be eradicated first. This is exactly what Vitoria aimed at. His framework is theological, based on a Christian definition of the good life. In this respect it is wrong to assume with Robert Williams that Vitoria's thinking is 'secularized'. Vitoria writes about the Native Americans that 'belief in Christ and baptism is necessary for their own salvation.'[136] The Spanish obligation to missionize is central. The right of ambassadors is closely connected with the right to preach Christianity. But Vitoria sees that a thin conception of justice is the necessary condition of a successful mission. The natives should get a real chance to 'listen to peaceful persuasion about religion,' which in turn requires that 'the Christian faith is set before the barbarians in a probable fashion, that is with provable and rational arguments and accompanied by manners both decent and observant of the law of nature, such as are themselves a great argument for the truth of the faith', and this should be done 'not once or in a perfunctory way, but diligently and observantly'.[137]

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135 Williams, *American Indian*, p. 107 and the beginning of II, 5 above.

136 Vitoria, 'American Indians', p. 271. The theological framework of Vitoria's Indian lecture is emphasized by Justenhoven, *Vitoria*, pp. 165ff. In a similar vein, evangelization is central for the Calabrian Dominican Tommaso Campanella. See John M. Headley, 'Campanella, America, and World Evangelization', in Karen Ordahl Kupperman (ed.), *America in European Consciousness, 1493–1750* (Chapel Hill and London: University of North Carolina Press, 1995), pp. 254–61.

137 'Si fides Christiana proponatur barbaris probabiliter, i. e., cum argumentis probabilibus et rationalibus et cum vita honesta et secundum legem naturae studiosa,

Spanish injustices make any genuine Christian mission impossible. Vitoria claims that Spanish behaviour or 'manners' must conform to the standards of the 'law of nature', and coincide with minimal morality. Thin justice is embedded in a thick conception of the good, *quod erat expectandum*.

There is a tension in Vitoria's third section on the 'just titles' of the Spaniards. It revolves around two conflicting propositions.

1 If the Spaniards had injured the natives, the latter were thus entitled to expel them.
2 If, on the other hand, Spaniards had not injured them, they were therefore entitled to defend themselves and their natural right to hospitality. They could wage a just war.

Vitoria does not seem to take a clear stand on this problem. Interpreters have thus been confused, arguing that Vitoria endorsed either of the two mutually exclusive theses. Vitoria is either seen as a defender or as a critic of Spanish conquest and rule.[138] How does the predominantly consistent theory of a right of hospitality, limited by the provision that no injury is inflicted, relate to the actual behaviour of Spaniards and natives? Vitoria writes: 'Since these travels of the Spaniards are (as we may for the moment assume) neither harmful nor detrimental to the barbarians, they are lawful.'[139] The decisive part of the sentence is the one in brackets. May we really assume this? The resolution of the above dilemma rests on our judgement of the situation; moral principles do not help here. Throughout the third section, Vitoria points out that some of the just titles enumerated are only 'possible' ones, that they 'might' or 'could' be legitimate. He assumes the mental incapacity of the barbarians just 'for the sake of argument'.[140] This could mean that most of the titles, with the exception of hospitality and humanitarian intervention, do not apply, and that those two exceptions are juridically limited by Amerindian rights and the provision that 'everything is done *for the benefit and good of the barbarians, and not merely for the profit of the Spaniards*.'[141] It is important to bear in mind that Vitoria is

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quae magnum est argumentum ad confirmandam veritatem, et hoc non semel et perfunctorie, sed diligenter et studiose, barbari tenentur recipere fidem Christi sub poena peccati mortalis', Vitoria, 'American Indians', 2, 4, § 37, pp. 270f.

138 For Schmitt, *Nomos*, p. 78 the lecture ultimately legitimizes Spanish rule. Wolfgang Lienemann, *Gewalt und Gewaltverzicht Studien zur abendländischen Vorgeschichte der gegenwärtigen Wahrnehmung von Gewalt* (Stuttgart: Klett-Cotta, 1982), p. 197 takes the opposite stance: Vitoria rejects Spanish conquest. Cf. Justenhoven, *Vitoria*, p. 98 and p. 172 on the debate.

139 Vitoria, 'American Indians', p. 278.

140 Ibid., pp. 290, 288, 291.

141 Ibid., p. 291.

very careful in his assessment. He does not state bluntly that the titles are inapplicable, but comes close to it: it 'appears' that this is the case, and if so, then 'the barbarians gave no just cause for war', with the consequence that '*the whole Indian expedition and trade would cease*, to the great loss of the Spaniards.'[142] This is formulated as a hypothesis, but Vitoria suggests that it is plausible.

We can speculate why Vitoria was not more outspoken here. Possible reasons are his fear of the Inquisition, or the fact that he could hardly reject in an explicit manner the policy of the government that paid his salary. On 10 November 1539, after Vitoria had delivered his second lecture on the Native Americans, de Soto, the prior of his convent, received a letter from a not very pleased Charles V, demanding that the theologians hand in all material on the Indian question and stop writing or lecturing on it.[143] I presume that Vitoria was aware that applying his titles and making a definite judgement depended on an accurate evaluation of the situation in the Americas, an evaluation that was not accessible to him. His conclusion was that the Spaniards should do what can't be wrong, that is, using the right of hospitality as specified and trading with the natives as equal partners, who 'have a surplus of many things which the Spaniards might exchange for things which they lack'.[144] Vitoria does not feel sure about all of his arguments, and concludes that trade and hospitality based on reciprocity and fair exchange are the best remedies in the given situation. Standards of justice might of course conflict with economic benefits, or rather its opposite, 'a huge loss to the royal exchequer'. Vitoria is quick to add that the loss can be avoided if a tax is imposed.[145] But this hardly resolves the normative conflict between morality and prudence. His focus on the crown's benefits ignores the economic losses which the end of the 'Indian expedition' would mean for the ordinary Spaniards already there, especially those who profited from the *encomienda* system. Vitoria's suggestion to restrict relations to hospitality and trade was well-intentioned and sound, but unrealistic.

So far I have argued that there are good reasons to interpret Vitoria favourably, and that we can find minimal normative standards that are reasonable and can be shared by all. However, we know that we should not be too enthusiastic, projecting our modern understanding of humanism into the sixteenth century. Keeping matters in a balance is probably best, even if this

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142 Ibid.

143 See, for instance, Ortega, 'Vitoria', p. 109, who sees this as a possible reason. The letter is quoted in Scott, *Spanish Origin*, pp. 84f. and in Vitoria, *Relectio de indis o libertad de los indios*, ed. Luciano Pereña et al. (Madrid: Consejo Superior de Investigaciones Científicas, 1967), pp. 152f.

144 Ibid.

145 Ibid., pp. 291f.

can't be done consistently. One telling example of presentism might be the evaluation of Vasco de Quiroga, who founded a number of 'village hospitals' in Mexico in the 1530s, and was subsequently seen as a champion for Native American rights who tried to realize More's *Utopia*. In fact he opposed Las Casas, was in favour of Spanish conquest and the *encomienda*, and supported Cortés.[146]

The major differences between conquistadores such as Cortés and theologians such as Vitoria are not matters of principle, but primarily how to apply, or not to apply, those principles. The differences are, above all, differences of judgement, not divergent standards. Cortés and Vitoria agree on the principle of self-defence, but the conclusions they draw are incompatible with each other. Juan Ginés de Sepúlveda and his *Democrates secundus* (1544) also fits in here. He does not, after all, challenge moral standards. He simply denies the status of being human to the Native Americans, contrasting them with the noble and virtuous Spaniards and comparing the former with monkeys and pigs 'with their eyes fixed always on the ground'.[147] Few of the Salamancan theologians were willing to swallow this. Reasoned argument is not necessarily 'totalizing'. The Spanish academic community was not homogeneous, but allowed for internal criticism by some theologians who did not support the economic interests of the 'ruling class'. William's thesis applies to authors like Sepúlveda: this can be interpreted as Western ideology, 'both chauvinistic and dogmatic',[148] and for most contemporary readers offensive.

A previous section has shown that historians are sometimes accused of Whig interpretations or presentist fallacies (I, 3). It could be argued that any attempt to take a Spanish sixteenth-century Thomist theologian out of his historical context is bound to fail. Anthony Pagden has claimed:

> ... that by re-describing the battles of the early-modern world in modern terms, by making Francisco de Vitoria the remote ancestor of the Charter of the United Nations or the Bill of Rights, the specificity of the conflict is lost, and with it, the possibility of its significance as a process over time. The nature and legitimacy of the Spanish empire, and the impact of the discovery and conquest of 'new' worlds on the European consciousness are not, as these historical perspectives suggest 'perennial questions,' even though they recur again and again throughout the course of the

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146 The enthusiastic account is Silvio Arturo Zavala, *Sir Thomas More in New Spain. A utopian adventure in the Renaissance* (London: Hispanic & Luso-Brazilian Councils, 1955), criticized by Anthony Pagden, 'The Humanism of Vasco de Quiroga's "Informacion en derecho" ', in: *Uncertainties*, ch. V, pp. 133–42.

147 Juan Ginés de Sepúlveda, *Democrates segundo, o de las justas causas de la guerra contra los indios*, ed. Angel Losada (Madrid: Consejo Superior de Investigaciones Científicas, 1951), p. 38 and pp. 33f. quoted after Pagden, *Fall*, p. 117; Tierney, *Rights*, pp. 273. See also Pagden, 'Dispossessing the Barbarian', pp. 27–32.

148 Pagden, *Fall*, p. 109.

> history of the European overseas expansion. For each time they recur they do so in contexts and languages which are unlike those in which they first appeared. To interpret what Lewis Hanke called 'The Struggle for Justice in the New World,' in the light of either the American Revolution or the conflict between liberal democracy and Fascism, is to rob it both of its identity as a series of historical events, and of its place within a temporal sequence.[149]

Pagden warns us that an interpretation that stresses the similarities with our time might become anachronistic. We may add that this interpretation is exposed to the danger of creating Lyotard's meta-narrative, or a liberal whiggish success story of modern history. Pagden's main charge is that of unhistorical presentism: unlikeliness should come first, otherwise history as the description of change gets lost (see above I, 3).

However, there are some considerations which support Lewis Hanke's approach and qualify Pagden's. Is the difference between the two approaches really an all-or-nothing affair? Our binary mode of thinking tends to answer the question in the affirmative, but mostly fails to grasp the complexity of human affairs. Philosophically, the problem is one of our categories: do we emphasize the similarities or the differences? Do we apply the category of identity or of non-identity? A way out of this dilemma would be to offer a fair compromise. Pagden is right in the sense that the contexts and languages change over time, and our modern language of human rights differs from a Thomist approach (but not profoundly, Brian Tierney might add). Hanke is also right, because there is a common theme that 'recurs again and again': thin justice and moral minimalism which are reiterated in different times and places. When we read about Vitoria's outrage concerning the atrocities in Peru, and his insistence that the Native Americans are humans and our neighbours, and not 'monkeys', we can identify with his moral feelings, and moral disposition. We understand why Sepúlveda dropped the phrase about the native 'monkeys' in the final version of the text.[150] The Dominican Antonio Montesinos' famous questions hurled at his audience on the Sunday before Christmas 1511 – 'With what right, and with what justice do you keep these poor Indians in such cruel and horrible servitude? ... Are these not men? Do they not have rational souls? Are you not obliged to love them as yourselves?' – are perfectly understandable for us, and can be transposed out of their historical context. With the exception of the question on the natives' rational souls, they could have been asked in our century. We can even identify with Cortés's creative but fanciful attempt to justify a glaring injustice, because we know that we also tend to rationalize our behaviour, looking for excuses and exceptions.

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149 Pagden, *Uncertainties*, p. x.

150 Sepúlveda, *Democrates segundo*, p. 33, note 28.

Las Casas's writings, especially his *Brevíssima relación*, were widely spread in Northern Europe for propaganda purposes, and helped to establish the black legend among anti-Spanish and anti-Catholic Dutch, English and French writers.[151] The English themselves often did not do any better than the Spaniards. Examples abound. The charter of Charles II referred to the Native Americans as 'savages' who had to be displaced, not incorporated, and Governor Wyatt saw the expulsion of the heathens as his first task in 1623. While the Spaniards were accused of genocide, the English colonists in the early seventeenth century preferred to see themselves as benevolent helpers of the Native Americans who were 'crying out to us ... to come and help'.[152] In moral terms, they debunked Spanish colonial practice for polemical reasons and following their sense of justice, but failed to see the trunk in front of their own eyes. French colonialism seemed to have been more lenient. Legislation and frequent royal decrees tried to keep good relationships with the Native Americans and attempted to restrain possible excesses of the colonists.[153] In Spain itself, the debate over the rights of the Native Americans ebbed away in the 1560s. Spanish universities went through a boom and bust, with clear signs of decline in the 1620s. A hundred years after Pizzaro's invasion of Peru, Juan de Solórzano Pereira (1575–1654) summarized the arguments of the debate (see III, 5). He offered a new consideration taken from Roman jurisprudence. The crown could claim ownership by virtue of subsequent, long-term occupation (*praescriptio longi temporis*): 'Even a tyranny becomes in time a perfect and legitimate monarchy.'[154] The Spaniards had acquired *dominium* in the

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151 William S. Maltby, *The Black Legend in England: The Development of Anti-Spanish Sentiment, 1558–1660* (Durham, NC: Duke University Press, 1971), and Benjamin Keen, 'Main Currents in United States Writings on Colonial Spanish America, 1884–1984', *Hispanic American Historical Review*, 65 (1985), pp. 657–82, on the black legend in American historiography.

152 All quotations in Pagden, *Lords*, pp. 37 and 87f.

153 See Pagden, *Lords*, pp. 88f.

154 Juan de Solórzano Pereira, *Politica indiana sacada en lengua castellana de los dos tomos del derecho i govierno municipal de las Indias* (1648), in Miguel Angel Ochoa Brun (ed.), *Biblioteca de autores Espanoles*, CCLII, 5 vols (Madrid: Ediciones Atlas, 1972), 3.3.6, vol. 5, p. 108; quoted in Pagden, 'Dispossessing', p. 97. See also Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart.* Beiträge zur Kolonial- und Überseegeschichte Bd. 26 (Stuttgart: Steiner, 1984), pp. 255–62, and Pagden, *Lords*, pp. 89f. The definitive study on Solórzano is now James Muldoon, *The Americas in the Spanish World Order. The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994). See Randall Collins, *The Sociology of Philosophies. A Global Theory of Intellectual Change* (Cambridge, MA and London: The Belknap Press of Harvard University Press, 1998), pp. 575–82 on the Spanish intellectual community and the decline of the universities in the 1600s.

'New World' simply by being there for a sufficient tract of time. *Tempus, non veritas facit legem. Ex factis ius oritur.*

The Salamancan theologians were widely read outside Spain in the sixteenth and seventeenth centuries, but later forgotten. Grotius turned into the 'father' of modern international law, while Vitoria and his pupils became 'victims of unfair exclusion' at least until Scott's famous publication in 1934 (see III, 6). Vitoria's achievement is raising the important issues of *ius gentium* and international hospitality. His answers are predominantly successful. His legacy can be described as a packet of conceptual conflicts: between the independence of communities and the demands of the global commonwealth, and among consent, custom and natural law. International customary law, defined as generally applicable non-written standards, is often seen as the core of modern international law.[155] For Vitoria and Suárez, custom is integrated into the order of divine and natural law. It keeps a precarious position between tacit consent and natural justice, between ascending and descending arguments, between *opinio iuris* and state practice, which it attempts to reconcile. As the modern European law of nations gradually removed the theological framework, these tensions became more troubling.

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155 See Alfred Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 29 (1969), pp. 635–53 and Seidl-Hohenveldern, *Völkerrecht*, paras. 28–30 for a conventional legal, and Koskenniemi, *Apology*, ch. 6 for a deconstructive account. For the following see Suárez, 'On Laws', pp. 351 and 459.

Chapter 3

The Age of Hugo Grotius

For a long time, Grotius was given credit for a triple paternity. He was seen as the father of modern natural law, of private law theory, and of international law. Especially Barbeyrac and Pufendorf helped to spread Grotius's fame. In this century, Grotius has also gained a certain reputation among scholars of international relations. Hersch Lauterpacht wrote about 'the Grotian tradition', claiming that the Dutch jurist had found a middle ground between positivism and naturalism in his writings. Especially British scholars like Martin Wight and Hedley Bull followed this categorization. The Grotian or internationalist tradition, Bull pointed out, has moved beyond Hobbesian premises and the Kantian universalist perspective, emphasizing 'economic and social intercourse between one country and another.'[1] Grotius has also come under repeated attack. Rousseau accused him of arguing in favour of tyrants and slavery. Kant subsumed him under the 'sorry comforters' whose legal works can be abused by anyone who embarks on an aggressive war and wishes to justify it.[2] A comprehensive recent study has argued that Grotius's main work,

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[1] Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946), in Elihu Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 1975), vol. 2, pp. 307–65; Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* [1977], 2nd edn (New York: Columbia University Press, 1995), p. 25. See also his piece 'The Importance of Grotius in the Study of International Relations', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), pp. 65–93; Cornelis G. Roelofsen, 'Grotius and the development of international relations theory', *Grotiana*, 18 (1997), pp. 97–120, and the recent publication by Barbara Allen Roberson (ed.), *International Society and the Development of International Relations Theory* (London: Cassell, 1998) on the English School and Hedley Bull. The rise, fall and recent improvement of Grotius's reputation is partly included in Charles S. Edwards, *Hugo Grotius: The Miracle of Holland. A Study in Political and Legal Thought* (Chicago: Nelson-Hall, 1981), ch. 2 (pp. 9–25) and in Onuma Yasuaki, 'Conclusion', in Onuma Yasuaki (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), pp. 357–70.

[2] Jean-Jacques Rousseau, 'On Social Contract', I, 2 and 4; II, 2, in Alan Ritter and Julia Conaway Bondanella (eds), *Rousseau's Political Writings* (New York: Norton, 1988), pp. 89, 88–90, 100; Immanuel Kant, 'Toward Perpetual Peace', in *Practical*

De Jure Belli ac Pacis (1625) is only an exploration of the traditional *ius belli*, rather than the foundation of modern international law, and thus pre-modern: 'considérée en elle-meme, l'oeuvre de Grotius ne fait en réalité qu'achever et couronner la tradition scolastique du *Ius belli.*'[3] In addition, it could be pointed out that Grotius was squarely rooted in the natural law thinking of the Second Scholastic, especially in terms of the status of *ius gentium*, the natural commonwealth, the emphasis on sociability and natural freedom, and a rudimentary consent theory. Bull's five features of Grotius's view of international society: the centrality of natural law, the universality of the natural commonwealth, the importance assigned to individuals and non-state groups, solidarity in the enforcement of rules, and the absence of international institutions can also be found in authors like Vitoria, Gentili and Suárez.[4]

If there is ample evidence to stress the continuity with the past, it should not lead us to the conclusion that no change took place. Our task is to think through both persistence and change together, without favouring the one against the other. Any debate on founding heroes is open-ended. The claim that Grotius was merely transmitting late Scholastic thought has been confronted with conflicting evidence, but equally exaggerated is the counter-thesis that Grotius had made a complete break with the past. One suitable metaphor might be that of the bridge, suggesting that Grotius was an indispensable arch linking medieval and modern Europe.[5] But this runs into the familiar problem of how to define the complex entity referred to as 'modern Europe' and its essential features, and where to draw the proper line of demarcation between medieval

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Philosophy, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), p. 326.

[3] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983), p. 615; see also pp. 615–21. He makes the same point in 'On Assessing the Grotian Heritage', in Asser Instituut, *International Law and the Grotian Heritage* (The Hague: T. M. C. Asser Instituut, 1985), p. 156: Grotius's major work should not be read anachronistically as a treatise on international law, but as a contribution to the law of war, a self-contained legal discipline going back to the medieval Scholastics. David J. Bederman, 'Reception of the classical tradition in international law: Grotius' "*De jure belli ac pacis*" ', *Emory International Law Review*, 10 (1996), pp. 1–52 shows Grotius' extended use of textual authority, especially classical Greek and Latin sources. Karl-Heinz Ziegler, 'Hugo Grotius als "Vater des Völkerrechts" ', in Peter Selmer and Ingo von Münch (eds), *Gedächtnisschrift für Wolfgang Martens* (Berlin, New York: de Gruyter, 1987), pp. 851–8 defends Grotius's importance against recent criticism.

[4] Bull, 'Importance of Grotius', pp. 78–91. See Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols (Cambridge: Cambridge University Press, 1978), II, pp. 148–66 on the innovative political thought of the Second Scholastic.

[5] See the illuminating discussion in Brian Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150–1626* (Atlanta: Scholars Press, 1997), pp. 316–19.

and modern. Depending on our definition, and depending on whether we look at his links with the past or at his anticipation of what was to come, we can see Grotius as the last of the medieval writers or as the first modern one.

There is an additional dimension where our own position comes in and gets peculiar. Grotius lived at a time that moved from the medieval idea of the *respublica Christiana* incorporated in a great society of humankind with an emphasis on individuals and corporations below the state level, and on institutions above the state, to a society of (at least formally) sovereign states which mediated the individual. Our present time seems to move back to the 'old', away from the modern to the pre- or postmodern. This can be illustrated with the example of humanitarian intervention (see II, 5). While Suárez, Gentili and Grotius joined Vitoria in endorsing a qualified right of intervention, it fell prey to the strict norms of non-intervention and state sovereignty in nineteenth-century European international law. Nowadays this has in turn been abandoned in favour of a search for a tenable theory of humanitarian intervention. Similarly, the European medieval focus on the *ius gentium intra se* (the law of nations within the political community) has been renewed at the cost of the *ius gentium inter se* (the law between communities or states), in search for a doctrine of the international law of human rights.[6]

The first section argues that Grotius's originality as a natural lawyer can be found in his willingness to confront moral and international scepticism as well as religious pluralism, in his departure from Aristotelian views, in facing the modern problem of coexistence, in advocating free choice and pluralism, in his emphasis on social utility and expediency, in his tendency to reject voluntarism and to ground natural law in natural rights (rather than the other way round), and in his concept of a minimalist natural law which opens up a permissive domain for it. As one commentator put it, Grotius offers 'the first modern effort to rethink morality.'[7] While continuing scholastic efforts and building on them, Grotius develops natural law further. The second section focuses on the friction between natural justice and implicit, virtual, hypothetical, or explicit consent. The problem is troubling in Grotius, and has remained so in modern international law. Full-blown consent theories are exposed to relentless arguments, for instance in Hume. The section concludes with Kant's attempt to let consent and justice coincide in the idea of rational or just consent. The third section argues that Grotius endorses the notions of a moral and of a legal worldwide society of humankind. He leaves two problems unsolved, that of interpretation and that of law enforcement, though he clearly sees both

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6 R. J. Vincent, 'Grotius, Human Rights, and Intervention', in Bull, Kingsbury and Roberts, *Grotius*, pp. 242 and 252–4.

7 Jerome B. Schneewind, *The invention of autonomy. A history of modern moral philosophy* (Cambridge: Cambridge University Press, 1998), p. 66.

difficulties. Grotian international society is characterized by the absence of institutions beyond the level of domestic governments. War has the structure and function of a lawsuit, and replaces the judge of domestic jurisdiction. The fourth section develops Grotius's notion of the ocean as common property or dominion. While partly following the Second Scholastics, his novel claim was the freedom of the seas. Grotius sides with Vitoria, arguing that the rights to travel and trade are perfect ones and enforceable. Concluding passages investigate whether Grotian impartiality is consistent and his idea of international society truly universal. The fifth section tries to give Gentili and Suárez credit for their contributions to the law of nations. Gentili turns the right to visit and trade into a conditional one, requiring the consent of the people being visited. He cites the example of the Chinese, whose policy of restricting access to their territory was, on Gentili's view, justified. Suárez attempts to clarify the systematic status of *ius gentium*. He keeps a precarious balance between native rights such as self-defence and the Christian duty to preach the Gospel. The concluding section briefly refers to the Grotian legacy and presents an answer to the question of who can be considered the true founder of modern international law.

1. Beyond scepticism: A modern theory of natural rights

At the beginning of the eighteenth century, Christian Thomasius enthusiastically praised Grotius as the founder of natural law: 'Grotius was the first to try to resuscitate and purify this most useful science, which had become completely dirtied and corrupted by scholastic filthiness, and was at its last gasp.'[8] Other authors followed suit. The main problem of this evaluation is that it has to juxtapose old and new, creating the theory of a 'watershed' or 'new period' which cannot be sustained. While one side is overrated, the losing end turns into something dirty, filthy and corrupt. Historians can detect this mechanism almost anywhere in intellectual history. More recently, sceptical scholars have observed a similar fallacious juxtapostition in some of the commentaries on the allegedly wide gap between postmodern and modern philosophy, and the utter uselessness of the latter. Our thinking tends to 'fall into' binary oppositions. Usually we do not have to wait long to find people who, out of charity and

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[8] Christian Thomasius, *Fundamenta juris naturae et gentium* [1705]. Neudruck der 4. Aufl. Halle 1718 (Aalen: Scientia, 1963), pref. 1, translated in Schneewind, *Invention*, p. 66. Favourable assessments of Grotius's legacy are compiled in Edwards, *Grotius*, pp. 10ff., and Tierney, *Natural Rights*, pp. 318f. The history of Thomasius' founding myth is discussed in Merio Scattola, *Das Naturrecht vor dem Naturrecht. Zur Geschichte des 'ius naturae' im 16. Jahrhundert* (Tübingen: Max Niemeyer Verlag, 1999), pp. 1–5.

intellectual honesty, stand up in favour of the denounced side. In Grotius's case, they point out that the late Scholastics were not at their 'last gasp', but rather creative, and laid the foundation on which Grotius was able to build. The challenge is to keep a convincing balance while not assuming that the truth always lies between extremes.

Grotius lived at a time of religious, political and intellectual unrest, a fact which is reflected in his biography. As a politician, he was unsuccessful. He was imprisoned, escaped, and spent most of the rest of his life in exile. As Rousseau was careful to observe, he received a royal pension from the French government, though it was paid unreliably. He witnessed the United Provinces' struggle for independence from Spain, its overseas expansion, and the beginnings of Dutch world trade primacy, while his major work was written during the first years of the Thirty Years' War.[9] Grotius faced two intellectual challenges. Aristotelian, Scholastic natural law arguments had ceased to be convincing. Europeans had assembled enough information about the diversity of cultures and human behaviour. The major challenge was the sixteenth-century scepticism of Montaigne and Charron. Montaigne accepted that we could not expect any agreement about the highest good. If this was true, then our world of conflicts and wars would urge us to ask a new question: 'can we find laws that bind us all alike even if we do not agree on the good?'[10] Grotius's

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9 A reliable biography is William Stanley Macbean Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925). Peter Borschberg, *Hugo Grotius' 'Commentarius in theses XI' : an early treatise on sovereignty, the just war, and the legitimacy of the Dutch revolt* (Berne, New York: P. Lang, 1994); C. G. Roelofsen, 'Grotius and the International Politics of the Seventeenth Century', in Bull, Kingsbury and Roberts, *Grotius*, pp. 241–56; Jonathan Irvine Israel, *The Dutch Republic. Its Rise, Greatness, and Fall 1477–1806* (Oxford: Clarendon Press, 1995) and *Conflicts of empires: Spain, the low countries and the struggle for world supremacy, 1585–1713* (London; Rio Grande, Ohio: Hambledon Press, 1997), and Timothy J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000), ch. 5 on the Hugenot Diaspora help to contexualize Grotius. The literature on Grotius's works is vast and expanding. See especially the periodical *Grotiana* (Assen, 1980–), and the bibliographies in Bull, Kingsbury and Roberts, *Grotius*, pp. 313–22; Haggenmacher, *Grotius*, pp. 645–72, and Onuma, *Approach*, pp. 387–412. An excellent introduction is Hasso Hofmann, 'Hugo Grotius', in Michael Stolleis (ed.), *Staatsdenker im 17. und 18. Jahrhundert. Reichspublizistik, Politik, Naturrecht*. 2., erweiterte Aufl. (Frankfurt am Main: A. Metzner, 1987), pp. 52–77. Four standard essays on Grotius and natural law are included in Knud Haakonssen (ed.), *Grotius, Pufendorf and Modern Natural Law* (Dartmouth, Aldershot et al.: Ashgate, 1998), pp. 3–104. A recent assessment is Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (Leiden, New York, Köln: Brill, 1998), chs. 5 and 6.

10 Schneewind, *Invention*, p. 57. See especially his third chapter (pp. 37–57) and Charles Larmore, 'Scepticism', in Daniel Garber and Michael Ayers (eds), *The Cambridge History of Seventeenth-Century Philosophy* (Cambridge: Cambridge University

post-sceptical natural law theory tried to answer this question. Scepticism ran into familiar problems (see I, 2 above). Charron's affirmative formula 'I don't know' was problematic because it sounded like a dogmatic statement. If subjected to sceptical scrutiny, scepticism itself could no longer be defended as 'the truth'. Grotius assumed that a moderate form of scepticism was not incompatible with his theory of moral minimalism, and a thin concept of justice. It was decisive that he did not dismiss scepticism as 'full of sound and fury, signifying nothing', out of hand. He was willing to take sceptical arguments seriously and respected them as worthy of consideration, which was a major break with the Scholastic attitude.

In the 'Prolegomena' of *De Jure Belli ac Pacis*, Grotius confronts the views of the ancient sceptic Carneades. Nowadays we distinguish between moral and 'international' scepticism, a distinction implicit in Grotius's work. In terms of the former, Carneades (who resembles Montaigne) holds that laws are imposed 'for reasons of expediency', that they change and differ among cultures. There is no justice because it contradicts self-preservation and self-interests, and if there was any, it would be 'supreme folly, since one does violence to his own interests if he consults the advantage of others.'[11] One way to criticize this position would be to point out that the implied anthropology (humans are by nature selfish) is dogmatic. This is roughly the line of attack Grotius chooses. The sceptic's anthropology is incomplete. While Grotius does not deny human selfishness, he adds another impulse, the 'desire for society', for peaceful and organized social life, a trend the Stoics referred to as 'sociableness'. For Grotius, this amounts to a 'universal truth'.[12] The other form of scepticism could be labelled 'international'. It holds that *ius gentium* is merely an 'empty name' without any reality or binding force. The result is one type of what is nowadays called 'political realism' (Grotius quotes Thucydides): anything that is useful or expedient in foreign affairs is just.[13] In his major work, Grotius tried

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Press, 1998), vol. 2, pp. 1154–92; Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), ch. 2 (pp. 31–64); Knud Haakonssen, 'Hugo Grotius and the history of political thought', *Political Theory*, 13 (1985), pp. 239–65, and Robert Schnepf, 'Naturrecht und Geschichte bei Hugo Grotius', *Zeitschrift für neuere Rechtsgeschichte*, 20 (1998), pp. 1–14. Perez Zagorin, 'Hobbes without Grotius', *History of Political Thought*, 21 (2000), pp. 16–40 stresses the originality of Hobbes, but tends to downplay Grotius's novel approach, even if he was admittedly not as revolutionary as Hobbes.

11 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [1625; The Law of War and Peace]. Vol. II, trans. Francis W. Kelsey, 3 vols (Oxford: Clarendon Press 1925; reprint New York: Oceana Publications, 1964), Prolegomena 5, pp. 10f.

12 Grotius, *Jure Belli*, prol. 6, p. 11.

13 Ibid., prol. 3, p. 9. Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 15 and 19–27 distinguishes between

to go beyond both types of scepticism. The international dimension was crucial. Moral scepticism could advocate adherence to local norms or conventions, but there was no answer whenever norms of different communities, states, or continents clashed. What were the norms one should follow then? Grotius first mentioned Carneades in his book *De Indis* (titled by modern editors *De Iure Praedae*), which he wrote at the age of twenty-one. Its starting point was colonial competition between the Dutch and the Portuguese (in personal union with the Spanish Empire since 1580). Reference to local norms could hardly help here.[14]

Grotius's reply to scepticism entails two parts, what could be called his political anthropology and his theory of minimalist natural law. As already indicated, his political anthropology includes the claim that human sociability (*appetitus societatis*) is a universal truth, and that 'the very nature of man ... is the mother of the law of nature.' This law is proved '*a priori*' by showing how it corresponds with human rational and social nature. Human sociableness is supposed to provide the motivation to act in accordance with the law of nature.[15] There are at least two ways to interpret Grotius. The unfavourable one suggests that he deliberately selected more pleasing human aspects and thus presented an idealization, that he ignored evil elements and was too naïve, which is demonstrated by his apparent inability to conceive of a ruler who consciously and knowingly wages an unjust war.[16] The more favourable interpretation indicates that Grotius was fully aware of the fact that social

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generic moral and international scepticism while focusing on a rejection of the latter in the first part of the book.

14 Grotius, Hugo, *De iure praedae commentarius* [1604; Commentary on the Law of Prize and Booty], transl. Gwladys L. Williams (Oxford: Clarendon Press, 1950; reprint New York: Oceana Publications, 1964), prol., p. 9 and 7.32, pp. 76ff. See Richard Tuck, 'Grotius, Carneades and Hobbes', in Vere Chappell (ed.), *Essays on Early Modern Philosophers from Descartes and Hobbes to Newton and Leibniz. Volume 2: Grotius to Gassendi* (New York and London: Garland Publishing, 1992), pp. 51–62, particularly 57, and 'The "modern" theory of natural law', in Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), pp. 99–119, especially 109f. and 115–18. The definitive study on modern scepticism and its political dimension is John Christian Laursen, *The Politics of Skepticism in the Ancients, Montaigne, Hume, and Kant* (Leiden, New York, Köln: Brill, 1992), especially pp. 56–9 (on Carneades), and pp. 94–144 (on Montaigne).

15 Grotius, *Jure Belli*, prol. 16, p. 15; 1.1.12, p. 42 (Citations are either to the 'Prolegomena' or by book, chapter, and section number, followed by page references to the Carnegie Endowment translation). See the discussion in Schneewind, *Invention*, pp. 75f. and Mary J. Gregor, 'Kant on "Natural Rights"' in Ronald Beiner and William James Booth (eds), *Kant and Political Philosophy. The Contemporary Legacy* (New Haven and London: Yale University Press 1993), p. 53.

16 Onuma, 'Conclusion', p. 349, 'War', in Onuma, *Approach*, pp. 73f., and Terumi Furukawa, 'Punishment', ibid., p. 241.

conflict is unavoidable and ineradicable, that he faced the 'utter ruthlessness' of people and offered a more convincing political anthropology that is not one-sided but aware of human ambiguity. In short, Grotius offered an account of what Kant would later call 'unsocial sociability': the human 'tendency to come together in society, coupled, however, with a continual resistance which constantly threatens to break this society up'.[17] There is evidence for both interpretations. Grotius did depart from Aristotelian views in many respects, in emphasizing the sociable *and* self-seeking nature of humans, in rejecting his doctrine of the mean, and in distinguishing between the concept of justice and the agent's motivation.[18] Be that as it may, Humean scepticism, different from the one Grotius confronted, would reject this political anthropology as an example of the is-ought fallacy (see V, 3). However, this criticism does not affect Grotius's minimalist account of natural law.

There are two passages (one of them famous) which suggest that Grotius was fully aware of the modern problem of coexistence in the face of religious pluralism, scepticism, controversies and wars, and that he tried to solve it in a new way. The first passage states a fact:

> Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.[19]

Written during the carnage of the Thirty Years' War, the passage supports the more favourable interpretation of Grotian political anthropology: humans are socially oriented, but also and equally quarrelsome and prone to war. Grotius's ingenuity lies in the answer he gives to the problem of how this kind of humans can possibly live together. In the surprising second passage, Grotius points out:

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17 Grotius, *Jure Belli*, prol. 29, p. 20; Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in Hans Reiss (ed.), *Kant. Political Writings*, 2nd edn. (Cambridge: Cambridge University Press, 1991), p. 44. This interpretation is hinted at by Jerome B. Schneewind, 'Kant and natural law ethics', *Ethics*, 104 (1993), pp. 58f.

18 Grotius, *Jure Belli*, prol. 42–45, pp. 24–6; Schneewind, *Invention*, pp. 71f. and 76f.; Richard Tuck, *Natural rights theories. Their origin and development* (Cambridge: Cambridge University Press, 1979), pp. 74f.; Tadashi Tanaka, 'Grotius's Method: With Special Reference to Prolegomena', in Onuma, *Approach*, pp. 21–3.

19 'Videbam per Christianum orbem, vel barbaris gentibus pudendam bellandi licentiam: levibus aut nullis de causis ad arma procurri, quibus semel sumtis nullam jam divini, nullam humani juris reverentiam, plane quasi uno edicto ad omnia scelera emisso furore', Grotius, *Jure Belli*, prol. 28, p. 20.

> Just as, in fact, there are many ways of living, one being better than another, and out of so many ways of living each is free to select that which he prefers, so also a people can select the form of government which it wishes; and the extent of its legal right in the matter is not to be measured by the superior excellence of this or that form of government, in regard to which different men hold different views, but by its free choice.[20]

The passage underlines the impact of scepticism on Grotius. He abandons the hope to find once and for all the true way of living, stressing instead the right to choose among the various options. This 'free choice' is extended by analogy to political communities as well (like his predecessors, Grotius did not see what would later be called the 'domestic analogy' as a problem). This freedom of choice has the absurd consequence (provoking Rousseau's protest) that a people can enslave itself if it so pleases, in order to avoid destruction, for instance. The overriding concerns are self-preservation and the coexistence of ways of living, rather than the realization of a metaphysically found (highest) good. Unjust is that which is 'in conflict with society, that is which attempts to take away the rights of another',[21] all that is incompatible with peaceful coexistence based on mutual respect of rights. The preservation of social peace becomes the primary goal. For the law of nations this would mean that rules of coexistence count and that aggression, not regime type, is penalised.

The passage can be read as an endorsement of pluralism. The insistence of the moral sceptic on the variety of laws, customs and beliefs throughout history and across cultures is not denied, but absorbed into the theory. What Grotius keeps are the core values not even the sceptic, he argues, is capable of denying without doing violence to his or her own beliefs, the right of self-preservation being an example. Structurally, this approach is similar to contemporary ethical universalist positions outlined above (I, 4). Scepticism is not ignored or dismissed, but transcended. The main philosophical problem we get here is familiar: how to draw a proper line of demarcation between the core and the ephemeral. For instance, some could join Rousseau and point out that popular sovereignty is inalienable, while others might hold with Grotius that, given that slavery is better than death and that free choice counts, it is permissible to

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20 'Sicut autem multa sunt vivendi genera, alterum altero praestantius, et cuique liberum est ex tot generibus id eligere quod ipsi placet; ita et populus eligere potest qualem vult gubernationis formam: neque ex praestantia hujus aut illius formae, qua de re diversa diversorum sunt judicia, sed ex voluntate jus metiendum est', ibid., 1.3.8., p. 104. The importance of this passage is underlined by Schneewind, *Invention*, pp. 70–3; Tuck, 'Modern Theory', pp. 117f., and Steven Forde, 'Hugo Grotius on ethics and war', *American Political Science Review*, 92 (1998), p. 640.

21 Grotius, *Jure Belli*, 1.2.1, p. 53.

renounce it in extreme situations.[22] It is a problem we can hardly argue to have resolved in our own times (see section below for more).

Grotius's emphasis on social utility can be seen as another feature of his modernity. Although Grotius claims to keep expedience and justice apart and to leave out the former from his discussion, he frequently appeals to it. Expediency is supposed to reinforce natural law, form the basis of municipal law, and is the norm lawmakers should not lose sight of. Grotius's acceptance of slavery is based on a utilitarian calculus: life under subjection is better than death in political freedom.[23] Grotius needs utility as a motivating force so that people abide by the rule of natural law. His thesis is that 'all things are uncertain the moment men depart from law.'[24] His arguments supporting it are not convincing as soon as he moves to the sphere of international relations. Why should powerful states follow the precepts of justice if selfishness and the violation of rules gets them more? Grotius claims that even they profit from alliances, commerce and interaction. He adds a theological argument: God can and will punish the unjust in the afterlife, or maybe sooner. States which fight unjust wars might lose them because they lack the conviction of doing the right thing, and may not find allies if they win.[25] Kant would later point out that this is a sorry comfort. Grotius would have to show that law-abiding behaviour is always in the short as well as long-term interest of powerful states. However, consequentialist arguments of this sort never succeed in assembling sufficient convincing empirical data to support the proposition. It might be argued that Grotius's crime-does-not-pay naiveté amounts to wishful thinking. This criticism is too harsh. Perhaps Grotius was aware that compliance will never be perfect. Maybe Grotius's thinking is, at least in this respect, rooted in the medieval conviction that society and the individual form a coherent whole, that personal interests and social utility coincide, that there is, in spite of conflicts and wars, some pre-established harmony between what becomes torn apart later on.

Is Grotius a secularized rights theorist, who planned to base natural law and rights on human nature and rationality without referring to the divine will? The question should be seen in the context of the Scholastic debate between rationalists or intellectualists and voluntarists. Suárez offered a succinct summary of the dispute. For the intellectualists, good and evil are qualities

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22 Grotius, *Jure Belli*, 1.3.8, pp. 103f. According to Schnepf, 'Naturrecht', pp. 13f., Grotius both historicizes and marginalizes natural law. What is left is a very thin concept of justice indeed.

23 Ibid., prol. 57, p. 29; 16, p. 15; 1.3.7, p. 104. Grotian utilitarianism is discussed in Tadashi, 'Grotius's Method', pp. 16f. and 29.

24 Grotius, *Jure Belli*, prol. 22, p. 17.

25 Ibid., prol. 20, 16f. and 27, p. 19f.

existing 'intrinsically in the object' independent of God's will and would hold 'even if God did not exist'. By contrast, the voluntarists hold that natural law is rooted in God's will and not in a judgement of human reason. Suárez himself tried to find a middle position. Natural law is indicative, telling us what is good and evil in itself, but also preceptive, creating an obligation to avoid good and do evil.[26] Writing about an 'intrinsic natural obligation' and the 'immutable ... essence' of things, Suárez came close to endorsing the intellectualist thesis, but as a Jesuit theologian ultimately avoided undermining God's position as supreme lawgiver.[27] Rather than taking sides with Suárez's middle position, Grotius finally moved towards rejecting voluntarism. In *De Indis*, he endorsed a voluntarist position, establishing as his primary principle that God's will is law. In his later work, he breaks with his own earlier position. Natural law is above all 'a dictate of right reason' and *consequently* acts are either forbidden, demanded, or permitted by God.[28] The passage that was understood and interpreted by subsequent natural lawyers as endorsing intellectualism (even if Grotius himself may not have intended it fully), is the most famous sentence of the book: 'What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.' Grotius adds that there is no reason to doubt God's existence, and therefore claims that natural law can be attributed to God as the ultimate source.[29]

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[26] Francisco Suárez, 'On Laws and God the Lawgiver' (1612), in *Selections from Three Works of Francisco Suárez, Vol. 2: Translations* (Oxford: Clarendon Press, 1934), 2.6.3, p. 190; 2.6.4., pp. 190f.; 2.6.5 and 11, pp. 191 and 197f. Reliable and clear expositions are Schneewind, *Invention*, pp. 59–62; Knud Haakonssen, *Natural law and moral philosophy: from Grotius to the Scottish Enlightenment* (New York : Cambridge Univerity Press, 1996), pp. 16–24; Tierney, *Natural Rights*, pp. 301–15, and Edwards, *Grotius*, pp. 54–69. See Anthony Pagden, 'The Preservation of Order: The School of Salamanca and the "Ius Naturae" ', in *The Uncertainties of Empire. Essays in Iberian and Ibero-American Intellectual History* (Aldershot: Variorum, 1994), ch. III, p. 164 with sources for Gregory of Rimini, Vitoria, Soto and Suárez on the famous '*etiamsi daretur*'.

[27] Suárez, 'On Laws', 2.9.4–7, pp. 225–7; 2.15.18, p. 298; 2.6.11, p. 197. See also Haakonssen, *Natural law*, p. 23.

[28] Grotius, *Iure Praedae*, Prolegomena 2.4, p. 8; *Jure Belli*, 1.1.10, pp. 38f. On the difference between the two works, see Tuck, 'Modern Theory', pp. 112f. Schneewind, *Invention*, p. 74 argues that even *De Jure Belli* contains voluntarist elements.

[29] 'Et haec quidem quae jam diximus, locum aliquem haberent etiamsi daremus, quod sine summo scelere darit nequit, non esse Deum, aut non curari ab eo negotia humana', Grotius, *Jure Belli*, prol. 11, p. 13 and prol. 12, p. 14. The celebrated passage is discussed in Schneewind, *Invention*, pp. 73–5; Tadashi, 'Grotius's Method', pp. 26–9; Onuma, 'War', pp. 74–7; Haakonssen, *Natural law*, p. 29; M. B. Crowe, 'The "Impious Hypothesis": A Paradox in Hugo Grotius?' [1976], in Haakonssen, *Grotius*, pp. 3–34, and Haggenmacher, *Grotius*, pp. 496–507. See also Tierney, *Natural Rights*, pp. 333f.

The *etiamsi daremus* is a hypothetical proposition which helps to distinguish divine volitional law (as issued in the Ten Commandments, for instance) from natural law. If it did not amount to a clear divorce of natural law theory from theology and full secularization, it was a major move in this direction. Grotius can be interpreted as endorsing methodological agnosticism: God's will is distinguished from human reason and nature, and excluded from the study of natural law in principle. It all amounts to a break with the Second Scolastics. But this break is by no means a very clear one. As interpreters have repeatedly pointed out, Grotius makes distinctions and then treats the distinguished elements as interrelated. Again, there is a clear trend towards secularization of natural law, even if it is often ambiguous and incomplete. Clear passages are those where Grotius, for instance, derives the right of punishment not from God but from individuals who have given their consent to join in a state. An unmitigated intellectualist position is contained in the claim that 'even God ... cannot cause that two times two should not make four', and 'cannot cause that that which is intrinsically evil be not evil'.[30] Once God has created immutable rules and laws (and Grotius does not deny this authorship), God is bound by these, even if we believe that, theoretically, God could have willed a different set of rules and laws.

Grotius's innovative tendencies are underlined by the fact that the Lutheran reaction was predominantly negative, though there was no reason to question his personal devotion to Christianity. In terms of Christian theology, Grotius also broke new ground. As in morality, he distinguished between core or central beliefs and the ephemeral. Interested in mutual toleration among Christians of divergent confessions, he abandoned the traditional conviction that punishment of heretics was justified and quoted Salvianus at length instead. This ancient theologian had rejected the Arians, but had recognized their good intentions and love of God, and had advised fellow-Christians to leave possible punishment to God's wisdom and the Day of Judgement.[31] Grotius refused

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30 Grotius, *Jure praedae*, 8.40, p. 92; *Jure Belli*, 1.1.10, p. 40.

31 *Jure Belli*, 2.20.45, pp. 510–12 (on the four universal principles of the 'true' minimalist religion), and 2.20.50, pp. 519f. on the heretics. On Grotius's theology, see especially the fine volume by Henk J. M. Nellen and Edwin Rabbie (eds), *Hugo Grotius, theologian: Essays in Honour of G.H.M. Posthumus Meyjes* (Leiden, New York, Köln: E.J. Brill, 1994), with an extensive bibliography ibid., pp. 219–45, on religious toleration in Grotius see Tuck, *Philosophy*, pp. 179–90. The excellent volumes by John Christian Laursen and Cary J. Nederman (eds), *Beyond the Persecuting Society. Religious Toleration Before the Enlightenment* (Philadelphia: University of Pennsylvania Press, 1998), pp. 95–277, and Cary J. Nederman and John Christian Laursen (eds), *Difference and Dissent. Theories of Toleration in Medieval and Early Modern Europe* (Lanham, Boulder, New York, London: Rowman and Littlefield, 1996), pp. 83–137 (on Hans Denck, Sebastian Franck, Vitoria, Las Casas and Bodin) help to contextualize Grotian toleration.

to see the Pope as the Antichrist and provoked Lutheran and Calvinist theologians.

Another central feature of Grotius's modernity is sometimes seen in his departure from scholastic docrine where natural rights are embedded in and derived from natural law (see II, 2). In Grotius, *ius* has three meanings: it can be the justness of an act, a moral quality (*qualitas moralis*) 'making it possible to have or to do something lawfully', or *lex*, a 'rule of moral actions imposing obligation to what is right'.[32] Rights in the second sense become center stage: they are qualities grounding natural law rather than being derived from it. This interpretation must be taken *cum grano salis*. It can be argued that Grotius shared with the Second Scholastics a delicate balance between rights and natural law. However, the general trend, the move towards favouring rights, is obvious.[33]

Grotius tried to construct an account of moral minimalism. Again breaking with scholastic convictions, he held that neither the Decalogue nor the teachings of Christ obliged all humankind. There are the following universal moral principles: the right of self-preservation (the most basic one), the right to acquire the necessities of life, the ban on wanton injury (Ulpian's *neminem laede* principle, called the 'law of inoffensiveness' by Grotius), the duty to respect the property of others (the law of abstinence), and the right to punish those who violate these basic laws.[34] The move answered pre-Humean moral scepticism, and shared the sceptic's conviction that many or most moral practices differed among themselves, temporally as well as spatially. Distinguishing between principles and norms (I, 2), Grotius maintained, however, that the minimalist core was universal. Life in society builds on this core, but also goes beyond it. There are various ways of social and political life that are compatible within the framework of thin justice. On this level, the sceptics are right in pointing out that 'justice is a matter of opinion', based on the established customs, institutions and laws of various peoples.[35] Vitoria and Grotius share similar core principles, and I have argued that they can be found

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32 Grotius, *Jure Belli*, 1.1.3–4 and 9, pp. 34f. and 38. See the more extensive discussion in Tadashi, 'Concept of Law', passim.

33 Tuck, *Natural Rights*, p. 67; Schneewind, *Invention*, pp. 80f.; Tanaka Tadashi, 'Grotius's Concept of Law', in Onuma, *Approach*, p. 36, and Tierney, *Natural Rights*, p. 319 (with reservations).

34 Grotius, *Jure Belli*, prol. 48–51, pp. 26–8; 1.2.9, pp. 81–90, where he distinguishes between divine counsels and commands; *Jure praedae*, prol. 2.6–8, pp. 10–15; *Jure Belli*, prol. 8, pp. 12f., 1.2.1, p. 52 For a discussion of Grotian minimalist natural law, see Tuck, *Philosophy*, pp. 171–6, 190, 194, 198–200; 'Modern Theory', pp. 111–17; Forde, 'Grotius', p. 640, and Tanaka Tadashi, 'Grotius's Concept of Law', in Onuma, *Approach*, pp. 47f.

35 Grotius, *Jure praedae*, 7.32, pp. 76f.

in various cultures and different periods (see II, 4). What distinguishes Grotius from Vitoria is his conscious attempt to isolate the concept of thin justice.

Grotius differentiates between perfect rights, or rights strictly speaking, and imperfect rights, or the law of love. Perfect rights oblige other people, they are enforceable, their violation can be met by force. Following the law of love is praiseworthy, but is not demanded by strict obligation.[36] The distinction allows Grotius to follow Suárez's deontic trichotomy 'obligatory, permitted, forbidden'. It opens the space for a permissive domain of natural law, giving it more flexibility. For instance, what is morally not acceptable may still be done with legal impunity. The basic rights of self-preservation and of acquiring the necessities of life are permissive. Permissive conduct is regulated by divine and human volitional law.[37] Though the concept of permission was not new and had been dealt with by Suárez, for instance, Grotius gives it a central position in the *ius gentium*, made explicit in his admission that it 'permits many things which are forbidden by the law of nature'.[38] The quotation shows that Grotius's absorption of scepticism moves him into dangerous territory: natural law is prone to become an arbitrary notion and compatible with any injustice (see next sections).

Grotius attempted to walk a middle path between the extremes of moral rigorism ('nothing is allowable') and moral relativism ('everything is'), between radical Christian pacifism and amoral Machiavellism.[39] The discussion of Grotius's flexibility and acceptance of a permissive domain has shown that he runs into the well-known problem of how to draw clear lines of demarcation. It threatens his declared goal of a systematic account of natural law and the law of nations.

2. Justice or consent?

We have encountered a glimpse of the problem in the confrontation between Grotius and Rousseau on slavery. Before Grotius, Vitoria referred to the 'general consensus of men' supposed to guarantee the validity of derived second- or third-order principles. Of course not any consent would do; consent

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36 Grotius, *Jure Belli*, 1.2.1, p. 52; 2.12.9, pp. 347f.; Schneewind, *Invention*, pp. 79f.

37 Suárez, 'On Laws', 2.18.2, p. 335; Grotius, *Jure Belli*, 2.3.5, pp. 207f., Tadashi, 'Concept of Law', pp. 39–41, Forde, 'Grotius', pp. 643f. and 646f., Tierney, *Natural Rights*, pp. 328f. and Haakonssen, *Natural law*, 18 and 23 offer a fuller account of Grotian flexibility and the permissive domain of natural law.

38 Grotius, *Jure Belli*, 3.4.15, pp. 651f., and Forde, 'Grotius', p. 644.

39 *Jure Belli*, prol. 29, p. 20. Forde's article is a convincing account of Grotius's attempt.

had to be rational and reflect natural law (II, 2).[40] Dealing with the right of resistance, Grotius faces the dilemma of what rational rules those who entered civil society first would choose. Would they have imposed an unconditional obligation to obey those having superior authority, or would they have ruled that 'in case of extreme and imminent peril' resistance is permissible? Perhaps, Grotius argues, they would have included the qualification that resistance is off limits in case it 'could not be made without a very great disturbance in the state, and without the destruction of a great many innocent people'.[41] Grotius holds that they entered civil society in order to be better protected against attacks, and this was permitted by the right of self-preservation. But this very right could also be called upon to resist the political authorities. Like contemporary social contract thinkers, he employs a thought experiment: what would rational citizens agree to or choose? In another passage, Grotius clearly establishes a hierarchy of values. General utility, or the 'good of all', trumps the 'good of single individuals' and their right of self-preservation, as 'the cargo cannot be saved unless the ship is preserved.'[42] Grotius suggests that this hierarchy is based on core natural law. Yet other passages emphasize 'the common sense of mankind' (*sensus communis*), labelled *a posteriori* proof: what most nations, especially the more 'civilized' ones, believe to be in accordance with natural law, is most likely, 'with every probability', in fact identical with it.[43] What if this common sense contradicts Grotius's claim of a hierarchy of values? What if common consent reaches a conclusion pertaining to the right of resistance different from Grotius's own? Is a contract binding where one party agrees to give oneself over to slavery?

The friction between natural justice and implicit, tacit, hypothetical, or explicit consent is a modern dilemma. Some international lawyers assume that consent is the sole, or main, source of international law.[44] A full-blown empirical consent theory must cope with at least four criticisms. First, it will be called apologist or conservative because it assumes an identity of will and justice. Second, it does not tell us where to find consent. How do we specify consent? What indicates that explicit consent has been given? Third, it presupposes a non-consensual principle, namely the principle which specifies

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40 See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991) on the importance of the Second Scholastics and Grotius for modern law of contract.

41 Grotius, *Jure Bellli*, 1.4.7, pp. 148f.

42 *Jure praedae*, prol. 2.11, p. 21.

43 Grotius, *Jure Belli*, 1.1.12, p. 42 and the discussion of the notion of 'common sense' in Onuma, 'War', pp. 71–6.

44 See, for instance, Alf Ross, *A Textbook of International Law. General Part* (London, New York, Toronto: Longmans, Green and Co., 1947), pp. 83–95. More examples are listed in Koskenniemi, *Apology*, p. 265.

that consent should be binding. Finally, most consensualists readily admit that not all consent is restraining. This creates another circle: do we arrive at the distinction between non-binding and binding consent by way of consent or via some other principle or norm?[45] A way out of the dilemma is to oscillate between justice and consent. One starting point is a naturalistic, descending and non-consensual position such as natural law theory which tends to become consensualist when looking for evidence. The other, ascending line of argument starts with full consensualism, but weakens it because of the previously mentioned counter-arguments. Consensualism needs a principle beyond itself, for instance, the meta-theory of justice as fairness. It thus turns non-consensual, aiming at the point where natural justice and 'real' consent converge.[46] The classical example for this approach (or wavering) is Rousseau's distinction between *volonté générale* and *volonté de tous*.[47]

The usual way out of this tension is tacit consent theory. It tries to reconcile ascending and descending, consensualist and non-consensualist, arguments at the same time. What constitutes tacit consent? Austin argued it is 'habitual obedience', which can be observed as an empirical fact.[48] But this faces the above mentioned first counter-argument of being apologist, not distinguishing between force and law or justice. In addition, not all past behaviour necessarily reflects consent. If we emphasize the 'internal aspect' as one motivation for accepting a legal norm,[49] then we move to the sphere of psychology and do not know how to evaluate or assess this internal dimension objectively. Even if this problem could be solved, that of the non-consenting state or person remains.

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45 This list follows Koskenniemi, *Apology*, pp. 270–3. Koskenniemi in turn builds upon David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987), pp. 11–107. See also David Kennedy, 'Theses About International Law Discourse', in *German Yearbook of International Law*, 23 (1980), p. 374. See Jürgen Habermas, *The Theory of Communicative Action*, 2 vols (Cambridge: Polity Press, 1984), and Brown, *Theory*, pp. 202–5 for contemporary consent theories. Thomas J. Lewis, 'On Using the Concept of Hypothetical Consent', *Canadian Journal of Political Science*, 22 (1989), pp. 793–807 suggests a further distinction between 'objective' and 'subjective' hypothetical consent.

46 Koskenniemi, *Apology*, pp. 273–81. See also II, 4 above for the distinction between ascending and descending arguments, and Fernando R. Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), pp. 92f. on immoral consent and the difference between unjust and permitted harm.

47 Jean-Jacques Rousseau, 'On Social Contract', II, 3 and IV, 1, in Alan Ritter and Julia Conaway Bondanella (eds), *Rousseau's Political Writings* (New York: Norton, 1988), pp. 100f. and 148–50.

48 John Austin, *The Province of Jurisprudence Determined* [1832], ed. Wilfrid E. Rumble (Cambridge and New York: Cambridge University Press, 1995), pp. 243–51. Again, see the discussion in Koskenniemi, *Apology*, pp. 284–91.

49 See H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), pp. 55f.

All the major assumptions of empirical consent theory have been criticized by David Hume in his essay 'Of the Original Contract' (1742). He holds that presupposing a historical contract in the past is unwarranted because most governments are founded 'originally ... either on usurpation or conquest', that people come to accept governments after some tract of time simply because they are there, and that the historical contract, if it had ever existed, could not be binding on later generations. Tacit consent theory also does not work. We cannot infer consent from some external behaviour:

> Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.[50]

Hume claims that most people do not have the freedom to choose between one government or another. Tacit consent can in principle always be presupposed, even if there was every reason to assume that people were not happy with, or agreed to, their lot. Real or genuine consent should be a matter of 'free choice.'

Must we conclude that no consent theory works? There are some ways to escape circular arguments. We should not get trapped in our own linguistic dichotomies. What does not work in theory works well in practice. Levels of analysis must be kept apart. The concept of consent can be used to explain how a legitimate political community came into being, while its *legitimacy* is explained in terms of natural law, or justice. This was the strategy of Thomists like Vitoria and Suaréz.[51] Classical contract theory, realizing that taking recourse to natural morality cannot be avoided, generally assumed a normative basis for consent. Extreme cases like those of the non-consenting state are usually rhetorical and hypothetical. Basic principles such as that of impartiality (I, 4) or minimalist norms such as the ban on wanton injury (III, 1) are generally accepted, the real problem being differences in judgement, in applying those norms. This means that a theory of natural morality and justice cannot be avoided; legal positivism and its empirical consent theory must be transcended.

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50 David Hume, 'Of the Original Contract' [1742], in *Social Contract. Essays by Locke, Hume, and Rousseau. With an Introduction by Sir Ernest Barker* (London, Oxford, New York: Oxford University Press, 1960), pp. 151 and 156. There is a fine commentary and more secondary literature listed in Wolfgang Kersting, *Die politische Philosophie des Gesellschaftsvertrags. Von Hobbes bis zur Gegenwart* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1994), pp. 34–8 and 250f.

51 See Skinner, Quentin, *The Foundations of Modern Political Thought*, 2 vols (Cambridge: Cambridge University Press, 1978), vol. II, p. 162f.

But this does not imply that the theory must be 'utopian'.[52] Utopianism is assumed to be a theory which cannot be put into practice as it is located in a 'nowhere'. The principles of natural justice, by contrast, are meant to be realized. In other words, consent and justice coincide in the idea of rational or just consent. This is, for instance, Kant's approach. Like Hume, Kant rejects empirical consent theories, and for similar reasons. He modifies social contract theory in a way that contract becomes hypothetical and part of a thought experiment. Its function is to help a ruler in a pre-republican condition to determine what citizens could have consented to: 'In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it ..., it is unjust.'[53] We are thus brought back to the features of universalizability and free, possible and universal consent as discussed in the introductory chapter (I, 4; see also VI, 1). More precisely, it is the logical principle of consistency and its opposite, self-contradiction, which are the crucial normative standards.

3. The 'great society of states' and the law of nations

Grotius does not successfully solve the tension between justice and consent in his theory of *ius gentium*. An interesting example is his willingness to accept any conquest in a war as legitimate, no matter whether the conqueror's cause is just or not. Here he follows the Roman maxim *ex factis ius oritur*. In practice this meant that Spanish conquest in the Americas, for instance, was permitted by the outcome of the wars and the tacit consent of the hypothetical 'society of nations'.[54] It could further be defended with the claim that if this right of conquest was not granted, too many communities or states would disrupt peace by trying to recover by force what has been rightfully theirs. However,

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52 Koskenniemi, *Apology*, p. 291 defines utopianism as 'relying on a theory about natural morality'. Incidentally, this definition contrasts with his generic approach to delimit terms by their opposition to other concepts. My main point is that the definition is inadequate. On the distinctions between utopian, idealistic, architectonic, normative and anticipatory thinking, see Nicholas Greenwood Onuf, *The republican legacy in international thought* (Cambridge: Cambridge University Press, 1998), ch. 4 and my book *Theory and Practice*, 'Conclusion'.

53 Immanuel Kant, 'On the common saying: That may be correct in theory, but is of no use in practice', in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), p. 297. See Allen D. Rosen, *Kant's Theory of Justice* (Ithaca and London: Cornell University Press, 1996), pp. 129–39 and Leslie Arthur Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990), ch. 9 on Kant's social contract theory.

54 Grotius, *Jure Belli*, 3.6.2, pp. 664–6, and Sharon Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), part I.

accepting any *fait accompli* of a war amounted to abandoning the idea of justice entailed in another Roman maxim, stating that rights cannot be based on or derived from injustices, or the violation of the rights of others (*ex iniuria ius non oritur*). While developing these Grotian tensions further, I will analyse Grotius's notion of international society, his concept of *ius gentium*, and address the right to go to war.

'Many hold', Grotius writes, 'that the standard of justice which they insist upon in the case of individuals within the state is inapplicable to a nation or the ruler of a nation.'[55] I have identified this as international, as opposed to generic moral, scepticism (see III, 1). Grotius's strategy to challenge and transcend moral scepticism was to point at human sociableness and a core set of minimalist natural law principles. In order to combat international scepticism, an additional move was required. Grotius had to argue that a great society of communities, nations, or states (*civitates*) imposed obligations on its members. Having moved towards rejecting the voluntarist thesis which grounded natural law in the will of God, Grotius could not ground this society in divine volitional law. One way was to take up the Stoic idea of a moral community of humankind transcending the borders of Christianity. Another was to point at rights common to all humans like common *dominium* before private property was established (see next section). In both cases, Grotius could emphasize the utility of peaceful interaction and mutual interdependence.

We can find the notions of a moral and of a legal worldwide community in Grotius's writings. He appeals to a Stoic and Ciceronian *humani generis societas*.[56] This emphasizes individuals and political powers beyond the level of modern states rather than these states themselves. Grotius is not very clear how to balance the rights of individuals with those of states. In terms of resistance against political authority, individuals take a back seat, though Grotius admits of exceptions. In terms of humanitarian intervention, individuals are favoured, and the *ius gentium inter se* (the law between communities or states) recedes into the background. We are probably safe in arguing that normative individualism combined with moral cosmopolitanism, or the notion of a society of humankind, provide Grotius's ultimate frame of reference. Reading a strict juxtaposition of states and individuals into his writings is unfair to Grotius, as it applies a contemporary understanding to the past. As pointed out, Grotius did not see any problems in emphasizing independent powers below the state level, a central feature of his notion of international society.[57]

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55 Grotius, *Jure Belli*, prol. 21, p. 17.

56 Peter Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in Bull, Kingsbury and Roberts, *Grotius*, p. 172 and above, I, 5.

57 On the issue of humanitarian intervention, see R. J. Vincent, 'Grotius, Human

The tension between consent and justice continues in Grotius's distinction between law of nations and law of nature, between *ius voluntarium* and *ius naturale*.[58] Like his Scholastic predecessors, he tries to keep them strictly apart (II, 4). The former is based on common consent and common advantage. I have already outlined the problems of these two foundations: common consent has a precarious methodological status (see previous section). According to the 'Prolegomena', this consent is derived from the testimony of writers such as philosophers, historians, and poets (all of which belong to Western culture, and even here Grotius must be selective). In subsequent parts of the study, consent is also deduced from actual state practices, 'the will of all nations, or of many'.[59] Secondly, any appeal to long-term advantage in international relations tends to be unconvincing. Grotius points at the utter wisdom and cleverness of those who obey domestic laws as well as those 'common to nations', but admits in the following paragraph that law which lacks an external sanction 'fails of its outward effect'.[60] In this crucial respect, the domestic analogy breaks down (see also III, 1 and IV, 2). The generic problem with the distinction between *ius naturae* and *ius gentium* is that Grotius cannot keep it up by his own standards. The right to go to war, for instance, is an extension of core principles of natural law – of self-preservation, the right of property and the right to punish – by way

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Rights, and Intervention', in Bull, Kingsbury and Roberts, *Grotius*, pp. 246–56; Theodor Meron, 'Common rights of mankind in Gentili, Grotius and Suárez', *American Journal of International Law*, 85 (1991), pp. 110–12, and above, II, 5. Onuma, 'Conclusion', pp. 337f. warns us not to project modern concepts onto the past.

58 Grotius, *Jure Belli*, prol. 17, p. 15; prol. 40, pp. 23f.; 1.1.14, p. 44; 2.18.4, p. 442 (in the context of the rights of ambassadors). See Forde, 'Grotius', p. 642; Tadashi, 'Grotius's Method', pp. 17 and 'Concept of Law', pp. 44f.; Haggenmacher, 'Grotius and Gentili', pp. 171f. for commentaries on the distinction. The definitive study of Grotius's *ius gentium* is Haggenmacher, *Grotius*. See also Howard Williams, 'Grotius as an International Political Theorist', in *International Relations and the Limits of Political Theory* (Houndmills et al.: Macmillan Press, 1996), pp. 73–89; Christian Gellinek, *Hugo Grotius* (Boston: Twayne Publishers, 1983), and the older essay by Jaques Basdevant, 'Hugo Grotius', in Jean Barthélemy et al. (eds), *Les Fondateurs du Droit International: F. de Vitoria, A. Gentilis, F. Suárez, Grotius, Zouch, Pufendorf, Bynkershoek, Wolf, Wattel, de Martens: Leurs Ouvres, leurs Doctrines* (1904; reprint Vaduz: Topos, 1988), pp. 125–267. Filadelfo Linares, *Einblicke in Hugo Grotius' Werk Vom Recht des Krieges und des Friedens* (Hildesheim, Zürich, New York: Georg Olms Verlag, 1993) is a short, superficial, and hardly convincing account. Karl-Heinz Ziegler, *Hugo Grotius als Vater des Völkerrechts. Gedächtnisschrift für Wolfgang Martens* (Berlin, New York: de Gruyter, 1987), and Benedict Kingsbury, 'Grotius, Law, and Moral Scepticism: Theory and Practice in the Thought of Hedley Bull', in Ian Clark and Iver B. Neumann (eds), *Classical Theories of International Relations* (Houndmills et al.: Macmillan Press, 1996), pp. 42–70 list more secondary literature.

59 Grotius, *Jure Belli*, 1.1.14, p. 44.

60 Grotius, *Jure Belli*, prol. 18 and 19, p. 16.

of analogy to the sphere of international relations. So the body of norms comprising the law of nations must include parts of natural law as well, apart from being human volitional law.

The features of Grotian international society can be summarized in the following way.[61] The first feature has already been mentioned: Grotian international society is less state-centered than international societies as conceived by later authors such as Pufendorf. Though it continues Suárez's and Gentili's narrowing of the concept of *ius gentium* to the relationship among states (*civitates*), it still allows for groups other than states and individuals. Secondly, Grotius aims at the rule of law, though this is ambiguous. Is it the rule of natural law, of human volitional law, of the law valid only 'under certain circumstances', or of the law 'common to many peoples' but not all?[62] Grotius seems to appeal to all of them, depending on context and in accordance with his eclectic method. Book Two spells out the just causes of war, following core natural law principles and attempting to present a coherent system of legitimate causes. Grotius might have hoped that this systematization would restrain war and thus promote his overall goal. Just causes of war are self-defence, the restitution of things and the infliction of punishment. Defence encompasses resistance against attacks not only on life and body, but also on property and other legal rights and entitlements. The restitution of things (*recuperatio rerum*) comprises long lists of 'that which belongs to us' and 'that which is owed to us'.[63]

For Grotius, the investigation into the just causes of war was of paramount importance. Book Two is devoted in its entirety to this problem, comprising in turn almost half of the complete treatise. Grotius apparently assumed that in presenting a comprehensive system based on a universally valid account of human sociableness and minimalist natural law, he had solved this notorious, central and persistent problem of traditional *ius gentium* once and for all. Carl Schmitt claimed that for that very reason, because of Grotius's insistence on

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61 My analysis follows loosely Bull's five features of Grotius's view of international society, in Bull, 'Importance of Grotius', pp. 78–91. See also the essays by Jiménez de Aréchaga, Bierzanek and Lachs, included in Asser Instituut, *International Law*, pp. 5–24, 145–9, and 198–206. For the following, see Grotius, *Jure Belli*, prol. 17, p. 15 and Heinhard Steiger, 'Völkerrecht', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1992), vol. 7, pp. 109 and 111.

62 Grotius, *Jure Belli*, 2.8.26, p. 309.

63 Grotius, *Jure Belli*, 2.1.1–18, pp. 169–85 (self-defence); 2.2–10, pp. 186–327, and ibid., 2.11–19, pp. 328–461 (restitution). An excellent discussion of Grotius's just causes of war is Onuma, 'War', pp. 77–93. Haggenmacher, 'Grotius and Gentili', p. 165 adds a fourth category, the pursuit of a right *in personam*, based on a reading of Grotius, *Jure Belli*, 2.1.2, p. 171.

substantive justice, he can be interpreted as more medieval than modern, stepping back behind authors such as Ayala and Gentili.[64] Indeed, Grotius is not a modern moral relativist who dismisses traditional just war theory and accepts any war which meets the two formal requirements of supreme power and public declaration. But my main point of criticism is not that Grotius is allegedly medieval. After all, we can argue that even modern, postmodern, or anti-postmodern theories of justice cannot do without some reference to substantial moral principles. Grotius leaves two problems unsolved: that of interpretation and that of law enforcement. He clearly sees both difficulties. In his lengthy exposition of justified punishments, he includes the warning that punitive wars 'are under suspicion of being unjust, unless the crimes are very atrocious and very evident'. He perceives that the right of humanitarian intervention is open to abuse. All of Chapter 16 is devoted to the interpretation of contracts, promises, treaties, technical terms, and so on. Another full chapter ponders doubtful causes of war, where Grotius admits that certainty is elusive and that mutual ignorance may reach a degree where both parties believe that their cause is just: 'Thus either party may justly, that is in good faith, plead his case.'[65] If conflicts of interpretation exist, they pose a threat to international society. Consider Grotius's emphasis on the modern problem of coexistence and on free choice and pluralism (III, 1). The standards of coexistence and the mutual respect of rights are emphasized in a passage where Grotius claims that '[i]t is not ... contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed.'[66] But there are not commonly recognized boundaries that limit the sphere of rights or free choice of one party against other members. Diversity of interpretations or judgements, either the result of ignorance or of the human propensity to define one's own spheres of rights extensively and that of others restrictively, are unavoidable. A procedure of adjudication is needed to define and specify the rights of each party, and to fill the gap between abstract principles of justice and core norms of natural law on the one hand, and concrete coexistence on the other.

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64 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* [1950], 3rd edn (Berlin: Duncker & Humblot, 1988), p. 133. Schmitt claims that Grotius combines and confuses traditional *bellum iustum*-theory with formal war-doctrine while leaning towards the latter. See also Kasai Naoya, 'The Laws of War', in Onuma, *Approach*, p. 245.

65 Grotius, *Jure Belli*, 2.20.44, p. 508; 2.25.8, p. 584; 2.16, pp. 409–29 (on interpretation), 2.23, pp. 557–66, the quotation ibid., 1.23.13, p. 565.

66 Grotius, *Jure Belli*, 1.2.1, p. 54. For the following passage on conflicts of interpretation, see Otfried Höffe's excellent *Political justice: foundations for a critical philosophy of law and the state*, transl. Jeffrey C. Cohen (Cambridge, UK and Cambridge, MA: Polity Press, 1995), pp. 267–70.

Grotius's second problem, that of law enforcement, is part and parcel of the third feature of Grotian international society, the absence of international institutions. Grotius rejects the idea of a world- or European-wide government proposed by Dante and others (see I, 5). Grotius holds that the disadvantages outweigh by far the advantages. Born into a sea-going nation, he finds an appropriate metaphor. 'For a ship may attain to such a size that it cannot be steered, so also the number of inhabitants and the distance between places may be so great as not to tolerate a single government.'[67] An encompassing government contradicts social utility and feasability; Grotius's argument is pragmatic and consequentialist (he does not argue, for instance, that it conflicts with 'state sovereignty'). The only transnational institution Grotius advocates is resident diplomacy. Serving as Swedish ambassador in Paris for some time himself, he made important contributions to diplomatic law, especially elaborating the notion that ambassadors were 'as if by a kind of fiction' considered outside the territory of the receiving state (*quasi extra territorium*). It was Alberico Gentili, however, who must be credited with writing the first comprehensive and coherent account of diplomatic law.[68] Without any additional transnational institutions at hand, Grotius had to fall back on the hope that international society would show solidarity in the enforcement of its own rules, and that possible outlaws would be either deterred by a bad conscience, or the realization that crime does not pay. Repeatedly Grotius appealed to princes 'not to undertake war rashly, even for just causes', and to renounce rights if war can be thus avoided.[69] But these hopes and moral appeals do not offer a solution to the problems of interpretation and law enforcement.

Another way to underline the dilemma of missing law enforcement is to point at Grotius's notion of war as a lawsuit or para-legal process. He is obviously influenced by late medieval just-war theory (see I, 5). For Grotius, war has the structure and function of a lawsuit: 'It is evident that the sources from which wars arise are as numerous as those from which lawsuits spring; for

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67 Grotius, *Jure Belli*, 2.22.13, p. 552.

68 Grotius, *Jure Belli*, 2.18.4, p. 443; Alberico Gentili, *Three Books on Embassies* [1585], The Classics of International Law, vol. 12 (reprint New York: Oceana, 1964); Bull, 'Importance of Grotius', p. 90; Onuma, 'War', pp. 91f.; Haggenmacher, 'Grotius and Gentili', p. 139. See also below III, 5.

69 See above, III, 1 on the weakness of Grotian arguments in this respect. The concept of international solidarity in enforcing rules is developed by Hedley Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (Cambridge, MA: Harvard University Press, 1966), pp. 51–73 and Bull, 'Importance of Grotius', pp. 87–9. Grotius, *Jure Belli*, 2.24 is devoted to restraint on starting wars. The following chapter specifies when wars can be waged 'on behalf of others'.

where judicial settlement fails, war begins.'[70] Lawsuits and wars are on the same legal continuum, part of a juridical framework. If judicial procedures are not available, persons can resort to war in order to counteract a violation of their rights. But this analogy is mistaken. Though we can agree with Grotius that in a war, natural laws should not be silent, this does not imply that war and lawsuits are on the same continuum. There is a qualitative difference between lawsuits and wars. In a war, states or individuals (Grotius admits of private wars) are 'contending by force'.[71] They are bound by natural law, but may ignore it. Even if they respect its precepts, they interpret it their own way, maybe arbitrarily. There is no independent judge who aims at justice as impartiality, but the contending parties are their own judges. It is a system of self-help where each is his or her own lawmaker, judge and executive. It is a condition of anarchy mitigated, but certainly not overcome, by the persuasiveness of natural law, human sociability and a possible convergence of expediency and natural justice. But it was rather unlikely that these factors would exercise sufficient restraint, as the history of Spanish conquest demonstrated to Grotius and his contemporaries.

One final defining feature of Grotian international society is its universality. It will be addressed in the following section.

4. The ocean as common property and 'the sacrosanct law of hospitality'

While ambassador of Queen Christina of Sweden in Paris, Grotius wrote a creative but highly fanciful treatise on the origins of the American Indians (1642). Assuming that there was a common origin of all humankind, he held that the natives from Yucatan are descendants from Christian Ethiopians carried to the west in a storm while fishing. North American Indians were said to have descended from the Norse.[72] Bizarre as they were, these ideas had potentially important political repercussions. Natives with ancestors such as the European Norse or the Christian Ethiopians had to be treated with more respect than mere 'barbarians'. This argument can be found in the writings of Las Casas, and Grotius was willing to draw the identical conclusion: natives shared the same

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70 Grotius, *Jure Belli*, 2.1.2, p. 171. On war as a lawsuit, see the useful analysis in Onuma, 'War', pp. 57f. and 62. See also Grotius, *Jure Belli*, prol. 25, p. 18.

71 Grotius, *Jure Belli*, 1.1.2, p. 33 with the famous definition of war being 'the condition of those contending by force', interpreted by Haggenmacher, 'Grotius and Gentili', pp. 169f.

72 See the illuminating article by Joan-Pau Rubiés, 'Hugo Grotius's Dissertation on the Origin of the American Peoples and the Use of Comparative Methods', *Journal of the History of Ideas*, 52 (1991), pp. 221–44.

rights with Europeans. As in the case of Las Casas and the Spanish scholastics, this idea was subversive and thus politically inconvenient. The Dutch Indian Companies cherished Grotius's defence of native rights as long as it could be used to challenge the Spanish and Portuguese monopoly in the Indies. They were quick to abandon his arguments when they conquered the Moluccas themselves and established their own monopoly.[73]

The Spanish and Portuguese monopoly had never been accepted by other European powers. In the treaty of 1604 between Spain and England, neither side was willing to make concessions. It stipulated that trade should be conducted according to treaties signed before the outbreak of the war in 1587, leaving it open as to how these were to be interpreted.[74] The Twelve Years' Truce between Spain-Portugal and the United Provinces in 1609 conceded substantial rights to the Dutch: they were allowed to trade freely in all territories not effectively controlled by Spain or Portugal. It put the United Provinces on an equal footing. The Dutch insistence on the freedom of the seas, free trade and the right to acquire colonies prevailed.[75] Grotius's famous *Mare Liberum* was published before the truce was signed, probably in November 1608, at the request of the United East India Company (Verenigde Oostindische Compagnie) and with the help of minister Oldenbarnevelt, Grotius's mentor, in an attempt to influence the truce negotiations.

The situation in East Asia can hardly be compared to that in the Americas. There, in spite of protests from Las Casas, Vitoria and others, the rights of native communities as well as those of individuals were usually ignored. In Asia, European states and trade companies had to adapt themselves to existing 'international' relations structures. They were usually hierarchical, and at the beginning Europeans often had to accept a subordinate status as tributaries. Within the Chinese tribute system, for instance, trade was restricted to the ritualistic exchange of 'tribute' from the 'southern barbarians' (the Europeans) and 'gifts' from the Chinese emperor as the Son of Heaven, destined to rule over the whole world, both 'civilized' (Chinese) and not yet 'civilized'.

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73 Ibid., pp. 234, 236.

74 28. 8. 1604, art. 9. See Frances Gardiner Davenport, *European treaties bearing on the history of the United States and its dependencies*, 4 vols (Washington DC: Carnegie Institution of Washington, 1917–37), vol. 1, pp. 253; Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart.* Beiträge zur Kolonial- und Überseegeschichte Bd. 26 (Stuttgart: Steiner, 1984), pp. 68–71.

75 9.4.1609, art. 4 and secret article; see Fisch, *Expansion*, pp. 71–5 and Davenport, *European Treaties*, vol. 1, pp. 259–68. Israel, *Republic*, pp. 311–27 outlines the rise of the 'rich trades' and of Dutch world trade primacy. See also Jonathan Irvine Israel, *Dutch primacy in world trade, 1585–1740* (Oxford: Clarendon Press; New York: Oxford University Press, 1989).

Europeans were frequently not interested in conquest but in trade profits.[76] This situation is reflected in Grotius's *De Indis*: the emphasis is on trade relations and the rights of non-European communities and individuals are explicitly acknowledged.

I have argued above that Grotius could ground international society in the idea of a moral community of humankind, or follow an approach that stressed rights common to all humans. By taking the latter way we would arrive at a legal or juridical rather than moral universal commonwealth. Both concepts share the feature of universality: in principle, every human being is included. The distinction is admittedly artificial. As usual, both societies intersect for Grotius. The idea of a legal commonwealth is dominant in *De Indis*, written in 1604, four years before its publication. During the previous year, the Dutch East India Company had captured a Portuguese galleon in the Straits of Malacca. The Dutch argued that the act was justified as the Portuguese tried to prevent them from exercising their natural rights to travel to and trade with the East Indies. As Vitoria and some other members of the Second Scholastic had extensively defended these rights as perfect and enforceable ones, all Grotius had to do was quote them in support of the Dutch cause. He did so extensively, at least in part motivated by the hope to influence the Spaniards (dominating Portuguese politics) 'with the authority of their own people'.[77] Grotius's lengthy manuscript was discovered and published as *De Iure Praedae Commentarius* in the middle of the nineteenth century. The celebrated *Mare Liberum* is in fact just Chapter 12 of that work.

Grotius did not merely quote the Second Scholastics for tactical reasons. He made important contributions to the right of hospitality, above all with his claim that the seas are common dominion. I will start with the right of hospitality in the strict sense and the outlines of free trade doctrine in Grotius. The claim that the seas were common dominion touched upon the Grotian theory of property.

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[76] Fisch, *Expansion*, pp. 37–42, 251; Gerrit W. Gong, 'China's Entry into International Society', in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), pp. 171–83, especially pp. 173–5; Hidemi Suganami, 'Japan's Entry into International Society', ibid., pp. 185–99. Ying-Shih Yü, *Trade and Expansion in Han China: A Study in the Structure of Sino-Barbarian Economic Relations* (Berkeley: University of California Press, 1967), pp. 150–71 is a fascinating report on early trade relations with the West during the Han dynasty (206 BC–AD 220). See also Roelofsen, 'International Politics', pp. 108–12; W. E. Butler, 'Grotius and the Law of the Sea', in Bull, Kingsbury and Roberts, *Grotius*, pp. 209–11, and Tuck, *Philosophy*, pp. 170f.

[77] Hugo Grotius, 'Defensio Capitis quinti Maris liberi', in Samuel Muller, *Mare clausum* (Amsterdam: Frederick Muller, 1872), p. 332, translated in Tuck, *Philosophy*, p. 171. On the fate of *De Indis*, see again Tuck, *Philosophy*, pp. 169–71 and Butler, 'Grotius', pp. 209f. (with more references), and *Mare Liberum* [1608; The Freedom of the Seas], ed. James B. Scott (New York: Oxford University Press, 1916).

For Vitoria, the right of hospitality encompassed the right to travel (*ius perigrinandi*), the right to dwell in the countries or territories visited, the right to trade, the freedom to use common property, the *ius solis*, or freedom of residence, nationalization, and citizenship, and the negation of a right of expulsion without just cause (see II, 6). In *De Indis*, Grotius defended four claims: first, the right to travel – 'Access to all nations is open to all', second, the right to trade – 'The right to carry on trade with another nation cannot become the exclusive possession of a particular party', third, the natural rights of the 'infidels', fourth, the freedom of the seas.[78] Grotius's novel claim was the last one.

Vitoria held that the rights to travel and trade are natural, perfect and enforceable, and do not require consent. Grotius termed the first one the 'law of human fellowship', called it 'absolutely just', and agreed with Vitoria. Following the rationalist rather than the voluntarist tradition in explaining divine will (see III, 1), Grotius claimed that God wanted all peoples to specialize and help each other 'for mutual benefactions'. He could draw not only on Vitoria but also on a rich European tradition which favoured hospitality, trade and commerce (I, 6). If someone wanted to pass over a territory under the *dominium* of a people, various conditions could be imposed and precautions taken in order to protect the owner. But the right of passage itself could be demanded and enforced if refused. Grotius kept the theological and teleological structure of these traditional arguments. He invited his readers to buy into his rather shaky is-ought conclusions. The overall account was convincing in terms of implied universality. Both rights are universal and thus pertain 'equally to all peoples'.[79] Any defence of exclusive rights or privileges such as propagated by the Portuguese was therefore bound to fail. Grotius follows Vitoria's problematic feature that the rights are perfect ones and enforceable. He expounded what would later turn into the free trade doctrine of classical economic liberalism (see V, 2). Following the scholastic distinction between law of nature and law of nations, Grotius subsumed the freedom of trade under the latter and claimed that if it could be abrogated at all, then only with 'the consent of all nations'. All the Portuguese arguments were rejected: there was

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78 Grotius, *Jure Praedae*, 12.96, p. 216. My focus is almost exclusively on this twelfth chapter.

79 Ibid., ch. 12, pp. 216–20 with all quotations, the last one p. 218, and *Jure Belli*, 2.2.13, p. 198 (on the right of passage). It goes without saying that Grotius appeals implicitly to just standards of impartiality here. I claim that Grotius's law of nations can be reinterpreted along the lines offered in II, 4 with respect to Vitoria. However, I assume that showing this for each author presented in this study would bore the reader in the short run. I will therefore only point out whenever an author *violates* the standards outlined in I, 4.

no express grant or tacit concession which justified their exclusive privilege. As the right to trade is no corporeal object and can thus not assume 'the character of private property', prescription or custom do not apply. Portuguese privileges could also not be based on coercion, as it contradicted natural law in this case and anyway did not meet the required tacit consent of other European powers. In short, Iberian monopoly was an 'offence against Nature' and 'injurious to mankind as a whole'.[80]

Grotius's central move was to establish that the seas were common dominion and that the forced Dutch incursions into the Iberian trade empire were thus justified. This argument in turn can be split into four distinct segments: the theory of property, the justification of the thesis itself, the refutation of Portuguese contentions, and finally, the qualification of the thesis. Grotius's theory of property started from a pre-civil state ('of nature', as it was called later on). He argued that originally, there was no private ownership (*dominium*), but common possession (*communio*). People took what they needed for subsistence. Dominion referred to use, not to ownership. Original communism was a state of 'extreme simplicity' and 'ignorance of vices'.[81] Gradually human society became more complex, people more ambitious (symbolized by the Tower of Babel), and common possession was modified in certain areas in favour of private property. People realized that some form of individual ownership was inevitable. Food and drink, for instance, are consumed by use and therefore logically exclude other individuals. The concept was later extended to articles such as clothing. As humans had natural rights to self-preservation and to acquire the necessities of life (see III, 1), natural law supported this development. The new form of property had to be respected.[82] Grotius based its legitimacy both on individual acts of appropriation and on mutual agreement. He anticipated Locke's notorious labour theory of property with the claim that 'whatever each had ... taken for his own needs another could not take from him

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80 Grotius, *Jure Praedae*, 12.114–16, pp. 255–61, the quotations ibid., pp. 258, 261, and 259.

81 Grotius, *Jure Belli*, 2.2.2, p. 187. The differences between the accounts in *Jure Praedae*, 12.100–102, pp. 226–31 and *Jure Belli*, 2.2, pp. 186ff. are ephemeral. I will draw from both sources. On Grotius's theory of property see Reinhard Brandt, *Eigentumstheorien von Grotius bis Kant* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 1974), pp. 31–41; Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991), ch. 1, especially pp. 35–52 on the development of property; Masaharu Yanagihara, '*Dominium* and *Imperium*', in Onuma, *Approach*, pp. 147–73; Tuck, *Philosophy*, pp. 178f.; Forde, 'Grotius', p. 641; Tierney, *Natural Rights*, pp. 329–33, who emphasizes Grotius's dependence on medieval sources, and Tuck, *Natural Rights*, p. 61.

82 Grotius, *Jure Praedae*, 12.100f., pp. 228f., *Jure Belli*, 2.2.2, pp. 188f., 1.1.10, p. 39, 2.14.8, p. 385.

except by an unjust act.' But if individual appropriation came first, it was (and had to be) followed by explicit or implicit agreement.[83]

The oceans were excepted from this division of property. Grotius offered several arguments. The first set referred to the physical properties of water. The oceans are so vast that they can accommodate all humans and their activities such as sailing and fishing. The oceans cannot be occupied like territories because they have no definite limits and occupation is physically impossible. The sea can be repeatedly navigated without making it unfit for reuse by the same or different nations. Like the air, it belongs to those entities which, 'even when used by a specific individual, they nevertheless suffice for general use by other persons without discrimination.'[84] Grotius's third move was to reject Portuguese arguments. It was absurd to claim that someone can occupy the ocean 'first'. There was no possible evidence, and in the Portuguese case, it was more likely that others had navigated these waters before them. In any case, the right of passage and navigation must not be curtailed, as Mother Nature intended the ocean to be used by all and more than once. Furthermore, Grotius rejected arguments based on prescription or custom. He extensively quoted Vázquez to show that the writings of this 'pride of Spain' shared conclusions favouring the Dutch.[85]

Finally, Grotius was careful to qualify his claim. A line had to be drawn between common and private property. According to *De Indis*, some 'tiny part' of the oceans and the shore can be occupied, provided that their common use is not impeded. In *De Jure Belli ac Pacis*, Grotius was more generous, granting that 'a part of the sea' can be occupied such as bays and straits.[86] Another

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83 Grotius, *Jure Belli*, 2.2.2, p. 186 and p. 189 and *Jure Praedae*, 12.101, p. 229 (on occupation). The closeness to Locke is emphasized by Tuck, *Natural Rights*, p. 61, Forde, 'Grotius', p. 641, and Tierney, *Natural Rights*, p. 331, among others. Tierney argues that the introduction of the element of consent or agreement in *De Jure Belli* is the crucial difference between the two works. See ibid., p. 332.

84 Grotius, *Jure Belli*, 2.2.3, pp. 190f.; *Jure Praedae*, 12.101, pp. 230f. On Grotius and the freedom of the seas, see Frans Eric René de Pauw, *Grotius and the Law of the Sea* (Brussels: Institut de sociologie, 1965); M. C. W. Pinto, 'The New Law of the Sea and the Grotian Heritage,' in Asser Instituut, *International Law*, pp. 54–93; J. J. Logue, 'A Stubborn Dutchman: The Attempt to Revive Grotius' Common Property Doctrine in and after the Third United Nations Conference on the Law of the Sea', ibid., pp. 99–108, and W. E. Butler, 'Grotius and the Law of the Sea', in Bull, Kingsbury and Roberts, *Grotius*, pp. 209–20. Gundolf Fahl, *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648. Eine rechtsgeschichtliche Untersuchung* (Köln et al.: Carl Heymanns Verlag, 1969), pp. 116–28 investigates Dutch practice. See also Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (Freiburg, München: Verlag Karl Alber, 1958), vol. 1, pp. 393–452.

85 Grotius, *Jure Praedae*, 12.106–113, pp. 240–53.

86 Grotius, *Jure Praedae*, 12.103, pp. 233f. and *Jure Belli*, 2.3.8–12, pp. 209–12.

qualification was the distinction between the coastal state's right of *imperium*, or sovereignty and jurisdiction, and that of *dominium*, or ownership. For matters of convenience, Grotius argued, it made sense to assign different spheres of jurisdiction, for instance in order to persecute pirates, but they did not imply ownership.[87]

Grotius based international society first on the idea of a moral community of humankind, and secondly stressed rights common to all humans. Vitoria had presented the outlines of this international community, and Grotius repeatedly referred to him, stressing that the Spaniard was right. The natives of the East Indies 'enjoyed public and private ownership' like the natives of the Americas. Taking their property or natural rights away was 'an act of thievery and rapine no less than it would be if perpetrated against Christians'.[88] Like Vitoria and others before him, Grotius applied standards of impartiality. More so than in the case of the Spanish Scholastics, a major emphasis was on rejecting special rights of the Europeans: the argument of papal donation, that of Christianizing the unbelievers, and the duty to civilize the barbarians. The first title was rejected by Vitoria and most Spanish authors who followed him, with exceptions such as Solórzano. The right to missionize and convert was usually endorsed. It was debated when and to what extent coercion was acceptable. Grotius weakens the scholastic emphasis on religious issues. At the same time, he does not simply replace privileges based on Christianity with those based on civilization, as many other more secularized authors after him would do. He is quick to reject another argument in favour of European conquest, the 'excuse of introducing civilization into barbaric regions'.[89] It is ironic that the argument, which gained popularity among many Europeans in the nineteenth century and was immortalized by Kipling's notorious phrase of the 'white man's burden' (see VI, 5), was discarded by a European author two hundred years

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87 Grotius, *Jure Praedae*, 12.104, p. 237 and *Jure Belli*, 2.3.13, pp. 212–14. See also Butler, 'Law of the Sea', pp. 214f. and Masaharu, 'Dominium', p. 153.

88 Grotius, *Jure Praedae*, 12.97, pp. 221f. See also ibid., 12.99, 12.103f., and 12.104, pp. 226, 236 and 238. A brief introduction to the topic is Onuma, 'War', pp. 81–4, and Benedict Kingsbury and Adam Roberts, 'Introduction', in Bull, Kingsbury and Roberts, *Grotius*, pp. 42–7 on 'Grotius and the non-European world'. Barbara Arneil, 'John Locke, Natural Law and Colonialism', *History of Political Thought*, 13 (1992), pp. 588–94 holds that key issues of Locke's theory were anticipated by Grotius.

89 Grotius, *Jure Praedae*, 12.98, p. 222. On the arguments of the European 'thieves' in general, see ibid., 12.97–100, pp. 221–5, and *Jure Belli*, 2.22, pp. 546–56 on the unjust causes of wars, especially 2.22.13, pp. 551f. on the Emperor's universal monarchy, and 2.22.14, pp. 553f. on the Papal donation. A reliable introduction into European thinking concerning the right to 'civilize the barbarians' is James Muldoon, *The Americas in the Spanish World Order. The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994), ch. 2, pp. 38–65. See also V, 1 and 2 on the career of the concept of civilization in the eighteenth century.

earlier. Grotius's argument can be divided into three propositions. The first one is of course the rhetoric of human rights pertaining to all. The second one, again echoing Vitoria, points at the fact that the natives are 'neither insane nor irrational'. The third is psychological: Europeans use civilization as a pretext, their real motivation is greed. He buttresses the first proposition with a rejection of consequentialist thinking. The civilization argument implies that one person or group of persons imposes on another their thick conception of the good, pretending or claiming that 'it is for their own good.' But consequentialist thinking of this sort – popularized in the phrase that 'the end justifies the means' – is potentially incompatible with a deontological natural rights theory: 'those who have the use of their reason ought to have the free choice of what is advantageous or not advantageous, unless another has acquired a certain right over them.'[90] The qualification in the relative clause seems to leave a loophole for European conquest, but Grotius sees only children (and in another passage the mentally handicapped) as an exception. The passage shows that Grotius's modern theory of natural law with its emphasis on free choice, pluralism and rights (III, 1) is not empty talk. It suggests that social utility or considerations of expediency must take a back seat in case of conflict. Finally, natural rights are incompatible with Aristotelian natural slavery: Grotius agreed with Vitoria on the issue in *De Jure Belli ac Pacis*, though he added that institutionalized slavery is permissible if it is the outcome of a 'human act' such as choice, a crime, a war, or a convention.[91]

So far I have presented a favourable interpretation of Grotius. But is Grotian international society really universal? Is Grotius himself free of Eurocentrism? As in the case of Vitoria, we have a wide spectrum of possible interpretations here. On the one extreme, we can defend Grotius as a true cosmopolitan who refused to use the law of nations as an ideological instrument to justify European conquest. On the other end of the spectrum, Grotius is condemned as biased and inadequate, because his theory 'did not in any way restrict the endeavour of subjugating the non-European nations to European authority. Grotius' system could afford a pretext for every desired act of violence.'[92] The last sentence is certainly wrong if we consider the passages about the rights

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90 *Jure Belli*, 2.22.12, p. 551.

91 Grotius, *Jure Praedae*, 6.12, pp. 61f. had endorsed Aristotles's conception, but it was abandoned in *Jure Belli*, 2.22.11–12, p. 551, and 3.7.1, pp. 690f. See also above III, 1 and 2, and II, 3 on the issue of slavery in Vitoria and his followers.

92 Rosalyn Higgins, 'International Law in the UN Period', in Bull, Kingsbury and Roberts, *Grotius*, p. 278, and the quotation from B. V. A. Röling, 'Jus ad Bellum and the Grotian Heritage', in Asser Instituut, *International Law and the Grotian Heritage* (The Hague: T. M. C. Asser Instituut, 1985), p. 122. See also by the same author 'Are Grotius' Ideas Obsolete in an Expanded World?', in Bull, Kingsbury and Roberts, *Grotius*, pp. 281–99, especially 296.

of non-Europeans presented above. However, Röling's criticism cannot be dismissed out of hand. I have pointed out that the Grotian system suffers from a deep ambiguity with tensions between rights and utility, between justice and consent, and a flexibility of law which often borders arbitrariness. If my interpretation is correct, then this ambiguity must be reflected in his treatment of the issue of non-Europeans and international society as well. This is indeed the case. First, however, I will start with criticism where Grotius can be defended.

It is not clear how much Dutch interest in trade rather than conquest influenced Grotius. He states that the Portuguese are not the 'owners' of the East Indies, only 'visitors': 'Their very residence in the islands is allowed as a favour.'[93] This again emphasizes native rights, but we do not know if this standard is truly universal and applies to the Dutch as well. Grotius does not tell us; we can only assume that Grotius held, in accordance with other passages, that the Dutch do not enjoy exclusive rights either. Grotius's claim that war is just if waged against those who actively persecute Christians because of their faith can hardly be called biased. As a norm, it is of course in need of interpretation and application, and here abuse and latitude may creep in. But it can be accommodated with the principle of self-defence, and the norm is counterbalanced by the prohibition to wage war against those who are unwilling to accept Christianity.[94] Similar considerations hold true for humanitarian intervention or the rights of reprisal. There is no evidence that the duty to assist others trumps the rights of natives unconditionally.[95] The right of reprisal opened another back door for European conquest. If a right has been denied, Grotius claims, the offender's property might be seized by force, especially when a judgement cannot be obtained 'within a reasonable time' or when a judgement rendered is 'manifestly contrary to law'.[96] This right could be applied to the denial of the right to passage, travel, or trade, for instance, giving Europeans a pretext to seize native territory. As Grotius and we all know, abuse is always possible, but this is hardly an argument against the norm itself. There is no doubt that Grotius held that the rules among Christian states were different from those governing relations with non-Christians or non-Europeans.[97] But this difference can be explained in terms of the distinction between universal natural law and specific arrangements and customs, or the sphere of human volitional law. In other words, we could argue that Grotius is

93 Grotius, *Jure Praedae*, 12.97, p. 220.

94 Grotius, *Jure Belli*, 2.20.48–49, pp. 516–18.

95 Ibid., 2.25.8, p. 584. On humanitarian assistance in Grotius, see Onuma, 'War', pp. 107ff., and Terumi, 'Punishment', pp. 231–40 on punitive wars.

96 Grotius, *Jure Belli*, 3.2.5, p. 627 and Naoya, 'Laws of War', p. 254.

97 Bull, 'Importance of Grotius', pp. 81f.

biased or Eurocentric only if we could show that his thin notion of justice or of core natural law is spatially limited to Europeans. Grotius did not do this.

It is also difficult to establish that Grotius was biased in favour of the Dutch. Some doubts about Grotius's impartiality may arise, for instance, because of his claims for the freedom of the seas.[98] But this is not clear (*non liquet*, as the Roman jurists put it), and difficult to establish. Grotius is also rather enthusiastic about the justness of the Dutch war in *De Indis*, and harsh about the alleged crimes of the Portuguese.[99] Nevertheless, this does not disqualify the principles developed in this work. In addition, we should stay clear of the fallacy that impartiality *necessarily* implies criticizing one's own community, religion, tradition, or culture.

There are additional elements that seem to challenge Grotian impartiality and the universality of his idea of international society. In fact, they point at the inherent ambiguity of the Grotian system of the law of nations. Grotius's practical aim in *De Jure Belli ac Pacis* was to minimize wars and bloodshed. He thought that occasionally bending the law of nations was justified so that it might not break. This was in turn made possible by the flexibility of the Grotian system, and its unresolved ambiguities.[100] Thus Grotius held that ownership cannot be lost, that injustices do not establish right 'unless a new cause has intervened capable in itself of producing a right'.[101] The long exercise of sovereignty is one such *novus actus interveniens*, perfectly applicable to Spanish or other conquest. Similarly, the law of nations sanctions the new *status quo* at the end of the war, regardless of the question of justice.[102] Grotius offers a pragmatic calculus, not moral or legal considerations. The notion of a formal war, or *bellum solenne*, is introduced alongside the traditional just war doctrine because it is often difficult to decide on the justness of a war, and wars can be contained by giving belligerent rights to both sides equally. There are only two requirements of a formal war: it must be waged by the supreme power, and it should be publicly declared.[103] The pragmatic advantages of bending justice are that endless disputes about the legitimacy of conquests, ownership and boundaries, and possible wars based on them, can be avoided. Grotius quotes

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98 Suggested by Masaharu, 'Dominium and Imperium', pp. 153f.

99 Grotius, *Jure Praedae*, 12.118–126, pp. 262–78.

100 See Forde, 'Grotius', pp. 639, 646 and 647, and the previous section.

101 Grotius, *Jure Belli*, 2.4.11, p. 227. See also Green and Dickason, *Law of Nations*, p. 55.

102 Grotius, *Jure Belli*, 3.20.11–12, p. 809. See Grotius, *Jure Belli*, 3.6.2, p. 664 on the right of conquest, with Roman and other sources, e.g. ibid., 665f. (Gaius in *Digest*), demonstrating that Grotius could build upon a long Western tradition; see also Green and Dickason, *Law of Nations*, 57f. and Korman, *Right of Conquest*, passim.

103 Grotius, *Jure Belli*, 3.3.4–5, pp. 633f. See especially Forde, 'Grotius', p. 645 and Naoya, 'Laws of War', pp. 254–7 on the *bellum solenne*.

Cyprian that as a consequence, 'The laws have come to terms with crimes.'[104] Grotius thinks that we must pay this price in the name of peace and stability and in order to prevent greater evil. The concepts of formal war, of the right of conquest, and the acceptance of the new *status quo* tend to favour the more powerful communities.

Thus Grotian 'flexibility' indeed leaves a back door for greedy theives in Europe and elsewhere. However, it would be unjust to accuse Grotius of developing these features on purpose in order to privilege Europeans. There is no evidence that supports this conjecture. All the permissions are built into the Grotian system in the name of peace and tranquillity rather than due to Eurocentric prejudices. Grotius seems to have been fully aware of this. After his exposition of what is permitted by the *ius in bello*, he claims:

> I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant them. For when I first set out to explain this part of the law of nations I bore witness that many things are said to be 'lawful' or 'permissible' for the reason that they are done with impunity, in part also because coactive tribunals lend to them their authority; things which, nevertheless, either deviate from the rule of right ... or at any rate may be omitted on higher grounds and with greater praise among good men.[105]

With this statement, Grotius returns to natural justice. Conquests cannot simply be labelled 'lawful' because they are done with impunity. Injustices never create rights, even if there seems to have been consent among involved parties (perhaps the consent was not free). Just laws must be coupled with sanctions to become effective. We are back at the criticism of the previous section: Grotius's system of the law of nations is full of tensions because it tries to accommodate incompatible elements such as utility and natural justice, facts and norms, within one framework.

There is a final inconsistency, not within Grotius's writings, but between them and his political activities. Historians and international lawyers have argued that in the sixteenth and seventeenth centuries, European peace treaties were specifically limited to Europe, while territories outside Europe belonged to a sphere devoid of law. Carl Schmitt claimed that this division helped to

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104 Grotius, *Jure Belli*, 3.4.5, p. 646 and Forde, 'Grotius', p. 645.

105 'Legenda mihi retro vestigia, et eripienda bellum gerentibus pene omnia quae largitus videri possum, nec tamen largitus sum, nam cum primum hanc juris gentium partem explicare sum aggressus, testatus sum juris esse aut licere multa dici eo quod impune fiant, partim etiam quod judicia coactiva suam illis auctoritatem accommodent, quae tamen aut exorbitent a recti regula, sive illa in jure stricte dicto, sive in aliarum virtutum praecepto posita est, aut certe omittantur sanctius et cum majori apud bonos laude', 3.10.1, p. 716 and Forde, 'Grotius', p. 646, who calls it a 'statement of contrition'.

contain wars in Europe while accepting unrestrained struggles for influence, territories and power overseas.[106] 'No peace beyond the line' is an ambiguous sentence: it can refer to the fact of violence though peace was intended, but can also mean the agreement that this legal condition ought to prevail. English, Dutch and French publicists used the notion of amity lines in their fight against Spanish claims. At the Colonial Conference between England and the United Provinces in 1615, Grotius apparently suggested that the two countries should wage a preventive war against Spain, pointing out that neither the English nor the French had any peace beyond the line with the Spaniards anyway, and that a war overseas did not imply a military confrontation in Europe.[107] The notion of amity lines, the idea that law or regulations of a peace treaty are specifically limited to some sections of the globe, was part of the European customary law of nations, but hardly compatible with Grotius's assumption in his writings that natural law applies globally and universally. Perhaps the English delegation misunderstood Grotius. Grotius might also simply have stated the legitimacy of a preventive war, and pointed at the *fact* of overseas hostilities. Otherwise we can only explain the episode at the conference by distinguishing between Grotius the politician and Grotius the international lawyer and author. 'No peace beyond the line' is the pragmatic calculus of a clever politician, hardly the attitude of a moral cosmopolitan.

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106 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 3rd edn (Berlin: Duncker & Humblot, 1988), pp. 60–9, especially p. 66, who builds upon Gustav Adolf Rein, 'Zur Geschichte der völkerrechtlichen Trennungslinie zwischen Amerika und Europa', in *Europa und Übersee. Gesammelte Aufsätze* (Göttingen: Musterschmidt-Verlag, 1961), pp. 67–80. Wilhelm G. Grewe, 'Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des "europazentrischen" Bildes der Völkerrechtsgeschichte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 42 (1982), pp. 458–61, and Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart.* Beiträge zur Kolonial- und Überseegeschichte Bd. 26 (Stuttgart: Steiner, 1984), pp. 25–8, 141–6 debate the issue. It is dubious whether the concept of amity lines was actually part and parcel of customary *ius gentium* and included in treaties. Fisch, *Expansion*, pp. 146–52 offers a comprehensive survey of literature pertaining to the subject.

107 G. N. Clark and W. J. M. van Eysinga, 'The Colonial Conferences between England and The Netherlands in 1613 and 1615', *Bibliotheca Visseriana*, 17 (1951), pp. 76 and 114, and B. V. A. Röling, 'Are Grotius' Ideas Obsolete in an Expanded World?', in Bull, Kingsbury and Roberts, *Grotius*, p. 290. Texts and treaties which refer to the practice of amity lines are included in Wilhelm G. Grewe (ed.), *Fontes Historiae Iuris Gentium. Volume 2: 1493–1815* (Berlin, New York: Walter de Gruyter, 1988), pp. 135–43.

5. The contributions of Francisco Suárez and Alberico Gentili

There looms another whiggish fallacy: we might reconstruct the history of modern law of nations as a linear development, starting with Vitoria and continuing with Grotius, Pufendorf and others. We may disagree who actually lit the torch. But our narrative may imply that it was handed down within a limited number of authors. This distorts matters, as usual. The section tries to counterbalance this trend, by emphasizing lesser-known authors such as Suárez, Solórzano and Gentili.

The writing of the history of the modern law of nations is already distorted by the 'classics' themselves. Grotius relishes debunking his predecessors. He criticizes them for writing 'next to nothing' on the subject, and for not presenting a system but a farrago of natural law, divine law, the law of nations and civil law. Even in the case of Gentili, probably his most important inspiration and source, he stressed his 'shortcomings' rather than merits.[108] In spite of harsh criticism, Grotius relied heavily on previous authors, especially Suárez and Gentili. It has been argued that probably a whole section of *De Indis* is drawn from Gentili's *De Jure Belli*, and Grotius seems to take over a quotation from the Italian without checking the original – otherwise he would have found out that the title does not exist.[109] Grotius's practice should of course be contextualized: copying from others was generally considered research, not plagiarism. Still, we can wonder why Grotius tried to downplay his predecessors' influence and did not acknowledge his debt sufficiently.

Nowadays interpreters are usually quite charitable with Alberico Gentili (1552–1608), an Italian protestant and refugee who became professor of civil law at Oxford.[110] As a respected scholar, he defended Catholics on two

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108 Grotius, *Jure Belli*, prol. 37 and 38, p. 22.

109 An extensive discussion of Gentili's influence is Haggenmacher, 'Grotius and Gentili', especially pp. 145–67. Edwards, *Grotius*, pp. 148–55; Peter Borschberg, *Hugo Grotius' 'Commentarius in theses XI': an early treatise on sovereignty, the just war, and the legitimacy of the Dutch revolt* (Berne, New York: P. Lang, 1994), pp. 73–101, and James Brown Scott, 'Introduction', in *Selections from Three Works of Francisco Suárez. Vol. 2: Translations* (Oxford: Clarendon Press, 1934), pp. 17a–21a review the Second Scholastics' influence, especially that of Suárez.

110 The classic study is Gesina H. J. van der Molen, *Alberico Gentili and the development of international law. His life, work and times* [1937], 2nd rev. edn (Leyden: A. W. Sijthoff, 1968). Diego Panizza, *Alberico Gentili, giurista ideologo nell'Inghilterra elisabettiana* (Padova: La Garangola, 1981); *Alberico Gentili e la dottrina della guerra giusta nella prospettiva di oggi* (Milano: Giuffrè, 1991), Antonio Gómez Robledo, *Fundadores del derecho internacional: Vitoria, Gentili, Suárez, Grocio* (México: Universidad Nacional Autónoma de México, 1989), pp. 41–55, and Nussbaum, *History*, pp. 94–101 focus on Gentili's biography and offer introductions to his works.

accounts. He argued for the inviolability of ambassadors in the Mendoza affair. The Spanish ambassador, involved in a conspiracy to dethrone Queen Elizabeth I, was finally expelled rather than executed. Towards the end of his life, he was an advocate for Spain before an English court. Gentili must be credited with writing the first comprehensive and coherent account of diplomatic law. In his major work, *De Jure Belli Libri Tres* (1589; published individually in 1588 and 1589), Gentili defends the freedom of the seas, but accepts jurisdiction over a maritime belt extending 100 miles into the ocean.[111] This and probably many other assumptions and theorems like the prohibition of waging wars on religious grounds might have inspired Grotius's works, though the extent of this influence is still a matter of debate.

Like Grotius after him, Gentili holds that the natural rights of passage, of using harbours, of taking provisions, or engaging in trade and commerce, if infringed upon, constitute just reasons for making war. 'Free trade' is a basic right, and the 'right to engage in commerce pertains equally to all peoples'.[112] These rights are soon qualified. If there is a reason to fear that 'harm will be done', as in the case of enemies or their allies, the rights can be denied. The conduct of the Spaniards is criticized, not because they aimed at commerce (which is acceptable), but because they wanted dominion, considering 'lands which were not previously known to us' as *res nullius*, thus depriving the natives of their rights.[113] Most importantly, Gentili holds that the inhabitants of a country or community have the right to forbid all trade if they believe that some imports are harmful. They are also allowed to restrict access to their territory, for instance, admitting traders 'only as far as the frontiers'. Gentili cites the example of the Chinese of his age, an example that would be repeated by almost all subsequent international lawyers from Pufendorf, Wolff and Vattel to Kant. Communities can also lawfully prohibit the export of 'certain commodities' such as gold if they believe it might ruin their respective economies.[114] These qualifications actually undermine the generic free trade doctrine Gentili espoused at the outset. Put into contemporary parlance, he has successfully 'deconstructed' his own thesis. Gentili himself, however, believes that his 'cases' and 'other isolated ones' are marginal, that the overall right to wage war if commerce is interfered with is still intact. Gentili has emptied the glass more than half. Wheras Vitoria and Grotius tend to see the right to visit

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111 Alberico Gentili, *De Jure Belli Libri Tres* [1598; text is based on the 1612 edition], transl. John C. Rolfe, The Classics of International Law (1933, reprint New York: Oceana Publications, 1964), 1.19, pp. 90–2. The beginning of this chapter cites some works which focus on Gentili's legacy, and his influence on Grotius.

112 Gentili, *De Jure Belli*, 1.19, pp. 86–90.

113 Gentili, *De Jure Belli*, 1.19, p. 89.

114 Ibid., pp. 89f.

and trade as unconditional, Gentili turns it into a conditional one, requiring the consent of the people being visited. It is significant that he uses the Chinese as an example: it underlines his cosmopolitan approach. Presumably rights pertain equally to all peoples. Though he keeps the familiar distinction civilized/uncivilized, it does not lead to a bias against the latter. In a post-sceptical passage anticipating Grotius (III, 1) and contemporary communitarian positions, Gentili accepts a plurality of religions and 'moral codes' in the world: 'Strangers have no right to argue about these matters, since they have no licence to alter the customs and institutions of foreign peoples.'[115] This points at an understanding of international law as providing thin rules of coexistence and non-interference, giving communities the right to choose their own way of living.

This passage seems to conflict with Gentili's endorsement of humanitarian intervention. It is justified first, if people 'clearly sin against the laws of nature and of mankind', as in the case of cannibalism, second, if innocent victims are slaughtered, and third, in the phenomenon of pirates. Gentili has two strong arguments in favour of humanitarian intervention. First, the overriding community is that of humankind or the whole race. Piracy, for instance, is a 'general violation of the common law of humanity and a wrong done to mankind', and 'in the violation of that law we are all injured'.[116] The norms of cosmopolitan society trump the rights of independent communities, a position very close to contemporary cosmopolitans, but also to Vitoria. Second, the relationship between natural law and individual will is likewise hierarchical. Even sovereigns are not absolute in the sense that they are 'exempt from the law and bound by no statutes'.[117] How do an endorsement of humanitarian intervention and a 'neutral' law of coexistence and non-interference go together? The question brings us back to a systematic problem: there is a thin line of demarcation between the right of communities to choose their own way of living and the duty not to inflict harm on others (see II, 5).

More than any other member of the Second Scholastic, Francisco Suárez (1548–1617) is nowadays seen as the main link connecting medieval and modern philosophy.[118] He was four years younger than Gentili and wrote his

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115 Ibid., p. 90.

116 Ibid., 1.25, pp. 122–4. See also the discussion in Meron, 'Rights', pp. 113–16 and Molen, *Gentili*, pp. 133–7.

117 Gentili, *De Jure Belli*, 1.16, p. 74.

118 Recently there have been some important studies on his philosophy: Simone Castellote, *Die Anthropologie des Suarez*, 2nd edn (Freiburg i. B.: Alber, 1982), and Jean-François Courtine, *Suarez et le système de la métaphysique* (Paris: Presses Universitaires de France, 1990); Norman J. Wells, 'Descartes and Suárez on Secondary Qualities: A Tale of Two Readings,' *Review of Metaphysics*, 51 (1998), pp. 565–604. J. J. E. Gracia (ed.), 'Francisco Suárez', special issue of *American Catholic*

major works after the Italian had published his *De Jure Belli Libri Tres* (1589). From 1590 onwards, Suárez was extremely productive. *De Legibus ac Deo Legislatore*, which contains key passages pertaining to our subject, appeared in 1612. His contributions to natural law and *ius gentium* are considerable. In both cases, his theory can be compared to Vitoria, though he is certainly the more systematic thinker. Like Vitoria and Grotius after him, the Jesuit doctor distinguishes between two concepts of *ius*: the objectively given *iustum* and the personal *potentia* or *facultas utendi re* (see II, 2). Suárez offered a succinct summary of the Scholastic debate between rationalists or intellectualists and voluntarists, taking himself a middle position (III, 1). The right of humanitarian intervention is debated in his studies – and Gentili's – before Grotius, who was reluctant to admit his debt to those authors. The right is qualified. Suaréz argues that humanitarian intervention should not be a pretext for seizing goods or lands, even if inhabited by non-Christians. Neither do Christians have a right to take revenge upon the pagans for sinful behaviour, as it is up to God to do so. In customary law, Suárez breaks new ground. Custom (*consuetudo*) is integrated into the order of divine and natural law. It is introduced by the majority of the perfect community, established by voluntary acts, and in conformity with the general conditions of *ius*.[119] It keeps a precarious position between tacit consent and natural justice, between ascending and descending arguments, between *opinio iuris* and state practice, which it attempts to reconcile. The deontic trichotomy 'obligatory, permitted, forbidden' opens the space for a permissive domain of natural law. It may be modified by human practice (see III, 1). The

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Philosophical Quarterly, 65, 3 (1991) and Kevin White (ed.), *Hispanic Philosophy in the Age of Discovery* (Washington, DC: Catholic University of America Press, 1997), part IV, pp. 201–71 contain articles on various aspects of his work. Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (Leiden, New York, Köln: Brill, 1998), chs. 3 and 4 covers his natural law theory; Reijo Wilenius, *The Social and Political Theory of Francisco Suárez* (Helsinki: Societas Philosophica Fennica, 1963) is a brief introduction to his political philosophy, and Josef Soder, *Francisco Suárez und das Völkerrecht. Grundgedanken zu Staat, Recht und internationalen Beziehungen* (Frankfurt am Main: A. Metzner, 1973) as well as Robledo, *Fundadores*, pp. 57–100 provide extensive studies of his concept of *ius gentium*. John P. Doyle, 'Francisco Suárez: On Preaching the Gospel to People like the American Indians,' *Fordham International Law Journal*, 15 (1991–92), pp. 879–951 is a comprehensive article covering the right to missionize within Suárez's account of the law of nations. An older essay is Lucien Rolland, 'Suarez', in *Fondateurs*, pp. 95–124.

[119] Francisco Suárez, 'On Laws and God the Lawgiver' (1612), in *Selections from Three Works of Francisco Suárez, Vol. II: Translation* (New York: Oceana Publications, 1964), 7.9.3 (that is, book VII, chapter IX, section 3), p. 521; 7.12.1, p. 545, and 7.1.5, p. 445f. See also Wilenius, *Political Theory*, pp. 46f., and Theodor Meron, 'Common rights of mankind in Gentili, Grotius and Suarez', *American Journal of International Law*, 85, (1991), pp. 112–13 on humanitarian intervention in Suárez.

perfect community referred to above presupposes some kind of contract or agreement among those who joined it, has a certain end, a superior and has or is capable of possessing an independent political government.[120] These four features help Suárez to follow other Second Scholastics in defending native communities in the Americas, although he rarely does so explicitly.

The status of *ius gentium* is precarious. It is unwritten and has been established by the customs of the majority of nations, and thus differs both from natural law and from civil law. It originates in consensus and can therefore be changed in principle. The law of nations has two meanings. In its proper sense, it is *ius gentium inter se*, the body of customary laws observed among nations, such as the immunity of ambassadors. It can also be understood as *ius gentium intra se*, laws which states observe within their borders and which are shared by all or almost all nations.[121] By standards of the law of nations in the first, proper sense, 'commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause.'[122] In contrast to Vitoria and Grotius, this freedom of commerce is qualified. As in Gentili, visitors can be rejected with 'reasonable cause'. Suárez explicitly accepts that a state may prefer to 'exist in isolation and refuse to enter into commercial relations with another state even if there were no unfriendly feelings involved.' This resembles the position some of Vitoria's pupils adopted when criticizing their master in not including the element of Native American consent in his account (see II, 6).

As for Vitoria, Suárez's main problem is how to balance native rights such as self-defence and dominion with the Christian duty to preach the Gospel. He compares the Catholic missionaries with ambassadors whose rights are inviolable. Though Suárez reassures us that peaceful means should be employed first and 'aggressive preaching' is not acceptable, missionaries can be defended, and non-Christians forced to permit them to live in their territories, as there might be some who 'wish to hear the word'. Suárez's attempted claim, that the spreading of Christianity as a substantive concept of the good is compatible with universal standards of justice, is sophisticated and borders on elaborate manipulation. Some might argue that it is infamous Jesuit casuistry. This is suggested by his treatment of coercion. Though coercion is in principle illegitimate in religious matters (and also counterproductive), some form of it is nothing but hindering unjust coercion, and thus justified: a

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120 Suárez, 'On Laws', 1.6.19, p. 86 and Wilenius, *Political Theory*, pp. 34–9 for a full discussion. Imperfect communities are not non-European ones but private households.

121 Suárez, 'On Laws', 2.19.6 and 7, p. 345–7; 2.19.6, p. 347; see also Wilenius, *Political Theory*, pp. 64f.; Doyle, 'Suárez', pp. 905f.; Westerman, *Disintegration*, pp. 121–5, and Steiger, 'Völkerrecht,' pp. 109f.

122 Suárez, 'On Laws', 2.19.7, p. 347. The following quotation ibid.

'coercion to refrain from impeding the preaching of the Gospel'.[123] Missionaries representing Catholic Christianity have a right to preach everywhere, and as it is the only true religion, standards of reciprocity do not apply: non-apostate 'unbelievers' may not preach their faith in Catholic territories.

If Suárez tries to keep a precarious balance between native rights and Christian mission, between indigenous independence and European interference, between his sense of justice and his Catholic faith, between thin justice and a substantive highest good (the salvation of unbelievers), this balance is tipped in favour of the latter in *De Indiarum Jure* (1629–39) by Juan de Solórzano Pereira (1575–1654). Christianity, Christ's mandate to preach to all nations, and the vision of a Catholic world order are the cornerstones of his framework.[124] Solórzano is inspired by the work of a heretic with the title *Mare liberum*, a work he could not read because it had been put on the Vatican's *Index of Prohibited Books*. Ironically, he criticizes arguments Grotius took over from Solórzano's fellow-Spaniards. The second part of the work, the *acquisitio*, focuses on the legitimacy of the Spanish conquest. Solórzano discusses ten titles there, summarizing and elaborating on the foregoing Spanish debate. The first legitimate title is based on the right to civilize barbarous nations. Solórzano makes elaborate distinctions between types of non-Europeans. The Chinese and Japanese are as civilized as, and thus must be treated like, Europeans. Solórzano also reminds his readers that the ancestors of seventeenth-century Europeans shared similar features with contemporary barbarians. Barbarians of the second category such as the Peruvians have achieved some standards of civilization, whereas the real barbarians – the third and last category – are like animals: there are no restrictions Europeans are obliged to obey towards them.[125]

The most important title is included in Chapter 22 of the second book: the Spanish possessions are the result of a legitimate grant by the Pope. Any war against unbelievers is justified if waged with the intent to missionize and

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123 Suárez, 'Theological Virtues', disp. XVIII.2.4, p. 743; XVIII.2.8, p. 756. See Doyle, 'Suárez', pp. 913–48; Korman, *Right of Conquest*, pp. 49–51, and Green and Dickason, *Law of Nations*, pp. 50–6 for background information and a more extensive discussion.

124 James Muldoon, *The Americas in the Spanish World Order. The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1994) is now the definitive study. See also Fisch, *Expansion*, pp. 257–62 for a short but excellent introduction, and Juan de Solórzano Pereira, *De Indiarum Iure (Liber III: De retentione Indiarum)* (Madrid: Consejo Superior de Investigacion Cientificas, 1994), which includes essays and the third book.

125 Pereira, *De Indiarum iure sive de iusta Indiarum occidentalium inquisitione, acquisitione, et retentione*, 2 vols (Madrid: Francisci Martinez, 1629–39; Leiden, 1672), vol. 1, 2.8.100–2 (referring to book, chapter and paragraph); 2.9.9–11. Cf. Muldoon, *Americas*, pp. 62f.

convert. The denial of papal jurisdiction in temporal affairs is heretical, and the donation of Constantine legitimate. Civilizing and Christianizing go together.[126] Solórzano does not develop, and does not seem to be interested in, a coherent system of rights. He uses certain rights with a polemical purpose in mind. For instance, Solórzano seems to support Vitoria's right of hospitality, but it is trumped by the papal right to missionize. Travel and trade can be prohibited without reason (by the Spaniards in order to curb intrusion by other Eurpeans), which explicitly contradicts the previous acceptance of hospitality rights.[127] In short, a thick concept of the good absorbs basic standards of logic (coherence) and justice (impartiality). For that reason it is difficult to find pleasing aspects in Solórzano's work. It is easy to be full of moral indignation here, and debunk the author as presenting a 'totalizing system of thought' based on 'Eurocentric assumptions' and cloaked in the seemingly neutral language of legal discourse.[128]

6. The Grotian legacy and the origins of modern international law

As the previous sections have indicated, Grotius's reputation as the father of both natural law and the law of nations is highly debatable. In the first section, I have argued that Grotius is original in offering a modern theory of natural rights. In terms of the law of nations, the Dutchman does not fare equally well. There is widespread consensus that he is more of a 'later medieval synthesizer', usually following the lead of authors such as Vitoria, Suárez and Gentili.[129] The freedom of the seas is his major contribution and legacy in the law of nations. His *Mare liberum* became the framework of, and point of reference for, the debate in the following decades. Serafim de Freitas (1625) wrote the most important pamphlet against Grotius, defending exclusive rights of the

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126 Solórzano, *De Indiarum iure*, 2.22 and 23, passim; 3.7 passim. See Muldoon, *Americas*, p. 34, chs. 5 and 6, and pp. 99f., 153–64 and 170ff., and Fisch, *Expansion*, p. 260.

127 Solórzano, *De Indiarum iure*, 2.20.34 and 55; 2.25.63–65; 2.25.67–70; 3.3. passim, especially 3.3.70; and Fisch, *Expansion*, p. 259f. note.

128 Robert A. Williams, *The American Indian in Western Legal Thought. The Discourses of Conquest* (New York, Oxford: Oxford University Press, 1990), pp. 195–8, a description of Gentili's doctrine of international law, mistaken like Williams's judgement on Vitoria (see II, 5 and 7), but applicable to Solórzano. Unfortunately this author, who would be such an apt target of Williams's devastating critique, is omitted in the study.

129 Edwards, *Grotius*, p. 141. On the Grotian legacy, see especially Edwards's chapter 7, Bull, Kingsbury and Roberts, *Grotius*, passim, particularly pp. 51–64 and 267–80.

Portuguese against the Dutch in East Asia.[130] Freitas's titles were tailored for Portuguese needs; they did not even pretend to be universal in form and cosmopolitan in scope. John Selden published *Mare clausum* (1636) at the request of the English government, defending their claims to dominion over the North Sea. In spite of the divergent titles, both *Mare liberum* and *Mare clausum* have much in common. The latter is actually highly Grotian, and differs mainly in one respect: where to draw the line between common ownership of the sea and particular territorial dominion including coastal waters.[131] The subsequent debate thus focused on how to delimit common ownership and private use. Maritime powers tended to favour the principle of the freedom of the seas, whereas coastal states insisted on coastal zones. In *Dominio maris* (1702), Cornelius van Bynkershoek found a widely accepted compromise, arguing that possession, ownership and jurisdiction of a maritime belt extended 'just as far as it can be held in subjection to the mainland', specified by cannon range. Towards the end of the eighteenth century, the criterion of cannon range – always subject to technological innovations and thus imprecise – was gradually replaced by a three-mile-zone.[132] Grotius's defence of the freedom of the seas is nowadays accepted as a principle of international law. The high seas are considered common property, or 'common heritage of humankind'.[133] A similar

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130 Frei Serafim de Freitas, *De Justo imperio asiatico dos portugeses, de iusto imperio Lusitanorum Asiatico* [1625], 2 vols (Lisbon: Instituto Nacional de Investigacão Científica, 1983). Freitas is another victim of unfair exclusion by historians. There is a brief reference in Muldoon, *Americas*, p. 29 and succinct descriptions in Fisch, *Expansion*, pp. 252f.; Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967), chs. 3 and 4, 'Freitas versus Grotius', *British Yearbook of International Law*, 35 (1969), pp. 162–82, and Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos Verlagsgesellschaft, 1984), pp. 302–4.

131 John Selden, *Mare clausum*, is included in vol. 2 of *Opera omnia*, ed. David Wilkins (London, 1726). See the discussions in Tuck, *Philosophy*, pp. 205–21, *Natural rights*, ch. 4, pp. 82–100, and Butler, 'Grotius', pp. 211f. Haakonssen, *Natural law*, p. 30 (with more literature) deliberates Grotius's influence on Selden.

132 Cornelius van Bynkershoek, *De Dominio Maris Dissertatio* [1702, rev., 2nd edn [1744], transl. Ralph van Deman Magoffin, The Classics of International Law (reprint New York: Oceana Publications, 1964), pp. 43f. See the introduction by James Brown Scott, ibid., pp. 19f. and Butler, 'Grotius', pp. 216f. There is a new study on this lawyer who is usually assigned to the positivist camp, Kinji Akashi, *Cornelius van Bynkershoek: his role in the history of international law* (The Hague et al.: Kluwer, 1998). The controversies following Grotius and Bynkershoek, and actual state practices are analysed at some length in Grewe, *Epochen der Völkerrechtsgeschichte*, pp. 300–22, 381–7 and 481–4.

133 UN conference of 1982, International Legal Materials 1982, p. 1261. For an interpretation see Butler, 'Law of the Sea', pp. 217–20 and Ian Brownlie, *Principles of Public International Law*, 4th edn (Oxford: Clarendon Press, 1990), pp. 180–257.

doctrine was adopted for space in 1967 ('UN Declaration of Legal Principles Covering the Activities of States in the Exploration and Use of Outer Space'), which is seen as *res extra commercium*, again common property. The treaty excludes territorial sovereignty or property based on discovery.

I have already pointed out that Grotius is nowadays often seen as a synthesizer linking Second Scholasticism with the modern law of nations. The evaluation of the Grotian legacy has its own history. His influence and reputation in the eighteenth and nineteenth centuries was impressive. James Brown Scott upset the academic world in the 1930s with the claim that the importance of Grotius for the development of the modern law of nations has been overestimated at the cost of Vitoria and Suárez. Up to that time, Vitoria and Suárez had been widely unknown outside Spain (after Scott, it was no longer possible to ignore them). Scott pointed out that the axiom on which Grotius's reputation to a large extent rested (the freedom of the seas) actually went back to Vitoria.[134] Grotius's reputation as the father of modern international law was seriously challenged.

As usual, Scott's criticism was in turn exposed to critical scrutiny (meta-critique, first level). Arthur Nussbaum, in his history of the law of nations (1954), thought Scott biased and uncritical, his views 'extreme', anachronistic, naïve, and full of 'crude mistakes'. Grotius, not the Spanish theologians, was the real founder.[135] To support his critique of Scott, Nussbaum had to show that the Catholic authors were inferior to the Protestant Grotius. Here Nussbaum, the critic of the critic, can in turn be subject to criticism (meta-critique, second level). His debunking of the Second Scholastics seems to be based on a vice he claimed to have detected in Scott: it is biased rather than impartial. Nussbaum asserted that Vitoria and Suárez were still caught in medieval thinking, consequently not liberal, full of religious fanaticism, and defended the rule of the Pope. Though Nussbaum admitted that Vitoria's account of hospitality breaks new ground, he thought that the inadequacies predominate. Vitoria's and Suárez's concepts of state sovereignty were inapt, and they did not establish limits that protected the allegedly unjust side in case of a war. All this was 'in

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Koskenniemi, *Apology*, pp. 431–43 reads the 1982 Convention on the law of the sea as an example for the failure of legal formalism, ultimately betraying its own project.

134 Scott, *Spanish Origin*, p. 3, 9af., p. 141, pp. 159f., pp. 281ff., especially 287f. For a discussion of Scott's work and the ensuing debate, see James Muldoon, 'The Contribution of the Medieval Canon-Lawyers to the Formation of International Law', *Traditio*, 28 (1972), pp. 486–90 and the recent study, Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague et al.: Kluwer, 1998).

135 Nussbaum, Arthur, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), pp. 296ff., 74, 113.

conflict with modern conceptions'.[136] I have already pointed out the difficulties of applying liberal standards of the 1950s to the sixteenth century (see II, 7). Nussbaum's judgement is not only anachronistic, he also seems to fall into a well-known whiggish trap: modernity is equated with liberalism, and both in turn with Protestant thinkers, whereas the Catholic losers are assigned to the Middle Ages, anti-modernity and anti-liberalism. The inadequacy of this approach is illustrated by Nussbaum's interesting indictment in terms of sovereignty. Contemporary thinking, including current international law, is usually highly critical of a classical understanding of 'absolute' state sovereignty. So some of the inadequacies of the Spanish Scholastics may indeed be their strength, emphasizing individual rights, those of communities (not necessarily states), and the global commonwealth.

A plausible criticism of my critique (meta-critique, third level) would point out that the debate is outdated, and the quarrel foolish. It is reasonable to take a middle position. All share a roughly equal part in the honour. The German international lawyer Wilhelm Grewe pointed out the obvious, that Vitoria and the other second Thomists provided the foundations for later writers. Scott himself tried to arrive at a balanced evaluation. He distinguished between the father or initiator of the modern law of nations (Vitoria) and its first systematic expounder (Grotius). He did see Grotius as the definitive watershed in the history of the law of nations, dividing authors into Grotian predecessors and successors: 'International law is not ... a creation of Grotius, although he was its first and its greatest expounder.'[137] Vitoria anticipated many elements of this law, such as the status of diplomats, neutrals and prisoners of wars, while his greatest achievement was to apply it to non-Europeans as well. But it was Grotius who provided the full-blown theory. Neither deserves to be debunked. In addition, the exclusive focus on Vitoria and Grotius is unfounded, as Gentili and Suárez should be equally considered. If we take the concept of modernity as our standard of evaluation, and define modern international law by the replacement of the individual by sovereign states as the main and principal subjects of international law, by substituting the community of humankind for the community of sovereign states, and by the monopolization of military

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136 Nussbaum, *History*, pp. 71f. Pagden has offered a more convincing criticism. He claims that seeing Vitoria as the father of international law is anachronistic, because the project of the 'modern' theorists (Grotius, Selden, Pufendorf) and their definition of *ius* was different from Vitoria's theory, which is not completely consistent. See Anthony Pagden, 'Introduction', in Francisco de Vitoria, *Political Writings*, ed. Anthony Padgen and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. xvi.

137 Scott, *Spanish Origin*, p. 3 and his final evaluation in ch. XIV about Vitoria's contribution to *ius gentium*; James Brown Scott, letter to Robert S. Woodward [1906], in Grotius, *Jure Praedae*, appendix C, p. 389; Grewe, *Epochen der Völkerrechtsgeschichte*, pp. 222–4 and p. 230; Hofmann, 'Grotius,' pp. 72–5.

power, diplomatic activity and the right to make treaties in the hands of the state,[138] then hardly any author discussed in this book meets all of these standards, though the so-called positivists of the late eighteenth century come close. But we can ask if this concept of 'modern international law' is adequate. It may be too narrow, excluding the bulk of writings and favouring a small section of the tradition (state-centered, positivistic) which is not representative for the whole. The debate about the origins of modern international law can be used as an example how (not) to make historical judgements. They depend on our definition of modernity or of liberalism, on our belief either in great watersheds or in continuous development, and finally on the way we see our authors: either predominantly rooted in the past, or linked with the future.

Previous sections have already highlighted some of Grotius's weaknesses. Some tend to see his political anthropology and reliance on human sociableness as a fragile basis. Often his conflation of ethics, law and religion is considered a typically pre-modern 'rag-bag or patchwork', as Philip Allott would call it. *De Jure Belli* is only in a very limited sense systematic, though it is certainly comprehensive.[139] Grotius's theory of property is the interesting combination of a historical narrative with a rational natural law theory. The narrative has above all a theological framework, building on the book of *Genesis*. Subsequent authors removed this framework and developed a secularized economic history of property (see V, 1). Grotius also referred to hypothetical rational consent, for instance in the statement that 'no system can be conceived by which races so widely separated could have come to an agreement', regarding a division of the seas.[140] This gave natural lawyers a basis for developing theories of consent. Contemporary interpreters often find Grotius's jump from the description of the sea to normative conclusions unconvincing. The leap from 'is' to 'ought' rests on shaky foundations.[141] However, this criticism must face a meta-critique: we apply post-Humean ways of thinking – making a conceptual distinction

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138 J. L. Holzgrefe, 'The origins of modern international relations theory', *Review of International Studies*, 15 (1989), pp. 11–26. See also Otto Kimminich, 'Die Entstehung des neuzeitlichen Völkerrechts', in Iring Fetscher and Herfried Münkler (eds), *Pipers Handbuch der Politischen Ideen*, vol. 3 (München und Zürich: Piper, 1985), pp. 73–100, and James Muldoon, 'The Contribution of the Medieval Canon-Lawyers', pp. 483–97.

139 Philip Allott, 'Language, Method and the Nature of International Law', *British Yearbook of International Law*, 45 (1971), p. 100. Onuma, 'War', pp. 113–21 and Draper, 'Legal Ideas about War', in Bull, Kingsbury and Roberts, *Grotius*, pp. 193f. agree that Grotius's work is not systematic, whereas Haggenmacher, 'Grotius and Gentili', pp. 165f. stresses his systematic approach, at least with respect to the just causes of war, and in comparison with Gentili.

140 Grotius, *Jure Belli*, 2.2.3, p. 191. See also Tierney, *Natural Rights*, p. 333.

141 Butler, 'Law of the Sea', p. 213; Philip Allott, 'Language, Method and the Nature of International Law', *British Yearbook of International Law*, 45 (1971), pp. 101f. and 134f. and below, V, 3.

between normative and descriptive sentences and arguing that they are irreducible – onto the past.

The Grotian system is fraught with three systematic problems of utmost importance: those of interpretation, of law enforcement and of obligation. Grotius points out that it is often difficult to know the 'just limit' of self-defence, or the justice of a war. The problem of the overwhelming power is a case in point. Grotius explicitly rejects the right to go to war in order to prevent the growth of a neighbouring power that might later become dangerous. We are not justified in claiming that the mere possibility of suffering from the use of force entitles us to this very use of force. At the same time, however, Grotius concedes that it might be 'far-sighted' and expedient to launch a pre-emptive war in order to weaken a dangerous neighbour.[142] This gets us back to the problem of interpretation. It is always the rulers who judge on their own if the neighbouring state is dangerous or only appears to be so, whether precautionary measures are compatible with the right of self-defence or amount to a violation of the rights of others. This is a structural problem, related to what Hobbes would later call the state of nature. Grotius offers alertness and caution, and faith in Divine Providence, as remedies. From a Hobbesian perspective, this is a sorry comfort, as it does not solve the dilemma itself.

Related to the problem of interpretation is that of law enforcement. Grotius admits that law which lacks an external sanction 'fails of its outward effect'. He also understands that civil society originates in a contract which aims at overcoming the state of 'weakness of isolated households against attack'.[143] The dilemmas of the abuse of rights, of the free-rider, of coercing the outlaw in relations among civil societies are anticipated, but not clearly answered. The third open account is that of obligation. Is obligation independent of God's will? If yes, why are humans obliged at all? Is God irrelevant for natural law and/or morality? Why should humans comply with the law of nature? Can expediency and social feelings base obligation? These are some of the questions implicit in Grotius's writings, and tackled by commentators and subsequent authors.

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142 Grotius, *Jure Belli*, 3.4.4, p. 644, and Forde, 'Grotius', p. 645. See Grotius, *Jure Belli*, 2.1.17, p. 184, 2.22.5, p. 549, and my book *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), ch. 6 for a systematic analysis of the problem of overwhelming neighbours.

143 Grotius, *Jure Belli*, prol. 18 and 19, p. 16; 1.4.7, p. 149.

Chapter 4

In the Shadow of Leviathan: Hobbes to Wolff

Michel Foucault writes about the archaeology of knowledge that it is 'much more willing than the history of ideas to speak of discontinuities, ruptures, gaps, entirely new forms of positivity, and of sudden redistributions'.[1] Intellectual historians have hardly ever questioned the sudden rupture caused in political thought by Thomas Hobbes and his writings. Are there watersheds and discontinuities? If so, where? In this chapter, I start with what has been labelled the rise of the modern, sovereign territorial state. Bodin and Hobbes are usually seen as the key thinkers providing the theory or ideology reflecting on this development. The first section focuses on Hobbes. The state of nature is interpreted as a thought experiment which buttresses the conclusion that elementary conflicts can only be resolved if natural law is institutionalized, an independent judge is accepted and a public coercive authority set up. It is then asked how this structural reading of the state of nature among individuals translates into the relations among states. In the second section, I argue that the domestic analogy is incomplete, that there are two crucial differences – one moral, one juridical – distinguishing the international from the domestic level. Hobbes's thought experiment of the state of nature has shaped the political philosophies of subsequent authors. Pufendorf is a case in point. He struggles hard to strike a balance between Grotius and Hobbes. Ultimately, his theory is state-centered, moving away from the Grotian idea of a moral or legal community of humankind. State interests predominate. Pufendorf sees humans and states as moral entities, and is highly original in his theory of sociability. Human socialization becomes naturalized, a 'social construct' and a historical phenomenon, subject to change and development. Pufendorf's emphasis on the state has repercussions on the notion of hospitality. Unlike Vitoria and Grotius, and even more so than Gentili and Suárez, he stresses the right of any community to refuse visitors. Hospitality and trade belong to the imperfect

[1] Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, transl. A. M. Sheridan Smith (New York: Pantheon Books, 1972), p. 169.

duties of friendship which cannot be enforced. The two sections on Wolff help us to avoid a whiggish reconstruction of the past where modern European thinking moves from the idea of a global commonwealth to a society of states, and from natural law to positivism in a linear fashion. There are indeed discontinuities, ruptures and gaps in this story.

There is widespread agreement that the centuries prior to the French Revolution saw a unique Western development of the 'modern state' or the 'sovereign, territorial state'. Opinions are divided on the reasons for this development and the causes of its variety. A previous section, following Harold Berman, has emphasized the crucial role the medieval papacy played in this development (I, 5). Competing explanations of the variety of statebuilding range from emphasizing geopolitical factors and pressure from or conflict with other communities (Hintze), differences in the feasibility or ease of collecting taxes and the availability of abundant commercial revenues (Tilly), the benefits of trading countries (Mann), to stressing the advantages of absolutist regimes with bureaucratic infrastructures over patrimonial constitutionalism (Ertman).[2] Sovereignty has been defined as the 'final and absolute political authority in the political community'.[3] This implies that no other, more encompassing authority can have the same properties. The concept of sovereignty evolved out of three late Roman concepts: *majestas imperii*, *summum imperium* and *summa potestas*. The claim that the sovereign is 'exempt from the law' (*legibus solutus*) can be found in the *Digest*, and was elaborated by medieval jurists such as Bartolus (see I, 5). Eventually the triumph of state sovereignty demonstrated the power of language. The shift from *status* as the legal standing of humans, and a personal and charismatic understanding of public power, to impersonal

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2 The seminal article is Otto Hintze, 'Military Organization and the Organization of the State,' in *The Historical Essays of Otto Hintze*, ed. Felix Gilbert (New York: Oxford University Press, 1975), pp. 178–215; Charles Tilly, 'War Making and State Making as organized Crime,' in Peter Evans, Dietrich Rüschemeyer, and Theda Skocpol (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), pp. 169–91, and *Coercion, Capital and European States, AD 990–1990* (Oxford: Basil Blackwell, 1990); Michael Mann, *The Sources of Social Power*, 2 vols (Cambridge: Cambridge University Press, 1986 and 1993); Thomas Ertman, *Birth of the Leviathan. Building States and Regimes in Medieval and Early Modern Europe* (Cambridge: Cambridge University Press, 1997). See also William Hardy McNeill, *The pursuit of power: technology, armed force, and society since A.D. 1000* (Oxford: Blackwell, 1983) and Brian Downing, *The Military Revolution and Political Change: Origins of Democracy and Autocracy in Early Modern Europe* (Princeton: Princeton University Press, 1992). Ertman, *Leviathan*, pp. 1–34 contains a useful discussion of theories of statebuilding, a short presentation of his own thesis, and an excellent bibliography, ibid., pp. 325–50.

3 Francis H. Hinsley, *Sovereignty*, 2nd edn (Cambridge: Cambridge University Press, 1986), p. 26. He adds: '*and no final and absolute authority exists elsewhere*.' This is the standard study in English.

rule by 'the state' (*lo stato*) began in late-medieval Europe. Machiavelli, Bodin and Hobbes, who all wrote in the vernacular, could finally express in their languages what Latin categories made difficult if not impossible to formulate.[4]

The 'invention' of the state and its sovereignty was accompanied by additional conceptual developments. In seventeenth-century Italy, the term 'politics' became a synonym for reason of state (*ragion di stato*, Botero in 1586), effectively abandoning the traditional understanding of politics as the art of ruling according to justice. Another parallel conceptual shift affected 'reason'. It was no longer 'right reason' (*recta ratio*) focusing on deontic universal principles such as equity, but above all instrumental reason, the capacity to calculate means for a given end. Conceptual changes were embedded in sociological transformations. Modern political theory and natural law became the work of jurists and philosophers rather than theologians. The lawyer and scholar Alberico Gentili coined the well-known phrase: 'Let the theologians keep silence about a matter which is outside of their province.'[5] Though it can always be insisted that this demarcation of the sphere of jurisprudence and natural law remained incomplete, there was a clear tendency to move away from the predominance of theology, forcefully argued for in the Second Scholastics. Now theologians had to look after their own business.

For the French jurist Jean Bodin (1530–96), sovereignty encompassed the capacity to legislate free from human laws. It is neither limited in power nor in function; the sovereign recognizes nobody above him except God. The sovereign exercises his competences without the consent of others, internally towards the estates, aristocracy and the clerics as well as externally towards other rulers, the pope or emperor.[6] Bodin's theory can be read as yet another

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4 Nicholas Greenwood Onuf, *The republican legacy in international thought* (Cambridge: Cambridge University Press, 1998), p. 132. An excellent study of the conceptual change is Quentin Skinner, 'The state', in Terence Ball, James Farr and Russell L. Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), pp. 90–131.

5 Maurizio Viroli, *From Politics to Reason of State. The Acquisition and Transformation of the Language of Politics 1250–1600* (Cambridge: Cambridge University Press, 1992), passim, especially the introduction, pp. 1–4; Alberico Gentili, *De Jure Belli Libri Tres* [1612], transl. John C. Rolfe, The Classics of International Law, 1933 (reprint New York: Oceana Publications, 1964), 1.12, p. 57; Ilting, 'Naturrecht,' p. 278; Gesina H. J. van der Molen, *Alberico Gentili and the development of international law. His life, work and times* [1937], 2nd rev. edn (Leyden: A. W. Sijthoff, 1968), pp. 241f., and W. M. Spellman, *European Political Thought 1600–1700* (Houndmills: Macmillan Press, 1998).

6 Jean Bodin, *On Sovereignty. Four chapters from The Six Books of the Commonwealth*, ed. and transl. by Julian H. Franklin (Cambridge, Cambridge University Press, 1992), 1.8, pp. 3, 10, 23; 1.10, p. 67 and passim. A complete translation is *The Six Bookes of a Commonweale*, ed. Kenneth Douglas McRae (Cambridge, MA: Harvard

reply to scepticism (see III, 1): he transferred the basis of universal natural law to the sovereign's will, where Bodin hoped to find a minimal and lasting foundation for ordered politics. Bodin's theory of 'absolute sovereignty' must be qualified. The fallacy of 'premature secularization' must be avoided. For Bodin, sovereignty is limited by 'the laws of God and of nature' and the sovereign prince is bound by contracts and treaties he has made, no matter whether with his own subjects or a foreign power.[7] The notion of sovereignty is embedded in a divine, teleological and harmonious order.

The contemporary debate has emphasized the normative dimension of sovereignty, usually from a liberal perspective. It is claimed that respect for human rights has turned into a condition of legitimate sovereignty, that it has usually been subject to legitimising principles and normative constraints. Sovereignty is seen as an instrumental value. The primary moral units are individuals, not states. In addition, it is claimed, sovereignty admits of degrees, is not an all-or-nothing affair. A division of sovereignty may be impossible in theory, but works well in practice.[8] The emphasis on the normative dimension brings us back to one of the three main issues of this study, the idea of political justice, natural law and human rights. In principle, a qualified concept of sovereignty would not be incompatible with that of a global commonwealth. Another major contemporary trend argues for a methodological reorientation. It is claimed that the relationship between the concept and reality of sovereignty is unstable and open-ended, that the history of sovereignty is one 'without fixed referent' where a definition is impossible. Sovereignty is perceived as a 'social

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University Press, 1962). See Helmut Quaritsch, 'Souveränität', in Joachim Ritter and Karlfried Gründer (eds), *Historisches Wörterbuch der Philosophie* (Basel: Schwabe & Co., 1989), vol. 9, cols. 1104–6 and Dieter Wyduckel, *Princeps Legibus Solutus* (Berlin: Duncker & Humblot, 1979). The standard study on Bodin is Julian Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge: Cambridge University Press, 1973). See also the recent *Politique, droit et théologie chez Bodin, Grotius et Hobbes*, sous la direction de Luc Foisneau, préface de Yves Charles Zarka (Paris: Kimé, 1997). For the following, see the two articles Dan Engster, 'Jean Bodin, Scepticism and Absolute Sovereignty', *History of Political Thought*, 17 (1996), pp. 469–99 and J. H. M. Salmon, 'The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism?', ibid., pp. 500–22.

[7] Duncan Forbes, *Hume's Philosophical Politics* (Cambridge: Cambridge University Press, 1975), pp. 41f. and 57; Knud Haakonssen, 'Hugo Grotius and the history of political thought', *Political Theory*, 13 (1985), p. 247; Bodin, *On Sovereignty*, 1.8, pp. 34 and 35f.

[8] J. Samuel Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms', *Millennium: Journal of International Studies*, 27, no. 2 (1998), pp. 229–52; Fernando R. Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), pp. 2, 7, 21, 40, 57f., especially ch. 2: 'Sovereignty and Intervention'.

construct' which can and must be deconstructed, alongside with the modern inside-outside distinction.[9] In Vitoria and Suárez, but also in Gentili, Grotius and Bodin, sovereignty is embedded in a universal order of divine, natural and derived human law. There is thus no clear distinction between 'domestic' and 'international' spheres. Symptomatically, humanitarian intervention is the norm rather than the exception. The domestic analogy is not perceived as a problem. Things would definitely change with Hobbes: 'outsides' were 'invented', policy became 'foreign'.

1. Hobbes on the state of nature and sovereignty

In those days there was no king in Israel; every man did that which was right in his own eyes. (Book of Judges 21:25)

The previous chapter has emphasized Grotius's originality as a modern natural law theorist, but also his tensions and shortcomings. Grotius tries to accommodate natural justice, social utility and advantage, not considering that a utilitarian calculus may lead to choices incompatible with the former. Secondly, there is a tension between the *ius voluntarium* based on common consent and state practice on the one hand and the *ius naturale* on the other (see III, 1–3). In addition, I emphasized two shortcomings, the problem of interpretation and of law enforcement. Grotius realizes that a procedure of adjudication is needed, but does not provide one, relying on princely goodwill and divine providence. Secondly, he perceives that law which lacks an external sanction 'fails of its outward effect'. However, he hopes that intracommunal solidarity, pangs of remorse on the side of the transgressor, and again divine intervention take care of effective law-enforcement. Some conceptual distinctions implicit in this criticism may be anachronistic, and we may let Grotius off the hook by arguing that he is pre-modern rather than modern in his outlook or world-view. Be that as it may, Hobbes not only sees both problems, he also offers a radical cure for the domestic level. Though Hobbes was only five years younger than Grotius, his thinking was different, as if belonging to another world or age.

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[9] Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), chs. 1 and 2, especially pp. 2, 44, 53; Thomas J. Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996). See also the discussions in Richard Falk, *On Humane Governance. Toward a New Global Politics* (University Park, PA: Pennsylvania State University Press, 1995), ch. 3; Nicholas Greenwood Onuf, *The republican legacy in international thought* (Cambridge: Cambridge University Press, 1998), ch. 5, and Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), ch. 4.

Grotius seems to have read *De Cive* around April 1643, and disliked the concept of a natural state of war.[10]

I will present a favourable interpretation of Hobbes. The unfavourable reading emphasizes his outdated and reductionistic elements: his mechanistic paradigm (humans are machines), his dynamic materialism (life as a 'motion of limbs'), and his materialistic psychology (morals are based on desires, and they in turn on physics).[11] It also stresses Hobbes's anthropological claims: that humans are driven by a restless and everlasting 'desire of Power after power', by competition, diffidence and glory, that human nature is basically egocentric rather than sociable.[12] It is easy to dismiss these claims as one-sided. In a previous section, they have been used as an example of unconvincing idealization as opposed to successful abstraction (I, 4). There is no reason to deny this dimension of Hobbesian thinking. However, it is not the only one, and the favourable interpretation is in addition more relevant for present purposes. It reads the concept of a state of nature as an abstraction and thought experiment, not as an empirical fact but as a hypothetical condition without any form of social coercion such as legal or political structures. Thus not the nature of humans, but the structure of their relationship is decisive. This structure can also be explained in game-theoretical terms, such as the prisoner's dilemma.[13] The following minimal assumptions are required: actors coexist in a shared

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10 Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), p. 200. Perez Zagorin, 'Hobbes without Grotius', *History of Political Thought*, 21 (2000), pp. 16–40 criticizes Tuck's approach, which stresses Grotius's formative influence on the rights theory of Hobbes. Zagorin underlines Hobbes's novel concept of natural right and originality.

11 Thomas Hobbes, *Leviathan* [1651], ed. Richard Tuck (Cambridge: Cambridge University Press, 1991), introduction, p. 9f., ch. 6, p. 39 and 43, ch. 10, p. 63. See also the discussion in Wolfgang Kersting, *Thomas Hobbes zur Einführung* (Hamburg: Junius, 1992), pp. 59–90.

12 Hobbes, *Leviathan*, ch. 11, p. 70, ch. 13, p. 88; Thomas Hobbes, *On the citizen* [1641], ed. and transl. by Richard Tuck and Michael Silverthorne (Cambridge, UK, New York: Cambridge University Press, 1998), 1.2, p. 22.

13 For this and much of what follows, see Otfried Höffe, *Political Justice. Foundations for a Critical Philosophy of Law and the State*, transl. Jeffrey C. Cohen (Cambridge, UK and Cambridge, MA: Polity Press, 1995), ch. 10, pp. 182–218 and Wolfgang Röd, *Geometrischer Geist und Naturrecht. Methodengeschichtliche Untersuchungen zur Staatsphilosophie im 17. und 18. Jahrhundert* (München: Verlag der bayerischen Akademie der Wissenschaften, 1970), pp. 30–7. Edwin Curley, 'Reflections on Hobbes: Recent Work on His Moral and Political Philosophy', *Journal of Philosophical Research*, 15 (1990), pp. 169–250; Michael W. Doyle, *Ways of War and Peace. Realism, Liberalism, and Socialism* (New York, London: Norton and Company, 1997), pp. 111–36; Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986), ch. 3, and Tesón, *Philosophy*, pp. 75ff. provide introductions to a game-theoretical reading. I am much indebted to Höffe and Kersting.

environment and cannot avoid interacting; they are free to choose, that is, they are free from external constraint or social obligations, or free in a negative sense, and others do not impose limitations on personal discretion. As Hobbes put it, liberty in this sense is 'the absence of externall Impediments', the permission 'to do anything to anybody, and to possess, use and enjoy' whatever he or she wants or can get.[14] A participant is free to choose, but the result of one's choice is equally dependent on the choices of all other participants. Hobbes's starting point is that all humans are more or less equal in physical strength and intellectual powers. Everybody knows that he or she can be threatened by anybody else and is thus in constant danger of being dispossessed or destroyed. The right to everything is self-defeating. Even the aggressor or invader can never enjoy the fruits of his acquisitions, as he too is 'in the like danger of another'.[15] Everyone has therefore good reasons to be suspicious and in fear of others, and take preventive measures, attempting to increase one's own power. From the individual perspective, these measures are rational in pragmatic terms. From an impartial or comprehensive perspective, they are irrational. The likelihood of conflict is increased, and nobody gains in terms of security, but is even worse off than before. In the Hobbesian state of nature, there are no effective moral principles which can be enforced – there is no assurance of reciprocal compliance because anyone could turn into a free-rider and abuse the trust and gullibility of others. Everybody is one's own final judge, interpreter and executioner, if not lawmaker. The one given right is that of self-preservation, and Hobbes follows natural law theorists like Thomas Aquinas and Vitoria here.[16] The freedom to judge flows from the freedom of choice: 'By

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[14] Hobbes, *Leviathan*, ch. 14, p. 91; *Citizen*, 1.10, p. 28.

[15] This follows the famous picture in Hobbes, *Leviathan*, ch. 13, the quotation at p. 87. There are innumerable interpretations; I have found useful ones in Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 27–34; Jerome B. Schneewind, *The invention of autonomy. A history of modern moral philosophy* (Cambridge: Cambridge University Press, 1998), pp. 87–92; Kersting, *Hobbes*, pp. 102–21, and Höffe, *Justice*, ch. 10. See also Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996) and Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, transl. Daniela Gobetti (Chicago, London: The University of Chicago Press, 1993). Shorter sections, individual articles, or single chapters can be found in Annabel S. Brett, *Liberty, Right and Nature. Individual rights in later scholastic thought* (Cambridge: Cambridge University Press, 1997), ch. 6; Wolfgang Kersting (ed.), *Thomas Hobbes, Leviathan.* Klassiker Auslegen vol. 5 (Berlin: Akademie Verlag, 1996), and Tuck, Philosophy, ch. 7.

[16] Francisco de Vitoria, 'On Law', in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. 170: 'Each has a natural inclination to preserve its own being, and each is therefore obliged to preserve himself.'

natural law *one is oneself the judge* whether the means he is to use and the action he intends to take are necessary to the preservation of his life and limbs or not.'[17] The passage indicates that Hobbes does not make an abstract thought experiment. His account is interwoven with thick conceptions of the good life, emphasizing, apart from self-preservation, the pursuit of happiness, the desire for power and the avoidance of death.

Hobbes's key claim is that the state of nature is a condition of war, if not of actual fighting. The right of everybody to everything amounts to saying that 'there were no *right* at all.' Possible conflicts are solved by private judgements and private force.[18] This condition is of course incompatible with the right of as well as interest in self-preservation. Unrestricted self-preservation leads to possible or ultimate self-destruction. Rules are therefore necessary to promote self-preservation, and those are 'laws of nature' that limit the freedom of choice. The most fundamental law is to 'seek peace', and in order to achieve this, it is necessary to lay down my right to all things, provided that the others consent to do the same. The rights of self-preservation and self-defence are the only ones that cannot be given up, or are inalienable; the law to seek peace is contingent upon them.[19] The principle of political justice is the coexistence of liberty. Everybody is content with '*so much liberty against other men, as he would allow other men against himselfe*'.[20]

How does Hobbes justify the laws of nature? There are two ways to interpret him. The first one follows what I have called an unfavourable approach above. Right reason is not an 'infallible Faculty', but coincides with instrumental reason which helps us to find appropriate means to a given end, in this case, peace. According to this interpretation, Hobbes would side with Machiavelli and other representatives of the *ragione di stato* against natural lawyers such as Grotius.[21] The other interpretation would emphasize Hobbes's insistence on justice as 'good in itself', based on rational insight and encompassing reciprocity, impartiality and successful abstraction. Several passages support this reading, and given my own approach, I am of course much in favour of it (see I, 4). Hobbes asserts that the laws of nature are immutable and eternal, pointing out that an injustice like punishing the innocent can never be lawful or just. He interprets the biblical golden rule as a principle that helps us to abstract

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17 Hobbes, *Citizen*, 1.9, p. 27; cf. *Leviathan*, ch. 6, p. 39. See Höffe, *Justice*, pp. 198–205 for interpretation.

18 Hobbes, *Citizen*, 1.11–12, p. 29f.; *Leviathan*, ch. 13, pp. 88f.

19 *Leviathan*, ch. 14, p. 92; *Citizen*, 2.2–4, p. 34.

20 *Leviathan*, ch. 14, p. 92.

21 A passages which suggests this reading is Hobbes, *Citizen*, 2.1, p. 33 (with the above quotation). See Bobbio, *Hobbes*, pp. 118–21 with more quotations, where this interpretation is offered. See also Kersting, *Hobbes*, pp. 131–3.

from our own limited perspective and achieve an impartial point of view. All one has to do is 'when weighing the actions of other men with his own, they seem too heavy, to put them into the other part of the ballance, and his own into their place, that his own passions, and selfe-love, may adde nothing to the weight.'[22] Any rational being can understand that natural laws such as the obligation to keep peace or to renounce one's right to everything are not only useful and of instrumental value but reasonable in themselves. Though I favour the second interpretation, Hobbes apparently wants to have it both ways. He is certainly not the only author where the Kantian distinction between hypothetical and categorical imperatives is blurred; a similar 'inconsistency' can be found in Grotius and others. As usual, critics can point out that this reasoning is anachronistically overstated as a result of applying Kantian standards to older authors. Be that as it may, the upshot is that Hobbes offers a thin concept of justice as impartiality embedded in a thick account.

Hobbes's way out of the state of nature entails three precepts. First, natural law must be institutionalized and codified in positive law. While Hobbes belongs to the natural law tradition, he advocates legal positivism. Natural law is too generic to be useful, but it provides an 'absolute' foundation of positive civil law, in so far as the latter has effectively abandoned the state of nature in accordance with the fundamental precepts of the former. However, Hobbes's conclusion that 'no civil law can be contrary to natural law'[23] is based on the assumptions that *any* civil condition is better than the state of nature, and that the 'translation' of natural into positive law works. Hobbes's point is of course that secondly, citizens give up the right of private judgement, including judging the above two assumptions. Personal judgements must be abandoned in favour of an arbitrator. Hobbes holds that all laws, including those of nature, are in need of interpretation. He argues that most people are blinded by self-love or passions in applying something that is in principle self-evident.[24] Natural lawyers before Hobbes tended to overlook this problem, assuming that sociable

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22 Hobbes, *Leviathan*, ch. 26, p. 192; ch. 15, pp. 109f., with the quotation p. 110; ch. 17, p. 117; ch. 27, p. 204; *Citizen*, 3.26, p. 53.

23 *Citizen*, 14.10, p. 159; cf. *Leviathan*, ch. 18, p. 124. There is an excellent discussion of the relationship between Hobbes, the natural law tradition and civil law in Bobbio, *Hobbes*, chs. 4 and 5 and Zagorin, 'Hobbes without Grotius,' pp. 36–40. Hobbes is interpreted as the first representative of legal positivism in Kersting, *Hobbes*, pp. 122f.; cf. Hampton, *Hobbes*, pp. 107–10.

24 Hobbes, *Leviathan*, ch. 26, pp. 190f. There is an extensive discussion on this in Kersting, *Hobbes*, pp. 181–6. For the contemporary debate of applying and interpreting positive laws in legal science, see Alexander Somek, 'Rechtsanwendung als Interpretationspraxis. Zur Erneuerung des juristischen Konstruktivismus', *Zeitschrift für öffentliches Recht*, 53 (1998), pp. 337–62, who argues for a constructive approach where legal rules are presented as rational accounts of action (*vernünftige Handlungsgründe*).

tendencies and the faculty of right reason would yield just results. Hobbes realizes that natural laws are indeterminate and abstract and do not tell us themselves how to apply them – there is a latitude subject to conflicting interpretation. The sovereign power assumes the authority to interpret all laws in the name of peace. Finally, this public authority must be established to enforce these judgements and interpretations, apply sanctions and coerce those who do not respect the reciprocal spheres of freedom: 'Covenants, without the Sword, are but Words.'[25] If there was no effective public authority, individuals would keep or regain their right to be their own judges and executioners, interpret the laws of nature and rely on their own strength. The coercive power compels individuals 'equally to the performance of their Covenants, by the terror of some punishment', and this threat must outweigh the benefits a possible transgressor might expect from breaking the covenant. The provision takes care of the free-rider problem: for calculating reason, transgression becomes an imprudent option.

Various objections have been raised against Hobbes. First, he has been interpreted and then debunked as a precursor of legal positivism which finds any legal order acceptable. However, the notorious claim '*sed auctoritas, non veritas, facit legem*' (authority and not truth creates the law) requires a careful reading of the term *auctoritas*.[26] It coincides with power authorized by all affected parties who have given their free consent in an established commonwealth (*civitas*). Thus legitimate authority does include a dimension of justice. However, for Hobbes natural justice only serves to validate public authority without limiting its power. Secondly, Hobbes's assumption of approximately equal strength, of 'natural equality', can be challenged. He presupposes that each party can hurt others while being exposed to the same or similar injuries. Game theories usually assume a comparable constellation, as the two players in the prisoner's dilemma. But some individuals are clearly less powerful than others, such as children, the handicapped, or the elderly. Imbalance of power is even more marked among communities or states. The Native Americans were in no position to harm the Spaniards in a way they were being harmed.[27] Hobbes

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25 Hobbes, *Leviathan*, ch. 17, p. 117.

26 Thomas Hobbes, *Leviathan*, vol. 3 of Hobbes, *Opera philosophica*, ed. William Molesworth (reprint: Aalen: Scientia, 1961), ch. 26, p.202. See Höffe, *Justice*, pp. 80–6 for a succinct interpretation.

27 Barry, Brian, *Justice as Impartiality. A Treatise on Social Justice*, Volume II (Oxford: Clarendon Press, 1995), pp. 31–46 reads Hobbes as a proponent of 'justice as mutual advantages' which presupposes natural equality. His interpretation is challenged by David Gauthier, 'Mutual Advantage and Impartiality', in Paul Kelly (ed.), *Impartiality, Neutrality and Justice. Re-reading Brian Barry's Justice as Impartiality* (Edinburgh: Edinburgh University Press, 1998), pp. 120–3. See also Höffe, *Justice*, pp. 203f.

is ambivalent. His claim can be read as a deliberate attempt to include a moral premise into the account of the state of nature in order to arrive at the desired result, that is, the acceptance of legal equality. Like all decent natural lawyers, Hobbes rejects Aristotle's theory of natural slavery as contradicting reason as well as experience (II, 2). Even if nature should not have made people equal, they ought to acknowledge each other as such so that 'Equall termes' in the civil condition are guaranteed.[28] As a consequence, Hobbes's theory of contract presupposes a non-coercive baseline, namely the aforementioned free consent of all parties on an equal footing.

2. The domestic analogy

> [T]o be sane in a world of madmen is in itself a kind of madness. (Rousseau, 'Saint-Pierre's Project for Peace')

Hobbes is usually seen as the central figure in the transition to modern political ideas.[29] My interpretation has emphasized his connections with the natural law tradition and his emphasis on natural justice. In this section, I will outline Hobbes's systematic importance for international law and relations. The first and major innovation is his clear demarcation of domestic and inter-state spheres. In postmodern parlance, he invents and constructs an 'outside' to the commonwealth or state. This in turn implies a modern understanding of 'state'. Hobbes repeatedly refers to the state's duty to defend its citizens against 'enemies abroad' and foreign invasions.[30] His political theory is state-centric. He perceives the state, where many are represented by one, as a fictitious moral person. The individuals have submitted their wills and judgements to those of the sovereign, and moved from a mere crowd to a people, that is, 'a *single* entity, with *a single will*; you can attribute *an act* to it.'[31] States are independent

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28 Hobbes, *Leviathan*, ch. 15, p. 107. Cf. p. 103f. on the just man and Gauthier, 'Mutual Advantage', pp. 132 and 123.

29 Skinner, Quentin, *The Foundations of Modern Political Thought*, 2 vols (Cambridge: Cambridge University Press, 1978), vol. II, pp. 349–58; Onuf, *Legacy*, pp. 67f.; Karl-Heinz Ilting, 'Naturrecht', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1972ff.), vol. 4, p. 280; Kersting, *Hobbes*, pp. 7–9.

30 A prominent example is the famous passage on the mortal God, the 'great Leviathan', in Hobbes, *Leviathan*, ch. 17, pp. 120f.

31 Hobbes, *Leviathan*, ch. 16, p. 114; Hobbes, *Citizen*, 12.8, p. 137. A useful interpretation is Kersting, *Hobbes*, pp. 156f. and Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris: Editions A. Pedone, 1998), pp. 265–83.

entities distinct from each other. Their relations are identical with those of individuals before they entered a civil condition. They are therefore in a state of war, and the law of nations is identical with the law of nature: 'every Souveraign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring his own safety.'[32] The analogy between individuals and states is almost a perfect one. States encounter the same problems: there is a natural law, but it can't be enforced; they are judges in their own affairs; they have no reason to enter obligations unless they can be sure of mutual compliance.

The analogy between individuals and states is usually called the 'domestic analogy'. In an analogy, one entity is similar to another in certain or all respects. Generally, the domestic analogy is the assumption that both certain features or phenomena of the domestic sphere and normative principles in inter-individual relations can be applied in inter-state or international relations.[33] The analogic inferences are tentative, and the logic of inference is inductive rather than deductive. It can be argued that reasoning based on the domestic analogy is much older than Hobbes's political philosophy. Vitoria, for instance, takes it for granted that any commonwealth has the right to defend itself just like individuals, by standards of natural law.[34] However, it is not very useful to speak of a domestic analogy where the domestic sphere was neither clearly demarcated from the 'international' nor normatively relevant. In Hobbes, we get a split between individual and state, and between domestic and foreign.

This section focuses on one problem: is the domestic analogy complete, that is, are domestic and international phenomena, norms and features similar to each other in all, or only in certain respects? Where does the analogy break

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32 Hobbes, *Leviathan*, ch. 30, p. 244. Cf. *Citizen*, 13.13, p. 149. On Hobbes's law of nations and interstate relations, see Kersting, *Hobbes*, pp. 167–70; David P. Gauthier, *The Logic of Leviathan. The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 1969), pp. 207–12, Cornelia Navari, 'Hobbes, the State of Nature and the Laws of Nature', in Ian Clark and Iver B. Neumann (eds), *Classical Theories of International Relations* (Houndmills et al.: Macmillan Press, 1996), pp. 20–41 (with more literature), and Bernard Willms, *Thomas Hobbes. Das Reich des Leviathan* (München, Zürich: Piper, 1987), pp. 182–8.

33 The most comprehensive study is now Hidemi Suganami, *The domestic analogy and world order proposals* (Cambridge, New York: Cambridge University Press, 1989), with a fine definition p. 24. See also Koskenniemi, *Apology*, pp. 68f.; Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), pp. 58–63; Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 35–50; Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* [1977], 2nd edn (New York: Columbia University Press, 1995), pp. 51–73. Usually the analogy is first stated and later on qualified.

34 Vitoria, 'On Civil Power', in *Writings*, p. 11.

down? Hobbesian thinking has provided the frame of reference for subsequent thinkers up to contemporary political realists. Locke, Pufendorf, and Kant, among others, assumed that commonwealths were in a state of nature, comparable to the predicament of individuals before the establishment of civil society or the state.[35] There were of course crucial differences in the description of this state. It could be seen as a mere fiction, as a stage in a historical development, or as a cultural phenomenon. Either its anthropological or structural features were emphasized. In the previous section, I have interpreted the state of nature as a thought experiment that highlights its structural features. The state of nature among communities or states is identical with the condition of international anarchy.[36] According to the structural reading, its features are identical with those of the intra-individual natural condition. Sovereign states enjoy external freedom of choice. They are not subject to external coercion or a supreme public authority.[37] States, which cannot avoid interacting with each other, are the final judges of their own causes. In the words of Kant, each state 'has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this'.[38] States are their own judges, interpreters and executioners of the natural law. A clash of incompatible interests is possible. No state is secure against violence from others. The state of nature is a condition of mistrust without reciprocal security. As following the laws of nature may conflict with the right and duty of self-preservation, every state 'will, and may lawfully rely on [its] ... own strength and art, for caution against all other' states.[39] Even peaceful states must play this game if they do not want to perish: sanity in an insane environment may itself be a kind of madness.

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35 John Locke, *Two Treatises of Government*, ed. with an introduction by Peter Laslett (Cambridge: Cambridge University Press, 1994), 2.183, p. 390; Samuel Pufendorf, *The Law of Nature and Nations* [1672], trans. C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, 1934; reprint New York: Oceana Publications, 1964), 2.2.4, p. 163; Immanuel Kant, 'The Metaphysics of Morals', in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), p. 487; 6: 350.

36 The phrase 'international anarchy' was made famous by Goldsworthy Lowes Dickinson, *The European Anarchy* (London: Allen & Unwin, 1916) and *The International Anarchy* (London: Allen & Unwin, 1926).

37 My list of features follows the authors mentioned in the previous section, such as Höffe, Beitz and Kersting. In addition, I draw from Kenneth N. Waltz, *Man, the State and War. A Theoretical Analysis* (New York: Columbia University Press, 1959), chs. 6 and 8, and Karlfriedrich Herb and Bernd Ludwig, 'Naturzustand, Eigentum und Staat – Immanuel Kants Relativierung des "Ideal des Hobbes"', *Kant-Studien*, 83 (1993), pp. 283–316.

38 Kant, 'Metaphysics of Morals', p. 456; 6: 312. Cf. Herb and Ludwig, 'Kant', p. 302; Locke, Treatise, 2.90, p. 326; Pufendorf, *Law of Nature*, 2.2.12, pp. 176f.

39 Paraphrasing Hobbes, *Leviathan*, ch. 17, p. 118 on individuals.

Given the state's disposition to either defence or attack, the natural condition is one of possible, if not always actual, war. International anarchy is the permissive cause of war. Wars have immediate or efficient causes, such as the personal ambition of rulers. There are no mechanisms in the international environment that stop them.[40]

This structural understanding is counterbalanced in Hobbes's writings by an emphasis on culture and anthropology: 'In such condition, there is no place for Industry ... no Navigation ... no commodious Building no Instruments of moving, and removing such things as require much force ... no Arts; no Letters; no Society; and which is worst of all, continual fear, and danger of violent death.'[41] Other passages stress human depravity, for instance 'the natural tendency of men to exasperate each other'. These tendencies may be understood as being effective independent of environment and context. Yet there are also sections which suggest a structural reading. Hobbes points out that no matter if humans are modest, peaceful, aggressive, or arrogant, they are bound to harm each other in the state of nature, some out of self-defence, some for deeming themselves 'superior to others'.[42] The structural interpretation defines the state of nature in legal terms. Anthropological or cultural features are secondary if not irrelevant. As Kant points out, even if 'well disposed and law-abiding human beings' peopled the state of nature, it would still be 'a state *devoid of justice* [*status iustitia vacuus*], in which when rights are *in dispute* [*ius controversum*], there would be no judge competent to render a verdict having rightful force.'[43] Again, the very structure of the natural condition where private judgement and force matter is incompatible with natural justice. In other words, the state of nature contradicts the idea of external freedom of choice compatible with that of others; it prevents the exercise of this freedom. A more pragmatic and less formalistic claim is that the natural condition is self-contradictory because the unfettered right of self-preservation leads to self-destruction.

Which arguments support the domestic analogy? The main contention is the structural reading presented so far. A common approach is to compare international society with the domestic sphere, arguing that, other things being equal, the weakening of law enforcement will lead to an increase of crime. Bank robbers or murderers may be deterred in a state with an effective police

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40 Hobbes, *Leviathan*, ch. 13, pp. 88f.; *Citizen*, 1.15, p. 31; Waltz, *Man*, pp. 232–8. Waltz uses Rousseau's writings to analyse the structure of international anarchy. Kant is probably the more useful author, as anthropological elements are more clearly eliminated.

41 Hobbes, *Leviathan*, ch. 13, p. 89.

42 Hobbes, *Citizen*, 1.12, p. 29; 1.4, p. 26.

43 Kant, 'Metaphysics of Morals', p. 456, 6: 312. See Herb and Ludwig, 'Kant', pp. 299f. and below, VI, 2.

and judicial system. If they can't be deterred, they can at least be hunted down and prosecuted.[44] The bank robbers and murderers in the international arena – usually labelled 'aggressors' or 'disturbers of peace' – can get away with anything, provided their practices are backed up by sufficient force. In short, the task of politics would be to transform international law as a set of norms governing the relations among sovereign states into global domestic law, or *Weltinnenrecht*. Various arguments have been raised against the domestic analogy. First, there is the doctrine of *Realpolitik* that international affairs are a different matter, as Bismarck and others pointed out: 'Public opinion is only too ready to consider political relations and events in the light of those of civil law and private persons generally ... [This] shows a complete lack of understanding of political matters.'[45] It is simply denied that a sense of justice is or ought to be operative. In short, there is no international morality. The standard criticism points out that this eclipse of morality is unfounded, that there are thin and universal standards of minimal morality, that humans are not pawns but ends in themselves, and so on – almost the whole tradition of natural law is a permanent rejection of *Realpolitik*. There is a second and more plausible way to challenge the domestic analogy. Hobbes is one of the first to point out that domestic and international spheres are not fully analogous because states, even if they are like gladiators in an arena, can 'uphold ... the Industry of their Subjects' which mitigates the misery 'which accompanies the Liberty of particular men'.[46] The claim does not challenge the structural reading of the state of nature, it simply defines it as more tolerable. This line of reasoning was adopted and refined by myriads of thinkers following Hobbes, among them Spinoza, Pufendorf and Vattel. A recent representative is Hedley Bull, who presents several arguments.[47] First, he endorses Hobbes's contention that states provide within their borders conditions where trade, industry 'and other refinements of living' can flourish. Life in a state of international anarchy is thus not necessarily 'solitary, poore, nasty, brutish, and short' (Hobbes's famous description of the domestic state of nature). Secondly, states are not as vulnerable to violent attack as individuals. This has been pointed out by Spinoza: any commonwealth can guard itself against attack and troubles in a way an individual cannot, who is overcome by sleep, sometimes exposed to illness, and eventually 'prostrated by

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[44] Prominent examples of this sort of reasoning can be found in Waltz, *Man, the State*, pp. 231f. and in Walzer, *Wars*, pp. 58–60.

[45] Quoted in Walzer, *Wars*, p. 63.

[46] Hobbes, *Leviathan*, ch. 13, p. 90. There is a fine discussion of Hobbes's arguments in Christine Jane Carter, *Rousseau and the Problem of War* (New York, London: Garland Publishing, Inc., 1987), pp. 96–7.

[47] See Bull, *Anarchical Society*, pp. 44–9 for the following, including quotations. See also Suganami, *Analogy*, pp. 13f. and Beitz, *Political Theory*, pp. 35–50.

old age'.[48] Wars rarely lead to the physical extinction of the defeated people. Finally, in contrast to Hobbes's natural equality of individuals, great powers are certainly not in a position to be killed by the weakest or most vulnerable. States do not have relatively equal power.

These assertions can be challenged for various reasons. Natural equality among individuals is a fiction assumed by Hobbes for the sake of argument, in order to solicit in favour of moral or juridical equality (see IV, 1). Empirical claims can usually be countered with opposing empirical observations. For instance, the development and proliferation of nuclear weapons has lead to more natural equality in the sense of being equally subject to threat and destruction, according to some.[49] International anarchy in the atomic age may no longer be 'tolerable' as it might have been in previous centuries. Several indigenous peoples did get exterminated by aggression and conquest; the claim that it does not often happen may seem repugnant, callous and cynical. Debates on an empirical level are usually open-ended. If we presume that empirically, the domestic analogy does not hold, we should qualify this statement. Contemporary international relations certainly do not match the 'pure' state of nature of Hobbesian ideal theory. Empirical claims blur the distinction between ideal and non-ideal theory in the first place. If the state of nature is a thought experiment pertaining to ideal theory, we should never expect this experiment to fit any given constellation.

There are two strong arguments, one moral, one juridical, against the domestic analogy, apart from emphasizing the empirical differences. First, it has been claimed that states are not persons in a strict sense. They can be regarded as fictitious 'moral persons'. However, the claim that any government represents its population internationally, or that there is always a perfect fit between state and popular sovereignty, between the 'will' of a state representing its citizenry and the individuals themselves is certainly unwarranted. The state as an actor with will and personality is a juridical fiction; the individual as a natural person is not. For this reason, the domestic analogy is not complete. Consider the difference between stopping an assault in a park and humanitarian intervention (II, 5).[50] A bystander who could easily intervene but does not to prevent aggressive violence or harm will most certainly be morally blamed, and

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48 Benedict de Spinoza, 'Tractatus Politicus [A Treatise on Politics]', in *The Political Works of Spinoza*, ed. A. G. Wernham (Oxford: Clarendon Press, 1958), 3.2, p. 285, 3.9, p. 291–3, 3.11, p. 295. Cf. Bull, *Anarchical Society*, p. 47.

49 Gauthier, *The Logic of Leviathan*, pp. 207f. Cf. Bull, *Anarchical Society*, p. 48 and Beitz, *Political Theory*, pp. 41f.

50 See Gordon Graham, 'Morality, international relations and the domestic analogy', in Moorhead Wright (ed.), *Morality and International Relations. Concepts and Issues* (Aldershot et al.: Avebury, 1996), pp. 5–16 and Tesón, *Philosophy*, pp. 40–5.

possibly persecuted, for inactivity. There is a difference in the *moral* dimension whenever third parties are involved, as in the case of humanitarian intervention. Governments that intervene for the protection of human rights are also morally responsible for their own soldiers. In the modern language of those very human rights, governments may not use their citizens as mere pawns, and war is not a game of chess. As Kant put it, the sovereign has a duty towards the citizens, who are not pieces of vegetable, but ends in themselves and 'colegislating members of a state' entitled to give their free consent to any waging of war.[51] This in turn erodes moral certainty, and the lines of responsibility become blurred, because 'gaps open up between decisions, actions and cost.'[52] The humanitarian intervention may be considered immoral if the moral costs inflicted upon the citizenry of the intervening state by far outweighs the benefits in terms of provided humanitarian assistance. We could construct a binary opposition here between communitarian and normative individualistic positions. For the former, the interests of the community or state would trump the rights of the individual, whereas for normative individualism the community must take a back seat in case of conflict (see I, 5 for the notion of normative individualism). Be that as it may, the bottom line is clear: there is a moral difference between the actions of an individual on the one hand and those of an entity composed of several individuals, on the other.

The second formal argument against the domestic analogy builds upon the juridical difference between individuals and states. Early statements can be found in the writings of Rousseau and Kant. Rousseau claims that 'the body politic or sovereign, deriving its being only from the sanctity of the contract, can never obligate itself, even towards others, in anything that violates this original act, such as alienating some portion of itself or submitting to another sovereign.'[53] The term 'contract' refers to the social contract, the act by which a people unites together to form one (fictitious) political body, submit to common legislation, and abandon the lawless freedom of the state of nature. Rousseau argues that this act by which the political community constitutes itself is inalienable. Provided that the community decided to submit to a wider authority 'above' the state level, this original contract would presumably need be preserved. A similar reasoning can be found in Kant, who defines a state as 'a

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51 Kant, 'Metaphysics of Morals,' pp. 483f.; 6: 345f. Cf. Walzer, *Wars*, p. 64.

52 Graham, 'Morality', p. 11.

53 'Mais le corps politique ou le Souverain ne tirant son être que de la sainteté du contract ne peut jamais s'obliger, même envers autrui, à rien qui déroge à cet acte primitif, comme d'aliéner quelque portion de lui-même ou de se soumettre à un autre Souverain', Jean-Jacques Rousseau, 'On Social Contract', in Alan Ritter and Julia Conaway Bondanella (eds), *Rousseau's Political Writings* (New York: Norton, 1988), 1.7, p. 94.

union of a multitude of human beings under laws of right' (*Rechtsgesetzen*). Most states have 'a rightful constitution internally'.[54] Kant uses the concept 'rightful' (*rechtlich*). Constitutions are usually not, or only to some extent, 'lawful' (*rechtmässig*) in the sense of just, that is, corresponding to the *a priori* principle of justice, specifying the conditions where anyone's external sphere of freedom is compatible with that of all others. Most states have abandoned the mere state of nature or anarchy. Individuals can hypothetically coexist in a condition '*devoid of justice*' (*status iustitia vacuus*), whereas most real states have a different juridical quality: their implementation of justice is imperfect, but certainly not devoid of it. (I have written 'most states' because an argument can be made that some do indeed qualify for Kant's *status iustitia vacuus* in extreme cases. However, I consider this an exception to the rule.) Kant draws a consequence similar to that of Rousseau. Endorsing 'a rightful internal constitution', states have thus 'outgrown the coercive right of others to bring them under a more extended law-governed constitution in accordance with their concepts of right'.[55] States have established domestic juridical conditions that must not be violated. Put metaphorically, states have innate rights whereby they are constituted as moral persons in the international community. Rousseau and Kant qualify the domestic analogy. The differences between states and individuals on an empirical level are neglected. They resort to a rational distinction, focusing on the juridical/moral dimension.

What are the consequences for international relations and the global community? The outcome depends on how we assess the arguments developed so far. For those who believe in a perfect domestic analogy according to the structural approach, states would also be obliged to enter a civil condition, and submit their rights to everything, their judgements and wills to a common public authority. We would get a global Leviathan, or world state. The task would be to establish international equivalents for the three domestic branches of legislation, jurisdiction and execution.[56] The other extreme is simply being

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[54] Kant, 'Metaphysics of Morals', p. 456; 6: 313; Immanuel Kant, 'Toward Perpetual Peace', in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), p. 327; 8: 355.

[55] Ibid., p. 327; 8: 355f., translation slightly altered. A more extended discussion of this passage is offered in my *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), pp. 117f., with more secondary sources.

[56] Suganami cites the Edinburgh professor James Lorimer (1818–90) as an early example. See Suganami, *Analogy*, pp. 16f. as well as pp. 167, 172f., 181 and 184. Authors like Zeno, Dante, Crucé, Saint Pierre, Rousseau, Kant and the US American William Ladd (1778–1841) also come to mind. See I, 5; V, 2; VI, 2 and Cavallar, *Theory and Practice*, pp. 33 and 48f. John E. Noyes, 'Christianity and Late Nineteenth-Century British Theories of International Law', in Mark W. Janis (ed.), *The Influence of Religion on the Development of International Law* (Dordrecht, Netherlands, Boston, London:

satisfied with the present state of affairs. There is no compelling reason why states should leave the condition of anarchy. A world state, Hobbes claims, is impossible, and the domestic analogy does not hold completely. The first result may be political realism in international politics: *Si vis pacem, para bellum* (if you want peace, prepare for war). States must make the best of an unpleasant situation, above all by sending reliable intelligence agents to possible enemy territory and by being ready to fight.[57] A condition of peace is impossible, though there may and will be intermissions between actual fighting. Second, the state of nature may also be interpreted as peaceful, where cooperation and mutual trust is possible. The underlying assumption in both cases is that the international state of nature may be unpleasant, but is certainly not disastrous.

Here the argument moves to the empirical level, where it is of course exposed to criticism. An early critic is Montesquieu (1748), who perceived that an inevitable condition of mutual distrust, preventive measures and missing reciprocal security reproduced Hobbesian dilemmas on the international level:

> A new disease has spread across Europe; it has afflicted our princes and made them keep an inordinate number of troops. It redoubles in strength and necessarily becomes contagious; for, as soon as one state increases what it calls its troops, the others suddenly increase theirs, so that nothing is gained thereby but the common ruin. Each monarch keeps ready all the armies he would have if his peoples were in danger of being exterminated; and this state in which all strain against all is called peace.[58]

Martinus Nijhoff Publishers, 1991), pp. 87–96 gives a good introduction to Lorimer's theory; Mark W. Janis, 'Protestants, Progress and Peace: Enthusiasm for an International Court in Early Nineteenth-Century America', ibid., pp. 229–33 covers Ladd.

57 Hobbes, *Leviathan*, ch. 20, p. 145; *Citizen*, 13.7, pp. 144–6. See Beitz, *Theory*, Part One; Doyle, *War and Peace*, also Part One; Stefano Guzzini, *Realism in International Relations and International Political Economy* (London, New York: Routledge, 1998), and Tesón, *Philosophy*, pp. 47–54 on political realism.

58 'Une maladie nouvelle s'est répandue en Europe; elle a saisi nos princes, et leur fait entretenir un nombre désordonné de troupes. Elle a ses redoublements, et elle devient nécessairement contagieuse: car, sitôt qu'un État augmente ce qu'il appelle ses troupes, les autres soudain augmentent les leurs, de facon qu'on ne gagne rien par là que la ruine commune. Chaque monarque tient sur pied toutes les armées qu'il pourroit avoir si ses peuples étoient en danger d'être exterminés; et on nomme paix cet état d'effort de tous contre tous', Charles de Secondat, baron de Montesquieu, *De l'Esprit des Loix* [1748], 2 vols (Paris: Société les belles lettres, 1950), vol. 2, pp. 163f., translated in *The Spirit of the Laws*, transl. and ed. by Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (Cambridge et al.: Cambridge University Press, 1989), 13.17, p. 224. Merle L. Perkins, 'Montesquieu on national power and international rivalry,' in *Studies on Voltaire and the eighteenth century*, 238 (1985), pp. 1–95 and Steven Rosow, 'Commerce, power and justice: Montesquieu on international politics', *The Review of Politics*, 46 (1984), pp. 346–66 offer rare investigations into the international dimension of Montesquieu's political thought.

Structurally, the arms race resembles what Hobbes wrote about the natural condition among individuals. Each player's rational attempt at self-preservation leads to a collective (danger of) self-destruction, which is irrational and self-contradictory. Montesquieu does not specify the main cause of the arms race. Contemporary political theory offers three models. According to the logic of repeated prisoners' dilemmas, the arms race is caused by a non-cooperative equilibrium. For the spiral model, arms races are products of mutual fear. Unilateral increase becomes 'contagious' and creates a self-reinforcing cycle of military build-ups. According to the deterrence model, arms races are rooted in political differences and competing interests. Aggressive states want to modify the status quo and are held in check by status quo states resorting to arms racing.[59] Montesquieu seems to lean towards the spiral model; but we should not interpret too much into a short paragraph. This much is clear: international anarchy, Montesquieu argues against Hobbes, Spinoza, Pufendorf and others, is pretty bad.

So far the discussion has operated with a binary opposition: either world government or anarchy. Of course we must beware false dichotomies. The literature offers a wide variety of intermediate solutions. Some suggest that the states system and its institutions should be kept, while curbing external sovereignty. Others propose that only two branches of domestic institutions, legislation and jurisdiction, but not the executive branch, should be reproduced. According to the democratic peace proposition, liberal democratic states submit themselves voluntarily to the rule of law, without external sanctions or threats. In yet another model, states are checked by cosmopolitan civil society. States are subject to public laws which prescribe external actions, not dispositions. Cosmopolitan civil society takes over the control of international relations and guarantees horizontal law enforcement, replacing the missing coercive authority among states (see VI, 2 and 4 and 'Conclusion').[60]

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[59] See Andrew Kydd, 'Arms Races and Arms Control. Modeling the Hawk Perspective', *American Journal of Political Science*, 44 (2000), pp. 222–38. The basic texts are Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984) and Robert Jervis, *Perception and Misperception in International Politics* (Princeton: Princeton University Press, 1976). See also Rudolf Schüssler, *Kooperation unter Egoisten: Vier Dilemmata*, 2. Aufl. (München: Oldenbourg, 1997).

[60] Daniele Archibugi, 'Models of international organization in perpetual peace projects', *Review of International Studies*, 18 (1992), p. 312; James Bohman, 'Die Öffentlichkeit des Weltbürgers: Über Kants "negatives Surrogat"', in Matthias Lutz-Bachmann and James Bohman (eds), *Frieden durch Recht. Kants Friedensidee und das Problem einer neuen Weltordnung* (Frankfurt am Main: Suhrkamp, 1996), pp. 88–93; Richard A. Falk, 'International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order', *Temple Law Quarterly*, 32 (1959), pp. 295–320. Julian Nida-Rümelin, 'Zur Philosophie einer globalen Zivilgesellschaft', in Christine Chwaszcza and Wolfgang Kersting (eds), *Politische Philosophie der internationalen Beziehungen*

As pointed out, Hobbes has provided the framework of subsequent debates until the present. His conflicting account of a state of nature invited divergent interpretations. His mechanistic and reductionistic materialism, and anthropological pessimism provoked fierce criticism; but he could hardly be ignored. Pufendorf is an interesting example of an author writing in the shadow of Leviathan: partly following Hobbes, but also trying to free himself from his influence.

3. Pufendorf I: The society of states

Grotius's idea of a natural *societas gentium* was debated by his commentators, and the history of this debate can be interpreted as a gradual shift towards the novel concept of a society of states where *recta ratio* is more or less identified with the will of the sovereign prince. As early as 1653, the jurist Johannes von Felden denied Grotius's idea of a natural society as a source of the *ius gentium*. Grotius was in turn defended by his compatriot, Theodor Graswinckel.[61] Samuel Pufendorf (1632–94) is usually considered a crucial figure in this debate, one who favoured a development subsumed under concepts such as state sovereignty, princely absolutism and legal positivism. Already during his lifetime, Pufendorf was criticized as a second-rate thinker who simply plagiarized Grotius and Hobbes. He was well-known and widely read in the seventeenth and eighteenth centuries, but later forgotten. In 1660, he accepted an offer of Karl Ludwig, Elector of the Palatinate, to become professor of natural and international law at Heidelberg University. Pufendorf later erroneously claimed that it was the first chair of its kind; many historians have shared the mistaken assessment. For some time he was only remembered for his famous description of the Holy Roman Empire as an irregular body similar to a monster (*irregulare aliquod corpus, & monstro simile*). In recent years, his stocks have risen again. He has been praised as the 'grandfather' of modern economics who laid the foundations of a theory of commercial society, as the greatest of all natural lawyers, and as the champion of human dignity and human rights.[62] Like Suárez, Pufendorf was a prolific writer. His major work,

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(Frankfurt am Main: Suhrkamp, 1998), pp. 223–43 offers a reliable analysis of the concept of cosmopolitan civil society. Suganami, *Analogy*, chs. 1–3 offers a succinct outline of various proposals.

[61] Ernst Reibstein, 'Deutsche Grotius-Kommentatoren bis zu Christian Wolff', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 15 (1953), pp. 82–5 reports these debates.

[62] Detlef Döring, *Pufendorf-Studien: Beiträge zur Biographie Samuel von Pufendorfs und zu seiner Entwicklung als Historiker und theologischer Schriftsteller* (Berlin: Duncker & Humblot, 1992), pp. 205–10 prints the text of Leibniz's criticism;

De jure Naturae et Gentium Libri Octo (1672), amounts to eight books and almost 1,400 pages. The few who manage the text claim that Pufendorf should be seen as a founding father of modern liberalism who perceived the dilemma of politics: 'Although supreme sovereignty is established to repel the evils which threaten men from their fellows, yet that sovereignty had to be conferred upon men who are themselves not immune to the vices by which men are incited to do each other harm.' Especially relevant for this study is Pufendorf's endorsement of a new model of international society, the global community of independent states.[63] Ultimately, his theory is state-centered, moving away from the Grotian idea of a moral or legal community of humankind focusing primarily on individuals. Pufendorf sees states as moral entities, whose interests and reasons of state predominate.

Pufendorf's theory is a synthesis of divergent influences. On the one hand, he follows Hobbes. At the same time, his writings are embedded in the natural law tradition, its teleology and its emphasis on human sociability.[64] His central

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Leonard Krieger, *The Politics of Discretion. Pufendorf and the Acceptance of Natural Law* (Chicago and London: University of Chicago Press, 1965), p. 19; Samuel Pufendorf, *De statu imperii Germanici* [1667], German transl. Horst Denzer, *Die Verfassung des deutschen Reiches* (Stuttgart: Reclam, 1976), pp. 106; Arild Saether, 'Samuel Pufendorf. The Grandfather of Modern Economics', in Fiammetta Palladini and Gerald Hartung (eds), *Samuel Pufendorf und die europäische Frühaufklärung* (Berlin: Akademie Verlag, 1996), pp. 236–52; Istvan Hont, 'The language of sociability and commerce: Samuel Pufendorf and the theoretical foundations of the "Four-Stages Theory"', in Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), p. 276; Karl-Heinz Ilting, 'Naturrecht', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1972ff.), vol. 4, p. 287 and 289; Christoph Müller, 'Der heutige Kampf um die Universalität von Menschenrechten: Rückfragen bei Samuel Pufendorf', in Bodo Geyer and Helmut Goerlich (eds), *Samuel Pufendorf und seine Wirkungen bis auf die heutige Zeit* (Baden-Baden: Nomos Verlagsgesellschaft, 1996), pp. 117–64, and Werner Maihofer, 'Schlusswort: Was uns Pufendorf noch heute zu sagen hat', ibid., pp. 223–82.

63 'Cuius rei causa est, quia summum imperium est institutum ad repellenda mala, quae mortalibus abs se inuicem impendent. Atqui illud ipsum imperium fuit conferendum in homines; qui utique ab iis vitiis, queis homines ad se mutuo infestandos proritantur, non sunt immunes', Samuel Pufendorf, *The Law of Nature and Nations*, 7.5.22, p. 1052; cf. Craig L. Carr, 'Editor's Introduction', in *The Political Writings of Samuel Pufendorf*, ed. Craig L. Carr, transl. Michael J. Seidler (New York, Oxford: Oxford University Press, 1994), pp. 7 and 17f.; Walter Schiffer, *The Legal Community of Mankind* (New York: Columbia University Press, 1954), p. 52.

64 Fiammetta Palladini, *Samuel Pufendorf discepolo di Hobbes: Per una reinterpretazione del giusnaturalismo moderno* (Bologna: Il Mulino, 1990) emphasizes the Hobbesian elements, whereas Thomas Behme, *Samuel von Pufendorf: Naturrecht und Staat. Eine Analyse und Interpretation seiner Theorie, ihrer Grundlagen und*

synthesis is the claim that sociability, though not natural in the strict sense, lies in the interest of individuals. Even selfish humans need the company of others, their sociability becomes naturalized, or a 'social construct' (see V, 1). Like writers before him, Pufendorf faces the challenge of generic relativism and its special version, international relativism. He realizes that Grotius's reference to customs and ancient writers is deficient, because counter-examples can readily be found. In addition, he claims that the insistence on the consent of civilized nations might amount to cultural imperialism. For who is to judge which nation should be categorized as civilized and which not? As in Grotius and others, taking scepticism seriously is a matter of fairness, and there is no reason to dismiss the sceptical questioning of civilized standards out of hand.[65] But for Pufendorf, scepticism does not lead to relativism. Like Hobbes, he finds safe foundations in a thin concept of justice as impartiality. Apart from the Hobbesian scale of impartiality (see IV, 1), Pufendorf quotes the Bible's golden rule and non-Europeans such as Confucius and the Inca Manco Capac to demonstrate the principle's universality.[66] For Pufendorf, previous natural law theory has been unconvincing. The new 'science of morals' must be distinct from moral theology, proceed *a priori* and deductive, and follow the mathematical method (*mos geometricus*) as employed by Descartes and Hobbes: in the first step, all elements are resolved into its constituent parts. Then they are reconstructed, offering a genetic explanation of the conditions of their origin.[67] Ultimately, however, Pufendorf's science of morals is based on

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Probleme (Göttingen: Vandenhoeck & Ruprecht, 1995), and 'Gegensätzliche Einflüsse in Pufendorfs Naturrecht,' in Palladini and Hartung, *Pufendorf*, pp. 74–82 stresses his ties with more traditional approaches. See also Wolfgang Hunger, *Samuel von Pufendorf: aus dem Leben und Werk eines deutschen Frühaufklärers* (Flöha: Druck & Design, 1991) and Gerald Hartung, *Die Naturrechtsdebatte. Geschichte der Obligatio vom 17. bis 20. Jahrhundert* (München: Verlag Karl Alber, 1998), pp. 30–82. A reliable generic introduction is Notker Hammerstein, 'Samuel Pufendorf', in Michael Stolleis (ed.), *Staatsdenker im 17. und 18. Jahrhundert. Reichspublizistik, Politik, Naturrecht*, 2., erweiterte Aufl. (Frankfurt am Main: A. Metzner, 1987), pp. 172–96.

65 Pufendorf, *Law of Nature*, 2.3.10, pp. 194f.; 8.9.2, p. 1330; Pufendorf's first letter to Boineburg, 13 January 1663, in Fiammetta Palladini, 'Le due letteri di Pufendorf al Barone do Boineburg', *Nouvelles de la République des Lettres*, 1 (1984), pp. 134f.; cf. Hont, 'Language', pp. 258f. and Timothy J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000), pp. 63–5.

66 Pufendorf, *Law of Nature*, 2.3.13, pp. 204f.

67 See Behme, *Naturrecht*, pp. 30–8, and 'Einflüsse', p. 75; Krieger, *Politics*, pp. 51–68; Röd, *Geometrischer Geist*, pp. 81–99, and Hans Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft. Die Ursprünge der bürgerlichen Sozialtheorie als Geschichtsphilosophie und Sozialwissenschaft bei Samuel Pufendorf, John Locke und Adam Smith*, 2. Aufl. (Göttingen: Vandenhoeck & Ruprecht, 1981), pp. 44–8. The most comprehensive recent study is Simone Goyard-Fabre, *Pufendorf et le Droit Naturel* (Paris: Presses universitaires de France, 1994). Jan Schröder (ed.),

metaphysical claims, abandoning the mathematical or geometrical method. He turns to divine sanctions to provide for the binding force of law. Pufendorf knew that this was problematical. If the threat of a sanction was removed, then so was the motive for obedience. Still, Pufendorf insists, against Grotius, that it is necessary to presuppose the existence of God and divine providence, because otherwise 'the dictates of reason could in no possible way have the force of law, since law necessarily supposes a superior.'[68] Contemporary authors have criticized Pufendorf's moral voluntarism, his theory of obligation and appeal to sanctions as problematic. As usual, this criticism can be dismissed as anachronistic, being based on post-Kantian ways of thinking, which distinguishes between the ground of obligation, motivation and our knowledge of natural law.[69] However, this criticism can in turn be challenged.

Entwicklung der Methodenlehre in Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert. Beiträge zu einem interdisziplinären Symposion in Tübingen, 18.–20. April 1996 (Stuttgart: Steiner, 1998) covers methodology and hermeneutics in German natural law thinking and jurisprudence, starting in the sixteenth century and including Leibniz, Pufendorf, Daries and Wolff. A comparable volume is Clausdieter Schott (ed.), special volume 'Juristische Methodenlehre zwischen Humanismus und Naturrecht', *Zeitschrift für Neuere Rechtsgeschichte*, 21 (1999), Heft 1.

68 Pufendorf, *Law of Nature*, 2.3.19, p. 215; 1.6.4, pp. 89f. I can only dip my toe here into the much larger issue of Pufendorf's theory of natural law. Fortunately, most studies on Pufendorf tackle this issue. For reliable analyses, see the studies by Behme, *Pufendorf*; Hartung, *Naturrechtsdebatte*; Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991), ch. 2; Simone Goyard-Fabre, *Pufendorf et le droit naturel* (Paris: Presses universitaires de France, 1994); Kari Saastamoinen, *The Morality of the Fallen Man: Samuel Pufendorf on Natural Law* (Helsinki: Suomen Historiallinen Seura, 1995); Hans Welzel, *Die Naturrechtslehre Samuel Pufendorfs: ein Beitrag zur Ideengeschichte des 17. und 18. Jahrhunderts* (Berlin, New York: de Gruyter, 1986), and the four essays collected in Knud Haakonssen (ed.), *Grotius, Pufendorf and Modern Natural Law* (Dartmouth, Aldershot et al.: Ashgate, 1998), pp. 133–231. The 'classical' studies are Krieger, *Politics* and Horst Denzer, *Moralphilosophie und Naturrecht bei Samuel Pufendorf* (München: Beck, 1972), and a recent one is Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (Leiden, New York, Köln: Brill, 1998), chs. 7 and 8. Succinct and excellent are, as usual, Knud Haakonssen, *Natural law and moral philosophy. From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge Univerity Press, 1996), pp. 37–43 and Jerome B. Schneewind, *The invention of autonomy. A history of modern moral philosophy* (Cambridge: Cambridge University Press, 1998), pp. 118–40.

69 Knud Haakonssen, 'Hugo Grotius and the history of political thought', *Political Theory*, 13 (1985), p. 248. Schneewind, *Invention*, p. 137 calls the appeal to sanctions 'problematic'. See also Jerome B. Schneewind, 'Pufendorf's Place in the History of Ethics', *Synthese*, 72 (1987), pp. 123–55 and 'Kant and natural law ethics', *Ethics*, 104 (1993), pp. 64–7. Pufendorf does not distinguish between 'the motivational force arising from a command and the justification for giving the command.' (ibid., p. 66). A similar objection independently of Schneewind has been raised by Mary J. Gregor, 'Kant on "Natural Rights"' in Beiner, Ronald, and Booth, William James (eds), *Kant and*

First, we do not need Kantian tools to show that Pufendorf is internally inconsistent. He attempts to distinguish between obligation and mere coercion, but commentators have rarely been convinced by the undertaking. Secondly, we have historical evidence that the inconsistency of Pufendorf's moral voluntarism was perceived by contemporaries such as Leibniz.[70] A more convincing defence of Pufendorf would emphasize that his voluntarism and the framework of natural (not revealed) religion and theology is only part of the picture. There are passages that support an interpretation which is more in touch with contemporary standards in moral philosophy. The passages underline that rational insight is also important, that the anti-naturalistic, non-utilitarian, non-theological foundation of natural law is the status of humans as moral entities (*entia moralia*) endowed with universal human rights such as equality.[71] The overall picture is complex, as usual. Pufendorf's theory of natural law can be interpreted as including a core doctrine of natural justice consistent with my own (see I, 4). Recall that my own presentation of justice outlined its key features such as universalizability, impartiality and equality, and simply assumed that they were binding because any rational being could perceive its validity. In other words, rational insight is the basis of obligation. Pufendorf differs from this account. Though he distinguishes between obligation and mere coercion, natural law remains imperfect as long as it is not backed up by the will of a superior, by a contract or civil laws. Only then rights which are denied constitute an injury in the strict sense; outside the framework of civil law the denial is a mere 'sin against the law of nature'.[72] In other, Hobbesian words: only the state as the perfect community (*societas perfecta*) can turn natural law into *lex perfecta.*

I have started this section with Pufendorf's natural law theory, because it is the background of his thinking on *ius gentium* and the global community. This is particularly evident in the distinction between perfect and imperfect duties (see next section) and the theory of moral entities, modes, or qualities. At the core of this theory is the distinction between physical and moral entities. The former ones are controlled by the instinct of nature, and neither perception nor reflection play a significant role. Humans are both physical and moral

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Political Philosophy. The Contemporary Legacy (New Haven, London: Yale University Press, 1993), pp. 58–61.

70 See again Gregor, 'Kant', p. 59 and Jerome B. Schneewind, 'Barbeyrac and Leibniz on Pufendorf', in Palladini and Hartung, *Pufendorf*, pp. 181–9, especially p. 184.

71 Pufendorf, *Law of Nature*, 8.6.2, p. 1293; 3.2.2, p. 333. A favourable interpretation is Ilting, 'Naturrecht', pp. 290f.

72 Pufendorf, *Law of Nature*, 1.6.9 and 10, pp. 95f.; *Elements*, 1.17.6, p. 179; cf. Ernst Reibstein, 'Pufendorfs Völkerrechtslehre', *Österreichische Zeitschrift für öffentliches Recht*, 7 (1956), pp. 46f.

beings, because they are also capable of intelligent understanding, judgement, and wilful actions. Moral entities have several functions. They enable humans to judge and temper morals and actions, especially 'the freedom of the voluntary acts of man, and thereby to secure a certain orderliness and decorum in civilized life'.[73] Humans have deliberately imposed or superadded moral entities, which are modes rather than substances, for the sake of convenience, to limit excesses of external freedom, and to further social life in well-ordered communities. One type of moral entities are called moral persons. Pufendorf offers elaborate distinctions between simple and composite, inferior and principal moral persons. The most important composite moral person (*persona moralis composita*) is the state or society, constituted by the union of physical individuals who 'subordinate their will to the will of one person, or of a council'.[74] This moral person is then considered as if it had one body, one will, and acted coherently. In this sense, the state could also be called a moral 'fiction'. Accordingly, Pufendorf's theory of moral entities does not necessarily lead to a predominance of the state. As Wolff would later point out, the state as a fictitious entity could in principle be surpassed by that of a global community or *civitas maxima* – in moral terms, the latter would not be less 'real' or 'substantial' (see IV, 5). Pufendorf himself, however, aims at eliminating this theoretical possibility. The following passages will focus on his arguments.

Pufendorf's characterization of the sovereign state as a fictitious moral person endowed with will, a body, and the capacity to act is highly Hobbesian. He also follows Hobbes closely in his description of interstate relations. Hobbesian and modern is his clear-cut distinction between internal and external political spheres. He accepts that most citizens are 'barely restrained by fear of punishment', rather than showing a genuine interest in the public good. Humans are potentially evil, their malice has to be restrained by common effort, and this is efficiently done by the establishment of states. Against Grotius, Pufendorf holds that 'neither the fear of God nor the sting of conscience are found to have sufficient force to restrain the evil that is in men.'[75] The voice of

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73 Pufendorf, *Law of Nature*, 1.1.3, p. 5. Excellent introductions to Pufendorf's theory of moral entities are Behme, *Pufendorf*, pp. 50–6, and Theo Kobusch, 'Pufendorfs Lehre vom moralischen Sein', in Palladini and Hartung, *Pufendorf*, pp. 63–73. See also Schneewind, *Invention*, pp. 120f and Haakonssen, *Natural law*, p. 38. My interpretation follows these authors and the primary text, Pufendorf, *Law of Nature*, 1.1.2–1.1.14, pp. 4–15.

74 Ibid., 1.1.13, p. 13. See also 7.2.8, p. 975 and 7.2.13, pp. 983f. and *On the Duty of Man and Citizen According to Natural Law* [1673], ed. James Tully, transl. Michael Silverthorne (Cambridge [UK], New York: Cambridge University Press, 1991), 2.6.10, p. 137. Jouannet, *Vattel*, pp. 283–308 offers a comprehensive analysis, which includes Pufendorf's pupils Barbeyrac and Burlamaqui.

75 Pufendorf, *Law of Nature*, 1.1.8, p. 9; *Duty*, 2.5.5 – 2.5.9, pp. 133f.

reason is often too weak, divine punishment often unintelligible, and pangs of remorse usually follow rather than precede evil deeds. The bottom line is that at least some individuals must be coerced by state institutions to prevent the worst.

If Pufendorf partly follows Hobbes's political anthropology, we should not push this point too far. After all, Pufendorf uses the thesis of human wickedness for strategic purposes, in order to provide a partial defence of the modern state. Though he agrees that the relations among states amount to a state of nature, he criticizes Hobbes for maintaining that in such condition the natural laws remain silent. Against Hobbes, Pufendorf emphatically stresses the fundamental imperative of natural law: 'Every man, inasmuch as he can [*quantum in se*], should cultivate and maintain toward others a peaceable sociality that is consistent with the native character and end of the human race.'[76] However, Pufendorf's criticism is only partially justified. Hobbes's point was that individuals are not obliged to follow the demands of natural law if there was no assurance of reciprocal compliance. For Hobbes, the duty to cultivate a sociable attitude is conditional, contingent upon the circumstances. Pufendorf admits of this qualification with the restriction 'inasmuch as he can'. It can be argued that he endorses a 'tit-for-tat' strategy within a larger moral context. Being sociable is a moral duty, but only if others do the same. Sociality may require to meet an attacker with a dose of his own medicine. Pursuing this strategy and eliminating the threat may arguably further sociality in the long run.[77]

Pufendorf also follows Hobbes in making use of the concept of a state of nature. I have argued above (IV, 1 and 2) that the Hobbesian account should be read as a thought experiment. Pufendorf's explication is confusing, mixing descriptive and analytical elements. In fact, we get several 'states' of nature. First, it is the result of a thought experiment. Pufendorf claims that it would be naïve to assume that it ever existed.[78] Secondly, the state of nature is identical

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[76] Pufendorf, *Law of Nature*, 7.1.8, p. 963; 2.3.15, p. 208, translation modified, following the recent translation in *The Political Writings of Samuel Pufendorf*, ed. Craig L. Carr, transl. Michael J. Seidler (New York, Oxford: Oxford University Press, 1994), p. 152. Craig L. Carr and Michael J. Seidler, 'Pufendorf, Sociality and the modern State', *History of Political Thought*, 17 (1996), pp. 354–78 emphasize Pufendorf's moral arguments in favour of states: they are a moral necessity, and a key feature of human evolution.

[77] This interpretation has been suggested to me by Michael J. Seidler.

[78] Pufendorf, *Law of Nature*, 1.1.6, p. 7; 2.2.4, p. 163; *Duty*, 2.1.4, pp. 115f. Succinct analyses of Pufendorf's various states of nature are Behme, *Pufendorf*, pp. 57–73 and 112–14, Medick, *Naturzustand*, pp. 49–63. More secondary literature is mentioned in Dieter Wyduckel, 'Die Vertragslehre Pufendorfs und ihre rechts- und staatstheoretischen Grundlagen', in Palladini and Hartung, *Pufendorf*, p. 155. The primary texts are Pufendorf, *Law of Nature*, book 2, chapter 2, pp. 154–78 and *Samuel Pufendorf's 'On the Natural State of Men': The 1678 Latin Edition and English*

with the state of peace and the rule of right reason (*recta ratio*) and sociability.[79] Here, Pufendorf is close to the pre-Hobbesian tradition of natural law and Richard Cumberland: the natural condition is peaceful because most humans perceive their obligations and follow them accordingly. Pufendorf admits that this state of affairs is shaky and often interrupted by the violation of rights. Its deficiencies are overcome by the establishment of civil societies. The world then enters a modified (*limitatus, temperatus*) condition. Some individuals have organized themselves into societies with a common authority, but the relations among these societies remain in a natural condition.

So far, Pufendorf has pretty much followed the Hobbesian account, with two major differences: the emphasis on sociability and the rosier description of the intra-individual state of nature. Hobbes's central claim was to point out that the natural condition among states is more tolerable than that among individuals, thus ultimately rejecting the domestic analogy. Again, Pufendorf follows Hobbes, but his texts are more ambivalent. On the one hand, he agrees that international anarchy lacks the inconveniences of a pre-societal state of nature. However, Pufendorf admits that this predicament is hardly a source of complacency. The safety of commonwealths which enjoy natural liberty hangs by a thread, natural peace is 'but a weak and untrustworthy thing' and a 'poor custodian of man's safety', even among Christian nations. Unlimited liberty without binding law, Pufendorf admits, is 'disadvantageous'.[80] However, as in Hobbes, Pufendorf thinks in binary oppositions. The choice is either between the status quo or a world government. Although the latter would overcome the state of insecurity, the disadvantages prevail in Pufendorf's assessment. His two arguments follow the European tradition: first, the world state is not feasible and impracticable; secondly, there is no real necessity to institute one.[81]

While also rejecting a world state, Grotius put his emphasis on the notion of a moral and juridical union among humans. In Pufendorf, the emphasis is clearly on a defence of separate societies and states, sometimes in a very 'communitarian' fashion, for instance when he points out that humans have a right to create separate societies because they have not all 'grown out of the earth together like fungi, without any relationship to one another'. They have an obligation to comply with the universal standards of natural law and practice 'general friendship', but may associate and form closer ties with those with

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Translation, transl., ann., and intro. Michael Seidler (Lewiston, NY: Edwin Mellen, 1990).

79 Pufendorf, *Law of Nature*, 2.2.9, pp. 172f.

80 Ibid., 2.2.4, p. 163; 2.2.11 and 12, pp. 176f.; 2.1.2, p. 145ff.

81 Samuel Pufendorf, *Elements of Universal Jurisprudence* [1660], transl. William Abbott Oldfather, vol. 15 of The Classics of International Law (reprint New York: Oceana Publications, 1964), 2.5.1, p. 274. See also Schiffer, *Legal Community*, pp. 62f.

whom they share a certain territory or 'special inclinations'.[82] The formation of societies thus becomes dependent upon certain contingent factors such as geographical features or character dispositions. At the same time, the ties that bind the global community become weaker and of lesser significance in Pufendorf's account. It is important to stress that he does not simply dismiss 'cosmopolitan' in favour of 'communitarian' elements. The cosmopolitan element, reminiscent of Vitoria, Gentili, Suárez and others, is still there. One passage refers to 'the memory of a common ancestry', emphasizing the biological rather than moral community of humankind. Occasionally Pufendorf sees 'common nature' as the source of 'general friendship'. Foreigners are not enemies, but friends, though unreliable ones, and we have reasons to be distrustful in the absence of common coercive legislation. Still, there is a common moral bond, or 'a kind of kinship' among all humans based on the precepts of natural law, specifying, for instance, that we should not harm but help each other.[83] Here it is crucial that Pufendorf makes a clear distinction between perfect and imperfect rights (see next section). A perfect right (*ius perfectum*) is precise and enforceable, usually based on contract, promises, or agreements, whereas an imperfect right (*ius imperfectum*) allows some latitude, cannot be enforced, and goes beyond mere rules of coexistence, aiming at 'improved existence'.[84] The state provides the impeccable framework of enforceable, perfect rights based on agreements or contracts. Against the background of perfect duties, the obligation to promote 'the cultivation of a friendly society' turns into a pale precept, and Pufendorf's repeated reminder that the ties among humans go beyond mere 'friendship', though certainly meant seriously, seems unconvincing.[85] Pufendorf devotes his philosophical energies to a natural law defence of the modern state and civil society. This seems to be his main objective. He accumulates a whole array of arguments, pointing at the introduction of private ownership, the necessity of overcoming the state of

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82 Pufendorf, *Elements*, 2.3.5, p. 236. Pufendorf's concept of a society of states has been widely neglected by interpreters. There is an older, but excellent analysis in Schiffer, *Legal Community*, pp. 49–63. Andrew Linklater, *Men and Citizens in the Theory of International Relations* (New York: St. Martin's Press, 1982), pp. 62–79 is extensive, but tends to dismiss Pufendorf from a contemporary cosmopolitan perspective. Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 60–3 and 65f. basically shares Schiffer's assessment.

83 Pufendorf, *Law of Nature*, 1.1.7, p. 9; Pufendorf, *Elements*, 2.3.5, p. 236; *Duty*, 2.1.5, p. 116 and 2.1.11, p. 119. Reibstein, 'Pufendorfs Völkerrechtslehre', pp. 54–8 and 63 emphasizes Pufendorf's closeness with the universalism of the tradition and his indebtness to Suárez in particular.

84 Pufendorf, *Duty*, 1.9, pp. 68–76 is a very succinct introduction.

85 Pufendorf, *Law of Nature*, 2.3.16, p. 212; 2.2.7, p. 169, with reference to the Bible.

nature, of regulating laws which foster reciprocal laws of benevolence, the ambiguity of the human character and its propensity to evil, and the growth of world population.[86] Last but not least, Pufendorf becomes a 'victim' of his moral voluntarism. Natural law turns into perfect law in a civil condition backed up by the will of a superior, the sovereign.

The corrosion of the global community endorsed by the early international lawyers becomes manifest in Pufendorf's treatment of the law of nations. The first professor of *ius gentium* in the Holy Roman Empire starts with the blunt statement that this branch of the human sciences has simply no object, as 'there is no law of nations' distinct from natural or civil law. In other words, Pufendorf again follows Hobbes, asserting that *ius gentium* and *ius naturae* coincide.[87] As previous chapters have shown, early natural lawyers wavered in their assessment of the status of *ius gentium* (see II, 4; III, 3 and 5). Pufendorf follows Hobbes's radical solution. States are moral persons, enjoy natural freedom and equality, must not be injured, and can enter into mutual agreements that go beyond mere perfect duties. The right of warfare is customary, not part of the natural law, moderation in warfare is a matter of morality or 'the law of humanity' and thus excluded from the sphere of natural law proper. This means that the 'licence' (*licentia*) of warring states goes beyond that of individuals in a state of nature. Though this move in fact sanctions the predominance of state interests, Pufendorf is quick to add that at least some of the 'more civilized nations' have consented to 'temper the harshness of war by

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86 Key passages are Pufendorf, *Law of Nature*, 4.4.12, pp. 551f.; 3.3.1, p. 524; 7.1.7, pp. 959f.; *Duty*, 2.5.6, p. 133. See also the accounts in Carr and Seidler, 'Pufendorf', pp. 372–6 and Linklater, *Men and Citizens*, pp. 64–77 with more references.

87 Pufendorf, *Elements*, 1.13.24, p. 165. There are not many accounts of Pufendorf's theory of *ius gentium*. See Jean Avril, 'Pufendorf', in Jean Barthélemy et al., *Les Fondateurs du Droit International: F. de Vitoria, A. Gentilis, F. Suárez, Grotius, Zouch, Pufendorf, Bynkershoek, Wolf, Wattel, de Martens: Leurs Ouvres, leurs Doctrines* [1904] (reprint Vaduz: Topos, 1988), pp. 331–83. The best accounts are Reibstein, 'Pufendorfs Völkerrechtslehre', pp. 43–72 and Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris: Editions A. Pedone, 1998), pp. 30–57. Hermann Klenner, 'Bileams Pferd auf die Kanzeln! Zur Naturrechts- und Völkerrechtslehre des Samuel Pufendorf,' in Geyer and Goerlich, *Pufendorf*, pp. 195–208 emphasizes – sometimes anachronistically – Pufendorf's modernity. There are some short references in Krieger, *Politics*, pp. 164f., who deplores its superficiality; Linklater, *Men and Citizens*, p. 74, who calls it a mere 'law of coordination'; Westerman, *Disintegration*, pp. 221–4, and Beitz, *Political Theory*, pp. 65f., who refers to the 'morality of states'. See also Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos Verlagsgesellschaft, 1984), pp. 410–14 and Behme, *Pufendorf*, p. 167. Sharon Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), pp. 21–5 compares Pufendorf with Grotius in terms of the right of conquest.

some humanity and a certain show of magnanimity'.[88] This invites historical contextualization: Pufendorf is sarcastic about the 'sport' of sovereign kings and does not simply accept post-Westphalian warfare as conducted during his age, often in a gentlemanly and noble fashion.[89] He wants states to limit themselves and not go to war for frivolous reasons. He urges cooperation among them and leaves room for a system of states (see below). However, there is no mechanism for anything more. Pufendorf seems to be delighted about current European trends towards more moderation in warfare. His theory of *ius gentium* tends to become deeply positivistic, conservative and pragmatic, sanctioning the endorsement of reasons of state in the name of public welfare: 'For since a king is bound to no one more closely than to his citizens, no promise of his to a foreigner can be valid if it is clearly to the disadvantage of the latter.'[90] Historically, Pufendorf's account of the law of nature meets two tasks: it legitimizes absolutism with his emphasis on state sovereignty, while at the same time acknowledging that international anarchy can only be mitigated but not overcome. He recommends a policy based on reason of state. However, reasons of state should not be misunderstood in a negative sense as coinciding with Machiavellism. Public welfare is commanded by the natural law, and reasons of state serve this welfare.

If Pufendorf invites historical contextualization, the available biographical information does not fit into the picture. It is usually taken for granted that personal experiences shape a philosopher's thinking. Hardly anyone can resist the temptation to relate Hobbes's endorsement of a strong government (to put it mildly) to his experience during the English Civil War. Causal relations between biography and written thoughts or political convictions are notoriously difficult to assess. Pufendorf might be considered a counter-example to Hobbes in this respect. Born during the carnage of the Thirty Years' War in Saxony, the twenty-six-year-old Pufendorf was exposed to life-threatening experiences related to inter-state anarchy early on in his academic career. In 1658, he was employed by the Swedish diplomat Peter Julius Coyet in Copenhagen, the capital of Denmark. Coyet and his colleague Sten Bielke, representing King Charles X Gustav of Sweden, were negotiating the details of a peace treaty

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88 Pufendorf, *Law of Nature*, 8.6.2, pp. 1292f.; 8.6.7, p. 1298; *Elements*, 1.13.25, p. 166.

89 See Georg Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), p. 34 and pp. 45f. for more.

90 Pufendorf, *Law of Nature*, 8.9.5, p. 1334. See the commentaries in Alfred Dufour, 'Pufendorfs föderalistisches Denken und die Staatsräsonlehre', in Palladini and Hartung, *Pufendorf*, pp. 115–22; Reibstein, 'Pufendorfs Völkerrechtslehre,' pp. 66, 68f. and 71, and Behme, *Pufendorf*, pp. 165–72 for more extensive analyses. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 2 vols (München: Beck, 1988), vol. 1, pp. 197–212 investigates the *Reichspublizistik* on the topic.

when Charles X attacked Copenhagen again, after only five months of peace. As Coyet managed to escape in time, popular anger was directed against members of his household, including Pufendorf. An angry mob of more than three hundred was ready to lynch them, when the Danish king intervened and ordered their imprisonment. During eight months of confinement, Pufendorf wrote his first major work, *Elementa Jurisprudentiae*, to kill time and avoid depressing thoughts. Ill with a life-threatening fever, he was finally released.[91] If these events remained a lasting memory, they certainly did not incite Pufendorf towards a radical solution of international anarchy, the containment of aggressive states, or the promotion of inter-state peace.

The bleak picture of Pufendorf's theory of international relations receives some bright spots with his 'system of states' (*systemata civitatum*). Two or more states may join together under one king. More important is the second type of system, where two or more states form a defensive alliance and seem to constitute one body while preserving their sovereignty and 'autonomy'. They agree to mutual assistance, and accept that the consent of all associated states is required. For matters of convenience, they can establish a council of deputies. Pufendorf specifies that it is up to the member states to decide how much power and authority they delegate to these councils. Authority always resides ultimately with the member states; they are free to leave the federation. These specifications clearly relate to the Holy Roman Empire. Pufendorf believes that its decline can be stopped if its 'irregular form' is abandoned and it is reconstructed as a federation of states with defensive character.[92] Enthusiastic interpreters might read those passages as an anticipation of modern 'unions' or 'confederations', from the United States to the European Union.

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91 The episode is recounted in Detlef Döring, 'Biographisches zu Samuel Pufendorf', in Geyer and Goerlich, *Pufendorf*, pp. 27f. The basic text is Pufendorf's 'Gundaeus Baubator Danicus' [1659], reprinted in Detlef Döring (ed.), *Samuel von Pufendorf. Kleine Vorträge und Schriften. Texte zu Geschichte, Pädagogik, Philosophie, Kirche und Völkerrecht* (Frankfurt am Main: Vittorio Klostermann, 1995), pp. 125–55, especially p. 153.

92 Pufendorf, *Verfassung des deutschen Reiches*, pp. 107 and 128f.; Pufendorf, *Law of Nature*, 7.5.17–19, pp. 1044–9, especially p. 1049. Ibid., 8.4.21, p. 1254. Pufendorf holds that sovereign powers may agree to organize into an 'established council' (*stabile concilium*). There is also a Latin *dissertatio* on the topic in *Dissertationes academicae selectiores* (1675). I am grateful to Michael J. Seidler for this reference. Cf. also Reibstein, 'Pufendorfs Völkerrechtslehre', p. 66. For the connection with the German empire, see Behme, *Pufendorf*, pp. 170–2; Hammerstein, 'Pufendorf,' pp. 188–92, and Krieger, *Politics*, pp. 163f. Otto von Gierke, *Natural Law and the Theory of Society, 1500–1800*, transl. and intro. Ernest Barker (Cambridge: Cambridge University Press, 1950), pp. 196f. helps to contexualize Pufendorf.

4. Pufendorf II: The imperfect right of hospitality

Pufendorf's emphasis on the state has repercussions on the notion of hospitality. Unlike Vitoria and Grotius, and even more so than Gentili and Suárez, he stresses the right of any community to refuse visitors. Hospitality and trade belong to the imperfect duties of friendship which cannot be enforced.

There are several factors in Pufendorf's theory which foster a pro-hospitality attitude. Like his predecessors, he holds that originally there was negative 'common dominion' among individuals. It was negative because without any preceding act, items or things 'belonged no more to one man than to another.'[93] He tells a story reminiscent of Grotius how population pressure and social changes led to the introduction of private dominion or property (see III, 4). Pufendorf anticipates Locke's labour theory of property with the claim that 'whatever one of these things which were left open to all ... a man had laid his hands upon, with intent to turn it to his uses, could not be taken from him by another.' However, in agreement with earlier natural lawyers, Pufendorf makes clear that true ownership requires another element: the tacit or express consent or agreement of others.[94] Pufendorf does not base hospitality rights on this doctrine of common dominion. It is his political anthropology and theory of sociability which becomes crucial in this respect. Pufendorf holds that more than other animals, humans are dependent on the help and assistance of others in order to survive and secure a good life. Their very self-love and desire to preserve themselves, combined with weakness (*debilitas*) and natural helplessness or feebleness (*imbecillitas*), urges humans to become sociable beings. From these observations, Pufendorf derives the first fundamental law of nature, the duty 'to cultivate ... towards others a sociable attitude'.[95] The other laws of nature specify this basic law, applying it to situations, combining it with human features, and balancing it out with self-love and the duty of self-preservation. If we have a duty to promote sociability, then it is not enough simply to abstain from injuring or harming others. In addition, we should confer some positive benefit upon others. More specifically, this implies granting things to others which we can give to them 'without loss, trouble, or labour on our part' (those are *res innoxiae utilitatis*). Examples include accepting foreign

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93 Pufendorf, *Law of Nature*, 4.4.13, p. 554 and 4.4.5, p. 537. See ibid., 4.4: 'On the origin of dominion', pp. 532–57 for the following. Buckle, *Natural Law*, ch. 2, esp. pp. 77–86 and 91–107 covers Pufendorf's theory of property.

94 Ibid., 4.4.4 and 5, pp. 536f.

95 Ibid., 2.3.15, p. 208. See also above, IV, 3; below, V, 1; Schneewind, *Invention*, p. 130 and the essays by Carr and Seidler, 'Pufendorf' and Hont, 'Language', especially p. 274 for more.

ships on our coast, admitting strangers, providing hospitality, and allowing residence, innocent passage, or passage for merchandise.[96]

How do these generous provisions go together with Pufendorf's emphasis on state sovereignty and reason of state? In the first place, Pufendorf does not see a glaring contradiction between reasons of state and the precepts of justice or humanity. Quoting Cicero, Quintilian, Epicurus and others, he holds that long-term utility coincides with justice, that the morally good is usually also useful and rewarding: 'Actions in conformity with the law of nature have indeed this characteristic, that not only are they reputable, that is, they tend to maintain and increase a man's standing, reputation, and position, but they also are useful, that is, they procure some advantage and reward for a man, and contribute to his happiness.'[97] These claims are of course potentially dangerous for any decent Kantian, as they tend to 'contaminate' pure morality and justice. Historically, Pufendorf's mixing of Christian and natural morality with a form of early utilitarianism was not uncommon. In addition, he clearly perceives that works of love must be done with the proper moral motivation, that is, with 'good will and bent' and not aiming at 'private advantage' or expecting the equivalent favour from others in return.[98] Pufendorf does not reject clear demarcations in this respect, but holds that possible gaps between state interests and sociability are more imagined than real. For instance, Pufendorf claims that the promotion of trade and 'navigation in the coastal districts' is a military necessity, as they ensure the strength of the state. Incidentally, these military requirements (disputed by Rousseau later on) coincide with the expansion of a sociable and hospitable commercial society relying on foreign trade.[99] In short, Pufendorf does see a convergence of interests and duties at work in the real world, in a

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96 Pufendorf, *Law of Nature*, 3.3.1, p. 346; 3.3.3, p. 350; 3.3.8–3.3.10, pp. 361–68. A short analysis of the 'general duties of humanity' can be found in Behme, *Pufendorf*, pp. 93f.

97 'Habent quippe hoc actiones legi naturali congruentes, ut not solum honestae sint, id est, quae ad honorem, existimationem et dignitatem hominis conferuandam et augendam faciant, sed et utiles, eadem exsistant, seu quae commodum aliquod et emolumentum homini concilient, et ad felicitatem ipsius conferant', ibid., 2.3.10, pp. 195f. See John Morrow, *History of Political Thought. A Thematic Introduction* (Houndsmills et al.: Macmillan 1998), pp. 108–12 on eighteenth-century early utilitarians 'within a Christian framework'. Pufendorf, for instance, refers to Marcus Tullius Cicero, *On duties*, edited by M. T. Griffin and E. M. Atkins (Cambridge [UK], New York: Cambridge University Press, 1991), 2.9 and 10, p. 66.

98 Pufendorf, *Law of Nature*, 3.3.15, p. 373; 1.9.5, pp. 138–40. The key sentence consistent with Kantian *Gesinnungsethik* is that 'as soon as a kindness is done for private advantage, it loses forthwith its designation and essence', ibid., 3.4.1, p. 380. See also Schneewind, *Invention*, p. 133 and Behme, *Pufendorf*, p. 94.

99 Pufendorf, *Duty*, 2.11.11, pp. 153f.; *Law of Nature*, 7.1.6, p. 958; Hont, 'Language,' p. 274.

manner that explicitly anticipates the Scottish Enlightenment and Adam Smith, as scholars have discovered in recent years (see V, 1 for more). Pufendorf also makes a clear distinction between perfect and imperfect duties and rights, and this gives the states and communities the last word in terms of hospitality and trade. Douglas Irwin has deplored the fact that Pufendorf seems to justify almost any commercial policy, however restrictive, as he allows too many exceptions to the general natural law rule of hospitality. From this perspective, Pufendorf's theory marks the triumph of state sovereignty over free trade, the universal economy doctrine, overriding concerns, and interests or norms of the global community.[100] This assessment is one-sided. Pufendorf tries to combine all of the above into one synthesis. I will start with the distinction between perfect and imperfect rights, and then proceed to the issue of hospitality in the strict sense.

Pufendorf's distinction builds upon Grotius (see III, 1). A perfect right (*ius perfectum*) is precise, enforceable and necessary if society is to exist at all. If a perfect right is violated in civil society, the injured person can go to court. In the international area, it justifies the use of force. Perfect rights are usually based on contract, promises, or agreements. By contrast, an imperfect right (*ius imperfectum*) allows for some latitude, cannot be enforced, and goes beyond mere rules of coexistence, aiming at 'improved existence'. We are obliged 'by some moral virtue,' but the obligation falls outside the sphere of strict justice. Pufendorf calls these obligations 'works of humanity or of love'. The imperfect duty to come to someone's aid and to offer shelter and hospitality are cases in point.[101] It is crucial to keep in mind that Pufendorf does not see imperfect rights as less important or qualitatively inferior to perfect ones.

Pufendorf considers all rights pertaining to hospitality imperfect ones. States, communities and nations have the right to refuse visitors, provided they do not travel themselves: '[I]f any nation has no interest in visiting foreign peoples, there seems to be no law requiring it to admit those who come to it unnecessarily and without good reason.'[102] Pufendorf holds that by standards of reciprocity, it would be inconsistent to exclude foreigners while demanding hospitality rights for one's own citizens. He adds another qualification. In cases of extreme necessity, for example, if some shipwrecked traveller is in 'extreme

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100 Douglas A. Irwin, *Against the Tide. An Intellectual History of Free Trade* (Princeton: Princeton University Press, 1996), pp. 23f.

101 Pufendorf, *Duty*, 1.9, pp. 68–76 is a very succinct introduction. See also *Law of Nature*, 1.1.19 and 20, pp. 18–20; 1.7.7, pp. 118f.; 1.7.9, p. 119; 3.4.1, p. 379; Buckle, *Natural Law*, pp. 85f. and Reibstein, 'Pufendorfs Völkerrechtslehre', pp. 61f. Jouannet, *Vattel*, pp. 164–219 offers the most comprehensive analysis on perfect and imperfect duties and rights in Grotius, Hobbes, Pufendorf, Wolff and others. My interpretation is much indebted to Schneewind, *Invention*, pp. 133f.

102 Pufendorf, *Law of Nature*, 3.3.9, p. 364. Cf. 8.9.2, p. 1330.

want of food necessary to maintain life', he should be received, and might even violate property rights if 'unjustly attacked'.[103] These qualifications do not undermine the overall direction of Pufendorf's argument: communities have a perfect right to refuse visitors. Though he does not state it explicitly, it is to be assumed that the conception of the state as a moral person is the ultimate justifying principle. In addition, Pufendorf is fair enough to include non-European communities, even if they should not meet modern European standards of statehood. Like Gentili before him (III, 5), Pufendorf mentions the Chinese as a people that avoids contacts with foreigners, and is justified in doing so.[104] In another passage, he explicitly rejects Vitoria's reasoning in favour of Spanish perfect hospitality rights (see II, 6). First, Pufendorf dismisses Vitoria's first just title of 'natural partnership and communication'. The perfect right of ownership trumps the imperfect right to visit and live in foreign countries. The property-holder simply has 'the final decision on the question, whether he wishes to share with others the use of his property'.[105] Pufendorf adds the pragmatic consideration that any unlimited influx of visitors who might stay for an unlimited period of time may have detrimental effects on the native community. In the language of natural law, this inflow could conflict with the community's duty of self-preservation. Secondly, there is also no natural enforceable right to trade. Again, the natives must grant permission and may renounce it 'if the well-being of the state demands it'. Third, Pufendorf rejects the claim that a unilateral grant of rights is unjust. Vitoria's third proposition was that 'if there are any things among the barbarians which are held in common both by their own people and by strangers, it is not lawful for the barbarians to prohibit the Spaniards from sharing and enjoying them.'[106] Pufendorf asserts that rights do not have to be symmetrical in this respect. In matters of imperfect obligations, a property-holder can be 'more liberal to one than to another'. Historically, this gave the Japanese, for instance, the right

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103 Ibid., 2.6.5, pp. 302f.; 3.3.5, p. 354.

104 Pufendorf, *Law of Nature*, 3.3.9, p. 364.

105 Ibid., 3.3.9, p. 364. See ibid., pp. 364f. for the following. In an attempt to reclaim Pufendorf for secularized, post-Christian modernity, Klenner, 'Naturrechts- und Völkerrechtslehre', p. 201 claims that the Scholastics were 'beyond criticism' for Pufendorf, that he simply chose to ignore them, while debunking orthodox Protestants. The passage on Vitoria shows that this assessment is grossly mistaken. There is a useful discussion of Pufendorf's position, and his criticism of Vitoria, in Barbara Arneil, 'John Locke, Natural Law and Colonialism', *History of Political Thought*, 13 (1992), pp. 594–600.

106 Francisco de Vitoria, 'On the American Indians', in *Political Writings*, ed. Anthony Padgen and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. 280. The passage is quoted in Pufendorf, *Law of Nature*, 3.3.9, p. 365. The subsequent quotation ibid.

to admit Dutch traders, but refuse admission of other Europeans (see VI, 3). Here and in other instances, Pufendorf's reasoning makes use of the domestic analogy. In this case, he argues that the relationship among communities can be compared to the owner of a garden who grants special privileges to one of his neighbours exclusively.

Pufendorf's mature position is complex. Denying hospitality rights is not unlawful, in the sense of violating natural law, but may be immoral at the same time, that is, contrary to the imperfect duty of humanity and love: 'no one can question the barbarity of showing an indiscriminate hostility to those who come on a peaceful mission.... to expel without probable cause guests and strangers, once admitted, surely savours of inhumanity and disdain.'[107] For the first time, we have a fully developed theoretical framework which distinguishes between perfect and imperfect rights. This framework is then used to solve a problem which has waited for a comprehensive solution since Vitoria. Pufendorf takes pains in demarcating the sphere of humanity and love from that of perfect rights. Again, this invites historical contextualization. The Treaty of Augsburg (1555) established the right to emigrate (*ius emigrandi*), and it was confirmed by the Westphalian Treaty (1648). Pufendorf underlines that it corresponds with the demands of humanity to receive (religious) refugees. He also does not forget to remind us that this liberal immigration policy is often very useful, increasing the strength of the receiving state, 'while others, who have repelled [foreigners and aliens] ..., have been reduced to second-rate powers.'[108] Usually the revocation of the Edict of Nantes by Louis XIV in October 1685, and the subsequent wave of refugees to Protestant countries like Brandenburg, is cited as the classical example in this context. However, Pufendorf's major work was published some years earlier, in 1672, and there is another, more plausible example he might have referred to. In the 1580s, over 100,000 refugees from the Catholic south Netherlands emigrated to the north, contributing to what has been called the economic 'miracle' at the onset of the Golden Age. Historians have noted the speed and comparative ease of integration into Dutch society and economy. In the 1590s, about ten per cent of the total population of the United Provinces were immigrants from the south. They contributed to the subsequent Dutch dominance of the 'rich trades'.[109] Pufendorf specifies that immigrants are obliged to recognize the government of

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107 'Enimuero etsi passim inhospitalitatem, tanquam certum specimen barbarae inhumanitatis, traduci videas, dubium tamen moueri potest circa illos potissimum, qui curiositatis duntaxat causa alienas regiones adeunt, an istis ipso naturali iure admissio debeatur', Pufendorf, *Law of Nature*, 3.3.9, p. 365.

108 Ibid., 3.3.10, p. 366.

109 Jonathan Irvine Israel, *The Dutch Republic. Its Rise, Greatness, and Fall 1477–1806* (Oxford: Clarendon Press, 1995), pp. 308f. and 310f.

the receiving country, must be willing to integrate, and must be content with what has been assigned to them.

Restrictions also apply to trade and commerce. Although Pufendorf subscribes to the universal economy doctrine of Libanius, Grotius and others (see I, 6 and III, 4), and readily admits that commerce is advantageous for all, it is again a matter of humanity and consent of the parties involved. Items 'not absolutely essential to human life' do not have to be shared, trade in certain articles can be restricted if community interest might be infringed, and nobody can be forced to purchase certain merchandise. Possible profit always must take a back seat if the liberty of others is at stake.[110]

Irwin's criticism must be qualified. The free trade doctrine was 'deconstructed' in Gentili and Suárez long before Pufendorf. His restrictive approach is balanced out by a new emphasis on the evolution of a global commercial society. After all, any imperfect obligation can be transformed into a perfect one by contract.[111] Pufendorf sees the world moving towards commercial sociability which transcends borders simply because 'many states ... seek abroad the means to supply their needs or pleasure.' The overall result is very Kantian. Pufendorf provides the outlines of Kant's third definitive article. In terms of the scope of hospitality, Kant does not add anything new (see VI, 4).

Pufendorf's interest in non-European affairs is rather limited. He endorses the Roman legal principle of usucapion, the acquisition of another's property by use or continued possession in good faith. As in Grotius, Pufendorf's reasoning is predominantly pragmatical. If this right was not accepted, the prospects of peace would be bleak. Though Pufendorf could have followed Solórzano's example and applied the doctrine to European overseas conquests (III, 5), he refuses to do so, and sticks to cases taken from classical antiquity.[112] He explicitly refers to the Native Americans when he rejects Francis Bacon's claim that Europeans have a right of humanitarian intervention to stop acts of cannibalism and human sacrifice. Like Bacon, most authors before Pufendorf took this right for granted (II, 5; III, 4 and 5). In Pufendorf's account, state or community rights trump those of the global moral community. (He might argue that they serve the latter, albeit indirectly.) There is clear indication of a paradigm shift. State sovereignty entails a strict duty of non-intervention. Foreign states may only intervene if their own citizens are victimized, provided that they have come as 'innocent guests, or driven by storms'. In a move

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110 Pufendorf, *Law of Nature*, 3.3.11–12, pp. 369–71.

111 Pufendorf, *Law of Nature*, 2.6.5, p. 302; 3.3.14, p. 373. The following quotation is at 7.1.6, p. 958.

112 Ibid., 4.12, pp. 646–60 passim, especially 4.12.2, p. 646; 4.12.6 and 7, p. 652. There is a short analysis in Leslie Claude Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), pp. 62f.

anticipating Kant, Pufendorf distinguishes between foreign visitors who behave peaceably or are in need of help on the one hand, and those who come to visit 'as enemies and robbers' on the other.[113] An explicit reference to European conduct is missing, but perhaps implied. In sum, there are no special rights for Europeans. Pufendorf rejects the Aristotelian doctrine of natural slavery as implausible and conflicting with natural equality, and any titles of conquest based on civilization.[114]

It has already been pointed out that Pufendorf's influence on seventeenth- and eighteenth-century thinking was profound. Although he was debunked from the start as a mere plagiarizer of Grotius and Hobbes, his rather short volume *De Officio* became a popular textbook at many European universities and schools. His works were translated, among others by Jean Barbeyrac, and defended by Pufendorf's most gifted disciple, Christian Thomasius. His ideas on toleration and human rights influenced French and British representatives of the Enlightenment, among them Locke, Montesquieu and Diderot.[115] Pufendorf

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113 Pufendorf, *Law of Nature*, 8.6.5, p. 1297. See also Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart*, Beiträge zur Kolonial- und Überseegeschichte Bd. 26 (Stuttgart: Steiner, 1984), pp. 250f.

114 Pufendorf, *Law of Nature*, 3.2.8, pp. 340–4. Fisch, *Expansion*, pp. 248f. claims that these arguments are anticipated in the writings of the German scholars Johann Wolfgang Textor, *Synopsis juris gentium* [1680], ed. Ludwig von Bar (Washington DC: Carnegie Foundation, 1916) and Johannes Gryphiander, *De insulis tractatus* (Frankfurt, around 1623). Richard Waswo, 'The Formation of Natural Law to Justify Colonialism, 1539–1689', *New Literary History*, 27, no. 4 (1996), pp. 754–6 includes Pufendorf among those European authors who justify colonialism. His textual evidence is unconvincing.

115 On Pufendorf's influence, see Bodo Geyer and Helmut Goerlich (eds), *Samuel Pufendorf und seine Wirkungen bis auf die heutige Zeit* (Baden-Baden: Nomos Verlagsgesellschaft, 1996), and the bibliography in Döring, *Pufendorf-Studien*, pp. 259–66. Shorter accounts are Behme, *Pufendorf*, pp. 183–8 (with more references); Krieger, *Politics*, pp. 255–69. Hartung, *Naturrechtsdebatte*, pp. 83–125; Klaus Luig, 'Von Samuel Pufendorf zu Christian Thomasius', in Palladini and Hartung, *Pufendorf*, pp. 137–46, and Simone Zurbuchen, 'Gewissensfreiheit und Toleranz: Zur Pufendorf-Rezeption bei Christian Thomasius', ibid., pp. 169–80 focus on the relationship with his pupil Thomasius. Hochstrasser, *Natural law*, ch. 2 includes a comparison with Leibniz; see also Jerome B. Schneewind, 'Barbeyrac and Leibniz on Pufendorf', in Palladini and Hartung, *Pufendorf*, pp. 181–9 and Döring, *Pufendorf-Studien*, pp. 134–42. Pufendorf's decisive role in the development of a theory of toleration has been the focus of several studies. See Friedrich Lezius, *Der Toleranzbegriff Lockes und Pufendorfs: ein Beitrag zur Geschichte der Gewissensfreiheit* (Aalen: Scientia Verlag, 1987); Simone Zurbuchen, *Naturrecht und natürliche Religion: zur Geschichte des Toleranzbegriffs von Pufendorf bis Rousseau* (Würzburg: Königshausen and Neumann, 1991); 'Samuel Pufendorf's Concept of Toleration', in Cary J. Nederman and John Christian Laursen (eds), *Difference and Dissent. Theories of Toleration in Medieval and Early Modern*

is highly original in his theory of sociability. He claims that it is not natural in the strict sense, but can be learned. Human socialization becomes a 'social construct' and a historical phenomenon, subject to change and development. His influence on the Scottish Enlightenment, on Gershom Carmichael, Francis Hutcheson and Adam Smith is obvious (see V, 1). In the theory of *ius gentium*, Pufendorf marks the beginning of, or rather continues, the move towards positivism and the understanding of the international community as a society of equal and sovereign states. The concept is no longer an isolated statement as in Hobbes, but put forward by a prominent and widely read international lawyer. It has been claimed that equality is a feature of the Westphalian system, that it is a liberal assumption 'about the non-existence of a pre-existing hierarchy of values', that 'denial of natural law, independence, equality' go together because they presume each other.[116] The historical record is actually more complex. Pufendorf does not flatly deny the rule of natural law, or a hierarchy of values. It would be more accurate to spot a tension between naturalistic and positivistic tendencies, already apparent in Hobbes.

5. Wolff I: *Civitas maxima*, or the universal commonwealth

The two sections on Wolff help us to avoid a whiggish reconstruction of the past where modern European thinking moves from the idea of a universal commonwealth to a society of states, from Christian theology to a secularized outlook, and from natural law to legal positivism in a linear fashion. There are indeed discontinuities, ruptures and gaps in this story. The emphasis of Mevius, Leibniz, Thomasius and Wolff on the *societas magna* or universal society can be read as an implicit rejection of Pufendorf's society of states. In one form or another, they revive an older conception exemplified in Vitoria's lectures, where the whole world is seen as 'in a sense a commonwealth' (II, 4).[117]

Europe (Lanham, Boulder, New York, London: Rowman and Littlefield, 1996), pp. 163–84; Detlef Döring, 'Samuel von Pufendorf and Toleration', in John Christian Laursen and Cary J. Nederman (eds), *Beyond the Persecuting Society. Religious Toleration Before the Enlightenment* (Philadelphia: University of Pennsylvania Press, 1998), pp. 178–96.

116 Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), p. 72. Green, *Law of Nations*, p. 62 describes Pufendorf as a naturalist, whereas Reibstein, 'Pufendorfs Völkerrechtslehre', p. 66 calls him a crypto-positivist.

117 Gierke, *Natural Law*, p. 196; Vitoria, 'On Civil Power', in *Political Writings*, ed. Anthony Padgen and Jeremy Lawrance (Cambridge, Cambridge University Press, 1991), p. 40. Like some other authors, Christian Thomasius (1655–1728), though important beyond doubt, is excluded from this study. His main work is *Fundamenta juris*

Christian Wolff (1679–1754) is nowadays mostly known for his role in pre-Kantian metaphysics, and as the target of Kant's devastating criticism. He aimed at a comprehensive philosophical system based on 'scientific method'. International lawyers usually remember his postulate of a *civitas maxima*, primarily because the idea was quickly rejected by Emmerich de Vattel, Wolff's follower.[118] Wolff is also known for the controversy with his Pietistic colleagues at the university of Halle in the 1720s. It reached a climax with his notorius lecture, 'Discourse on the practical Philosophy of the Chinese', delivered on 12 July 1721, when he formally handed over the prorectorate of the university. For Wolff, Chinese philosophy demonstrated that there was a transcultural natural morality available to any reasonable human being without the help of divine revelation. He praised the virtues of the Chinese and claimed that Confucian teachings were in harmony with his own ethical doctrine. Many Protestant theologians like Joachim Lange accused Wolff of teaching a subversive and atheistic doctrine. A royal cabinet order issued by King Frederick William I (the father of Frederick the Great) banished Wolff from Prussia 'under pain of

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naturae et gentium ex sensu communi deducta, 4. Aufl. [1718] (reprint: Aalen: Scientia Verlag, 1963); valuable secondary literature is Klaus Luig, 'Christian Thomasius', in Michael Stolleis (ed.), *Staatsdenker im 17. und 18. Jahrhundert. Reichspublizistik, Politik, Naturrecht*, 2., erweiterte Aufl. (Frankfurt am Main: A. Metzner, 1987), pp. 227–56 (with more references); Werner Schneiders, *Naturrecht und Liebesethik. Zur Geschichte der praktischen Philosophie im Hinblick auf Christian Thomasius* (Hildesheim, New York, 1971), and Schneiders (ed.), *Christian Thomasius – 300 Jahre Aufklärung in Deutschland* (Hamburg: Meiner, 1987), and the three essays collected in Knud Haakonssen (ed.), *Grotius, Pufendorf and Modern Natural Law* (Dartmouth, Aldershot et al.: Ashgate, 1998), pp. 311–78.

[118] Nicholas Greenwood Onuf, *The republican legacy in international thought* (Cambridge: Cambridge University Press, 1998), p. 58 and Jouannet, *Vattel*, pp. 96–104 quote more sources on the Wolff-Vattel episode. Jean École, *La métaphysique de Christian Wolff* (Hildesheim, New York: Georg Olms, 1990) is the definitive study on Wolff's metaphysical system. Useful introductions are Timothy J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000), ch. 4 and Gerald Hartung, *Die Naturrechtsdebatte. Geschichte der Obligatio vom 17. bis 20. Jahrhundert* (München: Verlag Karl Alber, 1998), pp. 126–66. Concerning Wolff's complex influence on and his criticism by Kant, see Soo Bae Kim, *Die Entstehung der Kantischen Anthropologie und ihre Beziehung zur empirischen Psychologie der Wolffschen Schule* (Frankfurt am Main et al.: Lang, 1994); Christian Schröer, *Naturbegriff und Moralbegründung: die Grundlegung der Ethik bei Christian Wolff und deren Kritik durch Immanuel Kant* (Stuttgart: W. Kohlhammer, 1988) and Michael Radner, 'Unlocking the Second Antimony: Kant and Wolff', *Journal of the History of Philosophy*, 36 (1998), pp. 413–41. Werner Schneiders (ed.), *Christian Wolff 1679–1754. Interpretationen zu seiner Philosophie und deren Wirkung. Mit einer Bibliographie der Wolff-Literatur*, 2nd edn (Hamburg: Felix Meiner Verlag, 1986) offers articles on theories of natural right and the state.

death by strangulation'.[119] Though it was probably more his endorsement of ethical determinism that led to his expulsion, Wolff's defence of the Chinese is important for two reasons. First, it underlines the attempt of natural lawyers to find empirical evidence for their assumption of cross-culturally valid norms. Second, it illustrates Wolff's conscious endeavour to move beyond an ethnocentric perspective in international relations, and accept the peculiarities of Chinese culture such as its isolationist tendencies.

Wolff tries to improve on Pufendorf with his 'scientific method'. In natural law theory, this amounts to deriving natural laws from the nature of humans.[120] The supreme law of nature which anyone can find in their own reason prescribes humans to 'Do what makes you and your condition, or that of others, more perfect.' As in Grotius, the law is binding even if God should not exist. Reasonable beings do not have to be moved by threat of punishment or promise

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[119] The controversy and its political, even international repercussions are described in Donald F. Lach, 'The Sinophilism of Christian Wolff (1679–1754)', in Julia Ching and Willard G. Oxtoby, *Discovering China. European Interpretations in the Enlightenment* (Rochester: University of Rochester Press, 1992), pp. 118–23; Thomas P. Saine, *The problem of being modern, or, The German pursuit of Enlightenment from Leibniz to the French Revolution* (Detroit, MI: Wayne State University Press, 1997), pp. 146–52, and Julia Ching and Willard G. Oxtoby, *Moral Enlightenment. Leibniz and Wolff on China* (Sankt Augustin: Institut Monumenta Serica; Nettetal: Steyler, 1992), pp. 26f. and 50–4. The text itself is printed ibid., pp. 145–86. More references are quoted in Schneewind, *Invention*, p. 442. There is a fine biographical essay by Wolfgang Drechsler in Jürgen G. Backhaus (ed.), *Christian Wolff and Law & Economics. The Heilbronn Symposium* (Hildesheim, Zürich, New York: Georg Olms Verlag, 1998), pp. 1–18 with extensive notes and references, and an updated review of secondary literature by Peter R. Senn, 'What is the Place of Christian Wolff in the History of the Social Sciences?', ibid., pp. 42–122.

[120] Christian Wolff, *Jus naturae* [1740], ed. Marcel Thomann, in *Gesammelte Werke*, vol. 17 (reprint: Hildesheim, New York: Georg Olms Verlag, 1972), paras. 1 and 2, pp. 1–4. Extensive studies of Wolff's natural law theory and ethics are Emanuel Stipperger, *Freiheit und Institution bei Christian Wolff (1679–1754): zum Grundrechtsdenken in der deutschen Hochaufklärung* (Frankfurt am Main, Wien: Lang, 1984); Bénédict Winiger, *Das rationale Pflichtenrecht Christian Wolffs: Bedeutung und Funktion der transzendentalen, logischen und moralischen Wahrheit im systematischen und theistischen Naturrecht Wolffs* (Berlin: Duncker & Humblot, 1992); Clemens Schwaiger, *Das Problem des Glücks im Denken Christian Wolffs: eine quellen-, begriffs- und entwicklungsgeschichtliche Studie zu Schlüsselbegriffen seiner Ethik* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 1995), and Röd, *Geometrischer Geist*, ch. 5. Short accounts are Schneewind, *Invention*, pp. 432–42; Kristian Kühl, article 'Naturrecht', in Joachim Ritter and Karlfried Gründer (eds), *Historisches Wörterbuch der Philosophie* (Basel and Stuttgart: Schwabe & Co., 1984), vol. 6, col. 592–3. See also Claes Peterson, 'Zur Anwendung der Logik in der Naturrechtslehre von Christian Wolff', in Schröder, *Entwicklung der Methodenlehre*, pp. 177–89. I am much indebted to Schneewind's account.

of external rewards to do what they ought to do.[121] Like Pufendorf, Wolff divides duties, or acts we are obligated to perform, into those towards God, oneself and others. In ethics and politics, others should be regarded 'as if they were one person with us' (*als wenn sie mit uns eine Person wären*). In international relations, this leads to the idea of a *civitas maxima.* As humans tend to deviate from natural law, the state introduces sanctions to ensure compliance. Thus natural turns into civil law.[122]

Wolff rejects Pufendorf's identification of natural law and the law of nations. He distinguishes between four levels, already expressed in the title of his work. The natural or necessary law of nations (*ius gentium naturale vel necessarium*) is the application of natural law to nations (*gentes*). The volitional or voluntary law of nations (*ius voluntarium*) is precariously located between natural and positive law, based on right reason and the presumed consent of nations. It specifies 'what nations ought to consider as law among themselves, although it does not conform in all respects to the natural law of nations, nor altogether differ from it.' Wolff does not clearly spell out the differences between necessary and voluntary law. He seems to argue that acts which violate the obligatory law of nature are 'not indeed allowed, but endured' because of human frailty.[123] Wolff divides positive law into stipulative law (*ius gentium pactitium*) which derives from pacts or stipulations, thus from express consent, and customary law (*ius gentium consuetudinarium*), based on tacit consent, that is, long usage, custom, or *das Herkommen*.[124] Like Vattel later on, Wolff accepts both forms of positive law as part of the body of the law of nations. However, he

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121 Christian Wolff, *Vernünfftige Gedancken von der Menschen Thun und Lassen, zu Beförderung ihrer Glückseeligkeit* [1720], *Gesammelte Werke*, vol. 4, ed. Hans Werner Arndt (reprint Hildesheim: Georg Olms Verlag, 1976), paras. 12, p. 12, 24, pp. 18f.; 5, p. 7, 29, pp. 20f.; 38, pp. 28f.

122 Wolff, *Vernünftige Gedancken*, paras. 222–3, p. 144; 650, p. 451; 768, p. 540; 796, p. 557; *Vernünfftige Gedancken von dem gesellschaftlichen Leben der Menschen und insonderheit dem gemeinen Wesen* [1721], *Gesammelte Werke* vol. 5, ed. Hans Werner Arndt (reprint Hildesheim: Georg Olms Verlag, 1975), 2.3, paras. 341f., pp. 287f. and 4, para. 401, pp. 415–18.

123 Christian Wolff, *Ius gentium methodo scientifica pertractatum, in quo ius gentium naturale ab eo, quod voluntarii, pactitii et consuetudinarii est, accurate distinguitur* [1749], transl. Joseph H. Drake (reprint New York: Oceana Publications 1964), 'Prolegomena', paras. 4, 20 and 21; 12. Wolff's four-part division is analysed in Grewe, *Epochen*, pp. 418f.; Heinhard Steiger, 'Völkerrecht', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1992), vol. 7, p. 118; E. B. F. Midgley, *The Natural Law Tradition and the Theory of International Relations* (London: Paul Elek, 1975), pp. 175–84, and Schiffer, *Legal Community*, pp. 72–6.

124 Wolff, *Ius gentium*, paras. 23 and 24.

assumes a clear hierarchy. Nations form a universal community termed *civitas maxima* whose norms are identical with the volitional law of nations.

The juridical notion of a *civitas maxima* must be distinguished from the 'great society [*societas magna*] ... made up of the whole human race'.[125] The idea of a great society refers to the fact that all humans share certain biological qualities, and are thus related to each other. The *civitas maxima*, by contrast, is an ideal or fiction which structures the moral sphere and outlines how humans ought to coexist with each other. Wolff develops this idea in the 'Prolegomena' of his comprehensive work on the law of nations.[126] Many translations of *civitas maxima* like 'supreme state' or 'universal empire' are misleading, as they suggest a political body similar to the Holy Roman Empire or a world state, which Wolff did not have in mind. *Maxima* can be translated as 'greatest', 'largest' or (by implication) 'universal', The term *civitas*, linked to the Greek term *polis*, poses more problems. 'Civil society' might be a good translation, but is confusing in light of our current understanding as 'the space of uncoerced human association and also the set of relational networks ... that fill this space'.[127] It is usually assumed that this space is located between the government and its bureaucracy on the one hand and the private sphere of

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125 Wolff, *Ius gentium*, para. 11, note. The distinction is pointed out by Röd, *Geometrischer Geist*, p. 139.

126 Wolff, *Ius gentium*, paras. 9–22. The most reliable interpretations are Schiffer, *Legal Community*, pp. 63–78 and Onuf, *Republican legacy*, pp. 60–70, the latter with an excellent discussion of the term. '*Civitas maxima*: Wolff, Vattel and the Fate of Republicanism', *American Journal of International Law*, 88 (1994), pp. 280–303 is an older and slightly different version of this ch. 3. See also Jouannet, *Vattel*, pp. 86–100; Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company 1989), pp. 86–9, and Ernst Reibstein, 'Deutsche Grotius-Kommentatoren bis zu Christian Wolff', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 15 (1953), pp. 76–102, especially pp. 76–81 and 97–101. Reibstein emphasizes Wolff's break with German interpreters and commentators on Grotius such as Adam Friedrich Glafey.

127 See, for instance, Michael Walzer, 'The Concept of Civil Society', in *Toward a Global Civil Society* (Providence, Oxford: Berghahn Books, 1995), pp. 7–27, the quotation ibid., p. 7; Terry Nardin, 'Private and Public Roles in Civil Society', ibid., pp. 29–40 and other essays in this volume. Traditionally, 'civil society' (*societas civilis*) is the antonym of the state of nature. In the late eighteenth century, 'civil society' gradually assumed its present meaning, denoting an entity separate from the state. See John Keane, 'Despotism and Democracy: The Origins and Development of the Distinction Between Civil Society and the State 1750–1850', in John Keane (ed.), *Civil Society and the State: New European Perspectives* (London, New York: Verso, 1988), pp. 35–71 and Manfred Riedel, 'Bürgerliche Gesellschaft', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 3rd edn (Stuttgart: Klett-Cotta, 1994), vol. 2, pp. 719–800, especially pp. 719f., 746

family and intimacy on the other. *Civitas* could also be translated as 'community', but since Ferdinand Tönnies' juxtaposed community and society, this term has been overloaded with meanings of solidarity and affection. So 'commonwealth' may after all be the most appropriate term, defined by Locke as an independent political community.[128]

Wolff holds that natural or necessary law based on reason is logically prior to all other types of law, even to voluntary law, which depends on 'the free will of nations' but must be compatible with natural law.[129] The idea of a *civitas maxima*, a hypothetical society or commonwealth based on tacit consent, is supposed to underline this primacy of natural law. Wolff also wants to establish the primacy of the universal commonwealth over the society of sovereign states. Pufendorf implied that the establishment of particular societies rendered the notion of an original commonwealth obsolete. In a passage that can be read as a criticism of Pufendorf's or Locke's theory, Wolff argues that if we consider the great society 'which nature herself has established among men, to be done away with by the particular societies which men enter when they unite into a state, states would be established contrary to the law of nature, in as much as the universal obligation of all toward all would be terminated; which assuredly is absurd.'[130] The law of nature includes universal obligations towards all people, such as mutual assistance. This obligation is only partially fulfilled by uniting into a state. Wolff continues: 'After the human race was divided into nations, that society which before was between individuals continues between nations.' Wolff stresses the continuity of membership. Unlike some nineteenth century nationalists, legal positivists (see VI, 5) or present-day communitarians, he does not see the (nation) state as the climax of human evolution or the end of history. His normative individualism leads him to adopt a cosmopolitan perspective. He is communitarian in the sense that he thinks humans to be embedded in communities, with the smaller ones (such as families and states) subordinate to the one on the next level (the universal commonwealth).

Wolff is convinced that the idea of a *civitas maxima* is based on natural law, right reason, and on the implicit consent of all peoples, 'as if they had signed a contract', 'as if by agreement'. As it is based on implicit consent, this cosmopolitan world order is, for Wolff, binding like positive law and cannot be

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128 Ferdinand Tönnies, *Community and Society*, transl. Charles P. Loomis (New York: Harper and Row, 1963); John Locke, *Two Treatises of Government*, ed. and intro. Peter Laslett (Cambridge: Cambridge University Press, 1994), II, para. 133 (p. 355).

129 Wolff, *Ius gentium*, 'Preface', p. 6.

130 'Quodsi ponamus societatem illam magnam, quam ipsa natura inter homines constituit, per societates particolares tolli, quas ineunt homines, dum in civitatem coeunt; civitates constituerentur contra legem naturae sublata quippe universali obligatione omnium erga omnes: quod utique absurdum', ibid., prol., para. 7 note. The following quotation ibid.

revoked by unilateral decision. Based on consent and the equality of nations, the universal commonwealth is 'a kind of democratic form of government'.[131] Wolff's analysis runs into problems familiar to those of Grotius, and related to the systematic difficulty to combine natural justice with consent (see III, 2). As a rational, regulative idea, the *civitas maxima* makes sense. Like individual states, it is a fiction, in the sense that it is a moral person or entity (*ens morale*) bearing rights and duties. Fictions of this sort are necessary assumptions to construct a coherent account of a cosmopolitan juridical order or sphere. The underlying assumption is a distinction between law and facts. The idea of the *civitas maxima* helps to distinguish between what nations do, or actually consent to, and what they ought to agree to, 'as if' they belonged to a wider commonwealth.[132] However, Wolff's rational construction of a juridical condition among nations does not sustain the clear-cut distinction between facts and norms, positive and natural law of nations. Volitional law is supposed to combine and mediate between the necessary law of nations and customary law based on presumed or tacit consent, while being neither of the two. On the one hand, Wolff postulates a rector of the *civitas maxima*, who, following the right use of reason, establishes 'what nations ought to consider as law among themselves'. On the other hand, this very reason assumes the freedom and equality of nations. They must therefore form a kind of democracy based on the majority principle. As they cannot assemble to vote, we have to take

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131 Christian Wolff, *Grundsätze des Natur und Völckerrechts worinn alle Verbindlichkeiten und alle Rechte aus der Natur des Menschen in einem beständigen Zusammenhange hergeleitet werden* [1754], in *Gesammelte Werke*, vol. 19 (reprint Hildesheim: Georg Olms Verlag, 1980), para. 1090; Wolff, *Ius gentium*, prol., para. 9 and 19.

132 Ibid., para. 21 note; para. 12, note; para. 13. Schiffer, *Legal Community*, pp. 73–6 and Röd, *Geometrischer Geist*, pp. 136–42 both offer reliable analyses of the fictitious element. On the role of fictions and hypotheses in a dynamic rationalist system of science, see Erik S. Reinert and Arno Mong Daastol, 'Exploring the Genesis of Economic Innovations: The Religious Gestalt-Switch and the Duty to Invent as Preconditions for Economic Growth', in Jürgen G. Backhaus (ed.), *Christian Wolff and Law & Economics. The Heilbronn Symposium* (Hildesheim, Zürich, New York: Georg Olms Verlag, 1998), pp. 137f. and Ernst Cassirer, *An Essay on Man* (New Haven: Yale University Press, 1944), pp. 56–62. Wolff's use of fictions in natural-law theory seems to be much indebted to Leibniz, who held that natural law does not invent, but allow the use of *fictiones* in order to bring it closer to (positive) Roman law. For Leibniz, a fiction is an assumption that can't be refuted, whose opposite is juridically unacceptable, and must be employed to resolve an issue. Cf. Gaston Grua, *Leibniz – Textes inédits* (Paris: Presses universitaires de France, 1948; reprint: New York, London: Garland Publishing, 1985), tome II, pp. 725 and 785. Peter König, 'Das System des Rechts und die Lehre von den Fiktionen bei Leibniz', in Schröder, *Entwicklung der Methodenlehre*, pp. 137–61, especially pp. 147–50 offers a fine analysis of proof (*probatio*), presumption (*praesumtio*), and fiction (*fictio*) in Leibniz's system.

recourse to 'what has been approved by the more civilized nations'.[133] With this specification, however, the normative dimension clashes with, or becomes subordinated to, contingent or empirical elements such as standards of civilization, contrary to Wolff's intentions. In this respect, he does get close to Pufendorf and Vattel, though he is certainly not a positivist champion of a society of states where rules evolve out of their explicit wills.[134] Wolff tries to combine a descending with an ascending argument. The descending normative element predominates, however. The main function of the regulative idea of a universal commonwealth is to limit sovereignty and caprice of states.

6. Wolff II: International hospitality qualified

Wolff's praise of Chinese, especially Confucian, ethics was no isolated statement. Scholars have referred to his generic sinophilism. Wolff's *ius gentium* justifies Chinese isolationism and reliance on economic self-sufficiency. Their foreign policy is defended by reference to the right of any nation to decide on its own whether it wants to engage in commerce or not. At the same time, however, Wolff postulates a natural obligation to engage in commerce, a term that now coincides with economic trade. At first sight, these rights and duties do not seem to fit together, or contradict each other.[135]

The seeming contradiction can be resolved with the help of two Wolffian distinctions: between perfect and imperfect rights, and between duties towards oneself and others. Both sets of distinctions are prefigured in Pufendorf. Like Pufendorf, Wolff starts with the assumption or fiction that states are moral persons. Any state must be regarded 'as if' it was *ens morale* endowed with duties and rights, natural freedom, juridically equal to other states and subject to natural law. The parallel between individuals and states implies a perfect

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133 Wolff, *Ius gentium*, prol., paras. 21, 19 and 20.

134 Labels of this sort are notoriously misleading. For instance, Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 71ff. and 75f. sees Wolff and Vattel as the representatives of the 'morality-of-states' doctrine, and Reibstein, 'Grotius-Kommentatoren', pp. 97 and 101 interprets Wolff as a representative of legal positivism. These assessments have to be qualified. 'Positivism' is a matter of degree rather than kind.

135 Irwin, *Free Trade*, p. 24 claims this contradiction. On Wolff's sinophilism, see the article by Lach, passim. On eighteenth-century enthusiasm about non-Europeans, especially the Chinese, see the two volumes by Ching and Oxtoby. David E. Mungello, 'Some Recent Studies on the Confluence of Chinese and Western Intellectual History,' in Ching and Oxtoby, *China*, pp. 176–88 offers a fine review essay covering Lach and other scholars of intellectual history. Wolff refers to Chinese foreign trade policy in *Ius gentium*, paras. 75, p. 44, 187, p. 98 and 296, p. 150.

domestic analogy: '[N]ature herself has united nations into a *civitas maxima* in the same manner as individuals have united into particular states.'[136] Although Wolff endorses the domestic analogy, he does not propose the institution of a world state. In its stead, he postulates a mere regulative idea, designed to guarantee the rule of volitional law of nations. This raises the familiar problem of how law enforcement is guaranteed (see IV, 2 and III, 6). For the hardliners endorsing the domestic analogy, nothing short of the global Leviathan will do. Wolff shrinks back from this idea. He suggests that a world state is inconceivable. He provides for collective law enforcement against the disturber of public security and peace, a provision anticipating Vattel's and Kant's war against the unjust enemy. Presumably Wolff saw Louis XIV as a historical example of such a disturber who 'harasses other nations in reckless and unjust wars'.[137] Be that as it may, though Wolff clearly aims at limiting state caprice, his remedy is not institutionalization, but a system of balance of power to protect common security. Wolff's century has been called the 'golden age' of the balance of power doctrine, when most authors commented upon it in favourable terms, and European diplomacy and politics revolved around this organizing principle, or was at least perceived as revolving around it.[138] In this respect, Wolff fits into the overall picture.

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136 Ibid., prol., para. 2, 3 and 16; Preface, p. 6; cf. Röd, *Geometrischer Geist*, p. 137. Jouannet, *Vattel*, pp. 211–19 elaborates Wolff's distinction between perfect and imperfect duties, and ibid., pp. 311–18 his conception of the patrimonial state.

137 Wolff, *Ius gentium*, paras. 19, 13, 627, 652, 965f. There is a good analysis in Schiffer, *Lega community*, pp. 69f. Cf. Emer de Vattel, *The Law of Nations or the Principles of Natural Law* [1758], transl. Charles G. Fenwick, in James Brown Scott (ed.), *The Classics of International Law* (Washington DC: Carnegie Institution 1916), 2.4.53, p. 130. The crucial Kantian passage is Immanuel Kant, 'The metaphysics of morals Part I: Metaphysical first principles of the doctrine of right', in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), para. 60; 6, p. 349. This provision is analysed in my book *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), ch. 7. See ibid., pp. 106f. on the foreign policy of Louis XIV as a possible illustration in Wolff, Vattel and Kant.

138 Wolff, *Ius gentium*, paras. 642–4. See Michael Sheehan, *The Balance of Power. History and Theory* (London and New York: Routledge, 1996), ch. 5; Arno Strohmeyer, *Theorie der Interaktion. Das europäische Gleichgewicht der Kräfte in der frühen Neuzeit* (Wien, Köln, Weimar: Böhlau Verlag, 1994); Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (Freiburg, München: Verlag Karl Alber, 1958), vol. 1, pp. 453–82; Heinz Duchhardt, *Gleichgewicht der Kräfte, Convenance, Europäisches Konzert. Friedenskongresse und Friedensschlüsse vom Zeitalter Ludwigs XIV. bis zum Wiener Kongreß* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1976), pp. 68–76, and his most recent *Balance of Power und Pentarchie. Internationale Beziehungen 1700–1785* (Paderborn et al.: Schöningh, 1997), and Hans Fenske, 'Gleichgewicht, Balance,' in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in*

As pointed out, Wolff distinguishes between necessary, or natural, and positive law. One type of the latter is stipulative law (*ius gentium pactitium*) which derives from pacts or stipulations, thus from express consent. Wolff's account of hospitality builds upon these distinctions. In the first place, states have perfect duties towards themselves, such as self-preservation and self-perfection, and towards others, such as non-interference. The latter duty clearly rephrases Ulpian's formula *neminem laede*.[139] There are also imperfect duties which cannot be enforced, such as the duty to help other nations or communities. However, they are subordinate to the perfect ones. Likewise, duties towards oneself prevail over duties towards others.[140] The duty to engage in commerce is a natural duty, but an imperfect one: 'It depends on the will of any nation whether it desires to engage in commerce with another nation or not, and upon what condition it desires to engage in it.'[141] Restricting commerce 'in any way whatsoever' does therefore not violate the rights of another nation or natural law. Any state is free to follow its own judgement or even a 'mere whim' and still does not act contrary to the idea of a *civitas maxima*, for three reasons. First, nations are naturally free, and this natural freedom of choice trumps imperfect obligations; even an abuse of freedom must be accepted from a legal point of view. As Wolff puts it, anyone is legally permitted to abuse his own right, 'although prohibited by the law of nature, as long as he does nothing contrary to the right of another'. In other words, one's freedom of choice must be respected as long as it is compatible with that of others. This implies a distinction between moral and legal wrong, to some extent prefigured by Grotius (see III, 1). Secondly, states act like 'private individuals'. As in domestic matters, no state can be forced to buy or sell without consent. Third, the duty towards oneself logically precedes that towards others.[142]

A perfect right to engage in commerce, however, can be acquired by agreements or contracts, and thus turns it into a stipulative right. Again and again, Wolff emphasizes that there is a natural obligation to engage in commerce, holding that the 'primitive common holding' – apparently a reference to the traditional notion of original negative community of possession – is the source of this duty.[143] Like Vitoria, Wolff provides a very extensive

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Deutschland, 3rd edn (Stuttgart: Klett-Cotta, 1994), vol. 2, pp. 971–84, especially on the eighteenth century.

139 Wolff, *Ius gentium*, paras. 28 and 29, pp. 20f.; 255, p. 130 and 269, pp. 137f.

140 Ibid., paras. 157, p. 85 and 159, pp. 85f.; para. 206, p. 107.

141 Ibid., para. 73 p. 43. Cf. para. 187, pp. 97f. See also Christian Wolff, *Institutiones juris naturae et gentium*, ed. Marcel Thomann, in *Gesammelte Werke*, vol. 26 (reprint Hildesheim: Georg Olms Verlag 1969), paras. 1098, p. 686; 1110–12, pp. 693f.

142 Wolff, *Ius gentium*, paras. 73, p. 43; 75, p. 44; 188, p. 99; 210, p. 110.

143 Ibid., paras. 74, pp. 43f.; 187, pp. 97f.; 199, pp. 104f.; 211, p. 111.

treatment of hospitality rights. Unfortunately, he tends to get repetitious. A long sequence of paragraphs (187–218) specifies details and repeats key theses: nations are bound by nature to engage in commerce, but can't be compelled by others (190, 199ff.), commerce may be limited (193), agreements may take various forms (194), permissions may be revoked if not based on contracts (195), unfair monopolies are immoral, but not unlawful (210), taxes can be imposed on merchandise (214), foreigners can be prohibited to enter the territory of a sovereign commonwealth (296).

Like authors before him, Wolff uses Chinese isolationist policy as an example. The Chinese have a perfect right to restrict or altogether refrain from international trade and commerce 'for the purpose of preserving their own interests'. Wolff interprets Chinese intentions, claiming that the government was interested in perfecting the state, which is of course compatible with the duty of self-perfection. Wolff does not stress the right of self-preservation or self-defence, as Kant would do later on in the same context (VI, 3 and 4), but points out instead that the Chinese are entitled to keep their morals 'pure and uncorrupted'.[144] If Chinese policy is perfectly lawful, Wolff nevertheless hints at the possibility that it may be imprudent, an argument later emphasized and elaborated by political economists like David Hume and Adam Smith (see V, 2 and VI, 3). Foreign commerce 'makes a nation rich, consequently powerful'.[145] Nations that refrain from it, Wolff suggests, might gradually lose their power, actually China's fate in the nineteenth century.

As far as European relations to non-Europeans are concerned, Wolff's system of *ius gentium*, together with Kant's, marks the triumph of justice as impartiality. Any exclusive European rights are rejected. The right of each nation to decide on foreign commerce effectively abandons Vitoria's first title. Secondly, nations may persuade, but must never force or compel others to embrace their religion. Unlike Vitoria and Suárez, Wolff makes sure that no back doors are left open. If other nations reject 'the true worship of God ... that must be endured.' Probably again referring to Chinese practice, Wolff holds that states may expel missionaries, prohibit their entrance and ban their books.[146] One might speculate whether Wolff has abandoned Christian claims to absolute truth here, if his thinking is more secularized than that of previous authors, whether he embraces a kind of relativism with formal state sovereignty triumphing over metaphysical truth. The most plausible interpretation is that

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144 Paras. 75 note, p. 44; 187 note, p. 98.

145 Para. 209, p. 109.

146 Paras. 261, p. 133; 297, p. 150; Wolff, *Institutiones*, paras. 1131f., pp. 705f; 1122, p. 699. See Fisch, *Expansion*, pp. 270–5 for Wolff's rejection of exclusive European rights, and especially pp. 271f. on religion. Green, *Law of Nations*, pp. 66–73 provides extensive quotations, but the interpretation is thin.

Wolff's system of natural law allows for a clear-cut distinction between right, morality and religion. He holds that, given religious pluralism in the world, the true religion is notoriously difficult to define. In cases of doubt, the rights of nations as specified in *ius gentium* are of primary importance, as religions are juridically equal.[147] Wolff does not endorse relativism; his juridical framework implies religious neutrality, or impartiality. Thirdly and in agreement with some previous authors like Vitoria, Wolff accepts the true ownership of natives, employing hypothetical thinking to arrive at the Golden Rule and the idea of impartiality. Thus, 'no nation ought to do to another what it does not wish to be done to itself. Indeed, if it is allowable for one nation to occupy lands inhabited by another nation, because they have been hitherto unknown to it, by the same reasoning it will be allowable also for the second nation to occupy the lands of the first, or for any other foreign nation to do so.'[148] European policy of conquest, though not explicitly mentioned, is rejected with the simple, but convincing argument that it cannot be universalized.

Previous sections have demonstrated that this kind of impartial thinking has been employed by numerous authors before Wolff. It usually boiled down to the tricky question if there was a loophole left for European prerogatives to sneak in. Here, Wolff does not allow for compromises. He is culturally sensitive, not imposing European standards of statehood and sovereignty on native communities. Admittedly, 'groups of men dwelling together in certain limits but without civil sovereignty' are not nations, but, like nomads, they have 'jointly acquired ownership' and must not be subject to civil sovereignty without their consent. The basic unit of *ius gentium* are families, not states. Finally and most importantly, there are no special rights for civilized peoples (*gentes*) against barbarians, who may not be expelled at will.[149] In a brilliant footnote based on natural law thinking that combines the notions of natural liberty, consent, culture and injury, and contrasts them with advantage and usefulness, Wolff, while accepting the distinction between civilized and uncivilized nations, refuses to establish rights for the former against the latter. States do have duties towards others, but they are imperfect, so that 'no right arises to deprive another of his natural liberty without his consent or to restrict it for his benefit as much as the purpose of the state demands; for where you desire to promote the perfection of another, you have no right to compel him to

147 Wolff, *Ius gentium*, para. 263, p. 135.

148 'Quamobrem cum nemini rem suam auferre liceat ... nec dominium et imperium Genti, quod habet in terra, quam inhabitat, auferre licet. Quoniam itaque hoc facit, qui terram antea sibi incognitam, sed a Gente habitatam occupat; ... terras incognitas a Gente habitatas occupare exteris Gentibus non licet,' para. 309, p. 157.

149 Paras. 309, p. 157; 310, pp. 157f.; 312, p. 159; paras. 85f., pp. 50f.; 282, p. 144.

allow that to be done by you.'[150] According to some pulp histories of European ideology of conquest, modern authors simply replaced the putative prerogative to missionize by the right to civilize. Wolff demonstrates that these stories have to be qualified. He rejects both rights equivocally. 'Usefulness' or 'civilization' are no acceptable standards in the necessary or natural law of nations.

'He moves with glacial celerity. He ruthlessly bores':[151] if Wolff was not simply ignored, he has been showered with unfavourable comments. Admittedly, he is no easy read. Our culture tends to esteem originality, provocation and shortness; Wolff offers none of these. He writes with clarity, but such clarity that it borders on confusion. Whatever his weaknesses, there are certainly pearls to be found. Wolff was more than Vattel's teacher. He did not contribute to the development towards positive *ius gentium*, or rather only in a very limited sense. He disagreed with Vattel on key issues such as hospitality rights and the rights of aboriginal communities (see V, 5). Whatever the generic philosophical relationship between Wolff and Kant,[152] both are definitely very close to each other in terms of *ius gentium* and hospitality rights. Their positions are almost identical, in terms of systematic status, scope of hospitality, and even justification (reference to the traditional notion of original negative community of possession). However, what Kant succinctly puts down on a few pages, Wolff buries in a volume of more than a thousand paragraphs. Put seemingly anachronistically, Wolff marks the triumph of pure practical reason in the law of nations before Kant. But the anachronism remains on the surface. It will be

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150 'Hinc enim nullum jus nascitur libertate sua naturali contra voluntatem suam alterum privandi, vel eam in commodum vel maxime ipsius restringendi, quantum finis civitatis exigit: nullum enim tibi competit jus cogendi alterum, ut, ubi perfectionem ejus promovere vis, id a te fieri patiatur', para. 313 note, p. 159.

151 Lewis White Beck, *Early German Philosophy. Kant and his Predecessors* (Cambridge, MA: Harvard University Press, 1969), p. 258. Beck's book is the standard study. See also Johan van der Zande, 'In the Image of Cicero: German Philosophy between Wolff and Kant', *Journal of the History of Ideas*, 56 (1995), pp. 419–42; Allan Arkush, *Moses Mendelssohn and the Enlightenment* (Albany: State University of New York Press, 1994); Eckhart Hellmuth, *Naturrechtsphilosophie und bürokratischer Werthorizont. Studien zur preussischen Geistes- und Sozialgeschichte des 18. Jahrhunderts* (Göttingen: Vandenhoeck & Ruprecht, 1985), Hellmuth (ed.), *The Transformation of Political Culture. England and Germany in the late Eighteenth Century* (Oxford: Oxford University Press, 1990). Wolfgang Kersting, 'Der Kontraktualismus im deutschen Naturrecht', in Otto Dann and Diethelm Klippel (eds), *Naturrecht – Spätaufklärung – Revolution* (Hamburg: Felix Meiner Verlag, 1995), pp. 90–110 covers the period from Pufendorf until Carl von Rotteck.

152 Manfred Gawlina, *Das Medusenhaupt der Kritik*. Kantstudien Ergänzungshefte, vol. 128 (Berlin, New York: Walter de Gruyter, 1996), is a full-length study of the controversy between Kant and the Wolffian philosopher Johann August Eberhard in the 1780s, a clash between two divergent paradigms. See also Radner, 'Second Antinomy', pp. 437–40.

pointed out (as was to be expected) that the structure of Kant's idea of practical reason coincides with the notion of justice as impartiality, focusing on freedom, equality, reciprocity and universalizability. In historical terms and put bluntly, Wolff follows an older tradition against the modern one which reserves membership in the international society to sovereign states. For Wolff, the basic unit of *ius gentium* are families, not states. From a modernist perspective, Wolff links up with a pre-Hobbesian current of thought, steps back and outside the shadow of Leviathan. Finally, there is another paradox here: though Wolff differs profoundly from Pufendorf, their respective theories of hospitality rights draw similar conclusions.

7. Contextualizing theory: State practice and hospitality rights

An important section of contemporary intellectual history – usually Pocock and Skinner are mentioned here – aims at contextualizing thought. It stresses the context-bound nature of ideas and values as they are embedded in human culture, and the changes in these contexts over time (I, 3). The insistence upon contextualization is somewhat redundant. Whenever a reader tackles a text, at least one context is imposed, namely that of the reader. The problem thus turns into what kind of context is the most appropriate – it may be historical, cultural, social, and so on. It makes little sense to argue that one type of context is more legitimate than another.[153] With these caveats in mind, I will focus in this section on the so-called relationship between theory and practice in terms of hospitality rights. How did theory (abstract reasoning or thought) relate to practice?

Theorists who are the focus of this study often referred to practices, either apologetically or critically. Many follow Leibniz' motto *theoria cum praxi*: both often intersect and cannot be distinguished clearly. Vitoria's lecture is best seen as a response to colonial practices and a contribution to the debates about Amerindian rights (II, 2). At the same time, Vitoria and his fellow theologians, relying on the social power of the Catholic Church, exerted some influence on Spanish practices. The inviolability of ambassadors is an ancient custom, as illustrated by the outcome of the notorious Mendoza affair in 1584. Thus Gentili, who was one of the consulted experts, probably just had to put into theory what was widely accepted in his time (III, 5). Finally, I have pointed at the tension between Grotius's writings and his apparent suggestion at the Colonial Conference between England and the United Provinces in 1615, that

153 See the analysis in Preston King, 'Historical Contextualism: The new Historicism?', *History of European Ideas*, 21 (1995), pp. 209–11.

the two countries should wage a preventive war against Spain (end of III, 4). This could be interpreted as a clash between legal theory and political practice. The previous conference of 1613 in London is useful in another respect. It shows how the members of the two commissions struggled with a familiar problem: how do we relate abstract principles ('theory') to specific cases ('practice')? The English delegation asserted that according to *ius gentium*, nations had the right to travel freely to all parts of the globe and carry on commerce there. This gave them, so they argued, a right to access the East Indies, contrary to Dutch claims. The Dutch did not question the invoked generic principle, but specified that it was limited by the customary laws of peoples who concluded, for instance, a contract. Natural liberty enabled persons to obligate each other (*se alteri posse obligare*) in accordance with the law of nations.[154] The English rejoinder compared the Dutch claims with those of the Portuguese, and in a clever move, the delegates referred to Grotius's treatise *Mare Liberum* and its eighth chapter on the freedom of trade and hospitality rights. Grotius probably did not expect this. The book had been published anonymously, and he obviously assumed that it was still unknown in England. So Grotius faced the interesting challenge of defending his own theory and Dutch claims at the same time. His defence is straightforward and consistent with his theoretical framework. It is based on a simple distinction between generic or indefinite principles and the specific content of contracts, in this case concluded with the natives. These treaties were just and honest and limited to a certain degree the prescriptions of the *ius gentium. Pacta sunt servanda*, contracts have to be preserved, even when contrary to liberty. Grotius incorporated a summary of his statement in *De Jure Belli ac Pacis*.[155]

How do theory and practice relate to each other? There are many possibilities. A widespread assumption is that practice influences theory. According to this thesis, philosophical or legal treaties about the rights of ambassadors, for instance, would be based on and reflect practices of a given period. Vitoria's lecture could then be seen as the ideology or set of ideas justifying colonial endeavours (II, 7). Pufendorf's and Wolff's balance-of-power theories would mirror eighteenth-century politics (IV, 3 and 5), and Vattel and Moser would epitomize a synthesis of natural law theory and actual state practice where practical considerations predominate (V, 5). Wilhelm Grewe perceives this dependence of theory as characteristic of the whole *Jus Publicum Europaeum* or the *Droit public de l'Europe*. He claims that it was simply identical with the European international regime or system of its age,

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[154] The conference is reported by G. N. Clark and W. J. M. van Eysinga, 'The Colonial Conferences between England and The Netherlands in 1613 and 1615', *Bibliotheca Visseriana*, 17 (1951), pp. 68–73. The quotation ibid., p. 69.

[155] See Clark and Eysinga, 'Colonial Conferences', pp. 72f.

embedded in a theory of natural law.[156] The opposite thesis maintains that theory influences and refines practice. Adherents would point at the impact of Grotius, Vattel and others on the way politicians conceptualized the legal dimension of international relations and acted upon these conceptions. According to the mediating thesis, theory and practice are mutually dependent or interdependent as well as interact. The respective theories of Grotius and Vattel would be cases in point, influenced by, but also influencing state practice. Especially in the eighteenth century, writers engaged in lively debates about controversial legal issues of international politics. Their theories were often crucial in the gradual development of customary legal norms. Examples are the debates about coastal waters and cannon range as well as the law of neutrality.[157] Sometimes the causal relationship is unclear: treaties before and after Grotius's publications customarily refer to *la liberté du commerce et de la navigation* as part of the *ius gentium* in the sixteenth and seventeenth centuries. Finally, we could claim that theory and practice are not connected at all. In the case of the *Droit public de l'Europe*, this would mean that it is a mere aggregation of treaties and principles of diplomatic practice, without any connection whatsoever with the system of *ius gentium* developed by the natural lawyers.[158] Wolfgang Preiser offers a more distant example, pointing at the curious split between theoretical ideas and practice in the world of the Greek city-states, or *poleis*. According to the the fourth-century state philosophers, non-Greeks or barbarians were 'by nature' in a state of war with the Greeks. State practice of the same period, on the other hand, openly refused to follow theory when the call to join the Attic maritime league was addressed to both Hellenes *and* barbarians not living under Persian rule.[159]

It does not make sense to favour any of these four possibilities over the

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156 Wilhelm G. Grewe, 'Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des "europazentrischen" Bildes der Völkerrechtsgeschichte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 42 (1982), p. 464. According to Charles Henry Alexandrowicz, 'The Afro-Asian world and the law of nations (historical aspects)', *Recueil des Cours*, 123 (1968), 1, pp. 161–3, especially maritime practice had an impact.

157 The interplay between theory and practice is suggested by Heinz Duchhardt, *Balance of Power und Pentarchie. Internationale Beziehungen 1700–1785* (Paderborn et al.: Schöningh, 1997), pp. 73–82 (with examples).

158 This is the thesis of Dietrich Schindler, 'Universelles und regionales Völkerrecht', in *Recht als Prozeß und Gefüge. Festschrift für Hans Huber* (Bern, 1981), pp. 609f., quoted in Karl-Heinz Lingens, *Internationale Schiedsgerichtsbarkeit und Jus Publicum Europaeum 1648–1794* (Berlin: Duncker & Humblot, 1988), p. 28.

159 Wolfgang Preiser, 'History of the Law of Nations: Basic Questions and Principles', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam et al.: Elsevier, 1995), vol. 2, p. 720.

others. We should remember Lyotard, beware of grand narratives, and hasty conclusions. What may be true in one case may not apply in another. The history of *ius gentium* in modern Europe sometimes seems isolated from state practices, sometimes not.[160] It has already been pointed out that during the Middle Ages, European mercantile law developed, aiming at reciprocity of rights, procedural and substantive fairness, and equality. A prominent example is Article 41 of the Magna Carta (1215), protecting the rights of merchants (*mercatores*) of the enemy state (I, 6). The rights of foreigners were either written down in treaties or granted as privileges by the sovereign. The Mediterranean world of the twelfth and thirteenth centuries saw the emergence of consulates. *Consules mercatorum* had legal authority over the members of their guilds, but also trading non-members, in foreign territories.[161] Hospitality rights were the focus of much attention in Byzantine treaties, as Constantinople was a key trading center of the area. Especially Venice and Genoa enjoyed special privileges in the late Byzantine period. In the sixteenth and seventeenth centuries, hospitality rights were included in peace or trade treaties, also signed with the non-Christians of the Turkish empire, its tributary states, or Morocco. A fine example is the first Franco-Turkish Capitulation of 1535, which emphasized the freedom of navigation, residence, travel and trade. The goal of the capitulation was to guarantee peace and concord between the two rulers 'so that all subjects and tributaries of said sovereigns who wish may freely and safely, with their belongings and men, navigate on armed or unarmed ships, travel on land, reside, remain in and return to the ports, cities, and all other

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160 There are some specialized studies on certain aspects of the *Jus Publicum Europaeum*. See for instance Lingens, *Schiedsgerichtsbarkeit*, passim; Strohmeyer, *Theorie der Interaktion*; Andreas F. Sonntag, *Die Behandlung des feindlichen Privateigentums bei Ausbruch des Krieges innerhalb der eigenen Grenzen in der Zeit von 1200 bis 1800. Ein Beitrag zur Völkerrechtsgeschichte* (Münster: Lit-Verlag, 1990), and Stephan Adam, *Kriegslisten und Perfidieverbot in der Geschichte des Kriegsaktionenrechts vor Abschluß der Haager Landkriegsordnung von 1899* (Frankfurt am Main et al.: Lang, 1992).

161 This and the following is partly based on Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (München: Beck, 1994), pp. 104f., 115, 132f., 160, and 174. I am also much indebted to H. Neufeld, *The international Protection of private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648–1815)* (Leiden: Sijthoff, 1971) and Jan Hendrik Willem Verzijl, *International Law in Historical Perspective*, 10 vols (Leyden: Sijthoff, 1968–79), vol. 5: 'Nationality and other matters relating to individuals', especially pp. 402–39. Rudolf Meyer, *Bona fides und lex mercatoria in der europäischen Rechtstradition* (Göttingen: Wallstein, 1994) is an introduction to the law merchant in European legal thought. The standard collection of sources relating to the history of *ius gentium* is now Wilhelm G. Grewe (ed.), *Fontes Historiae Iuris Gentium. Volume 2: 1493–1815* (Berlin, New York: Walter de Gruyter, 1988).

places in their respective countries for their trade, and the like shall be done for their merchandise.'[162]

Further articles stipulated that merchants should only pay regular customs (Art. II), French ships should receive supplies against reasonable payment in Turkish ports (Art. XII), and shipwrecked persons should remain free and 'be allowed to collect all their belongings' (Art. XIII). Subsequent peace or trade treaties in Europe followed similar patterns. The Anglo-Spanish treaty of 1630 emphasized the principle of free commerce, granting inhabitants of the two kingdoms the mutual right to travel, bring merchandise, buy and sell at liberty (Art. VII). It repeated a similar formulation in an earlier agreement (treaty of 1604, Art. IX).[163] Free movement and trade were usually limited by colonial trade monopolies the treaties specifically mentioned. Towards the end of the eighteenth century, the 'freedom of the seas' got a new meaning, justifying the free commerce of neutral countries in wartime. Trade monopolies were deliberately abandoned in the British-French trade treaty of 1786, apparently influenced by the new political economy of Adam Smith and others (see V, 2).[164]

As indicated, originally foreign merchants were unilaterally granted privileges by the ruler of a country. Either single merchants or whole groups of traders such as trading associations could benefit. Specifications offered a wide range of possibilities. Some treaties granted special authorizations such as the right to employ barristers and notaries public, to carry arms for self-defence, or limited the validity of the agreement to the lifetime of the rulers. Merchants usually needed a safe-conduct (*salvi conductus*) or special permission to enter the foreign country, which did not always guarantee security of person and property in practice.[165] Treaties also shed light on the discriminatory treatment aliens were often exposed to. Unless ruled out by provisions, foreigners could be exposed to compulsory loans to the local sovereign, their ships or goods on board could be seized or requisitioned, or they were forced into military service. According to the *jus naufragii* (*droit d'épave, Strandrecht*), the ruler was entitled to appropriate vessels and cargoes shipwrecked on his coasts. This

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162 '... que tous les sujets et tributaires desdits seigneurs, qui voudront, puissent librement et sûrement, avec leurs robes et gens, naviguer avec navires armés et désarmés, chevaucher et venir, demeurer, conserver et retourner aux ports, cités et quelconques pays, les uns des autres, pour leur négoce, mêmement pour fait et compte de marchandises', Article I, First Franco-Turkish Capitulation, Constantinople, 1535, in Grewe, *Fontes*, p. 72. On the relations between the Turks and Christian powers see for instance Karl-Heinz Ziegler, 'Deutschland und das Osmanische Reich in ihren völkerrechtlichen Beziehungen', *Archiv des Völkerrechts*, 35 (1997), pp. 255–72 with more references.

163 Grewe, *Fontes*, pp. 60 and 55f.

164 Neufeld, *Protection*, pp. 65f.; Grewe, *Epochen*, pp. 481–4.

165 Verzijl, *International Law*, pp. 405f.; Grewe, *Fontes*, p. 72.

right is the background of one article in the First Franco-Turkish Capitulation, which stipulated that persons suffering shipwreck should remain free and 'be allowed to collect all their belongings'.[166] In the seventeenth century, actual practice granted the owners of the shipwrecked vessels a term of a year and a day to reclaim their property unless it was of a perishable nature and if they payed a reasonable sum to those who had retrieved it. The *droit d'aubaine* (*jus detractus, Heimfallrecht*) gave the ruler the right to seize the property of foreigners after their death in, or departure from, the country of their residence. Many treaties included provisions which limited this right, for instance by expressly granting aliens the right to dispose of their goods by a will. In the second half of the eighteenth century, treaties or decrees jointly rejected the *droit d'aubaine*, which gradually fell into disuse. Finally, foreigners ran the risk of being held liable for debts of their home state or its citizens. This form of collective liability was also denied in many commercial treaties, and was later abandoned.

The seventeenth and eighteenth centuries saw a sharp rise in the sheer number of treaties signed by various European powers. Usually the causal relationship is explained in the following way: economic interests became more important in the Western 'commercial societies' (V, 1), which led to more international trade, which in turn required more security for the merchants and thus a more extensive legal network. Since Utrecht (1713), experts on commercial issues accompanied the delegations at peace congresses. Commercial pressure-groups such as the Hudson Bay Company tried to influence their governments prior and during peace negotiations. The legal network within Europe was often sophisticated. The jurisdiction of consuls, dominant in the fifteenth century, was gradually abandoned in favour of a legal position which placed aliens under the local jurisdiction of the foreign state. According to customary law, the home state of these aliens was in turn entitled to protect their citizens in relation to the host state. The means of protection were manifold. Customary law of nations granted the foreigner access to the local courts and legal equality with the locals.[167] Sometimes these rights were spelled out by municipal law, as in the *Allgemeines Landrecht für die Preußischen Staaten* (1794): Foreigners were entitled to enjoy the same rights as native citizens, as long as they deserved the protection of the laws.[168] Writers like Bynkershoek, Johann Jakob

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166 First Franco-Turkish Capitulation, Constantinople, 1535, Article XIII, in Grewe, *Fontes*, p. 79. Cf. Verzijl, *International Law*, pp. 403–17 for this and the following.

167 Neufeld, *Protection*, pp. 4–6, 94–114; Duchhardt, *Gleichgewicht der Kräfte*, pp. 120–6.

168 'Fremde Unterthanen haben ... bey dem Betriebe erlaubter Geschäfte in hiesigen Landen, sich aller Rechte der Einwohner zu erfreuen, so lange sie sich

Moser or Bonnot de Mably did not question the full jurisdiction of the sovereign host state. However, they agreed with customary practice that in case the hospitality rights were violated, for instance, when access to the courts was denied, the home state was free to resort to diplomatic representation or letters of reprisal (*lettres de marque*).[169] These letters authorized the holders to practice a peculiar form of retaliation. They could take the property of aliens as a compensation if their state or its subjects had inflicted some kind of injury or damage. To prevent abuse, treaties specified that letters of reprisal could only be issued if justice had been denied by the state or its subjects guilty of the injury. Thus the Hispanic-English treaty of 1667 detailed that

> ... there shall not therefore be given letters of reprisal, marque, or counter-marque, by any of the Confederates, until such time as justice is sought and followed in the ordinary course of law. But if justice be denied, or delayed, then the King, whose people or inhabitants have received harm, shall ask it of the other ... But if there should be yet a delay, or justice should not be done, nor satisfaction given within six months after having the same so demanded, then may be given letters of reprisal, marque, or counter-marque.[170]

In the eighteenth century, the right of private reprisal vanished, and states took over the protection of their nationals, and what would later be called the 'claims settlement process'. Self-help measures, often of forcible nature, were now solely controlled by the states, thereby creating the bare beginnings of a body of norms later entitled the state responsibility for injuries to aliens.

The hospitality rights in the eighteenth century reflected the *Droit public de*

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des Schutzes der Gesetze nicht unwürdig machen', *Allgemeines Landrecht für die Preußischen Staaten* (1794), ed. Hans Hattenhauer (Frankfurt am Main: Alfred Metzner Verlag, 1970), Einleitung, § 41. The influence of the law of nations on this code is analysed by Karl-Heinz Ziegler, 'Reflexe des Völkerrechts im Allgemeinen Landrecht für die Preußischen Staaten von 1794', in Norbert Horn (ed.), *Europäisches Rechtsdenken in Geschichte und Gegenwart. Festschrift für Helmut Coing zum 70. Geburtstag* (München: Beck, 1982), pp. 453–66.

169 Neufeld, *Protection*, pp. 50f. and Art. III of the Hispanic-English Treaty of Peace, Alliance and Commerce (1667), in Grewe, *Fontes*, p. 466. See Verzijl, *International Law*, pp. 408–10 and Richard B. Lillich, 'Duties of States regarding Civil Rights of Aliens', *Recueil des Cours*, 161 (1978), III, pp. 344–6 on the letters of reprisal.

170 '... Literae Repressaliarum Marcae, aut Contra-Marcae eam ob rem ex Parte Alterutrius Confoederatorum haud quaquàm emanabunt, nisi tentatis priùs et sollicitatis juris et justitiae remedijs ordinarijs: Juris verò et justitiae beneficion vel dilato, vel denegato, Rex ille, cujus Subditi, aut Incolae injuriam passi sunt, justitiam fieri instantiùs postulabit et urgebit ... Sin autem ulterior post haec mora interponitur, nullaque satisfactio intra sex menses post instantiam factam subsequitur, tùm demum Literas Repressaliarum Marcae, vel Contra-Marcae parti gravatae concedi posse consensum est', Treaty of Peace, Alliance and Commerce, Madrid, May 23 1667, in Grewe, *Fontes*, pp. 466f.

l'Europe. Above all, they were usually restricted to Europe. Only nationals were protected; stateless persons enjoyed no security. This emphasizes the beginnings of a state-centered understanding of the law of nations. Hospitality rights were either conferred upon by the sovereign or based on treaties, and thus divided into two branches, one municipal, the other international. Customary law by and by granted aliens a minimum standard of treatment, or the treaties simply stipulated that aliens should be dealt with like nationals. Natural law became progressively irrelevant, though sometimes mentioned in treaties, for instance, in order to justify the principle of free commerce.[171] Implicitly, the politicians who signed the numerous treaties endorsed a basic conviction of many natural lawyers: that the imperfect right of hospitality can only be turned into a perfect one by agreement. They also shared a common predicament, philosophical in nature: what exactly is 'equality of treatment', or 'treatment on the footing of nationals'? Controversies arose concerning the increases of taxes, for instance. What are 'minimum standards of treatment', and where do we draw the line between proper behaviour and ill-treatment?

[171] Neufeld, *Protection*, pp. 47 and 84, referring to the defence alliance between Russia and Sweden in 1800.

Chapter 5

The Age of Enlightenment

The previous chapter focused on what can be called the climax of natural law thinking. The main issue of this chapter is the transformation, 'decadence' and finally explicit attack on the natural law tradition, above all by Rousseau and Hume.[1] The third section is predominantly systematical, analysing the various arguments raised against natural law doctrines and concentrating on Hume's profound critique. Rousseau does not dismiss the whole tradition out of hand, but rejects a specific Pufendorfian version, as the fourth section tries to show. Although there is a clear focus on national community and a shift away from the *societas humani generis*, Rousseau is more ambiguous than usually assumed. I focus on his rejection of various forms of cosmopolitanism and the idea of a global commonwealth, and analyse the functions of civic patriotism. Rousseau can be interpreted as endorsing a form of genuine, moral cosmopolitanism which is in principle compatible with his notion of republican patriotism. As Rousseau rejects almost all forms of cosmopolitanism – cultural, commercial/economic, and the cosmopolitanism of the natural law tradition – many interpreters have been misled into believing that he is thoroughly anti-cosmopolitan. For Rousseau, however, cosmopolitanism is acceptable if firmly rooted in and evolving from adherence to one's particular community. Rousseau's patriotism in turn closely follows the republican tradition, and is similar to Montesquieu's.

The first section demonstrates that the citadel of the natural lawyers was not attacked by outside troops, but from within. More precisely, my main argument is that the tradition transformed itself into something that was later barely recognizable as its offspring. There is a clear intellectual connection and evolution from Pufendorf via the Scottish Enlightenment, especially Gershom Carmichael and Francis Hutcheson, to Adam Smith's new science of political economy, the four-stage theory, a qualified free trade doctrine, and incipient historicism. Sections One and Two focus above all on Montesquieu, Hume

[1] The notion of 'decadence' is used by George H. Sabine, *A History of Political Theory*, 4th, rev. edn, by Thomas L. Thorson (Fort Worth et al.: Harcourt Brace College Publ. 1989), p. 500.

and Smith, their theories of commercial society, and international free trade and relations. I examine several 'unit ideas' (Lovejoy), related to the law of unintended consequences, the role of self-interests, the economic futility of conquest and the benefits of free trade.

Previous sections have shown that from the start, *ius gentium* has had a systematically precarious position between natural law and 'positivistic' tendencies stressing custom or consent (I, 5). In Hobbes, natural law provides a foundation of positive civil law, dissolving itself in the process (IV, 1). Section Five shows how *ius gentium* and its dominant natural law orientation is transformed into a recognizably classical theory of international law stressing state sovereignty, custom and treaties. Chief exponents are Vattel and Moser.

1. Natural law, history, sociability, and commercial society: Pufendorf to Smith

I am afraid there are but few men in any country who will prefer the public good to their private interests, when they happen to be inconsistent with one another. (David Bindon, 'A Letter from a Merchant who has left off trade to a Member of Parliament', 1738)

At the end of the eighteenth century, Adam Smith (1723–90) used the notion of a 'commercial society' to describe a community where the division of labour has been established and members exchange goods for their mutual benefit, and everybody thus 'becomes in some measure a merchant'.[2] Hegel termed this commercial society *bürgerliche Gesellschaft* or civil society, where citizens provide in acts of barter and exchange for their own needs and those of others. This 'system of needs' is said to be based on reciprocity, the abstract freedom of the individual and morality. With considerable historical accuracy, Hegel named Pufendorf as the founding father of this new theory of society.[3] Even though it evolved out of the natural law tradition – of which Pufendorf was an integral part – it offered a notion of society different from that tradition. The idea of a commercial society with its emphasis on utility and the exchange of goods can be distinguished from the notion of a Christian society, where members share a belief system, a thick conception of the good life, and try to base their interactions on mutual care and benevolence. Given his theocentric

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[2] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776], ed. by R. H. Campbell, A. S. Skinner, and W. B. Todd (Oxford: Clarendon Press, 1976), Book I, chapter IV, paragraph 1 (from now on abbreviated 1.4.1), p. 37.

[3] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* [1821], ed. Allen W. Wood, transl. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), part 3, section 2, paras. 182–208, pp. 220–39; *Hegel's Lectures on the History of Philosophy*, transl. Elizabeth S. Haldane and Frances H. Simson (London: Routledge and Kegan Paul, 1974), vol. 3, pp. 321f. ('the social instinct ... was made the principle').

framework of thinking, John Locke is sometimes seen as a rather late proponent of this exclusive Christian community.[4]

The theory of commercial society should also be discerned from the ideal of a community espoused by the civic humanist tradition with its emphasis on *virtus*, *vertu politique* or civic virtue and on the political participation of citizens, also and especially in matters of military defence. To qualify for citizenship, the (always male) citizen must be master of his own household, and possess property in order to be economically independent. Civic humanists draw a line between full citizens, who are exempt from material pursuits, and producers, who exclusively satisfy economic needs and often aim at profit. By contrast, in Smith's commercial society, any citizen is producer, consumer and merchant simultaneously. Civic humanists, who are sometimes somewhat misleadingly called civic republicans, are extremely worried about the threat of corruption, caused by citizens who put private interests above the common good, or material concerns above civic virtue. With some justification, Rousseau can be interpreted as a civic humanist, whose attack on commercial society and sociability is partly fuelled by this tradition. The classic opposition between virtue and corruption is joined by that between virtue and commerce (see V, 4).[5]

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[4] David Gauthier, 'Why Ought One Obey God? Reflections on Hobbes and Locke', *Canadian Journal of Philosophy*, 7 (1977), pp. 425–46, especially p. 432; John Dunn, 'From applied theology to social analysis: the break between John Locke and the Scottish Enlightenment', in Istvan Hont and Michael Ignatieff (eds), *Wealth and Virtue. The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1983), pp. 119–35; Istvan Hont, 'Commercial Society and Political Theory in the Eighteenth Century: the Problem of Authority in David Hume and Adam Smith', in Willem Melching and Wyger Velema (eds), *Main Trends in Cultural History. Ten Essays* (Amsterdam and Atlanta, GA: Rodopi, 1994), p. 60; W. M. Spellman, *John Locke* (Houndmills et al.: Macmillan Press, 1997), pp. 140f.

[5] The standard study on the civic humanist paradigm is John Greville A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). Chapter XIV covers the eighteenth-century debates. Pocock calls Rousseau 'a major classical theorist in the humanist succession', ibid., p. 505. See also 'Virtue and Commerce in the Eighteenth Century', *Journal of Interdisciplinary History*, 3 (1972), pp. 119–34; Jack H. Hexter, 'Republic, Virtue, Liberty, and the Political Universe of J. G. A. Pocock', in *On Historians* (Cambridge, MA: Harvard University Press, 1979), pp. 255–303. Pocock reflects upon the relationship between natural law and civic humanist traditions in '*The Machiavellian Moment* Revisited: A Study in History and Ideology', *Journal of Modern History*, 53 (1981), pp. 49–72 and partly in 'Cambridge paradigms and Scotch philosophers: a study of the relations between the civic humanist and the civil jurisprudential interpretation of eighteenth-century social thought', in Hont and Ignatieff, *Wealth and Virtue*, pp. 235–52. A useful definition of civic humanism can be found in John Robertson, 'The Scottish Enlightenment at the limits of the civic tradition', ibid., pp. 138f.

There are many ways to tell the story of how Adam Smith's 'commercial humanism' and 'nascent historicism' (Pocock) evolved out of the natural law tradition. The most widespread story is that of gradual secularization, where the medieval emphasis on just price, benevolence and charity is replaced by considerations of utility and reciprocity. The story could either emphasize modern European practice or intellectual history. In terms of practices, the seventeenth century is often considered a turning-point, and contrasted with the Middle Ages or the sixteenth century. Scholars in the 1950s and 1960s, among them Joseph Schumpeter and Raymond de Roover, have emphasized how scholastic economic thought has become a victim of whiggish distortions, due to an entrenched willingness of modern authors to bounce themselves off from preceding periods. It is best to see the differences between medieval and modern times as comparative rather than absolute. Scholastic economics reluctantly accepted an element of utilitarian reasoning and the profit-seeking motive while trying to contain it within a deontological and theological framework. It was a compromise, and commerce and money-making, though not always condemned, stood lower in the hierarchy of medieval values than other activities.[6] In the sixteenth century, arguments for religious toleration were, above all, theological and moral rather than utilitarian. Occasional references to economic motives were always subordinated.[7] Proponents of toleration referred to the Christian duty to love one's neighbour and mentioned that faith cannot be coerced without causing hypocrisy and atheism. Some did

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[6] Joseph A. Schumpeter, *History of Economic Analysis* [1954], ed. from manuscript Elizabeth Boody Schumpeter, new intro. Mark Perlman (New York: Oxford University Press, 1994), pp. 73–113; Raymond de Roover, *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe*, ed. Julius Kirshner (Chicago: University of Chicago Press, 1974), especially pp. 306–45; Murray N. Rothbard, *Economic Thought before Adam Smith. An Austrian Perspective on the History of Economic Thought*, Volume I (Aldershot: Edward Elgar, 1995), pp. xf. and 29–133; Odd Langholm, *Economics in the Medieval Schools. Wealth, Exchange, Value, Money and Usury according to the Paris Theological Tradition 1200–1350* (Leiden: E. J. Brill, 1992), pp. 24f. and 594; Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before its Triumph* (Princeton: Princeton University Press, 1981), pp. 9–12. See also I, 6 above.

[7] See for the following Erich Hassinger, 'Wirtschaftliche Motive und Argumente fuer religiöse Duldsamkeit im 16. und 17. Jahrhundert', *Archiv für Reformationsgeschichte*, 49 (1958), pp. 226–45. See also Jonathan Israel, 'The Intellectual Debate about Toleration in the Dutch Republic', in Christiane Berkvens-Stevelinck, Jonathan Israel and G. Hans M. Posthumus Meyjes (eds), *The Emergence of Tolerance in the Dutch Republic* (Leiden, New York, Köln: Brill, 1997), pp. 3–36; John Christian Laursen, 'Introduction: Contexts and Paths to Toleration in the Seventeenth Century', in John Christian Laursen and Cary J. Nederman (eds), *Beyond the Persecuting Society. Religious Toleration Before the Enlightenment* (Philadelphia: University of Pennsylvania Press, 1998), pp. 169–77.

perceive the economic advantages of tolerating dissidents in the 1550s. The Dutch Mennonites, settled in West Prussia to develop agriculture there, enjoyed freedom of religious expression and proved extremely successful. The prince was explicitly more concerned with promoting commerce and industry than confessional uniformity. In the 1580s, over 100,000 refugees from the Catholic south Netherlands emigrated to the north, contributing to what has been called the economic miracle and the subsequent Dutch dominance of the rich trades at the onset of the Golden Age (IV, 4). However, Pieter de la Court still had to face repressions from the ruling Reformed Church in Leiden when he published *Interest van Holland* (1662 and 1669), basically repeating William of Orange's arguments in favour of confessional freedom. The Revocation of the Edict of Nantes (1685) is usually considered a turning-point. It ruined France's reputation as a tolerant country, while at the same time promoting more tolerance in those countries which received the French Calvinists, and profited from their industry.

Reference to actual practice has the great advantage of avoiding the fallacy of the Few Great Men or great thinker approach, where some brilliant figure – among possible candidates are Hobbes, Locke, or Smith – creates almost single-handedly a new paradigm, and now there is light where used to be darkness. Good historians, however, keep reminding us of the fact that practices often preceded theoretical reflections, as in the case of toleration, and that 'lesser' thinkers – frequently merely the neglected ones – are often equal, or even superior to the 'great' ones.[8] One of the alternative stories of the rise of commercial society tends towards this great thinker approach. It tells how the theory of commercial sociability and society was designed to overcome the Hobbesian binary juxtaposition of the state of nature, anarchy and war on the one hand, and the civil condition with a coercive authority, on the other (see IV, 1). *Tertium est datur* is the basic message here. As Smith put it in his *Theory of Moral Sentiments*, society based on 'a sense of its utility, without any mutual love or affection' and supported by a system of legal restraints is not morally perfect and probably not a happy one, but feasible and may be even just. It is important to keep in mind that Smith does not hold commercial society superior over the Christian one with its emphasis on virtues such as love, gratitude, friendship, esteem and affection. His point is that, even if these virtues should be absent, society 'will not necessarily be dissolved': 'Beneficience ... is less essential to the existence of society than justice.' Smith has commutative, not distributive justice in mind. The latter refers to Pufendorf's imperfect rights of charity or benevolence, the former to perfect, enforceable rights such as

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[8] Cf. John Christian Laursen and Cary J. Nederman, 'General Introduction: Political and Historical Myths in the Toleration Literature', in *Beyond the Persecuting Society*, pp. 1–10, especially pp. 3f.

property or contracts (IV, 4). In the *Wealth of Nations*, Smith adds the argument that members of modern civilized societies interact with many, but cannot make friends with everybody, as 'life is scarce sufficient to gain the friendship of a few persons.'[9] The utilitarian relations in a commercial society are thus a second-best, but feasible solution to the Hobbesian dilemma. Writers between Hobbes and Smith could then be interpreted as struggling with convincing answers, and both Hobbes and Smith emerge as almost mythical figures: one knowing how to raise tricky problems and provoking thought, the other providing the definite answer 'across the centuries'.

This story is closely related to another one, the debate about the nature of self-interest and selfishness in moral philosophy after Hobbes. A previous section has offered a structural interpretation of Hobbes's state of nature (IV, 1). If the emphasis is put on his psychology or anthropology, a picture of humans evolves whose unrestrained self-interests lead to confusion, disorder and civil war. 'All society', Hobbes claims, 'exists for the sake either of advantage or of glory, i.e. it is a product of love of self, not of love of friends.'[10] According to some, Hobbes's attempt to reduce morality to self-love, and his claim that it is destructive to society, sparked a debate among moral philosophers who usually tried to rebut him. Among his opponents and commentators were the theologian Richard Cumberland, of course Pufendorf, members of the Scottish Enlightenment such as Hutcheson, and finally Smith. Eventually it was claimed that economic self-interest, if properly channelled, could benefit society, and the theory of commercial sociability was born. In *The Passions and the Interests*, Albert Hirschman has shown that the term 'interest' was originally not restricted to the material aspects of personal welfare, but comprised human aspirations in general where an element of reflection and calculation was involved. In the eighteenth century, the economic meaning became predominant.[11] Interests became the tamers of the passions. By the middle of

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[9] Adam Smith, *The Theory of Moral Sentiments* [1759], ed. D. D. Raphael and A. L. Macfie (Oxford: Oxford University Press, 1976), Part II, Section II, Chapter III, paragraphs 1–3 (from now on 2.2.3.1–3), pp. 85f.; Adam Smith, 'Report of 1762–3', 1.14f., in *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford: Clarendon Press, 1978), p. 9; Smith, *Wealth of Nations* 1.2.2, p. 26. Cf. the discussion in Hont, 'Commercial Society', pp. 69f.

[10] Thomas Hobbes, *On the citizen* [1641], ed. and transl. Richard Tuck and Michael Silverthorne (Cambridge, New York: Cambridge University Press, 1998), 1.2, p. 24.

[11] Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before its Triumph* (Princeton: Princeton University Press, 1981), pp. 32f. Another relevant study is Milton L. Myers, *The Soul of Modern Economic Man. Ideas of Self-interest, Thomas Hobbes to Adam Smith* (Chicago,London: University of Chicago Press, 1983). See also Schneewind, Jerome B., *The invention of autonomy. A history of modern moral philosophy* (Cambridge: Cambridge University Press, 1998), pp. 101–395 on philosophers between Hobbes and Smith.

the eighteenth century, Mandeville's shocking and provocative language of 'private vices' was absorbed, when Hume replaced it by the euphemistic and more acceptable words 'private interests' and 'self-interests'.[12]

Arthur Lovejoy has claimed that any age is dominated by a set of 'implicit or incompletely explicit *assumptions*, or more or less *unconscious mental habits*' which predisposes it 'to think in terms of certain categories or of particular types of imagery'. He called these 'endemic assumptions' which shape and control any sort of reflection 'unit ideas'.[13] According to Lovejoy, one such idea was the 'chain of being', that is, a picture of reality understood hierarchically, from the pure potentiality of matter upward through the vegetative, sentient and rational souls, into the realm of disembodied, angelic souls, culminating in pure actuality or Being, or God (see I, 3). The vision that interests tame the passions and ultimately promote the public good can be interpreted as another unit idea. It is connected with the assumption that human actions have unintended consequences, or are directed by an 'invisible hand' towards beneficent results. In a now classic passage in the *Wealth of Nations*, Smith contends that any member of a commercial society is primarily and generally interested in his own security and profit, but 'he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention ... By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.'[14] Two elements can be separated: the metaphor or law of unintended consequences, and the implicit teleology. As usual, research has shown the long history of both, which reaches at least back to Christian theology. Smith's doctrine of an invisible hand can only be properly understood if it is seen within the wider framework of a deistic theology, where the market is part of and subordinated to a superior design of a pre-established harmony of ends. Among the many who endorsed this unit idea were the French theologian Bossuet, Mandeville, Vico, Sir James Steuart, Ferguson, Hume, Kant and Hegel.[15]

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[12] David Hume, 'Of the independency of Parliament', in *Political Essays*, ed. Knud Haakonssen (Cambridge: Cambridge University Press, 1994), p. 24, analysed in Albert O. Hirschman, *Rival Views of Market Society and Other Recent Essays* (New York: Viking, 1986), pp. 38f.

[13] Arthur O. Lovejoy, *The Great Chain of Being. A Study of the History of an Idea* (Cambridge: Harvard University Press, 1948), pp. 7, 10 and 14f.

[14] Smith, *Wealth of Nations*, 4.2.9, p. 456; cf. *Theory of Moral Sentiments*, 4.1.10, p. 184f. and *Wealth of Nations*, 1.2, p. 25 ('not originally the effect of any human wisdom').

[15] See my references in *Pax Kantiana. Systematisch-historische Untersuchung des Entwurfs 'Zum ewigen Frieden' (1795) von Immanuel Kant* (Wien, Köln, Weimar: Böhlau-Verlag, 1992), pp. 278–81; Karen I. Vaughn, 'Invisible Hand', in John Eatwell, Murray Milgate and Peter Newman (eds), *The New Palgrave: The Invisible Hand*

Yet another way to tell the story of intellectual history up to Adam Smith is to show how natural lawyers had to meet the challenge of cultural relativism, especially since the discovery of non-European cultures with divergent ways of life, and the revival of scepticism. Starting with Isaac La Peyrère's *Prae-Adamitae* (Men before Adam, 1655), Europeans struggled hard, for instance, to integrate knowledge about Chinese culture, history, morality and religion into a Christian frame of thought (see III, 1; IV, 3 and 5; VI, 3). In this story, Smith's four-stage theory is a solution offered to the problem of relativism: humankind passes through four distinct phases – the ages of hunters, shepherds, agriculture, and finally, commerce.[16] The key function of the stages scheme is to explain why norms and practices differ in various societies. The differences are explained by referring to the economic development. Smith offers a socialized and historicized theory of natural law. In showing how law and government 'grew up with society', Smith transforms the natural law tradition into a conjectural philosophy of history. This does not mean that Smith's theory should be interpreted as materialist or determinist. It is neither deterministic nor indeterministic. The *Wealth of Nations* stresses human efforts and 'natural progress' at the same time.[17] There is a normative *and* materialist dimension in Smith. He claims that certain material conditions are necessary, but not sufficient for societal change. For Smith, political power is based on economic dependence of the poor, and not only a matter of sympathy and admiration. There is an interplay between natural liberty on the one hand and laws and institutions on the other. In good natural law fashion, Smith juxtaposes positive laws and the idea of justice, asserting that systems of the former are always an imperfect realization, or attempt at realizing, the latter. No society can successfully and completely bridge the gap between the two: 'In no country do

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(London and Basingstoke: Macmillan Press, 1989), pp. 168–72; Hirschman, *Passions and Interests*, pp. 16–18, 86f.; Bernard Mandeville, *The Fable of the Bees* [1714–29], ed. and intro. Phillip Harth (London: Penguin, 1989), Remark G, pp. 118–26; Adam Ferguson, *An Essay on the History of Civil Society* [1767], ed. Fania Oz-Salzberger (Cambridge, New York: Cambridge University Press, 1995), p. 119, and Jacob Viner, *Religious Thought and Economic Society* (Durham, NC: Duke University Press, 1978), passim. Martin Büscher, 'Gott und Markt – religionsgeschichtliche Wurzeln Adam Smiths und die "Invisible Hand" in der säkularisierten Industriegesellschaft', in Arnold Meyer-Faje and Peter Ulrich (eds), *Der andere Adam Smith. Beiträge zur Neubestimmung von Ökonomie als Politischer Ökonomie* (Bern, Stuttgart: Verlag Paul Haupt, 1991), pp. 123–44, especially p. 135, contrasts Smith's deism with secularized perspectives. The roots of the invisible-hand doctrine in natural theology is also emphasized by Peter Ulrich, 'Der kritische Adam Smith – im Spannungsfeld zwischen sittlichem Gefühl und ethischer Vernunft', ibid., pp. 175–9.

16 Smith, 'Report of 1762–3', 1.27 in *Lectures on Jurisprudence*, p. 14; *Wealth of Nations*, 5.1.1–44, pp. 689–708 (in relation to military defence).

17 Smith, *Wealth of Nations*, 2.3.31, p. 343 is one among many examples.

the decisions of positive law coincide exactly, in every case, with the rules which the natural sense of justice would dictate'.[18] Kant later makes a similar claim (VI, 1).

The continuity with the future is complemented by a continuity with the past. Scholarship since the 1950s has pointed out that several authors before Smith divided history into economic stages, and developed the outlines of a historical theory of property and law. Again, one of the first contributions to this story comes from Pufendorf (see also IV, 3 and 4). Assuming that human interdependence is an indisputable fact, that humans need the company of others, and that human needs are neither uniform nor finite, but malleable and dynamic, Pufendorf develops what has been called his theory of commercial sociability. He claims that it is not natural in the strict sense, but can be, and has been, learned in the past. Human sociability becomes a 'social construct' like language, and a historical phenomenon, subject to change and development. In a defence of Hobbes, Pufendorf points out that some feature that is not innate may still be called 'natural'. It would be foolish to argue that 'all speech which is acquired is contrary to the purpose of nature', simply because babies cannot talk.[19] 'Natural' signifies sometimes a 'fitness' or 'aptitude'. Reason and fitness

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[18] Smith, *Theory of Moral Sentiments*, 7.4.36, p. 341. Roy Pascal, Ronald Meek and Andrew Skinner have presented a materialist interpretation of Smith. They have recently been challenged by Knud Haakonssen, Donald Winch and others. I am inclined to side with John Salter's mediating position; see John Salter, 'Adam Smith on Feudalism, Commerce and Slavery', *History of Political Thought*, 13 (1992), pp. 219, 223f., 235 and 239. I am also much indebted to Knud Haakonssen, *The Science of a Legislator. The Natural Jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge University Press, 1981), pp. 178–89, Donald Winch, *Adam Smith's Politics. An Essay in Historiographic Revision* (Cambridge: Cambridge University Press, 1978), pp. 56–65, and his 'Adam Smith's "enduring particular result": a political and cosmopolitan perspective', in Hont and Ignatieff, *Wealth and Virtue*, pp. 253–69, especially pp. 258f.; Hans Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft. Die Ursprünge der bürgerlichen Sozialtheorie als Geschichtsphilosophie und Sozialwissenschaft bei Samuel Pufendorf, John Locke und Adam Smith*, 2. Aufl. (Göttingen: Vandenhoeck & Ruprecht, 1981), pp. 205, 247–62 and 189–206, and Richard F. Teichgraeber III, *'Free Trade' and Moral Philosophy. Rethinking the Sources of Adam Smith's Wealth of Nations* (Durham, NC: Duke University Press, 1986), pp. 142f. and 148f.

[19] Samuel Pufendorf, *The Law of Nature and Nations* [1672], trans. C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, 1934; reprint New York: Oceana Publications, 1964), 3.3.1, pp. 346f.; 2.1.8, pp. 152f.; 2.4.1, pp. 231f.; 2.3.16, p. 210 with the quotation. The standard interpretations are Istvan Hont, 'The language of sociability and commerce: Samuel Pufendorf and the theoretical foundations of the "Four-Stages Theory"', in Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), pp. 253–76; 'Commercial Society', pp. 62–8; Craig L. Carr and Michael J. Seidler, 'Pufendorf, Sociality and the modern State', *History of Political Thought*, 17 (1996), pp. 354–78, especially pp. 363f.,

for society can be trained and cultivated by discipline, like language, so that 'full development which nature intends' is achieved. Infant growth helps us by analogy to understand the history of the species. Humans come to realize that sociability lies in their self-interest; this is Pufendorf's central synthesis. The natural law which specifies that we should cultivate a sociable attitude is thus 'natural' in a very specific sense. It is also expedient, though utility is just one of its features, not its essence or foundation.[20] Expanding Grotius's short sketch, Pufendorf offered a genuine history of property and civil society. The efficient use of the world's resources and population growth required the introduction of private ownership. As a possible source of conflict, it had to be regulated by civil laws: 'whatever may be said upon the eternity of natural law, it is certainly not necessary for all the objects of that law to have existed from all time, for many of them make their appearance gradually out of the conventions and institutions of men.'[21] Other early forms of the four-stage theory were developed by authors writing after Pufendorf, such as Bossuet (1681), Locke (1689), Montesquieu (1748), Rousseau (1755), John Dalrymple of Cranstoun (1757), Lord Kames (1758), Mirabeau (1763), Adam Ferguson (1767), John Millar (1771), and, in two unpublished papers, by Turgot. Comparisons with non-European cultures, especially the Native Americans, were often crucial. Meek has counted no less than five French thinkers who employed the theory in the 1750s.[22] I have claimed above that one function among others of the stages scheme was to meet the challenge of cultural relativism. This is underlined by Pufendorf, for example, who goes out of his way to rebut cultural relativism, which points at the 'differences between the laws and customs of different

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374ff.; Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991), pp. 91–107; Medick, *Naturzustand*, pp. 40–63.

20 Pufendorf, *Law of Nature*, 7.1.3, pp. 953f.; 2.3.15, p. 208; 2.3.10, pp. 195f. Cf. Timothy J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000), pp. 120–44; Carr and Seidler, 'Pufendorf', pp. 365f., 367 and 368; Hont, 'Language', pp. 267f.

21 Pufendorf, *Law of Nature*, 4.4.13, p. 553: 'Denique quicquid sit de aeternitate legis naturalis, id pater, non necessarium esse, omnia ejus legis objecta semper existisse; quorum multa ex conventionibus et institutis humanis demum proveniunt.' See also 4.4.12, p. 551; 4.4.14, p. 555; Carr and Seidler, 'Pufendorf', pp. 374–6; Hont, 'Language', pp. 270–6; Buckle, *Natural Law*, pp. 91–107; Medick, *Naturzustand*, pp. 59–63.

22 Ronald L. Meek, *Social science and the ignoble savage* (Cambridge: Cambridge University Press, 1976); 'Extract from "Rural Philosophy" [1763], in Ronald L. Meek, *The Economics of Physiocracy. Essays and Translations* (Cambridge: Harvard University Press, 1963), pp. 60–4; Anne Robert Jacques Turgot, *Turgot on Progress, Sociology and Economics*, transl., ed. and intro. Ronald L. Meek (Cambridge: Cambridge University Press, 1973); Peter Stein, *Legal Evolution. The story of an Idea* (Cambridge: Cambridge University Press, 1980), especially pp. 1–53, and the succinct footnote in Smith, *Wealth of Nations*, p. 689.

peoples' and concludes that 'there is no such thing as natural law.'[23] For Pufendorf, *some* normative differences can be explained by divergent cultural or economic contexts, and 'conventions and institutions' adopted to them. In short, the stages scheme introduces the new paradigm of historical change and development into the framework of natural law thinking.

The story of the four-stages theory may be told together with that of 'unsocial sociability' (Kant). As we have seen, Pufendorf conceives of civil society as a society of mutual needs, which instigate and convince individuals to cooperate with each other. These individuals are driven by both selfish and other-regarding motives simultaneously. If thinkers like Pufendorf did not use the term 'unsocial sociability', they knew the concept. In the provocative words of Rousseau: 'Our needs bring us together in proportion as our passions divide us, and the more we become enemies of our fellow men, the less we can do without them.' In society, everybody wants to profit from the feeling of universal goodwill 'without being obliged to cultivate it'.[24] Accordingly, a key feature of modern commercial society is the moral ambiguity of its members.

Finally, the last story builds upon the antinomy between the needs of the poor and the property rights of the rich. It starts with Thomas Aquinas and the Scholastics, and focuses on the moral problem of whether persons in a situation of 'manifest and urgent' or 'extreme need' are entitled to supply their wants 'by means of another's property' if there is no other remedy.[25] Most natural lawyers, starting with Aquinas, answered the question in the affirmative. They held that individual possession was not contrary to natural law. In

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23 Pufendorf, *Law of Nature*, 2.3.10, p. 194.

24 Jean-Jacques Rousseau, 'First Version of the "Social Contract"', in Stanley Hoffmann and David P. Fidler (eds), *Rousseau on International Relations* (Oxford: Clarendon Press, 1991), p. 102; *Oeuvres complètes, vol. III: Du contrat social, écrits politiques* (Paris: Éditions Gallimard, 1964), p. 282 and V, 4 below. See especially the unpublished papers of the International Workshop organized by Hans Erich Bödeker and Istvan Hont, 'Unsocial Sociability and the 18th Century Discourse of Politics and Society', Max Planck Institute for History, Göttingen, West Germany, 26–30 June 1989; Hans Erich Bödeker and Istvan Hont, 'Naturrecht, Politische Ökonomie und Geschichte der Menschheit. Der Diskurs über Politik und Gesellschaft in der Frühen Neuzeit', in Otto Dann and Diethelm Klippel (eds), *Naturrecht – Spätaufklärung – Revolution* (Hamburg: Felix Meiner Verlag, 1995), pp. 87f.; Istvan Hont, 'Language', pp. 267f., and Jerome B. Schneewind, 'Kant and natural law ethics', *Ethics* 104 (1993), pp. 67–73 on the career of unsocial sociability in the eighteenth century.

25 Thomas Aquinas, *Summa Theologica*, 1st complete American edn in three volumes (New York: Benziger Brothers, 1947), IIa IIae, qu. 66, art. 7, vol. 2, p. 1481. See the excellent discussion in Istvan Hont and Michael Ignatieff, 'Needs and justice in the *Wealth of Nations*: an introductory essay', in *Wealth and Virtue*, pp. 1–44, here pp. 27f. with more secondary literature; Winch, *Smith's Politics*, pp. 87–93, and Buckle, *Natural Law*, pp. 121f. My account is much indebted to Hont and Ignatieff.

times of extreme necessity, however, the original community of goods was re-established in a legal sense, and property rights had to take a back seat. The natural law tradition, from Vitoria over Suárez, Grotius, Pufendorf and Locke to Smith, tries to resolve the antinomy and tension. The ultimate outcome is the new science of political economy, Smith's market solution to the problem, and the theory of commercial society. There even a poor workman, 'if he is frugal and industrious, may enjoy a greater share of the necessaries and conveniencies of life than it is possible for any savage to acquire.' Commercial or civilized societies may be unvirtuous and unequal, because they promote self-interest and neglect civic virtue, and are based on an unfair division of property and 'oppressive inequality', but they are not necessarily unjust. In relation to 'the chief of a savage nation in North America', Smith claims, the poorest members of commercial societies are still better off, mainly due to the division of labour.[26] He repeats a contention made by Locke, for instance, at the end of the seventeenth century. A king of the Native American tribes inhabiting 'a large and fruitful Territory', Locke writes, 'feeds, lodges, and is clad worse than a day Labourer in *England*'.[27] It would be unfair to describe this as an unqualified apology of commercial society. Smith, for instance, sides with Rousseau's radical contention that laws and governments are, in certain respects, an instrument of the rich to oppress the poor, in order to 'preserve to themselves the inequality of the goods which would otherwise be soon destroyed'.[28] Poor workmen merely enjoy a *comparative* economic or material advantage, and Smith does, after all, provide for some government intervention to improve their lot further.

Like the other stories, the last one links up nicely with the issue of how the natural law tradition developed up to Adam Smith. It would be foolish to favour one story over the others: all tell an important truth, highlight key issues and debates, and overlap in some cases. I have implied that there is an intellectual continuity from the natural law tradition, especially Pufendorf, to Adam Smith. This 'important link' was emphasized by Dugald Stewart in the 1820s. Though the natural lawyers have recently fallen into 'just neglect', he wrote, it was 'from their school that most of our best writers on Ethics have proceeded, and many of our most original inquirers into the Human Mind; and it is to the same school ... that we are chiefly indebted for the modern science of Political Economy.'[29] Scholarship since the 1950s has supported Stewart's contention,

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26 Smith, *Wealth of Nations*, 'Introduction', 4, p. 10; 'Early Draft of Part of *The Wealth of Nations*', 3–6, pp. 563–4.

27 John Locke, *Two Treatises of Government*, ed. and intro. Peter Laslett (Cambridge: Cambridge University Press, 1994), 2.41, p. 297.

28 Smith, 'Report of 1762–3', 4.23, in *Lectures on Jurisprudence*, p. 208.

29 Dugald Stewart, 'Dissertation Exhibiting the Progress of Metaphysical, Ethical,

especially in the fields of moral philosophy and political economy. Locke held that Pufendorf's *De Jure Naturae* was 'the best book of that kind', even surpassing Grotius, and it may have inspired his criticism of Hobbes. Gershom Carmichael (1672–1729), the first occupant of the chair of moral philosophy at the University of Glasgow and often seen as the founder of the Scottish Enlightenment, established the natural law tradition at the Scottish universities, making Pufendorf's *De Officio Hominis et Civis* the set text in moral philosophy. Carmichael's position was taken over by Francis Hutcheson, Smith's teacher, who drew upon Grotius and Pufendorf, among others. The group around the lawyer and judge Henry Home, later Lord Kames, included David Hume, Smith and John Millar.[30]

The concluding parts of this section focus on theories of commercial society in Montesquieu, Hume and Smith. Montesquieu is important because he emphasizes the historical dimension of law, and tries to overcome the antinomy between civic virtue and commerce. Hume profoundly distances himself from

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and Political Philosophy, since the Revival of Letters in Europe' [1815 and 1821], in *Collected Works*, ed. Sir William Hamilton, 2nd edn (Edinburgh: Clark, 1877), vol. 1, p. 171.

30 See Barbara Arneil, 'John Locke, Natural Law and Colonialism', *History of Political Thought*, 13 (1992), pp. 594f. and 587; James Moore and Michael Silverthorne, 'Gershom Carmichael and the natural jurisprudence tradition in eighteenth-century Scotland', in Hont and Ignatieff, *Wealth and Virtue*, pp. 73–87, especially pp. 73f.; Medick, *Naturzustand*, passim, particularly pp. 144f. and 296–305; Duncan Forbes, 'Natural law and the Scottish Enlightenment', in Roy Hutcheson Campbell and Andrew S. Skinner (eds), *The Origins and Nature of the Scottish Enlightenment* (Edinburgh: John Donald, 1982); *Hume's Philosophical Politics* (Cambridge: Cambridge University Press, 1975), pp. 3–58; Thomas Mautner, 'Pufendorf and 18th-century Scottish philosophy', in Kjell Å. Modéer (ed.), *Samuel von Pufendorf 1632–1982* (Stockholm: Institut för Rättshistorisk Forskning, 1986), pp. 120–31; Teichgraeber, *Free Trade*, passim; Buckle, *Natural law*, passim; Daniel Brühlmeier, 'Die Geburt der Sozialwissenschaften aus dem Geiste der Moralphilosophie', in Daniel Brühlmeier, Helmut Holzhey and Vilem Mudroch (eds), *Schottische Aufklärung: 'A hotbed of genius'* (Berlin: Akademie Verlag, 1996), pp. 23–38; Knud Haakonssen, *Natural law and moral philosophy: from Grotius to the Scottish Enlightenment* (Cambridge: Cambridge Univerity Press, 1996), pp. 37–181; *Grotius, Pufendorf and Modern Natural Law* (Dartmouth, Aldershot et al.: Ashgate, 1998); 'Jurisprudence and Politics in Adam Smith', in Knud Haakonssen (ed.), *Traditions of Liberalism. Essays on John Locke, Adam Smith and John Stuart Mill* (Centre for Independent Studies, Australia, 1988), pp. 107–15. Hont and Ignatieff, *Wealth and Virtue*, chs. 8 and 12 includes essays on Lord Kames and John Millar, respectively. Andrew S. Skinner, 'Pufendorf, Hutcheson and Adam Smith: Some Principles of Political Economy' [1995], in Haakonssen, *Grotius, Pufendorf and Modern Natural Law*, pp. 529–57, claims that all three did not see themselves as economists but rather as philosophers who embedded the study of economical phenomena in a moral and social context (cf. pp. 529f.). The essay covers theories of property, of value, of money and the division of labour.

natural law thinking, though it can be argued that he does so in a qualified and seemingly paradoxical way, offering a system of 'natural jurisprudence without natural law'.[31] Smith simply presents the most succinct analysis of commercial society.

Charles de Secondat, Baron de Montesquieu (1689–1755) starts *The Spirit of the Laws* (1748) with three major conceptual distinctions: between natural laws and their contextualization, between the political and the civil state, and between the law of nations and civil law. First, he presents a conventional definition of natural laws as the precepts of 'right reason' 'deriving from the nature of things'. They are obtained from the constitution of humans as they naturally are, before societies were established.[32] Montesquieu goes beyond familiar natural law thinking with his claim that these laws must relate to contingencies such as climate, geography, to the mentality of the people and their way of life – be they 'plowmen, hunters, or herdsmen'.[33] The last specification hints at an embryonic four-stage theory. Montesquieu has sometimes been called a cultural or historical relativist. However, such a broad claim is, to say the least, debatable. As in the case of Smith, it makes more sense to interpret him as attempting to mediate universal 'right reason' with contingencies. Natural law may be unchanging, but it must be applied to different historical periods and societies. Second, Montesquieu, following the Italian writer Giovanni Vincenzo Gravina (1664–1718), distinguishes between '*Etat Politique*' and '*Etat Civil*'. The civil state is the union of all individual wills, coinciding with the natural lawyers's *pactum unionis*, whereas the political state is the transfer of this united power to a government. In natural jurisprudence, this was the second part of the social contract, the *pactum subjectionis*. The conceptual distinction clarifies the actual separation of individuals from the sovereign power, its bureaucracy and army during the rise of the modern state (see IV, 1). In addition, the distinction helped to create the sphere of the public (which was neither political nor private), and the new paradigm of civil or commercial society focusing on property, consumption and commerce.[34] Finally, Montesquieu separates the right of nations covering

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31 Haakonssen, 'Jurisprudence and Politics', p. 111.

32 Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws* [1748], transl. ed. Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (Cambridge et al.: Cambridge University Press, 1989), book I, chapter 3 (from now on: 1.3), p. 8; 1.1, p. 3 and 1.2, p. 6.

33 Montesquieu, *Spirit of the Laws*, 1.3, pp. 8f. See Stein, *Legal Evolution*, pp. 15–17 for a good analysis, and Medick, *Naturzustand*, pp. 149f. for Stewart's interpretation Panajotis Kondylis, *Montesquieu und der Geist der Gesetze* (Berlin: Akademie Verlag, 1996), pp. 39–70 is now the most comprehensive discussion of Montesquieu's modification of the natural law tradition.

34 Montesquieu, *Spirit of the Laws*, 1.3, p. 8; Manfred Riedel, 'Bürgerliche

laws among different peoples, nations, and societies, from civil right.[35] He effectively supports and strengthens the trend among modern authors to abandon the traditional ambiguity of the term *ius gentium*. Employing the domestic analogy, he suggests that both spheres, domestic and transnational, can be compared to a state of war. In a passage that has already been analysed, Montesquieu drives this point home, depicting the arms race among European powers as an irrational and self-contradictory Hobbesian dilemma (end of IV, 2).

Montesquieu does not present a full-blown theory of commercial society, but devotes the fourth part of his major work to commerce, economics and their histories. He starts with an enthusiastic praise of the commercial spirit, claiming that commerce destroys prejudices, promotes gentle mores (*les moeurs douces*), polishes barbarous ones, unites nations, leads to peace, and 'produces in men a certain feeling for exact justice'.[36] Softness or *douceur* is the antonym of violence, and commerce may still occasionally have the wider meaning of 'intercourse' in Montesquieu. Commerce conflicts with despotism, and in a democracy based on good laws and equality commerce does not corrupt mores, but brings 'the spirit of frugality, economy, moderation, work, wisdom, tranquility, order, and rule'.[37] Montesquieu's distinction between economy and luxury, between economic commerce and the commerce of luxury is crucial to keep the claims of the civic humanist tradition about the corrupting effects of the commercial spirit in check. Linking the commercial spirit with a free government, Montesquieu aims at weakening the alleged incompatibility of political virtue (*vertu politique*) and commerce.[38] In a famous chapter describing a 'free people' (presumably the British – though not explicitly mentioned), the powers are separated, all the passions are free, but constructive, and the citizens are willing to defend their liberty. The nation

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Gesellschaft', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 3rd edn (Stuttgart: Klett-Cotta, 1994), vol. 2, pp. 746–9.

35 Montesquieu, *Spirit of the Laws*, 1.3, pp. 7f.

36 Montesquieu, *Spirit of the Laws*, 20.1–2, pp. 338f. On Montesquieu's political philosophy in general, see Judith N. Shklar, *Montesquieu* (Oxford, New York: Oxford University Press, 1987); 'Montesquieu and the New Republicanism,' in *Political Thought and Political Thinkers*, ed. Stanley Hoffmann, foreword George Kateb (Chicago, London: University of Chicago Press, 1998), pp. 244–61; Peter V. Conroy, *Montesquieu Revisited* (New York: Twayne Publishers, 1992). Diane Kollar Monticone, *Montesquieu and his Reader. A Study of the Esprit des Lois* (Lanham, New York, London: University Press of America, 1989), pp. 139–53; Shklar, *Montesquieu*, pp. 127–31 and Conroy, *Montesquieu*, pp. 144–53 provide bibliographies.

37 Montesquieu, *Spirit of the Laws*, 22.14, pp. 416f.; 5.6, p. 48; Hirschman, *Passions*, pp. 59–62 on the meaning of '*doux commerce*'; *Rival Views*, pp. 41–4.

38 Montesquieu, *Spirit of the Laws*, 20.10, p. 344; 20.4, p. 340.

would be commercial rather than conquering, would have a strong fleet and harsh trade and navigation laws. Most importantly, the people would not be morally decadent, but enjoy a 'solid luxury' based on 'real needs'. There would be no 'refinement of vanity' or superfluous things, commerce would triumph over political interests, and the citizens would be willing to defend themselves and their political liberty.[39]

The last specifications are crucial, for they try to break up, at least partially, the link between commerce and what the civic humanist tradition called 'corruption'. The term had two dimensions. On the one hand, it described the decline of the healthy polity and the loss of civic virtue. On the other hand, mores could be corrupted, and people become decadent. In Montesquieu's *Considerations* (1734), both forms of corruption intersect. Rome declines as soon as the citizen army is replaced by professional soldiers, farmers are substituted by slaves and artisans, and luxury and wealth corrupts civic virtues and morals.[40] Similar arguments are repeated in the *Spirit of the Laws*. Plato is right, Montesquieu contends, commerce cuts both ways, it also corrupts mores. People do even small favours only for money, and the culture of hospitality towards strangers declines. Greek politicians used to appeal to civic virtue, whereas contemporary ones speak only 'of manufacturing, commerce, finance, wealth, and even luxury'.[41] Rousseau makes an almost identical claim later (V, 4). In short, Montesquieu's attitude towards commerce is ambiguous. He seems to hold that it is ultimately incompatible with *vertu politique*, but in the intermediate perspective conducive to sociability, liberty, peace and even virtue.[42] Hume and Rousseau explode the antinomy between commerce and

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[39] Montesquieu, *Spirit of the Laws*, 19.27, pp. 325–31. There are fine analyses in Pocock, *Machiavellian Moment*, pp. 488–93; Richard B. Sher, 'From Troglodytes to Americans: Montesquieu and the Scottish Enlightenment on Liberty, Virtue, and Commerce', in David Wootton, *Republicanism, Liberty, and Commercial Society, 1649–1776* (Stanford: Stanford University Press, 1994), pp. 368–402, and Alan Gilbert, '"Internal Restlessness": Individuality and Community in Montesquieu', *Political Theory*, 22 (1994), pp. 45–70.

[40] Charles de Montesquieu, 'Considerations on the Causes of the Romans' Greatness and Decline' [1734], *Selected Political Writings*, ed. Melvin Richter (Indianapolis, Cambridge: Hackett, 1990), pp. 85–7; *Spirit of the Laws*, 23.21, pp. 441–50; 7.13, pp. 107f.; 23.23, p. 451. See Shklar, *Montesquieu*, pp. 49–66 and Conroy, *Montesquieu*, pp. 52–68 on the 'Considerations', and J. Peter Euben, 'Corruption', in Terence Ball, James Farr and Russell L. Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), pp. 220–46.

[41] Montesquieu, *Spirit of the Laws*, 20.1, p. 338; 3.3, pp. 22f. See 7.1, pp. 96f. and Conroy, *Montesquieu*, pp. 77f. on the concept of luxury.

[42] This is Pocock's interpretation in *Machiavellian Moment*, p. 493. Sher, 'From Troglodytes to Americans', p. 381 also stresses Montesquieu's deeply ambivalent endorsement of modern commercial society.

political virtue in different ways: Hume in favour of the former, Rousseau, siding with civic humanism, in favour of the latter.

Montesquieu sent a copy of his work to David Hume immediately after its publication, who helped to publish an incomplete English translation.[43] Hume pushes the emphasis on the historical dimension of law even further, claiming that natural laws are derived from interests and human conventions. Men actually *invented* the laws of nature – which are therefore artificial, not natural in the strict sense – 'when they observ'd the necessity of society to their mutual subsistance, and found, that 'twas impossible to maintain any correspondence together, without some restraint on their natural appetites'.[44] Pufendorf's precarious balance between the precepts of reason and social utility is resolved in favour of the latter and his theological voluntarism is abandoned. Hume's naturalistic ethics are completely secularized. Justice is artificial, but not arbitrary, and Hume still refers to 'laws of nature' because they are a natural and necessary invention of beings who are not only self-interested but also endowed with the capacity of limited benevolence and sociable sentiments. Hume reduces the laws of nature to three: the 'stability of possession, ... its transference by consent, and ... the performance of promises'.[45] Humans invent these laws because they perceive that they are useful for the establishment and maintenance of society, and thus coincide with their self-interests (see V, 3 for more).

Hume does not paint the picture of man as a one-dimensional *homo oeconomicus*. Humans are selfish and full of self-love, but also capable of limited or 'confined generosity' and calculated adjustment of their passions to the benefit of the public. They are often indolent or lazy, and must be stimulated to increase skill and industry.[46] Hume further historicizes sociability, replacing the conventional claim that humans are by nature sociable beings with a

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43 Ernest Campbell Mossner, *The Life of David Hume* (Austin: University of Texas Press, 1954), p. 229; Stein, *Evolution*, p. 23.

44 David Hume, *A Treatise of Human Nature* [1739–40], ed. with an Analytical Index by Sir Lewis Amherst Selby-Bigge, 2nd edn by Peter Harold Nidditch (Oxford: Clarendon Press, 1992), book III, part II, section VIII (from now on: 3.2.8), p. 543. Fine studies on Hume's ethics, theory of justice, and politics are Forbes, *Hume's Philosophical Politics*; Haakonssen, *Science of a Legislator*, and Nicholas Capaldi, *Hume's Place in Moral Philosophy* (New York et al.: Peter Lang, 1992).

45 Hume, *Treatise of Human Nature*, 3.2.6, p. 526; emphasis deleted. See Forbes, *Hume's Philosophical Politics*, p. 70 and Haakonssen, *Natural law*, pp. 104f. on the meaning of 'artificial' in Hume.

46 Hume, *Treatise of Human Nature*, 3.2.2, p. 495; 3.2.6, p. 529; 3.3.1, p. 586; 'Of commerce' [1752], in *Political essays*, ed. Knud Haakonssen (Cambridge [UK], New York: Cambridge University Press, 1994), pp. 93–104, here 98f. and 100. R. G. Frey, 'Virtue, Commerce, and Self-Love', *Hume Studies*, 21 (1995), pp. 275–87 points at the moral problems involved in Hume's account of commercial activity.

theory of cultural development where nations move from ignorance, lethargy, isolation and barbarity to a stage where the liberal and mechanical arts are refined and perfected:

> The more these refined arts advance, the more sociable men become ... They flock into cities; love to receive and communicate knowledge; to show their wit or their breeding; their taste in conversation or living, in clothes or furniture ... Thus *industry*, *knowledge*, and *humanity*, are linked together by an indissoluble chain, and are found ... to be peculiar to the more polished, and what are commonly denominated, the more luxurious ages.[47]

The passage is relevant in several respects. First, Hume firmly establishes a distinction between barbarous and civilized nations, and his reference to people flocking into cities makes clear that he is thinking of eighteenth-century European culture. By implication, this culture is superior to barbarous ways of living, and Hume's racism clearly points that way. For the arch-sceptic Hume, negroes are 'naturally inferior' to whites, they show neither ingenuity nor arts and sciences, and occasionally imitate learning like parrots.[48] Second, Hume thinks in historical terms, more so than either Pufendorf or Montesquieu. Sociability evolves in specific contexts and circumstances.[49] Third, Hume's approach is descriptive, and his experimental philosophy does not refer to final causes. He claims to take humans as they are, not as they are supposed to be. By the same token, politicians 'must take mankind as they find them'.[50] Hume's new science of man is emphatically empirical.

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47 Hume, 'Of refinement in the arts' [1752], in *Political Essays*, pp. 105–114, here 107. See Richard H. Popkin, 'The Philosophical Bases of Modern Racism' and 'Hume's Racism', in *The High Road to Pyrrhonism* (Indianapolis: Hackett, 1993), pp. 79–102 and 267–76; 'Eighteenth-Century Racism', in *The Columbia History of Western Philosophy* (New York: Columbia University Press, 1999), pp. 508–15 for the following.

48 Hume, 'Of national characters' [1748], in *Political Essays*, p. 86 note. See Jörg Fisch, 'Zivilisation, Kultur', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1992), vol. 7, pp. 705–16 on the juxtaposition of civilization and culture (*civilitas, cultura*) on the one hand, and barbarian (*barbari*) on the other, in the eighteenth century.

49 See Haakonssen, *Science of a Legislator*, pp. 36–9 and Forbes, *Humes Philosophical Politics*, part III on the role of history and Hume's philosophical history.

50 Hume, 'Of Commerce', p. 98. Cf. Letter to Francis Hutcheson, 17 September 1739, in *The Letters of David Hume*, ed. John Young Thomson Greig (Oxford: Clarendon, 1932; reprint New York and London: Garland Publishing, 1983), vol. 1, p. 33 on his doubts concerning final causes; 'Idea of a perfect commonwealth' [1752], in *Political Essays*, p. 222; *Treatise of Human Nature*, 'Introduction', p. xix. See John Christian Laursen, *The Politics of Skepticism in the Ancients, Montaigne, Hume, and Kant* (Leiden, New York, Köln: Brill, 1992), pp. 151–8 on the new science of man.

Hume's naturalistic ethics and empirical approach are major weapons in his criticism of the civic humanist tradition. An attack is imperative and crucial, for Hume wants to show that the ages of refinement of the arts, of increased interaction and sociability, of commerce or trade, and of luxury are not only happier but also more virtuous, rather than politically corrupt and morally decadent. In a first step, he debunks civic humanist romance about antiquity as wishful thinking and a distortion of historical reality. Economically, Greek and Roman ancient societies were based on the cruel (and inefficient) institution of slavery, the government was often subject to arbitrary popular impulses and party strife instead of the rule of law and genuine representation, and warfare was ferocious and undisciplined by eighteenth-century standards. In spite of the claim of 'passionate admirers of the ancients' to the contrary, humanity generally enjoys more political liberty in modern times, even 'in the most arbitrary government of Europe, than it ever did during the most flourishing period of ancient times'.[51] With these claims, Hume effectively turns civic humanist romance about ancient politics upside down. This leaves him to deal with the second aspect of corruption, the theories about moral decadence. He sweeps the topic conveniently under the rug. Sallust, the eminent author in this respect, wrote about corruption, but was decadent himself and is thus unconvincing. The decline and fall of the Roman empire, Hume claims, was not caused by decadence and luxury, but by an inefficient government and extended conquests.[52] The two arguments are not convincing. Hume's *ad hominem*-reasoning against Sallust is speculative, does not rebut other civic humanists or moralists, and misses the point: even, or especially, the *décadent* may arrive at truthful insights into moral decadence (ask Rousseau and Nietzsche). Hume's contention about the real causes of Roman decline, on the other hand, gets him into the riddles of causality, chance and correlation, developed in his own epistemology.

Hume makes three concessions to the civic humanist tradition. First, the charge of corruption is justified in terms of the undermining of the economy through public debt. In the essay 'Of public credit' (1752), Hume paints a bleak picture of a commercial society with growing public debts, where national bankruptcy is averted by a shaky trust in the future.[53] Second, Hume sometimes

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51 David Hume, 'Of the Populousness of Ancient Nations', in *Writings on Economics*, ed. Eugene Rotwein (Madison: University of Wisconsin Press, 1970), p. 113. See also Hume, 'That politics may be reduced to a science' [1741], in *Political Essays*, pp. 5f.; 'Of parties in general' [1741], in ibid., pp. 34f.; Knud Haakonssen, 'Introduction', in *Political Essays*, pp. xxiiif.; Laursen, *Politics of Skepticism*, p. 178; Robertson, 'Scottish Enlightenment', pp. 164f. and 158f.; Teichgraeber, *Free Trade*, pp. 10, 110 and 117.

52 Hume, 'Of refinement in the arts', pp. 110f.

53 David Hume, 'Of public credit' [1752], in *Political Essays*, pp. 166–78. See the

hints at a cyclical understanding of history. The assumption of progress, for instance of 'increasing trade *in infinitum*', is an illusion, as 'the growth of everything ... at last checks itself'.[54] This should prevent us from seeing Hume as a naïve believer in historical progress, or read back nineteenth-century ideas into his writings. Finally, Hume concedes, there are two types of luxury. It signifies 'great refinement in the gratification of the senses', and becomes morally objectionable if 'pursued at the expence of some virtue' such as charity or benevolence. Otherwise luxury is morally innocent, and may even be socially advantageous.[55]

In the essays 'Of commerce' and 'Of refinement in the arts', Hume describes the beneficial effects of morally innocent luxury, industry, refined arts, and commerce. They are the crucial factors and dynamic forces of political and civilizational progress. Indolence is overcome, more labour and increased industry stimulate commerce, which in turn extends consumption of commodities, and this means more public wealth, a 'storehouse of labour' and more state power. With some satisfaction, Hume notes how French commercial society enabled Louis XIV to keep up an army of 400,000 over decades, while a mere two hundred years ago his predecessors were happy to put 20,000 troops into the field for some weeks. Rather than deploring this as a sad development of affairs under conditions of Hobbesian anarchy (as Montesquieu did), Hume interprets it as supporting his overall thesis that the 'greatness of a state, and the happiness of its subjects, how independent soever they may be supposed in some respects, are ... inseparable with regard to commerce.'[56] More public happiness and state power are not the only results. Hume asserts moral benefits, namely 'mildness and moderation' in politics, softened tempers, more politeness and good manners. While armies have admittedly increased their numbers, European warfare has become less ferocious, and 'honour and interest steel men against compassion as well as fear.'[57] Hume seems to share the optimism

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analyses by Haakonssen, *Natural law*, pp. 127f.; Terence Hutchison, *Before Adam Smith. The Emergence of Political Economy, 1662–1776* (Oxford: Basil Blackwell, 1988), pp. 210–12; Hont, 'Commercial Society', pp. 72–9; Winch, *Smith's Politics*, ch. 6.

54 Hume, Letter to Henry Home, Lord Kames, 4 March 1758, in *Letters*, vol. 1, pp. 271f.; and Letter to James Oswald of Dunnikier, 1 November 1750, ibid., p. 143. Cf. Forbes, *Hume's Philosophical Politics*, pp. 189f. and Istvan Hont, 'The "rich country – poor country" debate in Scottish classical political economy', in Hont and Ignatieff, *Wealth and Virtue*, pp. 284f. and 288f.

55 Hume, 'Of refinement in the arts', p. 105.

56 Hume, 'Of commerce', p. 94; 'Of refinement in the arts', p. 108, emphasis deleted; pp. 108f. on armies. See also the analysis in Pocock, *Machiavellian Moment*, pp. 494–8.

57 Hume, 'Of refinement in the arts', p. 109. See Laursen, *Politics of Skepticism*, pp. 170–5 on the politics of politeness and good manners.

of some eighteenth-century thinkers (and Hegel's) in this respect. Finally, progress in the arts and commerce yields political benefits. The 'middling rank' of peasants, tradesmen and merchants gets stronger, they insist on more equal laws, subvert any form of tyranny, and thus promote the cause of political freedom. Commerce can also ultimately guarantee economic independence and hence political participation for lower ranks of people in the future.[58]

Hume cautions us at the beginning of one of his essays that his propositions about luxury, the arts, commerce and the power of states may only hold true 'in general', and 'possibly admit of exceptions'. However, the essays present the arch-sceptic 'at his least sceptical'.[59] He not only dismisses the civic humanist tradition with often dubious arguments. He also seems to be insensitive to the doubts and qualifications of Montesquieu, Smith, Kant, or other representatives of the Enlightenment in terms of the benefits of commercial society. Hume, the sceptic, has argued that our thinking cannot resolve the riddles of teleology: is the end of man happiness or virtue? Hume the conjectural or philosophical historian subliminally supplies an answer: it is the happiness in a modern commercial society.

The beginning of this section has outlined several aspects of Adam Smith's philosophy and political economy, such as the four-stage theory and the historical dimension of law, the doctrine of an 'invisible hand', and the emphasis on a 'sense of utility' and commercial sociability. Recent scholarship has tried to correct some of the nineteenth-century distortions of Smith's work. Especially Germans struggled with the Adam Smith problem, the alleged incompatibility of the *Theory of Moral Sentiments* and its emphasis on sympathy with the *Wealth of Nations* supposedly peopled by selfish, one-dimensional and greedy merchants. The issue is now seen as resolved.[60] Traditionally, Smith was often perceived as a precursor of the Manchester *laissez-faire* liberalism, a proponent of the minimal state and of functional, 'value-free' economics. More recently, interpretations have emphasized Smith's moral philosophy, his contribution to the eighteenth-century discourse of the 'science of a legislator', and attempt to combine ethics and economy in a comprehensive system. Research has outlined his connections with the natural law tradition and pointed out that he considered natural jurisprudence the 'most important' science, but could

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58 Hume, 'Of refinement in the arts', pp. 111f. See the discussion of the term 'middling rank' in Forbes, *Hume's Philosophical Politics*, pp. 176–9; Winch, *Smith's Politics*, pp. 99–102 (covering Hume and Smith), and Robertson, 'Scottish Enlightenment', pp. 158f.

59 Hume, 'Of commerce', p. 94; Forbes, *Hume's Philosophical Politics*, p. 87.

60 Martin Patzen, 'Zur Diskussion des Adam-Smith-Problems – ein Überblick', in Meyer-Faje and Ulrich, *Adam Smith*, pp. 21–54; Medick, *Naturzustand*, p. 178; Teichgraeber, *Free Trade*, pp. xii–xvii.

unfortunately never finish his own contribution.[61] Smith's theory of impartiality in many ways anticipates a modern Kantian conception of thin justice (see VI, 1 and I, 4). While Smith tries to eliminate the government's influence on market processes and outcomes, he advocates government intervention in areas such as national defence, the provision of certain public goods like infrastructure and education, and the establishment and administration of law and justice. The scope of activities for government encompasses the use of taxation, the compulsory regulation of mortgages, coinage, and the granting of temporary monopolies, among others.[62]

In short, the *Wealth of Nations* tries to balance out government intervention with what Smith calls the 'system of natural liberty', the proposition that 'Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men.'[63] Smith's claim that self-interested actions contribute to the overall welfare of society and the state is not without precedent. His main innovation is a succinct analysis of the market mechanism in economic terms, relying on an assessment of the annual revenue of society, or the real national income. A commercial society is characterized by an imperfect realization of this system of liberty, the division of labour, a continuous exchange of goods, and social inequality.[64] As

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61 See the essays in Meyer-Faje and Ulrich, *Adam Smith*; Stephen Copley and Kathryn Sutherland (eds), *Adam Smith's Wealth of Nations. New interdisciplinary essays* (Manchester and New York: Manchester University Press, 1995), and the studies by Haakonssen, *Science of a Legislator*; Winch, *Smith's Politics*; Jerry Z. Muller, *Adam Smith in his Time and ours. Designing the decent Society* (New York: Free Press, 1993), and Teichgraeber, *Free Trade* on the revised picture of Smith. Cf. also Hont, 'Commercial Society', p. 80; Rothbard, *Economic Thought*, pp. 529–32 (a review essay), and Haakonssen, *Natural law*, pp. 130f. with more secondary literature. The passage on natural jurisprudence is in Smith, *Theory of Moral Sentiments*, 6.2, 'Introduction' 2, p. 218. His 'unfinished business' is discussed in Winch, *Smith's Politics*, pp. 9–27 and Medick, *Naturzustand*, p. 178.

62 Smith, *Wealth of Nations*, 4.9.51f., pp. 687f.; all of book V, chapter I, pp. 689–816; 5.1.f.1–61, pp. 758–88 covers education. The two classical articles correcting the picture of Smith as a proponent of the minimalist state are Jacob Viner, 'Adam Smith and Laissez-Faire', *Journal of Political Economy*, 35 (1927), pp. 198–232 and Nathan Rosenberg, 'Some Institutional Aspects of the *Wealth of Nations*', *Journal of Political Economy*, 68 (1960), pp. 557–70. See also more recently Muller, *Adam Smith*, ch. 11. For one specific aspect, education, see Andrew S. Skinner, 'Adam Smith and the role of the state: education as a public service', in Copley and Sutherland, *Adam Smith's Wealth*, pp. 70–96.

63 Smith, *Wealth of Nations*, 4.9.51, p. 687.

64 Smith, *Wealth of Nations*, 1.4.1, p. 37 (with the term 'commercial society'); 1.1.1–1.3.8, pp. 13–36 and passim (on the division of labour, Smith's *Leitmotiv* in this book); 1.8.1–57, pp. 82–104 (on wages of labour and economic inequality).

argued above, this type of society is by no means an inevitable outcome of a natural development. Smith's celebrated description of how commerce eroded feudalism and despotism in Book III, Chapter 4 of the *Wealth of Nations* underlines the haphazard elements, unintended consequences and the decisive role of actors.[65]

Smith does not only analyse commercial society; he evaluates it as well. The erosion of feudalism, Smith argues, was predominantly caused by 'commerce and manufactures', which in turn introduced good government, more personal freedom, more economic independence, and domestic peace. Smith takes this thesis from Hume, who is mentioned, while ignoring the writings of Sir James Steuart, Ferguson, Kames and others. The primary benefits of nascent commercial society are thus political. They were unintended consequences: the great proprietors gave their power away while aiming at gratifying their 'childish vanity', while the merchants followed their own selfish 'pedlar principle of turning a penny wherever a penny was to be got': 'A revolution of the greatest importance to the publick happiness, was in this manner brought out by two different orders of people, who had not the least intention to serve the publick.'[66] Commercial society carries the hope that forms of personal dependency like slavery or unfree labour will gradually be replaced by contractual relations. The division of labour, the 'increasing business of the society', triggers the separation of the judicial and executive powers, gradually establishing the 'impartial administration of justice' and, as a consequence, a wider sphere of individual liberty.[67]

Like Hume, Smith also lists some moral benefits. The wealth accumulated in a commercial society is the material prerequisite and *conditio sine qua non* of benevolent virtues: 'If our own misery pinches us very severely, we have no leisure to attend to that of our neighbour.'[68] As pointed out before, commercial society progressively overcomes the antinomy between the needs of the poor

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65 Noel Parker, 'Look, no hidden hands: how Smith understands historical progress and societal values', in Copley and Sutherland, *Adam Smith's Wealth*, pp. 122–43; Muller, *Adam Smith*, pp. 120–5; Medick, *Naturzustand*, pp. 262–75; Hirschman, *Passions*, pp. 100–3.

66 Smith, *Wealth of Nations*, 3.4.4, p. 412; 3.4.17, p. 422. Cf. Smith, 'Report of 1762–3', 6.6f., in *Lectures on Jurisprudence*, p. 333. See footnote 6 ibid., p. 412 and Winch, *Smith's Politics*, p. 72 on Hume and other authors. A useful 'moral balance sheet of commercial society' is presented in Muller, *Adam Smith*, ch. 10 and Winch, *Smith's Politics*, ch. 4, to whom I am much indebted.

67 Smith, *Wealth of Nations*, 5.1.b.24f., p. 722.

68 Smith, *Theory of Moral Sentiments*, 7.2.3.15f., p. 304; 5.2.9, p. 205; *Wealth of Nations*, 2.3.12, pp. 335f.; 'Report dated 1766', 326f., in *Lectures on Jurisprudence*, pp. 538f. See also *Theory of Moral Sentiments*, 1.3.3.5, p. 63; 1.3.2.5, p. 55, and 6.1.7, pp. 213f.

and the property rights of the rich. Commercial society is said to promote the development of civilized manners, and, by the redirection of our self-interested motives, some virtues such as prudence, temperance, industry, honesty, punctuality and discretion. Smith explains that a merchant who has intensive business transactions, for instance, is led to believe that honesty is the best policy under given circumstances, that is, the likelihood of continued interaction. Within the framework of a commercial society, self-interests are channelled into virtuous forms of behaviour. As Rousseau will point out, the outcome is not necessarily virtue in the strict sense, based on a moral disposition, but perhaps only the *appearance* of virtue. Kant, drawing on both Smith and Rousseau, will investigate into the tricky question whether the acquisition of virtuous behaviour in the absence of a moral disposition, that is, of moral legality (*Legalität*, not *Moralität*), might still be morally significant, and foster genuine morality in the long run (see V, 4 and VI, 1).

Smith's moral-balance sheet of commercial society is much more nuanced than Hume's. His assessment mixes apologetic and critical elements, and forcefully exposes the ambivalences, paradoxes and negative side-effects of commercial progress. The passages on the decline of the martial spirit are close to the civic humanist tradition, and reminiscent of Ferguson and Rousseau. Governments must take pains to prevent the 'mental mutilation, deformity and wretchedness' accompanying commercial societies.[69] Workers who perform the same simple operations over and over again are in danger of becoming 'stupid and ignorant', and their intellectual, social, and martial virtues deteriorate. Children are sent off to work at an early age, and their education is neglected.[70] Although Smith's analysis sometimes 'borders on cynicism', as Donald Winch puts it, the optimistic dimension prevails. Commercial societies are not inevitably doomed to decline, fall and perish. Smith hopes that ultimately the government, legislators and a responsible citizenry can remedy defects.[71]

This section has outlined the transformation of the natural law tradition, especially at the hands of the Scottish Enlightenment thinkers, and their emphasis on the historical dimension of law and commercial sociability.

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[69] Smith, *Wealth of Nations*, 5.1.f.60, p. 787. See the analyses in Winch, *Smith's Politics*, pp. 103–20; Eberhard K. Seifert, 'Das Fortschrittsparadox bei Adam Smith – sein unvollendetes System einer Moralphilosophie in ökonomischer Absicht', in Meyer-Faje and Ulrich, *Adam Smith*, pp. 79–83. Winch, *Smith's Politics*, pp. 82–7 also covers the interpretations of Joseph Cropsey, Duncan Forbes and John Greville A. Pocock.

[70] Smith, *Wealth of Nations*, 5.1.f.50, p. 782; 'Report dated 1766', 329f., in *Lectures on Jurisprudence*, pp. 539f.

[71] Smith, 'Report dated 1766', 333, in *Lectures on Jurisprudence*, p. 541; *Wealth of Nations*, 5.1.f.50, p. 782 ('unless government takes some pains to prevent it'); Winch, *Smith's Politics*, p. 71.

Commercial society is distinct from the civic humanist ideal, it focuses on *ius*, not *virtus*, and is not necessarily Christian, but in need of a legal framework, or the rule of law. Montesquieu and Smith point out that commercial society may be basically and simultaneously ambivalent. Rousseau, who probably influenced Smith, launches an all-out attack.

It might be argued that for proponents of commercial society, commercial or economic cosmopolitanism is a logical conclusion. Is not a worldwide division of labour the ultimate solution to increase productivity? Would not a global 'confraternity of trade' (Mirabeau) and full mobility of capital and labour guarantee the welfare of all humans and foster interdependence, mutual understanding, and thus peace, while corresponding with, or at least not contradicting, the enlightened self-interest of each individual? This transnational dimension of commercial society will be analysed in the next section.

2. The failure of conquest, agriculture, hospitality and free trade

> The natural effect of commerce is to lead to peace. Two nations that trade with each other become reciprocally dependent. (Montesquieu, *Spirit of the Laws*)

Previous chapters have shown that various European authors developed distinct arguments and doctrines designed to support claims overseas. They can be roughly summarized as follows. The claim that Europeans sometimes had the right and/or duty to intervene in aboriginal societies for humanitarian reasons has been presented as a quite convincing argument (II, 5). However, reasoning along these lines faced the problems of possible abuse, and the unreliability of overseas information. In addition, by definition humanitarian intervention had to be limited to its specific aim, that is, stopping human rights abuses. It could hardly be used to justify the permanent subjugation of whole continents. Second, European authors pointed at the right of hospitality. However, this argument squarely faced the problem of consent. If the French had the right to close borders to Spanish merchants, why not the Chinese or the native Peruvians? The third argument, the teaching of the Gospel and the spreading of Christianity, probably lost some of its appeal due to Vitoria's criticism. Nevertheless, it did by no means disappear, as Suárez, Solórzano Pereira, or Richard Zouche (1650) illustrate. Zouche, for instance, asserted that sins against God such as the worship of 'devils or wicked men', atheism or deism, and the persecution of Christians, may be punished by waging war.[72] Still, the

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[72] Richard Zouchaeus, *Iuris et iudicii fecialis, sive, iuris inter gentes, et quaestionum de eodem explicatio* [An Exposition of Fecial Law and Procedure, or of Law between Nations, and Questions concerning the Same; 1650], ed. Thomas Erskine Holland (Washington DC: Carnegie Institution, 1911), Part II, Section VII, paragraphs

argument clearly lost ground in the wake of gradual secularization. Pufendorf and Wolff either dismissed religious titles or simply ignored them. It is probably an oversimplification to argue that subsequently 'Christianity' was replaced by 'civilization', though this may qualify as a shallow summary of the story. Structurally, the assertion that civilized peoples are superior to barbarians, and that Europeans are thus entitled to civilize others, is similar to the third argument: both are teleological and utilitarian, and presuppose a thick concept of the good. Moreover, this fourth line of reasoning tended to conflict with basic assumptions of the natural law or legal tradition (*ex iniuria ius non oritur*). However, it did appeal to many authors, among them Sepúlveda (see beginning of II, 2) and Francis Bacon (1629).[73] The previous section has illustrated how Hume and Smith equate commercial with civilized society, and contrast it with barbarian or uncivilized societies, at least implicitly. Finally, versions of the four-stage theory and the labour theory of property paved the way for the 'agricultural argument', the claim that native nomads did not need all the land and did not own it because they failed to enclose and farm it permanently. The last two arguments were widespread in the eighteenth century.

This section covers three aspects: apart from the just-mentioned agricultural argument, it focuses on the emphasis of several eighteenth-century authors that conquest does not pay, and on Montesquieu, Hume and Smith and their free trade doctrines. It might be argued that the last two topics are interrelated, that perceiving the futility of conquest 'naturally' or 'logically' leads one to endorse foreign trade and transnational economic interdependence. Though Constant or Bentham draw this conclusion, the overall picture is more complex. Some writers do perceive that large empires based on conquest are a failure, but they do not always arrive at the liberal idea of commercial cosmopolitanism. Specifically, I will claim that Montesquieu, Hume and Smith qualify their endorsement of free trade, and do not fit into well-known clichés about eighteenth-century cosmopolitanism or liberal internationalism.

Previous sections have shown that authors like Vitoria and Grotius rejected ideas of a universal monarchy, as developed in Dante's *De monarchia*, for instance (end of I, 6; II, 3; III, 3). Another writer is Domingo de Soto (1556), who argues against the universal monarchy, in particular against the emperor's claim to be 'lord of all the world'. His first proof demonstrates how European exploration and conquest changed the view of the world. The emperor's

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1–2 (2.7.1f.), pp. 116f. Cf. Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart*. Beiträge zur Kolonial- und Überseegeschichte Bd. 26 (Stuttgart: Steiner, 1984), pp. 247f.

[73] Francis Bacon, 'An advertisement touching a Holy War' [1629], in *Works* (London 1740), vol. 3, pp. 534–48, quoted and analysed in Fisch, *Expansion*, pp. 254f.

pretension 'can be sustained by neither reason nor right [*neque ratio neque ius*] since the part over which he ruled was very small in respect of the whole world'.[74] Soto perceives that the term 'world' (*terra*) is ambiguous. For the Romans, it encompassed the parts of the globe they were familiar with. Imperial dominion could therefore only extend as far as the boundaries of the former Roman empire, but never to regions beyond, such as the New World. Soto's second argument proves to be even more decisive. Claiming universal sovereignty is one thing, actually exercising it a different matter: 'Consequently, as power [*potestas*] exists in order to be exercised, and its exercise is impossible over such extended territory, it would follow that such an institution is vain. But God and nature never do anything in vain.'[75] Soto combines an empirical claim with teleological considerations. Empirically, a vast empire over extended territories is impossible to administer successfully. Soto sees empires as natural entities, as human institutions that exist in chronological time. His view of the universal empire is stripped of eschatological connotations and partly secularized. But these considerations are embedded in teleological and theological considerations: Everything has a purpose, 'God and nature' do not allow anything to be 'in vain'. Soto's final argument is moral, focusing on the proper tasks of the legislator, which is 'to benefit the citizens and to instill good customs in them'.[76] This objective cannot be achieved in an over-extended empire.

Soto's arguments are prefigured to some extent by Aristotle, who claims that a *polis* should not be too large, otherwise it would be unable to provide the 'good life' for the political community.[77] Soto anticipates many of the

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74 'Quod tamen totius fit orbis neque ratio neque ius patrocinatur: nam pars quae consensit, perexigua erat, respectu totius orbis', Domingo de Soto, *De Iustitia et Iure* [1556], ed. Venancio Diego Carro (Instituto de Estudios Politicos: Madrid, 1968), book 4, question 4, article 2 (from now on: 4.4.2), vol. 2, p. 306; transl. in Anthony Pagden, *Lords of all the World. Ideologies of Empire in Spain, Britain and France, c. 1500 – c. 1800* (New Haven, London: Yale University Press, 1995), p. 53.

75 'Quia potestas fit ut adhibeatur, et exercitio potestatis supra tantum territorium non fieri potest, consecutio sit talem institutionem frustra esse. Sed Deus vel natura nihil umquam frustra faciunt', ibid., p. 306; also translated in Pagden, *Lords*, p. 54. For a discussion of Soto's argument, see Pagden, *Lords*, pp. 53–5, to whom I am much indebted.

76 Soto, *Iustitia*, 1.2.1, vol. 1, p. 18; Pagen, Lords, p. 55.

77 Aristotle, 'The Politics', in *The Politics and The Constitution of Athens*, ed. Stephen Everson (Cambridge: Cambridge University Press, 1996), book VII, 1326b, 5–20, p. 173. It is Pagden's merit to have shown how Spanish authors provided many arguments that became standard repertoire in the political thinking of later centuries. Apart from Soto, he analyses the work of the canon lawyer Diego Covarrubias y Leyva (1512–67), and that of Fernando Vázquez de Menchaca (1512–69) in Pagden, *Lords*, pp. 55–61. See also Annabel S. Brett, *Liberty, Right and Nature. Individual rights in later scholastic thought* (Cambridge: Cambridge University Press, 1997), ch. 5 on Vázquez.

criticisms raised against imperial aspirations in later centuries, though there is often a marked shift away from the focus on the universal monarchy. In his project of a worldwide peaceful federation, Eméric Crucé (1623) points out that if anyone, then the Ottoman Turks have reasons to see their conquests as beneficial. However, even they have to face domestic problems, realizing that 'if force establishes monarchies, it also ruins them.' In a later passage, he offers an explanation for this contention. History shows that it is usually easier to conquer a province than to keep it. Conquest requires only brute force, but possession is in need of prudence, good fortune, and 'true affection on the part of the subjects'. Extended monarchies, however, do not meet these requirements, especially if the ruler is far removed from the population.[78] Montesquieu (1748) tries to derive yet another lesson from the study of history. Extensive monarchies, he claims, either dissolve or turn despotic, referring to the Roman, Chinese and Spanish empires.[79] David Hume (1752) does not attribute Rome's decline and fall to its internal corruption or decadence, but to its dimensions. He offers an organic understanding of the state: like natural bodies, its growth is checked by 'internal causes' related to its 'enormous size'. Conquering monarchies may be deprived of able military leaders in the long run, wars are fought far away from the capital, with the nobility unwilling to live a life of hardships at remote frontiers. The government is subsequently forced to hire mercenaries, who are badly trained, unreliable and rebellious. The empire is ready to crumble and dissolve: 'Thus human nature checks itself in its airy elevations: Thus ambition blindly labours for the destruction of the conqueror.'[80] Rousseau (1755, 1756, and 1761) holds 'that nothing is as oppressed and miserable as conquering nations. Their success abroad only increase their misery at home.' Conquest abroad is a means of domestic oppression. The history of Rome and other empires does teach us a lesson: small is beautiful, large states inevitably decline and perish. Social bonds and the sense of community become looser, and the administration turns expensive and ineffective: 'And thus a state that is too big for its constitution always

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78 Eméric Crucé, *The New Cineas* [1623], transl. and intro. C. Frederick Farrell and Edith R. Farrell (New York and London: Garland Publishing, 1972), pp. 15 and 67f. There is a fine discussion of Crucé's peace project in Derek Benjamin Heater, *World Citizenship and Government. Cosmopolitan Ideas in the History of Western Political Thought* (Houndmills et al.: Macmillan, 1996), pp. 61, 65–70 and 87, and Hans Steinsdorfer, 'Eméric Crucé, Le nouveau Cynée, Die Begründung der modernen Friedensbewegung', *Friedenswarte*, 54 (1957), pp. 35–56, 146–61.

79 Montesquieu, *Spirit of the Laws*, 1.8.19, p. 126. Cf. ibid., 1.8.17 and 18, pp. 125f.; 1.8.6, pp. 116f., and 1.8.21, pp. 126f. (on the Chinese empire).

80 Hume, Letter to Lord Kames, 4 March 1758, in Hume, *Writings on Economics*, p. 210; 'Of the balance of power' [1755], in Hume, *Political Essays*, p. 160.

perishes, crushed by its own weight.'[81] Smaller states are proportionately stronger than big ones. A self-interested economic calculus, a sober cost-benefit analysis, should lead princes to the conviction that conquests do not pay nowadays, that 'they sometimes cost more than they are worth.'[82] Each soldier in the army removes a farmer from the fields or a merchant from the city. Better laws, an intelligent economic policy, and intensive use of labour increase the strength of a state more efficiently than simple conquest.

The late eighteenth century produced a row of 'enlightened critics of empire' (Pagden) and colonialism, among them Davenant, Raynal, Diderot, Gibbon, Condorcet and Herder. Charles Davenant (1771) follows the trend away from a focus on natural law and considerations of justice to pragmatic calculations. Monarchies should confine themselves to a limited territory, otherwise they are bound to fail.[83] Abbé Raynal's bestseller *Histoire philosophique et politique* (1772–80) argues that there was only one possible argument in favour of Spanish conquest: it brought the indigenous populations in America and Asia into the world economy. While celebrating the benefits of global commerce, it also condemns European colonial practices, especially the book's final version of 1780, which includes additional contributions from several Enlightenment authors, among them Diderot.[84] Like Hume, whom he praises as the 'Tacitus of Scotland', Edward Gibbon declares in the third volume of his monumental

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[81] Jean-Jacques Rousseau, 'Discourse on Political Economy' [1755], in *Rousseau on International Relations*, ed. Stanley Hoffmann and David P. Fidler (Oxford: Clarendon Press, 1991), p. 25; *Oeuvres complètes, vol. III: Du contrat social, écrits politiques* (Paris: Éditions Gallimard, 1964), p. 268; 'First Version of the 'Social Contract' [1761], in *Rousseau*, ed. Hoffmann and Fidler, p.123; *Oeuvres* III, p. 321; The State of War' [1756], in *Rousseau*, ed. Hoffmann and Fidler, p. 39; *Oeuvres* III, p. 606.

[82] Rousseau, 'Saint-Pierre's Project for Peace' [1756], in *Rousseau*, ed. Hoffmann and Fidler, p. 78; *Oeuvres* III, p. 582.

[83] Charles Davenant, 'An Essay upon Universal Monarchy', in *The Political and Commercial Works of that Celebrated Writer, Charles d'Avenant* (London, 1771; reprint Farnborough, Hants: Gregg Press, 1967), vol. 4, p. 4; 'On the Plantation Trade', ibid., vol. 2, p. 26. Cf. Pagden, *Lords*, pp. 160–3, 10 and 103f.

[84] Guillaume Thomas Raynal, *Histoire philosophique et politique des Établissements et du Commerce des Européens dans les deux Indes*, 4 vols (Jean-Leonard Pellet: Geneva, 1780), vol. 2, pp. 2–7, 39–46 and 300–10. Cf. Anthony Pagden, 'Dispossessing the Barbarian: Rights and Property in Spanish America', in *Spanish Imperialism and the Political Imagination. Studies in European and Spanish-American Social and Political Theory 1513–1830* (New Haven and London: Yale University Press, 1990), pp. 13–36, here p. 36. Raynal's work is discussed in Pagden, *Lords*, pp. 163–8; Melvin Richter, 'Europe and "The Other" in Eighteenth-Century Thought', in Karl Graf Ballestrem, Volker Gerhardt, Henning Ottmann, and Martyn Thompson (eds), *Politisches Denken Jahrbuch 1997* (Stuttgart: Metzler Verlag, 1997), pp. 42–4, and John Greville A. Pocock, 'Raynal back to back with Gibbon: a reading of the *Histoire des Deux Indes*' (manuscript).

study (1781) that the fall of the Roman empire was, above all, the 'natural and inevitable effect of immoderate greatness. Prosperity ripened the principle of decay; the causes of destruction multiplied with the extent of conquest; and as soon as time or accident had removed the artificial supports, the stupendous fabric yielded to the pressure of its own weight.'[85]

In spite of their often substantial differences in other matters, the message of all these authors is clear and rather uniform: conquest does not pay. Though we should avoid the 'fallacy of premature secularization' (Forbes), these Enlightenment authors show how the initial and predominant focus of the natural lawyers on the issues of justice and tradition (like the titles of the emperor) has been surpassed by utilitarian, historical and secularized arguments. To some extent, Bentham and Constant provide the concluding statements of this development. In Jeremy Bentham, the moral argument that conquest is unjust is still there, but has receded into the background. According to the 'Principles of International Law' (1786/89) and 'Rid Yourselves of Ultramaria' (1793), the emancipation of the colonies or 'foreign dependencies' is above all in the interest of the home countries. Bentham's arguments against the Spanish, British and French empires are predominantly utilitarian, stressing the economic aspects. Long tables and calculations are supposed to show that colonial expenses by far overbalance profits. In addition, the colonies have a detrimental domestic impact, and increase national insecurity by diverting manpower.[86] Like domestic law, international law is based on the principle of utility, or 'the most extensive welfare of all the nations on the earth'. Utility overrides national interests with the exception of self-preservation. Commerce should replace conquest and colonial exploitation. Britain can trade with independent states or communities better than with rebellious and expensive colonies.[87]

Reflecting particularly on Napoleon's hegemonic aspirations, Benjamin

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85 Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, vol. 3 [1781], ed. by David Womersley (London: Penguin Press, 1994), ch. 38, p. 509; John Greville A. Pocock, 'Gibbon's *Decline and Fall* and the world view of the Late Enlightenment', in *Virtue, Commerce, and History. Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985), pp. 143–56.

86 Jeremy Bentham, 'Rid Yourselves of Ultramaria' [1793], in *Colonies, commerce, and constitutional law: Rid yourselves of Ultramaria and other writings on Spain and Spanish America*, ed. Philip Schofield (Oxford: Clarendon Press, 1995), p. 25; cf. p. 309 (on the moral aspect); pp. 10–22 include some of the tables and attached explanations; pp. 23–5 focus on domestic and military disadvantages. The term 'Ultramaria' is a translation of the Spanish word *ultramar*, meaning '(the country) beyond the sea.'

87 Jeremy Bentham, 'Principles of International Law' [1786/89], in *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh, London: Simpkin, Marshall and Co., 1843), vol. II, pp. 538, 546, 547–9.

Constant (1813) stresses their utter futility. Any attempt of one nation to subject others is bound to fail: 'The force that a people needs to keep all others in subjection is today, more than ever, a privilege that cannot last. The nation that aimed at such an empire would place itself in a more dangerous position than the weakest of tribes.' Initially, aggression might pay, but overwhelming allied force would soon turn the tide. In the Europe of the 1800s, any attempt to prompt one nation to war and conquest is an anachronism, as the spirit of conquest is incompatible with 'the present state of civilization', that is, commercial society and the widespread utilitarism in its wake.[88] Conquest is more destructive in modern commercial nations, and Napoleon was an anachronism, attempting to destroy the peaceful commercial interdependence of Europe. The four-stage theory of Smith and others holds the promise of a future without war and conquest:

> We have finally reached the age of commerce, an age which must necessarily replace that of war ... War and commerce are only two different means to achieve the same end, that of possessing what is desired. Commerce ... is an attempt to obtain by mutual agreement what one can no longer hope to obtain through violence.[89]

Experience tells people that resorting to war is self-defeating, and that commerce is the better method to achieve the same goal. In Bentham and Constant, the insight into the futility of conquest leads naturally to an endorsement of economic cosmopolitanism.

This picture of European Enlightenment authors often criticizing the conquest and colonial policy of their own governments is incomplete. As pointed out, there were at least two strategies to justify colonialism, the alleged superiority of European civilization, and the agricultural argument. The claim that agriculturalists may appropriate the territory of hunters and nomads can be traced back to Thomas More's *Utopia* (1516) and – of course! – to the natural lawyers. Grotius equals the state of nature with the Native Americans' way of life, but without qualifying it as morally inferior. It is 'without inconvenience' and characterized by 'great simplicity'. In another context, an embryonic form

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88 Benjamin Constant, 'The Spirit of Conquest and Usurpation and their Relation to European Civilization' [1814], in *Political Writings*, transl. ed. Biancamaria Fontana (Cambridge, New York: Cambridge University Press, 1988), pp. 79 and 55.

89 'Nous sommes arrivés à l'epoque du commerce, époque qui doit nécessairement remplacer celle de la guerre, comme celle de la guerre a dû nécessairement la précéder. La guerre et le commerce ne sont que deux moyens différents d'arriver au même but, celui de posséder ce que l'on désire. Le commerce ... est une tentative pour obtenir de gré à grè ce qu'on n'espère plus conquérir par la violence', Benjamin Constant, *Oeuvres*, ed. Alfred Roulin (Paris: Gallimard, 1957), p. 32; Constant, 'Spirit of Conquest', pp. 81–3 and 53; cf. p. 313.

of the agricultural argument is presented: 'if within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it.' Sovereignty, however, still resides with the native population, and Grotius does not distinguish between hunters and farmers. Moreover, there is no reference to the Native Americans.[90] The agricultural argument is fully developed in John Locke's *Two Treatises of Government* (1689). In general, Locke's theory of natural law is similar to the accounts of Grotius and Pufendorf in crucial respects. Natural law is not relative, but universal. It is discovered by rational reflection, and is not a bundle of innate ideas.[91] Locke shares with other natural lawyers the same starting point, the idea of common property. Like Pufendorf but against Filmer, Locke holds that this community is merely negative, that is, describes the absence of private property rather than the legal fact of joint ownership. The world belongs to nobody, but can be appropriated by all. Contingent human features, namely 'corruption', 'vitiousness', and degeneration, and the inconveniencies of the state of nature – which is not identical with a state of war – urge people to leave this original negative community and establish 'smaller and divided associations', that is, a positive community where others are explicitly excluded.[92] Like Pufendorf, Locke builds a historical dimension into his account. Basically, he offers a two-stages theory of human social development, juxtaposing the primitive simplicity of the original condition with a more advanced money economy.

Locke tries to improve the doctrines of previous natural lawyers in two crucial respects. First, he asserts that the legitimacy of appropriation is not only dependent on the consent of others. Secondly, Locke holds that we can establish property rights in things by mixing our labour with them. A person owns his or her body, its labour, and thus also 'Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and

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90 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [1625; The Law of War and Peace]. Vol. II, trans. Francis W. Kelsey, 3 vols (Oxford: Clarendon Press 1925; reprint New York: Oceana Publications, 1964), 2.2.1, vol. 2, p. 187; 2.2.17, p. 202. Thomas Flanagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy', *Canadian Journal of Political Science*, 22 (1989), pp. 589–602 and Barbara Arneil, 'John Locke, Natural Law and Colonialism', *History of Political Thought*, 13 (1992), pp. 589 and 600–3 are the two standard articles.

91 John Locke, 'Essays on the Law of Nature', in *Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), pp. 79–133; Stephen Buckle, *Natural Law and the Theory of Property. Grotius to Hume* (Oxford: Clarendon Press, 1991), pp. 125–49.

92 John Locke, *Two Treatises of Government* [1689], ed. intro. Peter Laslett (Cambridge: Cambridge University Press, 1994), Second Treatise, paragraph 128 (from now on: 2.128), p. 352; cf. 2.21, p. 282. See Buckle, *Natural Law*, pp. 164f. and 183 as well as Hont and Ignatieff, 'Needs and justice', p. 36 on the distinction between positive and negative original community.

joyned to it something that is his own, and thereby makes it his *Property*.'[93] Locke's famous 'labour theory of property' has important consequences on an international or transnational level. Locke assumes that the property rights established by European settlers are justified. His labour theory is fully compatible with colonial expansion at the expense of native nomadic populations, who do not really own the land because they do not permanently enclose and farm it.[94] Formally, the argument corresponds with the standards of impartiality and equality as both natives and Europeans are entitled to engage in original appropriation. In actual practice, the natives were discriminated against, as they were left with the alternative either to adopt the European way of life and its technology or to leave. Historians point out that as a matter of fact the agricultural argument applied only to a small portion of the land acquired by the Europeans. The juxtaposition between hunting and agriculture was historically unjustified, as the aborigines of today's eastern United States and Canada also practised some form of farming, that is, slash-and-burn agriculture. In addition, some natives were expelled from their treaty lands even though they had started to practice European-style agriculture.[95] In short, the argument had only limited relevance for actual practice, but there can be no doubt that it proved extremely useful for European settlers, especially as it had a utilitarian

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93 Locke, *Treatises*, 2.27, pp. 287f.; Flanagan, 'Indian Lands', pp. 592f.; Arneil, 'Locke', p. 603; Karl Olivecrona, 'Appropriation in the State of Nature: Locke on the Origin of Property', *Journal of the History of Ideas*, 35 (1974), p. 211–30, who emphasizes the importance of Grotius and Pufendorf.

94 Locke, *Treatises*, 2.27–51, pp. 287–302. Cf. Howard Williams, 'John Locke and International Politics', in *International Relations and the Limits of Political Theory* (Houndmills et al.: Macmillan Press 1996), pp. 100–2; James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press 1993), pp. 137–76; Ruth Grant, *John Locke's Liberalism* (Chicago, London: University of Chicago Press 1987), pp. 159–61, and Robert A. Williams, *The American Indian in Western Legal Thought* (New York, Oxford: Oxford University Press 1990), pp. 246–51. Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (New York, Oxford: Oxford University Press 1995) and Matthew H. Kramer, *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality* (New York: Cambridge University Press, 1997) are recent studies of Locke's labour theory; see also Buckle, *Natural Law*, pp. 149–90 and Medick, *Naturzustand*, pp. 64–133.

95 See Flanagan, 'Indian Lands', pp. 593f. and 596–602, Nicholas Griffin, 'Aboriginal Rights: Gauthier's Arguments for Despoilation', *Dialogue*, 20 (1981), pp. 690–6, and 'Reply to Professor Flanagan', *Canadian Journal of Political Science*, 22 (1989), pp. 603–6 for a discussion. Some readers might wonder why Locke plays a minor role in this study. He seems to belong to those political thinkers who have been overrated, and there may be some truth in Schumpeter's statement that 'he added little to Grotius and Pufendorf'; Schumpeter, *History of Economic Analysis*, p. 117. Put polemically, what he added to them was original but not always convincing.

dimension, stressing the material advantages of agricultural and commercial societies. Authors who dealt with colonialism and related issues in the second half of the eighteenth century rarely missed the opportunity to comment upon, elaborate, or reject the argument. Vattel (1758) endorsed the theory, which may explain to some extent the popularity of his treatise on the law of nations in the United States. Kant (1797), by contrast, rejected it, along with Locke's labour theory of property (see V, 5 and VI, 2).

So far, this chapter has tried to show how the thinking of natural lawyers like Grotius and Pufendorf often developed into something very different from their theories. The agricultural argument, evolved from natural law assumptions, can be seen as a case in point. Previous chapters illustrate that most natural lawyers shared a common understanding of hospitality rights: individuals have an imperfect right to visit foreign communities, which may in turn prefer isolation over interaction. Diderot, who has been mentioned above as one of the co-authors of the *Histoire des Deux Indes* (1780), belongs to the eighteenth-century authors who repeat this doctrine. Diderot perceives the ambivalence of commerce. On the one hand, it can be one of the sources of human happiness and freedom, and is therefore enthusiastically endorsed. On the other hand, the actual history of European commercial expansion is one of unmitigated moral disaster, and criticized over again. Diderot's arguments repeat familiar features of impartiality. The old man's farewell speech stresses the legitimate ownership or *dominium* of the native Tahitians, and points out that Europeans violated standards of reciprocity. 'What right do you have over him that he does not have over you? You came; did we attack you?' The European conqueror is 'a domestic tiger returning to the forest': violent, ruthless, greedy, 'capable of every crime'.[96] Diderot is not against colonies, but claims that certain principles must be adhered to, and they are identical with familiar hospitality rights. Travellers who are on the verge of dying have a right of self-preservation and thus may force others to give them what they need in order to survive. However, these travellers must not demand more. If they like the country and want to

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96 Denis Diderot, 'The *Supplément au Voyage de Bougainville*' [1772], in *Political Writings*, transl. ed. John Hope Mason and Robert Wokler (Cambridge: Cambridge University Press, 1992), p. 42; 'Extracts from the *Histoire des Deux Indes*' [1780], in *Political Writings*, pp. 178 and 186; 'Observations sur le Nakaz' [1767], in *Political Writings*, pp. 159, 134f. For interpretations, see Anthony Pagden, *European Encounters with the New World. From Renaissance to Romanticism* (New Haven, London: Yale University Press, 1993), pp. 141–81; William Womack, 'Eighteenth century themes in the *Histoire philosophique et politique des deux Indes* of Guillaume Raynal', *Studies on Voltaire and the Eighteenth Century*, 96 (1972), pp. 129–265; *Lectures de Raynal: l'Histoire des Deux Indes en Europe et en Amérique au XVIII siècle*, ed. Hans-Jürgen Lüsebrink and Manfred Tietz, *Studies on Voltaire and the Eighteenth Century*, vol. 286 (Oxford: The Voltaire Foundation at the Taylor Institution, 1991).

settle there, it's up to the natives to grant permission or refuse it: 'If I am allowed to do so, it is a favour done to me, and a refusal cannot offend me.'[97] In other words, Diderot distinguishes between what Kant will later call a right to visit (*Besuchsrecht*) and a right to be a guest (*Gastrecht*; see VI, 4). In natural law terminology, the right to visit is a perfect one if the traveller's life is at stake. The right to be a guest, by contrast, is imperfect, and contingent upon the consent of the parties involved. Diderot does not miss the opportunity to point out that the Chinese politicians who choose isolation are 'not unjust', given the tiger-like propensities of the Europeans. In addition, Diderot distinguishes between deserted, partly deserted and fully inhabited countries. Only uninhabited countries can be totally appropriated. If they are partly populated, the Europeans may possess the deserted fraction, provided they are peaceful and do not destroy the livelihood of the aborigines.[98]

My analysis presents a rather favourable picture of Diderot's hospitality rights. However, it has recently been claimed that Diderot is not as radical and as impartial as often assumed, but in fact endorses 'a project of colonial management', and does not lose sight of the ultimate goal of a 'better control of the colonies'. According to this interpretation, Diderot shares the mistaken belief of other *philosophes* in the superiority of the civilized, that 'there are degrees of humanity.'[99] Diderot seems to be ambivalent. On the one hand, his vision of 'soft colonialism', where the natives happily receive peaceful Europeans, listen to them, and adopt their religion, culture and technology, suggests that he does believe in the superiority of the European civilized man. Other passages, however, leave this open or suggest the opposite. In addition, Diderot distinguishes between the cultural concept of 'savages' and the moral notion of 'barbarians'. Europeans are civilized as opposed to savage nations, but they are new barbarians because of immoral colonial practices such as slavery.[100]

Commerce (*commercium*) has a narrow meaning, where it is identical with trade and business. Its broader definition encompasses any form of interaction, communication and interchange among humans (see I, 6). In modern European political thought, the term becomes increasingly identical with the exchange of goods or trade.[101] The trend is reinforced in the eighteenth century. Hume

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97 Diderot, 'Extracts from the Histoire', p. 175.

98 Diderot, 'Extracts from the Histoire', pp. 175–7.

99 Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston: Beacon Press, 1995), p. 81.

100 Diderot, 'Extracts from the Histoire', pp. 178f., 197 and 173; Pagden, *Lords*, pp. 169f., who also points out that Diderot excluded the North American settlers from his generic attack on European injustices.

101 Thomas Hobbes, *De Cive. The Latin Version*, ed. Howard Warrender (Oxford: Clarendon Press, 1983), 1.2, p. 90, where *commercium* relates to persons who want each

sometimes equals commerce with interaction and intercourse, but Smith defines commercial society as based on the exchange of goods, and Kant characterizes England and the United Provinces as 'commercial states' which own trading companies. According to his analysis, the 'spirit of commerce' predominates whenever the exchange of goods is motivated by mutual self-interest.[102] We have already seen that some eighteenth-century literature enumerates possible advantages of commerce, especially international trade. Commerce, it is said, reduces old prejudices, because people interact, communicate and ultimately understand each other. Commerce makes people more gentle, and increased cooperation and reciprocity reduce the likelihood of domination, conquest and war. Sometimes it is claimed that commerce will replace conquest and colonialism, although it is advisable to be careful with sweeping assertions about 'the Enlightenment' and its allegedly uniform endorsement of cosmopolitanism, pacifism and optimism.[103]

The emergence of free trade literature is usually traced back to the end of the sixteenth century. Originally, the term 'freedom of trade' was directed against exclusionary guild regulations, privileges and government grants of monopoly rights.[104] In the eighteenth century, 'free trade' subsequently referred to import tariffs and other government restrictions, and came to be the opposite of the balance-of-trade doctrine. Usually advocated by mercantilists, the doctrine held that the value of exports should always exceed the value of imports, presumably resulting in a trade surplus and more precious metals and treasure for one's own country. Especially Hume and Smith were traditionally seen

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other's goods rather than their friendship. See also the remarks in Hont, 'Commercial Society', p. 61. In Crucé, *Cineas*, pp. 4 and 129f., commerce is identical with trade.

102 Hume, *Treatise*, p. 567; Smith, *Wealth of Nations*, 1.4.1, p. 37; Immanuel Kant, 'The metaphysics of morals Part I: Metaphysical first principles of the doctrine of right' [1797], in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), pp. 329f. and 336.

103 Cf. Pagden, *Encounters*, pp. 169–72, *Lords*, pp. 178f., Hirschman, *Passions*, pp. 51f., 60, 72–5, 79; Leonard Gomes, *Foreign Trade and the National Economy. Mercantilist and Classical Perspectives* (Houndmills: Macmillan Press, 1987), pp. 121–3, and the essay by Susan M. McMillan, 'Interdependence and Conflict', *Mershon International Studies Review*, 41 (1997), pp. 33–58, who distinguishes among political, economic and sociological liberalism. Ernst Cassirer, *The Philosophy of the Enlightenment* [1932], transl. Fritz C. Koelln and James P. Pettegrove (Boston: Beacon Press, 1964) is the classical study warning against widespread clichés about 'the Enlightenment'. For an updated account, see the excellent introductory essay in James Schmidt (ed.), *What Is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Questions* (Berkeley, Los Angeles, London: University of California Press, 1996), pp. 1–44.

104 Douglas A. Irwin, *Against the Tide. An Intellectual History of Free Trade* (Princeton: Princeton University Press, 1996), p. 46 as opposed to modern understanding, ibid., p. 217.

as the major and primary critics of the balance-of-trade doctrine. Recent scholarship has corrected the picture, and pointed out that free trade doctrines were outlined by political economists long before Hume and Smith, and that both severely qualify their stance on free trade. As a consequence, Jacob Viner characterized Hume, for instance, as a 'moderate protectionist'.[105]

Advocates of international trade often relied on the established doctrine of universal economy, put into words by Libanius as early as the fourth century and espoused by many natural lawyers (I, 6). According to the doctrine, God had made sure that commodities were dispersed among various countries and different regions, thus offering an incentive to trade. Ultimately, the people would form a kind of world society, and increased interaction would teach them to love each other as children of God. The English mercantilist literature from the sixteenth to the eighteenth centuries, for example, often overemphasized international trade, anticipated some of the economic arguments in favour of unrestricted trade, and envisioned an international division of labour. In *A Discourse of the Commonweal of this Realm of England* (1581), Sir Thomas Smith, the likely author, espoused the universal economy doctrine, claiming that trade between nations is indispensable. An anonymous essay, *Considerations on the East-India Trade* (1701), calculated the benefits of international trade, where goods can be acquired at lower costs than if produced at home.[106] Though a rather secularized thinker, Hume refers to the doctrine of universal economy in his critique of mercantilist trade restrictions, and of the unfounded fear of an unfavourable balance of trade. In fact, Hume contends, economic disadvantages result from depriving 'neighbouring nations of that free communication and exchange which the Author of the world has intended, by giving them soils, climates, and geniuses, so different from each other'.[107] The sentence illustrates a surprising continuity of arguments across centuries.

According to a widespread cliché, the *philosophes* of the Enlightenment endorsed a rather naïve cosmopolitanism and expressed their belief in the gradual expansion of an economic world order: 'The notion of international

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105 Irwin, *Free Trade*, pp. 34–8. Jacob Viner, *Studies in the Theory of International Trade* (New York, London: Harper and Brothers Publishers, 1937); Schumpeter, *History of Economic Analysis*, and Terence Hutchison, *Before Adam Smith. The Emergence of Political Economy, 1662–1776* (Oxford: Basil Blackwell, 1988) are some of the studies which have put Hume and Smith into perspective. Viner on Smith in *International Trade*, p. 92.

106 Irwin, *Free Trade*, ch. 2; pp. 27f. covers Sir Thomas Smith; Viner, *International Trade*, pp. 100–10; Schumpeter, *History*, pp. 367–76; pp. 373f. on the anonymous pamphlet.

107 Hume, 'Balance of trade', p. 148. In 'Of the jealousy of trade' [1758], in Hume, *Political Essays*, p. 151, Hume makes a similar claim, but refers to 'nature' instead of God.

commerce as a promoter of world civilization and peace became a consistent, if at times naïve, premise of Enlightenment cosmopolitan thought.'[108] This seems to be consistent with the philosophers' insistence on the futility of conquest, their repeated criticism of colonialism, and the perceived advantages of commerce. The doctrine of universal economy would then reappear in a secularized version: divine providence is replaced by the workings of nature, and the Christian brotherhood by humankind, united by common interests. It is important to qualify this interpretation, which will be the main goal of the remaining parts of this section. The focus is on Montesquieu, Hume and Smith, whose theories of commercial society were discussed at some length in the previous section. In all three authors, the concerns of the wider community must take a back seat in case they should conflict with the interests of the state, and neither of them thinks that a conflict is impossible.

Montesquieu is usually cited as one of the founding fathers of political and economic liberalism, and seen as the typical Enlightenment representative stressing the advantages of commerce. In famous passages, Montesquieu claims that trade turns people into gentler beings, 'cures destructive prejudices', and leads to peace: 'Two nations that trade with each other become reciprocally dependent; if one has an interest in buying, the other has an interest in selling, and all unions are founded on mutual needs.'[109] A commercial republic like England is vigorous and dynamic, though hospitality and friendship are discouraged (see V, 1). However, Montesquieu's assessment of international trade is ambivalent. On the one hand, he holds that exclusion of commerce is harmful, as in the example of the Japanese, and that competition guarantees just prices, whereas any monopoly raises prices on commodities. Large sections of the fourth part, especially the twentieth and twenty-first books, of the *Spirit of the Laws* offer a history of commerce and its impact on politics and culture, as it 'wanders across the earth, flees from where it is oppressed, and remains where it is left to breathe'.[110]

He praises European world trade, especially commerce with the Americas.[111] On the other hand, Montesquieu accepts the English trade restrictions such as

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108 Thomas J. Schlereth, *The Cosmopolitan Ideal in Enlightenment Thought: Its Form and Function in the Ideas of Franklin, Hume, and Voltaire, 1694–1790* (Notre Dame University Press, 1977), p. 103.

109 Montesquieu, *Spirit of the Laws*, 20.1 and 2, p. 338. For an analysis, see Daniel Brühlmeier, 'Considérations sur l'esprit de commerce et le marché libre chez Montesquieu et Adam Smith', *Revue de Théologie et de Philosophie*, 130 (1998), pp. 301–14.

110 Montesquieu, *Spirit of the Laws*, 20.9, pp. 343f.; 21.22, pp. 396f.; 21.5, p. 356. Cf. Merle L. Perkins, 'Montesquieu on national power and international rivalry', in *Studies on Voltaire and the eighteenth century*, 238 (1985), pp. 49–55.

111 Ibid., 20.21, pp. 391–3.

the Navigation Act (1660) as useful and justified: 'It hampers the trader, but it does so in favor of commerce.' Freedom of commerce is not defined as granting traders to do whatever they want to do, but as regulations of exports and imports 'in favour of the state'.[112] Montesquieu cautions against the dangers of an unfavourable balance of trade, and holds that no foreign trade at all would be better for the Polish population. In short, the perspective is predominantly state centered. Commercial policies, like colonies, must be assessed from society to society. Colonies may foster or undermine national power. They can cause inflation and drain a country of its population, as in the case of Spain, or turn the home country into a powerful actor with the help of trading companies, as in England. At any rate, in a condition of anarchy, national self-preservation is the first natural law of states: 'Each particular society comes to feel its strength, producing a state of war among nations.'[113] This might be interpreted as anticipating Rousseau's theory that as artificial bodies, states perceive their own strength by measuring it with that of other entities. State power is relative. The desire of self-preservation can deteriorate into an urge to feel superior to others (see V, 4). The condition of war can be mitigated by the law of nations and the establishment of federations, but not overcome.

In a letter to Montesquieu, David Hume comments on two chapters of the *Spirit of the Laws*, pointing out that economists are too worried about the balance of trade.[114] His main argument is repeated in the essay on the same topic. Nations that restrict exports often undermine their very intention, that is, amassing commodities or specie at home. Hume's self-adjusting specie-flow mechanism or quantity theory of money compares money with water. A sudden increase of money in one country would raise costs of labour and commodities there, so that neighbouring states could easily sell their comparatively cheap goods. Consequently the first country's money would flow to those neighbouring states. By the same token, a sudden destruction of money in one nation would lower the price of labour and commodities, and increase competitiveness on the international market, so that in the long run the equilibrium of money is re-established. Money is like water: 'All water, wherever it communicates, remains always at a level.'[115] A surplus in trade

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112 Ibid., 20.12, p. 345 and 20.13, p. 346. See also Hutchison, *Adam Smith*, pp. 222f.

113 Montesquieu, *Spirit of the Laws*, 20.23, p. 352; 1.2, p. 6 and 1.3, p. 7. See also the analysis in Perkins, 'Montesquieu', pp. 64–70.

114 Hume to Montesquieu, 10 April 1749, in *Writings on Economics*, pp. 188f.

115 Hume, 'Balance of trade', pp. 136 and 138. See also pp. 145 and 149, 'Of money' [1752], in Hume, *Political Essays*, p. 120, and 'Jealousy of trade,' pp. 150–3. On Hume's economic thought in general, see Teichgraeber, *Free Trade*, ch. 3; Hont, 'The "rich country – poor country" debate', especially pp. 282f., and Ernesto Screpanti and Stefano Zamagni, *An Outline of the History of Economic Thought* (Oxford:

balance does not work. Labour and the spirit of industry rather than money matter.

Hume expects static and dynamic gains from international trade.[116] He claims that 'the encrease of riches and commerce in any one nation, instead of hurting, commonly promotes the riches and commerce of all its neighbours.' Exchange is mutually beneficent, and not a zero-sum game: both the power of the trading states and the wealth of the subjects is increased.[117] For Hume, these static advantages are by far surpassed by dynamic ones. People become less indolent. Material gains give birth to domestic luxury, and people are thus motivated to make improvements, and engage in a healthy rivalry: 'Imitation soon diffuses all those arts; while domestic manufacturers emulate the foreign in their improvements, and work up every home commodity to the utmost perfection of which it is susceptible.'[118] In contemporary terminology, commercial states profit from the transfer of technology and know-how across borders, an opportunity isolationist states like China or Japan definitely miss (see VI, 3). New markets develop, new commodities are produced, and the economy is drawn into a dynamic process of invention, emulation and expansion. Hume infers that jealousy of trade is largely unfounded. He concludes his essay with the famous statement that 'not only as a man, but as a BRITISH subject, I pray for the flourishing commerce of GERMANY, SPAIN, ITALY, and

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Clarendon Press, 1993), pp. 31–3. Gomes, *Foreign Trade*, pp. 110–16 points out that Hume's theory is not flawless.

116 This convenient distinction follows Razeen Sally, *Classical Liberalism and International Economic Order: Studies in Theory and Intellectual History* (London: Routledge, 1998), pp. 39–50. See also Teichgraeber, *Free Trade*, pp. 108–20; John F. Berdell, 'Innovation and Trade: David Hume and the Case for Freer Trade', *History of Political Economy*, 28 (1996), pp. 107–26, especially pp. 117–20, and Hont, 'The "rich country – poor country" debate', pp. 291–3. Erik S. Reinert and Arno Mong Daastol, 'Exploring the Genesis of Economic Innovations: The Religious Gestalt-Switch and the Duty to Invent as Preconditions for Economic Growth', in Jürgen G. Backhaus (ed.), *Christian Wolff and Law & Economics. The Heilbronn Symposium* (Hildesheim, Zürich, New York: Georg Olms Verlag, 1998), pp. 123–73 argue that Wolff belongs to those influential scientists who viewed economic change as dynamic, organic and evolutionary, centered around *logos* (thought) and *Werden* (becoming) as opposed to a static, mechanical and deterministic world view focusing on matter and *Sein* (being). A fundamental change in attitude towards new knowledge is perceived as a necessary precondition for economic growth. Emphasising creativity, inventiveness, innovation, human will and mind, and morality, Wolff is seen as one of the 'spiritual forerunners' of contemporary evolutionary economics. I am in no position to assess this claim. If it is true, it would conveniently emphasize the importance of the natural lawyers once again. See also Keith Tribe, *Governing Economy. The Reformation of German Economic Discourse 1750–1840* (Cambridge: Cambridge University Press, 1988), chs. 1 and 2.

117 Hume, 'Jealousy of trade', p. 150f.; 'Of commerce', p. 101.

118 'Of commerce', p. 102; cf. pp. 101f., and 'Jealousy of trade', pp. 150–3.

even FRANCE itself.'[119] The 'enlarged and benevolent sentiments' of the cosmopolitan coincide with the self-interests of a particular state's citizen. More precisely, Hume is Eurocentric rather than cosmopolitan in this passage. In addition, presumably not all communities qualify as potential trading partners, although Hume takes for granted that poorer countries can undersell richer ones, as long as they are industrious and ambitious.

Hume endorses what could be labelled qualified, indirect, or long-term cosmopolitanism. The upshot of his economic analysis is that trading partners naturally profit from commercial interaction, without directly intending this result. In other words, 'while every man consults the good of his own community, we are sensible, that the general interest of mankind is better promoted, than by any loose indeterminate views to the good of a species, whence no beneficial action could ever result, for want of a duly limited object, on which they could exert themselves.'[120] It is better to focus on specific objects or projects than on lofty ones. Because of the law of unintended consequences, the more limited perspective willy-nilly promotes the broader 'general interest of mankind'. It does not make sense to characterize Hume as either cosmopolitan or anti-cosmopolitan. To some extent, he is both: There is no doubt that the interests of one's own state or community come first. However, assuming the doctrine of universal economy and that interests converge if unintended consequences are operative, Hume can also claim that his version of cosmopolitanism is more efficient and thus better than conventional types of cosmopolitanism (see beginning of I, 5).

Because concerns of the state come first, Hume does not hesitate to qualify his endorsement of free trade, emerging as a moderate protectionist: 'A tax on German linen encourages home manufactures, and thereby multiplies our people and industry.'[121] Hume claims that there is a difference between justified import taxes and restrictions and those that are based on jealousy. The thin line between the two probably tends to vanish. Be that as it may, the outline of Hume's vision of international society is clear. Enlightened political economy teaches us that transborder interaction is usually both mutually advantageous

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119 Hume, 'Jealousy of trade', p. 153. See the interpretation in Teichgraeber, *Free Trade*, pp. 106 and 113f., and Berdell, 'Innovation', pp. 116 and 119f.

120 David Hume, 'An Enquiry Concerning the Principles of Morals' [1777], in *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals by David Hume*, ed. Sir Lewis Amherst Selby-Bigge, 2nd edn (Oxford: Clarendon Press, 1902), section V, part II, p. 225 note. For Sally, *Classical Liberalism*, pp. 56f. Hume is patriotic and anti-cosmopolitan, whereas Schlereth, *Cosmopolitan Ideal*, pp. 97–103 views him as an internationalist or cosmopolitan.

121 Hume, 'Balance of trade', p. 148. See Sally, *Classical Liberalism*, pp. 38f.; Irwin, *Free Trade*, pp. 72f.; Hutchison, *Adam Smith*, pp. 207f., and Gomes, *Foreign Trade*, pp. 114f. on Hume's qualifications.

and 'even sometimes necessary', because resources and commodities are unevenly distributed over the globe. However, all states can exist without international society, albeit perhaps not luxuriously. Individuals, by contrast, depend on civil society for their very survival.[122] With this distinction between domestic and international society, Hume rehearses arguments of the natural law tradition, especially Hobbes and Pufendorf. In view of his attempt to revolutionize moral philosophy, Hume's account of the law of nations and international society is highly conventional. The same principles of natural justice, namely 'the stability of possession, its transference by consent, and the performance of promises', should be operative both in the domestic and the international sphere. However, the domestic analogy is soon qualified. These principles have lesser 'force' based on the just mentioned utilitarian calculus: the comparatively smaller usefulness or utility of international society translates into reduced *moral* necessity.[123] As the philosopher is in no position to assess with accuracy the precise degree of the moral 'force' of the law of nations, it is left to the politicians and their experience and practice to do so. Again, this is reminiscent of Pufendorf: state sovereignty is emphasized, international anarchy accepted as unavoidable, and political decisions are most likely a matter of reasons of state. Like Wolff and some other representatives of the Enlightenment, Hume goes out of his way to argue for the European system of a balance of power. For him, it is a safeguard against the threat of a universal monarchy, checks the ambition of rulers such as Charles V and Louis XIV, maintains the independence of states, and guarantees common security and relative stability (see end of IV, 3 and beginning of IV, 6).[124]

In many respects, Adam Smith's political economy can be compared with that of his friend Hume. He exposes mercantilist fallacies and the myths of the balance-of-trade doctrine. He follows Montesquieu and other authors with his claim that commerce naturally unites people. However, he concedes that deficient policies like mercantilism and the 'spirit of monopoly' breed animosity and wars.[125] In other words, Rousseau is partly right with the

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122 Hume, *Treatise*, 3.2.11, pp. 568f. R. J. Glossop, 'Hume and the Future of the Society of Nations', *Hume Studies*, 10 (1984), pp. 46–58 and Frederick G. Whelan, 'Robertson, Hume, and the Balance of Power', *Hume Studies*, 21 (1995), pp. 315–32 are two of the rare studies on Hume's law of nations and international relations thinking.

123 Hume, *Treatise*, 3.2.11, pp. 567f.; cf. 'An Enquiry Concerning the Principles of Morals', section IV, p. 206.

124 Hume, 'Balance of power', pp. 154–60, especially pp. 157f. See Whelan, 'Robertson, Hume' for an assessment and contextualization.

125 Smith, *Wealth of Nations*, 4.3.c.9, p. 493. See, among many others, Irwin, *Free Trade*, ch. 5; Sally, *Classical Liberalism*, ch. 3; Teichgraeber, *Free Trade*, ch. 4; Gomes, *Foreign Trade*, ch. 4; Hla Myint, 'Adam Smith's Theory of International Trade in the Perspective of Economic Development', *Economica*, 44 (1977), pp. 231–48, and

assertion that commercial interdependence may cause conflict rather than peace (V, 4). Like Hume, Smith stresses static and dynamic gains from foreign trade. It is more prudent to import cheap goods than to produce them at home, as free trade guarantees the best use of available capital and labour and thus increases the real annual revenue of society.[126] Foreign commerce may stimulate domestic manufactures, and invites imitation and technology transfer, or the 'mutual communication of knowledge'. In the long run, the productive powers of trading states are perfected.[127] Like Raynal, Smith claims that the real advantage of the discovery of America lies in the fact that a new market was opened, and he sides with the enlightened critics of empire and colonialism that the 'savage injustice' of the Europeans spoiled what could have been beneficial for all sides.[128] Like Hume, but with more systematic coherence, Smith qualifies his endorsement of free trade. First, his exceptions and qualifications encompass retaliation in order to secure abolition of trade restrictions, though he admits that it is left to the politicians to decide whether the policy works in a specific case. Second, free trade must be slowly introduced in order to avoid public disorder and unrest. Apart from that, complete free trade is an utopian concept because of existing prejudices and the private interests of those who have a say in policy decisions. Thus the task of the legislator boils down to contain monopolies and eliminate the worst regulations. Third, equivalent import duties could be imposed on foreign goods if domestic ones were taxed.[129] The most important exception, however, is the protection of industries considered necessary for national defence. Like Montesquieu, Smith holds that the British Act of Navigation is completely justified, simply because 'defence ... is of much more importance than opulence.'[130]

It has already been noted that recent scholarship emphasizes the significance and influence of older authors on Smith. Some even claim that there is no single new idea in the *Wealth of Nations*, whereas others praise Smith's ingenious systematical approach.[131] This issue is a matter of productive debate, and

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Brühlmeier, 'Considérations sur l'esprit de commerce', pp. 301–14 on Smith's free trade doctrine.

126 Smith, *Wealth of Nations*, 4.2.12, p. 457 and the interpretation in Irwin, *Free Trade*, p. 79. See Sally, *Classical Liberalism*, ch. 3; Myint, 'International Trade', and Arthur I. Bloomfield, *Essays in the History of International Trade Theory* (Brookfield: Edward Elgar, 1994), ch. 6, especially pp. 111–30 on static and dynamic gains.

127 Smith, *Wealth of Nations*, 3.3.19, pp. 407f.; 4.8.c.80, p. 627; 4.1.31, pp. 446f.

128 Ibid., 4.1.32, pp. 447f. See also 4.7.c.80, p. 626.

129 Smith, *Wealth of Nations*, 4.2.37–45, pp. 467–72; 4.2.31, p. 465.

130 Ibid., 4.2.23–30, pp. 463–5.

131 Irwin, *Free Trade*, p. 75 juxtaposes Schumpeter's negative assessment with Skinner; cf. Schumpeter, *History*, p. 184 and Andrew S. Skinner, 'The Shaping of Political Economy in the Enlightenment', *Scottish Journal of Political Economy*, 37 (1990), p. 157.

cannot be resolved here. My focus is on Smith's ideas about international relations, and they are indeed conventional rather than revolutionary. In familiar fashion, Smith describes international relations as a condition of anarchy, mutual distrust and suspicion without 'common superior', 'supreme legislative power', or judge 'to settle differences'.[132] The first duty of the state is thus defence, 'protecting the society from the violence and invasion of other independent societies', and as we have seen, Smith does not hesitate to subordinate economic policy to this most important task. Smith can be interpreted as anticipating Kenneth Waltz's distinction between permissive and efficient causes of war. The permissive cause of war (which permits war to occur) is the condition of anarchy in the international political system. The efficient causes are located at the individual and state level. Smith does not present a picture of one-dimensional *homo oeconomicus* in commercial societies. Humans can be driven by strong passions such as 'animosity of national vengeance', 'anxiety for national security', 'national prejudices', or hatred.[133]

Smith's remedy for international anarchy is a familiar one: the balance of power. Distinguishing between European politics and global international relations, Smith holds that the balance of power in Europe is for the most part the outcome of unintended consequences of individual statesmen and politicians preoccupied with the 'interest of their respective countries'. The overall result is 'peace and tranquillity' and the protection of the freedom and independence of the sovereign European states. The situation is different on a global scale. Since 1492, Europeans have enjoyed military superiority, which enabled them 'to commit with impunity every sort of injustice' wherever they wanted to.[134] Smith speaks as an impartial spectator; he is not interested in defending or trivializing European atrocities, or constructing a teleology

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132 Smith, 'Report dated 1766', 399, in *Lectures on Jurisprudence*, p. 545; *Theory of Moral Sentiments*, 6.2.2.3, p. 228. There are only a few publications on Smith's law of nations and theory of international relations. See Andrew Wyatt-Walter, 'Adam Smith and the liberal tradition in international relations', *Review of International Studies*, 22 (1996), pp. 5–28, Daniel Brühlmeier, 'Adam Smith und Internationale Beziehungen', in Thomas Maak (ed.), *Weltwirtschaftsethik: Globalisierung auf dem Prüfstand der Lebensdienlichkeit* (Bern: Haupt, 1998), pp. 171–87, and Haakonssen, *Science*, pp. 133f. My account is much indebted to Wyatt-Walter. Haakonssen, *Science*, pp. 178–81 and Winch, *Smith's Politics*, pp. 103–16 cover Smith's ideas about militias, standing armies, the balance of power and public debt.

133 Smith, *Wealth of Nations*, 5.1, p. 689 and 5.3.40, p. 921; *Theory of Moral Sentiments*, 6.2.2.5, p. 229. Kenneth N. Waltz, *Man, the State and War* (New York: Columbia University Press, 1959), pp. 232–8 provides the classic text distinguishing between permissive and efficient causes of war.

134 Smith, *Theory of Moral Sentiments*, 6.2.2.6, p. 230; *Wealth of Nations*, 4.7.c.80, p. 626.

of possible benefits arising from these injustices. However, as in European politics, the global remedy is a system of power balance. Smith speculates that perhaps in the future, European power will decline and that of non-European communities will increase, so that in the long run 'the inhabitants of all the different quarters of the world may arrive at that equality of courage and force which, by inspiring mutual fear, can alone overawe the injustice of independent nations into some sort of respect for the rights of one another.' This equality of force can be established by worldwide commerce and the above-mentioned transfer of technology.[135] In short, commerce reduces material inequalities among nations and parts of the globe, and contributes to peace and 'respect for rights' in the long run. To some extent, Smith can be interpreted as a representative of political realism, following a Hobbesian approach: he does not assume a natural harmony of interests across borders, his focus is on the state or commonwealth, he views international relations as anarchic, endorses the balance-of-power doctrine, and emphasizes the importance of defense. He is definitely not only the cosmopolitan liberal, and Friedrich List's attacks in *The National System of Political Economy* (1841) against Smith's alleged 'cosmopolitical economy' is a fight against windmills.[136] Smith combines in an interesting way political realism and a state-centered and patriotic perspective with cosmopolitan ideas. On the one hand, he asserts that the love of humanity is too vague, that patriotism is more feasible, and that Britain should be loved 'for its own sake'. However, as in Hume, the great society is indirectly supported by efforts consciously focusing on the domestic sphere. Worldwide economic gains are an unintended by-product. Free trade would turn states into sort of 'provinces' of one great empire: the idea of a *monarchia universalis* is transformed into the vision of a truly global free exchange of commodities, with overall beneficial results such as the end of local famines, where respect for rights is guaranteed by a roughly equal distribution of economic and military power. In addition, people with 'enlarged and enlightened' minds overcome the passions of 'savage patriotism'.[137]

In previous sections, I have repeatedly argued that it is often necessary to overcome our binary thinking. Smith is not simply a cosmopolitan, and he isn't anti-cosmopolitan either. Nor is he a typical political realist. After all, he does

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135 Smith, *Wealth of Nations*, 4.7.c.80, pp. 626f. This passage is analysed at some length in Wyatt-Walter, 'Smith', pp. 23f.

136 See especially Wyatt-Walter, 'Smith', pp. 5f. and passim, Sally, *Classical Liberalism*, pp. 8f., 12 on widespread clichés about Smith's international relations thinking, and Irwin, *Free Trade*, pp. 76 and 124 and Keith Tribe, 'Natural liberty and *laissez faire*: how Adam Smith became a free trade ideologue', in Copley and Sutherland, *Wealth of Nations*, pp. 38f. on List's attacks.

137 Smith, *Theory of Moral Sentiments*, 3.3.42, p. 154f.; 6.2.2.3 and 4, pp. 228f.; *Wealth of Nations*, 4.5.b.39, pp. 539f.

envision mutual respect for rights on a global scale, and also argues from a moral perspective against colonialism, for instance. His thinking is 'utopian' because he hopes that the future will bring more equality for non-Europeans. On the other hand, he is deeply pessimistic and anti-utopian when asserting that 'the violence and injustice of the rulers of mankind is an ancient evil, for which, I am afraid, the nature of human affairs can scarce admit of a remedy.'[138] Finally, there is the vexing problem whether Smith is a secularized thinker or not. Here we should also try to go beyond familiar dichotomies. Smith has certainly moved beyond Locke's theocentric frame of thought. However, the ultimate division of labour takes place between God and his creatures: 'The administration of the great system of the universe ... the care of the universal happiness of all rational and sensible beings, is the business of God and not of man.'[139] The all-knowing and all-powerful king of kings takes care of the whole, whereas humans with their limited perspectives and weaknesses do their duty in more humble spheres, in their families, circles of friends, and as citizens of particular countries. The division between human incompetence to manage the whole and divine providence is also an integral element of Kant's philosophy of history. As in the case of Smith, there is widespread confusion why a widely secularized thinker returns to, or rather keeps, theological premises (see VI, 1).

It remains to deal with Smith's hospitality rights. Unlike Montesquieu and Hume, and like the natural lawyers, Smith does consider them at some length in his lectures on jurisprudence, and we can assume that he would have included them in his unfinished work on that 'most important' science. Hospitality rights are subsumed under personal rights. That is to say, the Scholastic natural law doctrine has finally arrived at a theory of human rights. Smith's account is embedded in his four-stage theory, and encompasses a historical dimension. Originally, savage nations enslaved aliens and strangers, who were often not distinguished from enemies, as Cicero testifies. Gradually societies moved towards the commercial stage, people perceived that trade was in their own self-interest, and commerce was thus extended. However, first of all, foreign merchants had to be motivated to travel and settle. For this purpose it was 'absolutely necessary to give them the protection of the laws, both to their persons and their goods'.[140] In addition, the rights of ambassadors were

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138 Smith, *Wealth of Nations*, 4.3.c.9, p. 493.

139 Smith, *Theory of Moral Sentiments*, 6.2.3.6, p. 237. See Dunn, 'From applied theology to social analysis', passim on the break between Locke's theocentric framework and the secularized Scottish Enlighenment.

140 Smith, 'Report of 1762–3', 2.42–84, in *Lectures on Jurisprudence*, pp. 86–102; ibid., 5.91–8, pp. 306–9; 'Report dated 1766', 88–91, in ibid., pp. 432f., the quotation in 'Report of 1762–3', 5.93, p. 307.

specified, as they were perceived as crucial for both the maintenance of commerce and intercourse as well as peace. With historical accuracy, Smith points out that resident ambassadors are a modern invention.[141]

In addition to the historical dimension, there is a clear trend towards positivism. Smith discusses at some length restrictions under Henry VIII (1540) and other British practices and laws such as the Acts of Naturalization. Presumably referring to a passage in Vattel's *Droit des Gens*, Smith comments on one of the laws of Saxony which stipulated that, based on the principle of reciprocity, 'aliens from countries where they were allowed no privileges should be allowed none among them.'[142] Hospitality rights are subject to historical development and their scope is specified by the sovereign territorial state. In this sense, they are no longer part of natural law, although the legal philosopher does have a normative standard of judging the Saxon law as just, for instance.

Summing up, we can say that the concept of hospitality rights has considerably changed since Vitoria. They are no longer seen as simply given, but have evolved in history. They are not part of a hierarchy of natural laws, but subject to state legislation and change. It is significant how Montesquieu, Hume and Smith perceive hospitality itself. Montesquieu registers and to some extent deplores the waning of hospitality in commercial societies. For Hume, hospitality is connected with feudal nobility and was a source of 'vice, disorder, sedition, and idleness'. In a similar fashion, Smith historicizes hospitality as a dominant phenomenon of the medieval barons and their rule, characterized by caprice, 'violence, rapine, and disorder'.[143] Whereas Vitoria focuses in his lecture 'De Indis' on the problem of justice, and reserves a few sentences to economic issues in his conclusion, Smith's account underlines the major shift from the legitimacy question to utilitarian considerations and the new science of international political economy. Montesquieu, Hume and Smith continue the trend towards an unmistakably state-centered law of nations. Economic calculations, mutual self-interest and political realism tend to triumph over

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141 Smith, 'Report dated 1766', 353–8, pp. 551–4. Montesquieu, Hume and Smith, among others, show that the cliché about the unhistorical eighteenth century is widely unfounded. See Cassirer, *The Philosophy of the Enlightenment*, pp. 197–233 for an early critique, and also Peter Gay, *The Enlightenment: An Interpretation. Vol. II: The Science of Freedom* (New York, Alfred A. Knopf, 1969), pp. 368–96.

142 Smith, 'Report dated 1766', 90, p. 433. The corresponding passage in 'Report of 1762–3', 5.98, p. 309 is less clear. The possible reference is to Emer de Vattel, *The Law of Nations or the Principles of Natural Law* [1758], transl. Charles G. Fenwick (Washington, DC: Carnegie Institution, 1916), 2.8.112, p. 148.

143 Montesquieu, *Spirit of the Laws*, 20.2, p. 339; David Hume, *The History of England* (Indianapolis: Hackett Publishing Company, 1983), vol. 4, pp. 383f., quoted in Laursen, 'Scepticism', p. 179; Smith, *Wealth of Nations*, 3.4.5–9, pp. 413–8, the quotation at 3.4.9, p. 418.

love of humanity and the greater society of humankind, although it should be emphasized again that these trends are never without ambiguities.

Previous chapters have emphasized that natural lawyers at least since Grotius faced the intertwined problems of law enforcement and of interpretation (see end of III, 6). How could states be made to conform to the rules of natural law, and neither abuse their power nor interpret the law in an arbitrary fashion? The problem can be reformulated: how can weaker states be protected in a system of anarchy without common legislation, jurisdiction and authority? Several answers are offered by authors treated in this section. Some may imply that gradually rulers will perceive that conquest does not pay, and make the world a safer place. Montesquieu points out that small states can form federations.[144] Hume repeats Hobbes's and Pufendorf's sorry comfort that international anarchy is not as unpleasant and horrible as that among individuals. Smith offers the hope that in the future, there might be more equal distribution of power and thus more mutual respect for rights on a global scale. In addition, both Hume and Smith believe in moral or legal progress. Hume points out that wars become less destructive and more humane in commercial societies, whereas Smith holds that the law of nations has gradually improved towards more 'moderation and humanity.'[145] Later authors could interpret Smith as an explicit proponent of economic cosmopolitanism, where free trade, enlightened self-interest, and the invisible hand promote interdependence and peace. Rousseau and Kant, by contrast, are more radical. For them, international anarchy must be overcome, not only mitigated. This requires international institutions, above all, a common coercive power (V, 4 and VI, 2).

3. The attack on and transformation of natural law

I must confess that, if a man think that this reasoning much requires an answer, it will be a little difficult to find any which will to him appear satisfactory and convincing. (David Hume, *A Treatise of Human Nature*)

'Why are you Catholics so interested in natural law?', the editor of *Natural Law Forum* was frequently asked. He finally decided to change the name of the journal to something less odd and more mainstream (*The American Journal of Jurisprudence*) when he received letters from correspondents addressing 'The

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144 Montesquieu, *Spirit of the Laws*, 9.1, p. 131. See Murray Forsyth, *Unions of States. The Theory and Practice of Confederation* (Leicester: Leicester University Press, 1981) and Martin Thom, 'Confederacy, Federation and the Principle of Nationality' (manuscript).

145 Hume, 'Of refinement in the arts', p. 109; Smith, 'Report of 1762–3', 1.8, p. 7.

National Law Forum' or 'The Natural Law Farm'.[146] The episode illustrates two points. First, natural law thinking is nowadays often assigned to a certain camp, purportedly old-fashioned and conservative. Second, contemporary Western culture has distanced itself from the natural law tradition, although adherents do not fail to point out that modern human rights doctrines have their roots in this tradition, and that even legal positivists cannot argue without referring to 'natural' normative standards.

There is widespread disagreement when and how the natural law tradition lost its grip on European universities and ceased to be mainstream. Traditionally, David Hume has been considered the crucial watershed. Leo Strauss selected Hobbes, Rousseau and Burke as the main contributors who undermined traditional natural law thinking. In Strauss's account, Rousseau, in particular, replaces natural law by the idea of the *volonté générale*. Others claim that modern natural law collapses with Locke and Thomasius. As usual, the great thinker approach has been challenged with the thesis that widely unknown authors should be given credit. In this case, it might be Hermann Conring, who republished Machiavelli's *Prince* and stressed in his major work *On Civil Prudence* (1662) that utility (*utilitas*) trumps natural law.[147] The search for a definitive moment in intellectual history when a decisive paradigm shift takes place has to be abandoned. Previous sections have shown how the impact of scepticism forced natural lawyers since Grotius to modify constantly their doctrines. In particular, the first section of this chapter has tried to demonstrate that the citadel of the natural lawyers was not attacked by outside troops. More precisely, my main argument is that the tradition transformed itself into something that was later barely recognizable as its offspring. There is a clear intellectual connection and evolution from Pufendorf via the Scottish Enlightenment to Adam Smith's new science of political economy, the four-stage theory, and incipient historicism and relativism. Smith's relativism should

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146 Cf. David F. Forte (ed.), *Natural Law and Contemporary Public Policy* (Washington, DC: Georgetown University Press, 1998), p. 380.

147 George H. Sabine, *A History of Political Theory*, 4th, rev. edn Thomas L. Thorson (Fort Worth et al.: Harcourt Brace College Publ., 1989), pp. 379f. and 549–55; Leo Strauss, *Natural right and history* (Chicago: University of Chicago Press, 1953), pp. 166–202, 252–323, especially p. 286 on the general will; Schneewind, *Invention*, ch. 8; Hochstrasser, *Natural Law Theories*, pp. 57f. on Conring. See Victor Gourevitch, 'The Problem of Natural Right and the Fundamental Alternatives in *Natural Right and History*', in Kenneth L. Deutsch and Walter Soffer (eds), *The Crisis of Liberal Democracy. A Straussian Perspective* (Albany: State University of New York Press, 1987), pp. 30–47 and Stewart Umphrey, 'Natural Right and Philosophy', in Kenneth L. Deutsch and Walter Nicgorski (eds), *Leo Strauss. Political Philosopher and Jewish Thinker* (London: Rowman and Littlefield, 1994), pp. 275–95 on Strauss's influential interpretation.

be distinguished from contemporary versions (see I, 4): abstract standards of justice must be mediated, and in this process of mediation they are *related* to given historical circumstances, and codified in positive law. However, this does not amount to full-blown relativism where the abstract standards themselves are historicized.

In the two hundred years that separate us from Smith, several arguments against natural law have come to the fore. I will investigate them here and then proceed with Hume's is-ought passage, often considered the *coup de grace* against the natural lawyers. Perhaps the major attack against natural law is launched by ethical relativism and perspectivism. I have presented the positions and claims in previous sections (I, 2 and 4; II, 2) and do not have to rehearse them here. It was asserted that radical relativist positions inevitably get into familiar vicious circles (for example, to assert the relativist thesis is to deny it). Sometimes it is claimed that natural law is the ideology of the ruling class, of Europeans over non-Europeans, a fine example of ethnocentrism, or that at least it lends itself to all of the above in practice.[148] This problem has also been touched upon in previous sections (II, 1 and 2). The assertion must be qualified. Locke's agricultural argument presented above (V, 2) shows that the criticism is sometimes justified. However, this is certainly not the whole picture. We may just *construct* a connection between an author's work and its function in society and the dominant ideology, and then hold that this connection is a 'necessary' one. It is not difficult to find examples in natural law treaties that could be classified by contemporary standards as subversive, modern, or progressive. Most natural lawyers, for instance, showed compassion for the poor and disadvantaged when asserting that the right of necessity sets limits to property rights (V, 1). As Grotius put it, 'in direst need the primitive right of user revives, as if community of ownership had remained, since in respect to all human laws ... supreme necessity seems to have been excepted.'[149] Contemporary

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148 Barbara Arneil, 'John Locke, Natural Law and Colonialism', *History of Political Thought*, 13 (1992), p. 589 offers the familiar claim that Grotius provided a 'useful ideology'; cf. p. 594, where she refers to similar allegations by Edward H. Carr and B. Roling. See also Richard Waswo, 'The Formation of Natural Law to Justify Colonialism, 1539–1689', *New Literary History*, 27, no. 4 (1996), pp. 743–59, especially pp. 743, 746, 757f.; Richard Tuck, *Natural rights theories. Their origin and development* (Cambridge: Cambridge University Press, 1979), p. 62 and Charles S. Edwards, *Hugo Grotius: The Miracle of Holland. A Study in Political and Legal Thought* (Chicago: Nelson-Hall, 1981), pp. 152f. Otfried Höffe, *Political justice: foundations for a critical philosophy of law and the state*, transl. Jeffrey C. Cohen (Cambridge, UK and Cambridge, MA: Polity Press, 1995), ch. 4 analyses types of natural law and forms of criticism. See also Stefan Breuer, *Sozialgeschichte des Naturrechts* (Opladen: Westdeutscher Verlag, 1983); John Finnis (ed.), *Natural Law*, 2 vols (New York: New York University Press, 1991), and I, 5.

149 Grotius, *Jure belli*, 2.2.6, p. 193; cf. Buckle, *Natural Law*, pp. 46f.

interpreters are beginning to appreciate Pufendorf's emphasis on popular sovereignty, the consent of citizens and human rights.[150] Suárez held in the 1600s that women should be included when reckoning if a certain custom is observed by the majority of the community, as there is not 'any basis in law or ... in reason' that could justify this exclusion.[151] He defends a form of popular sovereignty as 'the principate itself is derived from individuals.' Though civil authority ultimately stems from eternal law, it is immediately from the citizens. They have thus a right to resist a monarch who 'lapses into tyranny'. This doctrine was one of the reasons why Suárez' book *Defensio fidei catholicae* was publicly burned in England and in France.[152] Previous chapters have shown that natural lawyers like Pufendorf and Wolff are far from providing a useful ideology of European conquest. Admittedly isolated examples do not prove much. However, it should be clear by now that generic statements of the kind 'the natural lawyers offer an ideology of X' are not justified. By the same token it is not difficult to raise similar accusations against critics of the natural lawyers, but the assertion is too generic to get us anywhere.

It has also been claimed that the natural law tradition is ahistorical. For instance, several interpreters from Macpherson to Pocock hold that Locke's thinking is devoid of historical elements.[153] The generic claim does not fare much better than others of this kind. Grotius offered a short account of the development of property in *De Indis* and his major work (III, 4). Later natural lawyers like Pufendorf and Locke expanded these sections, and emphasized the evolutionary character of human society and property rights, although this historical element was certainly not the center of attention, or carefully

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150 Pufendorf, *Law of Nature*, 7.2.8, pp. 975–7; 7.6.16, pp. 1080–2; 7.7.1 and 2, p. 1084. See IV, 3 and Karl-Heinz Ilting, 'Naturrecht', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1972ff.), vol. 4, pp. 291f.

151 Francisco Suárez, 'On Laws and God the Lawgiver' [1612], in *Selections from Three Works of Francisco Suárez, vol. II: Translation* (New York: Oceana Publications, 1964), 7.10.14, p. 529.

152 Suárez, 'On Laws', 3.4.6, p. 387, 'A Work on the three theological Virtues Faith, Hope and Charity', in *Selections*, Disputatio XIII, 8.2, p. 855; *Defensio fidei catholicae adversus anglicanae sectae errores* [1613], in *Opera omnia* (Paris: Louis Vivès, 1856–66), vol. 24, book VI, ch. IV; this chapter is included in *Selections*, pp. 705–25, especially p. 705.

153 Crawford B. Macpherson, *The Political Theory of Possessive Individualism. Hobbes to Locke* (Oxford: Clarendon Press, 1962), pp. 229 and 235f.; John Greville A. Pocock, *The Ancient Constitution and the Feudal Law. A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957), p. 237; Medick, *Naturzustand*, pp. 66 and 69.

elaborated. Finally, the representatives of the Scottish Enlightenment contributed a comprehensive philosophical history of jurisprudence.[154]

A related criticism holds that natural law offers a rigid, inflexible set of allegedly immutable rules. Dugald Stewart claimed that the thinking of the natural lawyers is too hypothetical and too abstract, as it does not specify 'particular circumstances'.[155] It can be countered that one of Grotius's major problems is his flexibility, the permissive domain granted in the mediation of natural law (end of III, 4). As already emphasized, most natural lawyers allowed for 'exceptions' to the rule of property rights in cases of extreme need. Systematically, abstraction is not necessarily a vice, and should not be confused with idealization (I, 4). Abstraction is unavoidable in any kind of reasoning about human action, as legislation testifies. There is no doubt, however, that many natural lawyers did not pay sufficient attention to the problem of mediating abstract principles with circumstances. In addition, some were prone to fanciful *a priori* reasoning. For instance, Wolff attempted to calculate the height of the inhabitants of Jupiter, and was duly debunked by the French sensualist Étienne de Condillac.[156] Finally, natural lawyers often adhered to a metaphysical concept of nature. Vitoria, for example, held that the origin of cities and commonwealths was 'a device implanted by Nature in man for his own safety and survival'.[157] The language is misleading, but the conclusion convincing: the purpose of the state should be identical with that of human society. In spite of its metaphysical assumptions, Vitoria's doctrine of *ius naturae* displays a convincing core of thin justice (II, 4).

According to a powerful historiographical tradition, Hume is considered the destroyer of natural law, and his famous is-ought passage seen as the crucial argument. Hume asserts that most authors – and he has apparently the natural lawyers in mind – move imperceptibly from 'is' to 'ought' statements. For instance, they would make observations about human sociability and then infer that humans thus *ought* to be sociable. This transition, Hume reasons, is in

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154 Buckle, *Natural Law*, pp. 4 and 7, and pp. 35–52 on the development of property in Grotius as an example; Jerome B. Schneewind, 'Kant and natural law ethics', *Ethics*, 104, (1993), p. 60, referring to Pufendorf; Medick, *Naturzustand*, pp. 137f. and passim; Stein, *Legal Evolution*, ch. 2.

155 Stewart, 'Dissertation', pp. 187f. (discussing Bentham) and 193 (in the context of Montesquieu).

156 The episode is reported in Peter R. Senn, 'What is the Place of Christian Wolff in the History of the Social Sciences?,' in Jürgen G. Backhaus (ed.), *Christian Wolff and Law & Economics. The Heilbronn Symposium* (Hildesheim, Zürich, New York: Georg Olms Verlag, 1998), p. 161.

157 Francisco de Vitoria, 'On Civil power', in *Political Writings*, ed. Anthony Padgen and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), question 1, article 2, p. 9.

need of justification: 'a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.' Hume is convinced that attention paid to these unwarranted inferences would 'subvert all the vulgar systems of morality'.[158]

Hume's passage has been the source of considerable confusion. Interpreters have argued that Hume himself sometimes infers an 'ought' from an 'is'. For instance, Hume deduces from the reduced pragmatic necessity or utility of international society its reduced *moral* necessity (V, 2). In addition, Hume concedes that his theory 'concerning the origin of property, and consequently of justice is, in the main, the same with that hinted at and adopted by Grotius'.[159] This would mean that Hume does not want to replace or destroy natural law, but aims at completing, improving and refining its foundations. He is neither a precursor of positivism nor a complete sceptic. His particular blend of scepticism is limited, mitigated and compatible with his own Ciceronian humanism. It has also been pointed out that, although almost all natural lawyers tend to transform descriptive statements into normative principles, a clear distinction between the two can be found in Pufendorf and Crusius long before Hume.[160]

What did Hume 'really want to say' in the is-ought passage? His reflections should not be confused with George E. Moore's naturalistic fallacy, the attempt to give normative concepts an empirical foundation in terms of pleasure or pain.[161] Hume was not a modern representative of logical positivism. The appropriation of the passage by this school is anachronistic and mistaken. The key to the understanding of the is-ought passage lies in Hume's naturalistic ethics. He claims that men actually *invented* the laws of nature when they

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158 Hume, *Treatise*, 3.1.1, pp. 469f. Nicholas Capaldi, *Hume's Place in Moral Philosophy* (New York et al.: Peter Lang, 1992), ch. 3, pp. 55–95 and Lewis White Beck, '"Was – must be" and "is – ought"' in Hume' [1974], in *Essays on Kant and Hume* (New Haven, London: Yale University Press, 1978), pp. 205–15 contain discussions of the famous paragraph.

159 David Hume, *Enquiries concerning Human Understanding and concerning the Principles of Morals*, 2nd edn, ed. L. A. Selby-Bigge and P. H. Nidditch (Oxford: Clarendon Press, 1902), 307n. See also Buckle, *Natural Law*, pp. vii, ix, 234–6, 246f. and 295–8.

160 Wolfgang Röd, *Geometrischer Geist und Naturrecht. Methodengeschichtliche Untersuchungen zur Staatsphilosophie im 17. und 18. Jahrhundert* (München: Verlag der bayerischen Akademie der Wissenschaften, 1970), pp. 7 and 90f.; Thomas Behme, *Samuel von Pufendorf: Naturrecht und Staat. Eine Analyse und Interpretation seiner Theorie, ihrer Grundlagen und Probleme* (Göttingen: Vandenhoeck & Ruprecht, 1995), p. 74; Christian August Crusius, *Anweisung vernünftig zu leben* (Leipzig 1744), p. 204 (para. 164), quoted in Ilting, 'Naturrecht', p. 297.

161 Hilary Putnam, *Reason, Truth and History* (Cambridge: Cambridge University Press, 1981), pp. 205–11.

realized that society was a necessity if they wanted to survive, and that 'some restraint on their natural appetites' was required if they wanted to coexist peacefully.[162] The natural laws are neither arbitrary nor natural in the strict sense, but artificial. They coincide with human self-interests (see V, 1). In short, Hume rejects the traditional conceptualization of moral obligation. The references to *recta ratio* as well as theological voluntarism are abandoned in favour of a naturalistic approach. The distinction between good and evil is neither derived nor perceived by reason, as reason is 'utterly impotent' in this respect. In fact, the notions of virtue and vice refer to mere feelings of approval or disapproval.[163] Although Hume denies an instinct for justice, he asserts that some kind of minimal social life is indispensable, and repeats the conventional idea of social interdependence. More than any natural lawyer before him, Hume applies the principle of parsimony. The fundamental laws of nature are cut down by Ockham's razor to three. The natural law distinction between benevolence and justice is taken to a radical conclusion. The sharp distinction between two moral spheres effectively ends the traditional idea of a comprehensive moral order. Ultimately Hume's theory of justice is 'a natural jurisprudence without natural law in anything like the sense of the natural law tradition'.[164] The is-ought passage has the task to provide yet another argument in favour of Hume's own anti-rationalist and naturalist ethics. It is of course a matter of debate whether this new theory is philosophically sound. At any rate, Kant tries to show a few decades later that it is undermined by its own assumptions (VI, 1).

Hume's passage did have subversive consequences. Whatever Hume's true intentions may have been, his works contributed to the waning of natural law thinking at the end of the eighteenth century. However, natural law thinking continued to exert considerable influence. It inspired both the 'American' and European theories of inalienable rights.[165] Natural law thinking was neither abandoned by the critics of the French Revolution nor the Romantics. According to conventional interpretation, a clear and decisive break with the natural law tradition took place in late eighteenth-century Germany: Möser, Rehberg and the Romantics such as Schleiermacher are said to have promoted a historical understanding of the state, its laws and institutions, and an organic

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162 Hume, *Treatise*, 3.2.8, p. 543.

163 Hume, *Treatise*, 3.1.1, pp. 470, 468f. and 457; 2.3.3, p. 413. Forbes, *Hume's Philosophical Politics*, pp. 59–90; Teichgraeber, *Free Trade*, pp. 75–102, and Haakonssen, *Science of a Legislator*, pp. 36–44 are reliable analyses of Hume's relationship with the natural lawyers. I am much indebted to their account.

164 Forbes, *Hume's Philosophical Politics*, pp. 80–85; Capaldi, *Moral Philosophy*, pp. 272f. and 274; Haakonssen, 'Jurisprudence and Politics in Adam Smith', pp. 110f., the quotation p. 111.

165 Haakonssen, *Natural Law*, ch. 10.

view of society. This interpretation is in need of improvement. The historical record shows that the doctrines of natural rights and popular sovereignty were often rejected with the help of natural law arguments. Rehberg criticized the excessive rationalism of the revolutionary ideology, but sometimes defended natural law. The Romantics rejected the mediation of natural law doctrine rather than the doctrine itself. In short, the organic model implied a reinterpretation rather than rejection of natural law.[166] Although Kant's critical philosophy brought an end to traditional theories of natural law, the first half of the nineteenth century saw the emergence of new (and politically more liberal) types of natural law theories, especially in Germany (see VI, 5).

It is useful to conceptualize change in this respect as continuous development rather than as sharp breaks or binary oppositions. What holds true for the transformation of natural law into the 'natural history of society' in eighteenth-century England and Scotland, for Hume or for the German romantics may also apply to Hegel. In 1818, he repeats the familiar natural law thesis that positive law can be unjust or contrary to reason. In 1820, the sentence is left out, and the emphasis is on the national character, historical development and natural conditions.[167] As usual, it would be mistaken to interpret this as the end of natural or rational law and the triumph of historicism. Hegel rejects the historical school of law, represented by Friedrich Karl von Savigny (1779–1861) and Gustav Ritter von Hugo (1764–1844), and distinguishes between the philosophical justification of right and the historical description of its emergence or development. He mentions Montesquieu approvingly, and asserts that natural right 'is different from positive right, but it would be a grave misunderstanding to distort this difference into an opposition or antagonism.'[168] Hegel aims at the *Aufhebung* or sublation of natural law where the philosophy

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166 Frederick C. Beiser, 'The End of Natural Law? Natural Law in Möser, Rehberg and the German Romantics', pp. 3–6 (manuscript); *Enlightenment, Revolution, and Romanticism. The Genesis of Modern German Political Thought, 1790–1800* (Cambridge: Harvard University Press, 1992), pp. 281–8, 350f. and 359, and *The Early Political Writings of the German Romantics*, ed. and transl. Frederick C. Beiser (Cambridge: Cambridge University Press, 1996), 'Introduction', pp. xi–xxix. See the article by Jan Schröder, in Michael Stolleis (ed.), *Staatsdenker im 17. und 18. Jahrhundert. Reichspublizistik, Politik, Naturrecht*, 2., erweiterte Aufl. (Frankfurt am Main: A. Metzner, 1987), pp. 294–309 (with an extensive bibliography) on Justus Möser, and Beiser, *Enlightenment*, part II on early German romanticism.

167 Georg Wilhelm Friedrich Hegel, 'Naturrecht und Staatswissenschaft', Einleitung paras. 2 and 3, in *Vorlesungen über Rechtsphilosophie*, vol. 1, ed. Karl-Heinz Ilting (Stuttgart, Bad Cannstatt: Friedrich Frommann Verlag, 1973), pp. 238–40; Hegel, *Philosophy of Right*, para. 3, p. 28. I follow Ilting, 'Naturrecht', pp. 307f.

168 Hegel, *Philosophy of Right*, para. 3, p. 29. The following quotation ibid. The definitive essay is now Günter Seubold, 'Hegels "Aufhebung" des Naturrechts', *Archiv für Rechts- und Sozialphilosophie*, 84 (1998), pp. 326–39.

of law is conceived as a theory of the will independent of any notion of 'nature'. Unlike Kant, Hegel wants to find a synthesis of positive right and the idea of justice 'within *one* totality', presented in his philosophy of spirit.

Most interpreters consider Hegel's synthesis unconvincing. It has been noted that the difference and antagonism between justice and positive law is reasserted especially when gross violations of human rights such as genocide urge people to question the assumptions of legal positivism. Usually a compromise is offered. Writing after the Holocaust, Gustav Radbruch, for instance, held that a law is valid even if its content is unjust 'unless the conflict between the law and justice attains such an intolerable dimension that the law must give way to justice'.[169] The relative clause opens the door to debates about the scope and content of justice, and leads us back to familiar problems of the natural law tradition. Where do we draw the line between a tolerable and an 'intolerable dimension' of conflict? Even if we narrow down the scope of Radbruch's 'justice' to the juridical convictions in a legal community, we may claim that these convictions or the complete legal order of the community are unjust. Natural justice provides a standard of judgment with the concept of impartiality, and avoids the deadlock of extreme legal positivism. However, it does not solve the problem of how to judge in a particular case itself. In addition, theories of justice require that we presuppose a sense of justice in humans, while knowing that this assumption may be unfounded. This brings us back to Hume, the secularized sceptic wavering between ethical universalism and relativism: 'I must confess that, if a man think that this reasoning much requires an answer, it will be a little difficult to find any which will to him appear satisfactory and convincing.'[170] Only those who are already moved by or feel a sense of justice can successfully be addressed by moral prescriptions.

4. *La société générale du genre humain*: Rousseau on cosmopolitanism, international relations and republican patriotism

It is not permissible to strengthen the bond of a particular society at the expense of the rest of the human race. (Jean-Jacques Rousseau, 'First Version of the Social Contract')

According to a widespread cliché, the Enlightenment philosophers were painstakingly cosmopolitan, and their critics such as Rousseau and the Romantics rejected cosmopolitan attitudes in favour of one's patriotic or nationalistic attachment to communal traditions, values, history, religion and

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169 Gustav Radbruch, *Rechtsphilosophie*, 8th edn (Göttingen: Vandenhoeck & Ruprecht, 1973), p. 345, translated in Höffe, *Political Justice*, p. 76. There is a useful discussion of legal positivism and legal moralism ibid., pp. 73–9.

170 Hume, *Enquiries concerning Human Understanding*, p. 283.

language. An earlier section cast some doubt on the first part of the thesis: the cosmopolitanism of authors like Hume and Smith was profoundly qualified (V, 2). In this section, I will revise the second part of the cliché as far as Rousseau is concerned. Although there is a clear focus on national community and a shift away from the *societas humani generis*, Rousseau is more ambiguous than is usually assumed, and the opposition of cosmopolitanism and nationalism breaks down. This section investigates Rousseau's concept of international society and its relationship with the republican polity. I will focus on his rejection of various forms of cosmopolitanism and the idea of a global commonwealth, and analyse the functions of civic patriotism. Rousseau can be interpreted as endorsing a form of genuine, moral cosmopolitanism which is in principle compatible with his notion of republican patriotism. As Rousseau rejects almost all other forms of cosmopolitanism – I label them cultural, commercial/economic and the cosmopolitanism of the natural law tradition – many interpreters have been misled into believing that he is thoroughly anti-cosmopolitan. My interpretation stresses the evolutionary aspect of Rousseau's thinking. For him, cosmopolitanism is acceptable if squarely rooted in and evolving from adherence to one's particular community. Rousseau's patriotism in turn closely follows the republican tradition, and is similar to Montesquieu's. *La patrie* is a political, not an ethnic, concept, and forms a close alliance with 'laws' and 'liberty'. Rousseau's reputation as a precursor of nationalism is predominantly the result of a gross misinterpretation. The main weakness of his political philosophy is not his concept of patriotism, but the way he tries to solve the enforcement problem. The last paragraphs thus deal with the interpretation of Rousseau's political philosophy as potentially totalitarian, or at least full of unsolved tensions, such as between individual claims and communal authority, between autonomy and state-controlled manipulation, between political liberty and the conviction that humans are shaped by politics. Rousseau's claim that anyone who refuses to obey the general will (*volonté générale*) 'will be forced to be free' is usually seen as the phrase that puts these tensions into a nutshell.[171]

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171 Jean-Jacques Rousseau, 'On Social Contract', in Alan Ritter and Julia Conaway Bondanella (eds), *Rousseau's Political Writings* (New York: Norton & Company, 1988), book 1, chapter 7 (from now on: 1.7), p. 95; *Oeuvres complètes, vol. III: Du contrat social, écrits politiques* (Paris: Éditions Gallimard, 1964), p. 364. See the essay by John Hope Mason, 'Forced to be free', in Robert Wokler (ed.), *Rousseau and liberty* (Manchester, New York: Manchester University Press, 1995), pp. 121–38 on the notorious phrase, and Lester G. Crocker, 'Rousseau's soi-disant liberty', ibid., pp. 244–66, and Iain Hampsher-Monk, 'Rousseau and totalitarianism – with hindsight?', ibid., pp. 267–88 on his alleged totalitarian political philosophy. Victor Gourevitch, 'Recent Work on Rousseau', *Political Theory*, 26 (1998), pp. 536–56 is a useful introduction to the contemporary debate on his generic political thought.

There is far-reaching consensus that Rousseau is devotedly anti-cosmopolitan, preferring the community of homogeneous republican citizens over the vague notions of a society of humankind. As one scholar put it, 'Rousseau's focus on the nation and its retreat from international relations demonstrates his desire to put an end to international society.'[172] He seems to support narrow-minded enthusiasm for the fatherland while indiscriminately rejecting cosmopolitanism. The term itself is notoriously difficult to define; it is helpful to distinguish between various forms of cosmopolitanism. Cultural or thick cosmopolitanism is the belief that a single thick conception of the good life can be precisely determined and should spread all over the globe, swallowing existing cultures and traditions. Moral cosmopolitanism is linked with a thin conception of justice as impartiality (I, 5). Rousseau emphatically rejects cultural cosmopolitanism, and deplores the fact that Europeans of his age endorse a way of life that successively becomes homogeneous, monotonous and more uniform. Cultural cosmopolitanism and moral decadence coincide. In a fierce attack upon contemporary European societies, Rousseau claims that 'there are no longer any Frenchmen, Germans, Spaniards, or even Englishmen; there are only Europeans. All have the same tastes, the same passions, the same manners, for no one has been shaped along national lines by peculiar institutions.' Rousseau laments the fact of cultural uniformity. But he does not argue along the lines – which we might expect – that cultural diversity is morally good, whereas uniformity is bad, sterile, one-dimensional, or deficient. Instead, Rousseau links cosmopolitan, or rather European-wide homogeneity, with decadence. Europeans 'will call themselves unselfish, and be rascals; all will talk of the public welfare, and think only of themselves.' They are greedy, bent on luxury, and without morals: 'Provided they can find money to steal and women to corrupt, they feel at home in any country.'[173]

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172 David P. Fidler, 'Desperately Clinging to Grotian and Kantian Sheep: Rousseau's Attempted Escape from the State of War', in Ian Clark and Iver B. Neumann (eds), *Classical Theories of International Relations* (Houndmills et al.: Macmillan Press, 1996), p. 131. See also Chris Brown, *International Relations Theory. New Normative Approaches* (New York: Columbia University Press, 1993), pp. 57f.; David Gauthier, 'The politics of redemption', in Jim MacAdam, Michael Neumann and Guy LaFrance (eds), *Trent Rousseau Papers. Proceedings of the Rousseau Bicentennial Congress, Trent University, June 1978* (Ottawa, Ontario: University of Ottawa Press, 1980), p. 84., and Iring Fetscher, *Rousseaus politische Philosophie. Zur Geschichte des demokratischen Freiheitsbegriffs* [1960], 3. Aufl. (Frankfurt am Main: Shurkamp, 1980), pp. 76–8 and 89.

173 'Il n'y a plus aujourd'hui de Francois, d'Allemands, d'Espagnols, d'Anglois même, quoiqu'on en dise; il n'y a ques des Européens. Tous ont les mêmes gouts, les mêmes passions, les mêmes moeurs, parceque aucun n'a recu de forme nationale par une institution particulière. Tous dans les mêmes circonstances feront les mêmes choses; tous se diront desintéressés et seront fripons; tous parleront du bien public et ne

Decadence is above all defined by greed, selfishness and hypocrisy. Rousseau's claim that there is a causal connection between a transnational culture and decadence is not convincing, and nowhere explicitly defended. After all, there may just be a correlation.

Be that as it may, Rousseau's criticism implies the rejection of a third type of cosmopolitanism, namely its economic version: 'The ancient politicians forever spoke of morals and virtue; ours speak only of commerce and of money.'[174] Again, Rousseau's standard of criticism is moral. Certainly he sees commercial or economic and cultural cosmopolitanism closely tied together in contemporary Europe. Rousseau endorses republican patriotism, which sees human fulfilment culminating in the citizenship of a free republic. Being Polish or French is thus always connected with being a participating citizen. Rousseau does not endorse nationalism where the spiritual unity is based on ethnicity, language, or common heritage. For him, the true *patrie* must be a republic.[175] Like Montesquieu and other early modern European civic humanists (V, 1), Rousseau adored the ancient republics and their (alleged) emphasis on civic virtue and material equality. Rousseau, however, was more radical than Montesquieu, who was most likely Rousseau's source for the above statement on modern politicians, but also held that commerce was primarily beneficial, destructive of prejudices, and promoting gentle mores and peace.[176] Rousseau, by contrast, rejects the widespread eighteenth-century conviction that commercial interdependence fosters peaceful relations.

To sum up, Rousseau dismisses cultural and economic/commercial cosmopolitanism. His views on moral cosmopolitanism must be qualified. After all, he debunks cosmopolitans who are hypocrites, those who write about duties

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penseront qu'à eux-mêmes; tous vanteront la médiocrité et voudront être des Cresus; ils n'ont d'ambition que pour le luxe, ils n'ont de passion que celle de l'or. Sûrs d'avoir avec lui tout ce qui les tente, tous se vendront au prémier qui voudra les payer. Que leur importe à quel maitre ils obéissent, de quel Etat ils suivent les loix? Pourvu qu'ils trouvent de l'argent à voler et des femmes à corrompre, ils sont partout dans leur pays', Jean-Jacques Rousseau, 'Considerations on the Government of Poland', in Stanley and David P. Fidler (eds), *Rousseau on International Relations* (Oxford: Clarendon Press, 1991), pp. 168f.; *Oeuvres* III, p. 960; cf. Fidler, 'Desperately Clinging', pp. 129f.

174 Rousseau, 'Discourse on the Sciences and Arts or First Discourse', in *The Discourses and Other Early Political Writings*, ed. and transl. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), p. 18; *Oeuvres* III, p. 19.

175 Marurizio Viroli, *For Love of Country. An Essay on Patriotism and Nationalism* (Oxford: Clarendon Press, 1995), pp. 93f.

176 Montesquieu, *Spirit of the Laws*, 4.20.1 and 2, p. 338 and above, V, 1 and 2. Montesquieu writes: 'The political men of Greece who lived under popular government recognized no other force to sustain it than virtue. Those of today speak to us only of manufacturing, commerce, finance, wealth, and even luxury', ibid., 3.3, pp. 22f. This formulation is very close to Rousseau's.

'they do not deign to fulfill around them' and who love, or claim to love, distant people 'so as to be spared having to love ... [their] neighbors'.[177] Criticizing a deformed type of cosmopolitanism leaves room for its genuine or true version. Finally, Rousseau rejects another, fourth type of cosmopolitanism, that of the natural law tradition. Natural lawyers from Vitoria to Wolff held that the human race constituted a natural *societas humani generis*, a general society or *société générale du genre humain*.[178] They differed extensively on the nature, function and epistemological status of this society. Rousseau appears to have a version in mind that was developed by Pufendorf and gained widespread attention in eighteenth-century Europe. Pufendorf is rarely mentioned in Rousseau's writings, but it is very likely that he had some familiarity with his texts, *De jure naturae et gentium* and *De officio hominis et civis*. In addition, Rousseau seems to have accepted Jean Barbeyrac as a reliable interpreter and critic of Pufendorf's doctrines. Pufendorf's key claim was that *socialitas* or sociability is not natural or inborn but a necessary requirement of selfish humans who want to survive in a harsh world. Society and sociability develop out of the self-interested needs, weaknesses and feebleness of the individuals, rather than out of their *appetitus societatis*, or natural tendency towards society (see V, 1).[179]

Rousseau's second chapter of the 'Premiéres notions du corps social', the so-called Geneva manuscript, is thus as much a head-on challenge to Pufendorf's natural law doctrine as a response to Denis Diderot's article on 'Natural Right' written for the *Encyclopédie* in 1755. At the center of this article is Diderot's search for universal standards of justice in a natural or presocial condition. Like natural lawyers before him, he introduces the idea of a general will (*volonté générale*) of the whole human race which 'is always good' as a normative principle. Is it simply a pure ideal or does it connect with the real world? In a manner reminiscent of Grotius and others, Diderot claims that the general will is 'deposited' or materializes 'in the principles of right written by all civilized nations' (*nations policées*). This gets him into a familiar circle: natural justice is claimed to be identical with the juridical consent of the civilized nations.

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177 Jean-Jacques Rousseau, *Emile or On Education*, ed. Allan Bloom (New York: Basic Books, 1979), p. 39; *Oeuvres* IV, p. 249.

178 Jean-Jacques Rousseau, 'First Version of the "Social Contract" ', *Rousseau*, ed. Hoffmann and Fidler, p. 101; *Oeuvres* III, p. 281.

179 See in addition Gordana Vukadinovic, 'Jean-Jacques Rousseau et le droit naturel', *Archiv für Rechts- und Sozialphilosophie*, 86 (2000), pp. 207–20 and the excellent and unique essay by Robert Wokler, 'Rousseau's Pufendorf: Natural Law and the Foundations of Commercial Society', *History of Political Thought*, 15 (1994), pp. 373–402, now reprinted in the fine volume *Natural law and moral philosophy: from Grotius to the Scottish Enlightenment*, ed. Knud Haakonssen (Cambridge: Cambridge Univerity Press, 1996), ch. 20. Wokler shows how Rousseau repeatedly confronts Pufendorf in his writings, often without mentioning his name.

Miraculously, justice and consent coincide (III, 2). A possible European prejudice against the outgroup 'barbarians' is softened by reference to 'the social activities of savage *and* barbarian people'.[180] However, the central dilemma remains: an abstract principle of natural justice cannot be the same as divergent practices of humans across centuries and cultures, which hardly *all* reflect the same universal standard. In his response to Diderot, Rousseau emphasizes exactly this problem. In the first place, he agrees with the natural law tradition that there is in fact a standard of justice as impartiality, expressed in the idea of a general will: 'Indeed, no one will deny that the general will in each individual is a pure act of understanding, which reasons in the silence of the passions about what man can demand of his fellow man and what his fellow man has the right to demand of him.'[181] In good traditional (and Kantian) fashion, pure understanding is contrasted with the passions, and the general will is conceived as the capacity of each individual to abstract and attain an impartial perspective. Like Hobbes, however, Rousseau perceives that the main problem is how to *apply* this abstract normative standard. The 'art of generalizing ideas' is notoriously difficult, as is the balancing of the right of self-preservation with the general good, or one's own passions with the interests of the majority. Judging in specific situations creates another circle, according to Rousseau: the inner voice of reason is formed 'by the habit of judging and feeling within society and according to its laws. It cannot serve, therefore, to establish them.'[182] Rousseau hints at his generic conviction that our moral reasoning and mores are shaped if not determined by the constitution and laws of the land. In short, the voice of the general will might get lost if applied, filtered and distorted by passions, mistaken judgements and our embeddedness in social and political life.

The upshot of Rousseau's argument is that the cosmopolitan idea of a *societas humani generis* might be empty. He supports his criticism with further considerations, apparently directed against Pufendorf and related eighteenth-

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180 Denis Diderot, 'Droit naturel', *The Political Writings of Jean Jacques Rousseau*, ed. Charles E. Vaughan (Oxford: Basil Blackwell, 1962), vol. 1, p. 432; my emphasis. This section is much indebted to Wokler, 'Rousseau's Pufendorf', pp. 384–7 and Grace G. Roosevelt, *Reading Rousseau in the Nuclear Age* (Philadelphia: Temple University Press, 1990), pp. 69–89; pp. 70–5, which covers Diderot's article. The notion of a *volonté générale* was of course not invented by Rousseau; see the article by Patrick Riley, 'The General Will Before Rousseau', *Political Theory*, 6 (1978), pp. 485–516 on its origin in seventeenth-century religious writings.

181 'En effet que la volonté générale soit dans chaque individu un acte pur de l'entendement qui raisonne dans le silence des passions sur ce que l'homme peut éxiger de son semblable, et sur ce que son semblable est en droit d'éxiger de lui, nul n'en disconviendra', Rousseau, 'First Version', p. 107; *Oeuvres* III, p. 286.

182 Ibid., p. 108; *Oeuvres* III, p. 287.

century convictions (see V, 1). The central feature of their concept of commercial or unsocial sociability is its ambivalence and paradoxical nature. Rousseau employs two moral arguments. First, the kind of society these morally torn individuals create is not a real union 'for its own sake' or a 'liaison', but a mere aggregation that stifles morality and makes virtue impossible. The general society created by mutual needs is a Hobbesian state of anarchy and instability. There is no natural order or alliance between private interests and the general good. Pufendorf and others, Rousseau seems to say, have deceived us into believing that commercial society constitutes a kind of moral whole, while it is not even a society: 'They live together without any real union, like men grouped on the same piece of land but separated by deep ravines.'[183] Rousseau's argument is not only moral. Again we see his connection with the civic humanist tradition. Montesquieu described the fraudulent union of oppressed subjects in a similar fashion, comparing them to corpses 'which ... are united when buried in a mass grave'. By contrast, the true union shows the harmony of all parts which 'concur in attaining the general good of the society' even if they may appear opposed.[184]

Rousseau's second argument follows Hobbesian tracks. The general society based on needs or economic interests is identical with a state of anarchy, simply because there is no assurance that the general will or moral goodness will be observed by others. 'Either give me guarantees against all unjust undertakings or do not expect me to refrain from them in turn', Rousseau has the 'independent man' say.[185] He thus follows a structural understanding of Hobbes's state of nature: it is the relationship among individuals or units such as states rather than their inherent nature like wickedness in a condition where a common authority is absent, which creates a state of possible or latent war (IV, 1). Rousseau's relationship to Hobbes is complex. The fact that he denounces Hobbes's 'absurd doctrine' should not prevent us from realizing that he follows him in crucial respects. Occasionally, especially when criticizing him explicitly, Rousseau follows the traditional interpretation, claiming that Hobbes wanted to convince us that men are evil and prone to war, and that survival implies aggression. Then Rousseau postulates natural human innocence, asserting that Hobbes, though a genius, got the causal relationship wrong: the state of nature is not the cause of vices, but their effect.[186] The hostilities of corrupt

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183 Rousseau, 'First Version', p. 121; *Oeuvres* III, p. 319. The previous quotation ibid., p. 103; *Oeuvres* III, p. 283.

184 Montesquieu, 'Considerations', p. 101.

185 Rousseau, 'First Version', p. 106; *Oeuvres* III, p. 285.

186 Jean-Jacques Rousseau, 'The State of War' [1755–6], *Rousseau*, ed. Hoffmann and Fidler, p. 45; *Oeuvres* III, p. 610; Rousseau, 'First Version', p. 110; *Oeuvres* III, p. 288. See Howard R. Cell, *Rousseau's Response to Hobbes* (New York: Lang, 1988); Peter Cornelius Mayer-Tasch, *Hobbes und Rousseau*. 3rd edn (Aalen: Scientia, 1991);

and decadent society are by no means a universal feature of humankind. When criticizing the natural law idea of a general society and when analysing international anarchy, however, Rousseau clearly relies on a structural understanding of the Hobbesian state of nature.

Summing up, it would be mistaken to claim that Rousseau denies the existence of the natural lawyers' general society. He argues that the way they conceived it, as a society of mutual needs based on unsocial sociability, is an illusion and mere caricature of genuine society. Again, I want to emphasize that this does not imply a wholesale rejection of *any* cosmopolitan society. Crucial is Rousseau's insistence that humans are capable of abstract thinking and of conceiving the idea of an impartial general will. In addition, Rousseau explicitly praises Christianity for popularizing the 'healthy ideas of natural right and the brotherhood of all humans' (*fraternité commune de tous les hommes*). His attack is directed against the 'supposed cosmopolites' (who are simply hypocrites) in favour of genuine moral cosmopolitanism, which is one of the educational goals for Emile.[187] My own previous conceptual distinctions should be qualified as well. I have distinguished between two types of cosmopolitanism, that of the natural lawyers and its commercial or economic version. My analysis has shown that both are close to each other, at least in Rousseau's interpretation. His attack is apparently above all directed against Pufendorf, and barely touches other natural lawyers such as Wolff. It might be argued, though, that his central criticism holds true for all, that they failed to distinguish properly between natural human qualities and those features which are a product of societal and cultural development. 'They spoke of Savage man and depicted Civil man' is his key complaint in a nutshell.[188] Sceptical interpreters of Rousseau's work do not miss the opportunity to point out that he himself failed in the probably impossible task to distinguish neatly between the natural and cultural, and to keep up this distinction coherently.

Rousseau's own answer to the issue and problem of a general society of humankind includes the belief that rights and justice must first be established in specific communities, based on the agreement of their citizens. The general will can be nurtured 'from the inside out'. In the first place, people must be dragged out of their selfishness and preoccupation with their own interests in

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Roosevelt, *Reading Rousseau*, pp. 21–7 and Christine Jane Carter, *Rousseau and the Problem of War* (New York and London: Garland, 1987), pp. 96f. on their relationship.

187 Rousseau, 'First Version', p. 109; *Oeuvres* III, p. 287. See Roosevelt, *Reading Rousseau*, pp. 163–73 on Emile's cosmopolitan peace education, with more textual evidence.

188 Jean-Jacques Rousseau, 'Second Discourse on the Origin and the Foundation of Inequality among Men', in *The Discourses and Other Early Political Writings*, p. 132; *Oeuvres* III, p. 132. See also the excellent summary in Wokler, 'Rousseau's Pufendorf', pp. 284–7.

order to think of themselves as 'parts of a greater whole'. This greater whole are particular states, not the universal society, and civic education is the means to transform men into denatured citizens. I have already pointed out that Rousseau endorses republican patriotism, which sees human fulfilment culminating in the citizenship of a free republic. Being Polish or French is always connected with being a participating citizen. The *générale* must be realized in a particular form: 'We conceive of the general society on the basis of our particular societies; the establishment of small republics makes us think about the large one, and we do not really begin to become men until after we have been citizens.'[189] The passage invites us to choose between two interpretations. According to the unfavourable one, Rousseau simply replaces the general society by particular republics, and cosmopolitan sentiments by patriotism. The favourable interpretation claims that Rousseau endorsed an evolutionary approach, and a bottom-up procedure. Civic patriotism is the first and indispensable step in the evolution of a genuine 'love of humanity'. Patriotism and cosmopolitanism do not exclude each other, they can form a synthesis with the help of education. 'Willing generally' can only be properly learned in a specific community. A global general will might be created by continuous republican practice. Participation in a community governed by just laws and the general will helps people to form ideas of justice with a more extensive application. Human history would be a learning process, and the crucial lesson is parallel to Emile's, who, as a first step, must cultivate his moral sensibility to those he knows and has relations with. After all,

> ... the word *mankind* will signify anything to him ... It will be only after having cultivated his nature in countless ways, after many reflections on his own sentiments and on those he observes in others, that he will be able to get to the point of generalizing his individual notions under the abstract idea of humanity and to join to his particular affections those which can make him identify with his species.[190]

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189 Rousseau, 'First Version', p. 108; *Oeuvres* III, p. 287. The use of 'men' rather than the gender-fair concept of 'person' (Rousseau writes '*hommes*') is justified in view of the fact that Rousseau, in spite of some recent feminist appropriations, exclusively writes for male citizens. A recent example of feminist interpretation is Nicole Fermon, *Domesticating Passions. Rousseau, Woman, and Nation* (Hanover and London: Wesleyan University Press, 1997). Rousseau failed to live up to his own standards of impartial justice with respect to women, a moral fact white Western males like myself are nowadays able to admit. See Patrick Riley, 'Rousseau's general will: freedom of a particular kind', *Rousseau and liberty*, ed. Wokler, p. 20 and Roosevelt, *Reading Rousseau*, pp. 81–9 on the transition to specific political communities.

190 'En dirigeant sur elle sa sensibilité naissante, ne croyez pas qu'elle embrassera d'abord tous les hommes, et que ce mot de genre humain signifiera pour lui quelque chose ... Ce ne sera qu'après avoir cultivé son naturel en mille manieres, après bien des réflexions sur ses propres sentiments, et sur ceux qu'il observera dans les autres, qu'il

Abstract moral reasoning must be practised, learned and perfected in order to achieve a true cosmopolitan attitude. A more limited sensibility is a necessary if not sufficient condition of emotionally identifying with the whole species. According to this interpretation, Rousseau is a peculiar kind of cosmopolitan, who believes in human capacity to learn, form syntheses and develop one's moral potential.

The interpretation itself, which Jean Starobinski has labelled 'synthesis through education' and which Kant was the first to propose, can of course be challenged.[191] If it is correct and Rousseau is not the precursor of nationalism as he is often conceived of, then we must ask why he was apparently unable to convey his ideas in a way that made subsequent misinterpretations unlikely. Why was Rousseau not more outspoken on his idea of nurturing the general will 'from the inside out'? But perhaps the 'real' Rousseau is potentially nationalistic. Works such as the *Projet de Constitution pour la Corse* (1765) and *Considérations sur le Gouvernement de Pologne* (1772) are usually seen as documents clearly supporting the unfavourable interpretation. Before turning to them, I will focus on what might be labelled somewhat anachronistically Rousseau's 'theory of international relations'. It is crucial for a proper understanding of these two writings. Since Rousseau perceives relations among European states in a Hobbesian fashion as a condition of anarchy, he believes that these two communities, weak as they were militarily, had no choice but to adopt an insular and defensive form of patriotism for defensive purposes.

For Rousseau, the state of war combines three problems: the corruption of human nature, the oppressive condition of citizens under tyrannical governments, and the very nature of the international system.[192] I am concerned here with the second and third problems. Rousseau sees both of them intricately connected. In Europe, he holds, 'unfortunate nations [are] groaning under yokes of iron, the human race crushed by a handful of oppressors, a starving crowd overwhelmed with pain and hunger, whose blood and tears the rich drink in peace, and everywhere the strong armed against the weak with the formidable power of the law.'[193] Rousseau does not buy classical natural law and social

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pourra parvenir à géneraliser ses notions individuelles, sous l'idée abstraite d'humanité, et joindre à ses affections particulieres celles qui peuvent l'identifier avec son espece', Rousseau, *Emile*, p. 233; *Oeuvres* IV, p. 520.

191 Jean Starobinski, *Jean-Jacques Rousseau. Transparency and Obstruction* (Chicago, London: University of Chicago Press, 1988), pp. 30–2 also mentions Cassirer's approach; cf. Ernst Cassirer, *The Question of Jean-Jacques Rousseau*, transl. Peter Gay, 2nd edn (New Haven: Yale University Press, 1989). An additional passage supporting this reading is 'First Discourse', p. 27; *Oeuvres* III, p. 30.

192 See Fidler, 'Desperately Clinging', p. 122.

193 '... je vois des peuples infortunés gemissans sous un joug de fer, le genre humain ecrasé par une poignée d'oppresseurs, une foule affamée, accablée de peine et de faim,

contract theories where all individuals living in a hypothetical state of nature profit from entering a civil society and enforceable laws protect the rights of each citizen. Rousseau divides citizenry into two groups: the minority of rich and powerful oppressors, and the starving, helpless masses. They are deluded into believing that they are part of a fair agreement, mutually beneficial for all parties. The unequal social contract is not only unjust, it has harmful consequences abroad. Diplomacy degenerates into a tool of tyranny, and wars are one of its consequences. Princes use international conflicts to increase power at home.[194] Rousseau also hints at what is nowadays called the scapegoat or diversionary theory of war: political elites use a foreign war to divert popular attention from domestic problems. The theory is based on the in-group/out-group hypothesis in sociology.[195]

In an influential volume, Kenneth Waltz has distinguished between three images in international relations theory. The first image entails the belief that international conflict is rooted in the individual, in human nature or behaviour. Writers of the second image hold that the domestic or internal structure of states determine inter-state relations. Waltz sees Rousseau as the most prominent representative of the third-image tradition, holding that the major causes of war and conflict can neither be found in humans nor communities 'but in the state system itself'.[196] It is crucial to bear in mind that Rousseau's political philosophy combines all three images. The quoted passages about the ambitions of kings and ministers establish him as a second-image thinker. Going beyond Saint-Pierre, Rousseau's 'Judgement' is revolutionary and provocative, attacking the European princes as the main reason why wars are fought. They are described as ruthless usurpers who suppress their respective populations, want to expand their absolute rule at home, and use wars to make themselves indispensable: 'The whole life of kings, or of those on whom they shuffle off their duties, is devoted solely to two objects: to extend their rule beyond their

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dont le riche boit en paix le sang et les larmes, et partout le fort armé contre le foible du redoutable pouvoir des loix', Rousseau, 'The State of War', pp. 42f.; *Oeuvres* III, pp. 608f.

194 Rousseau, 'Saint-Pierre's Project for Peace', Hoffmann and Fidler, *Rousseau*, p. 90; *Oeuvres* III, pp. 592f. See Rousseau, 'Second Discourse', especially pp. 172–9; *Oeuvres* III, pp. 176–83, and 'Discourse on Political Economy', Hoffmann and Fidler, *Rousseau*, p. 30; *Oeuvres* III, p. 273 on the unequal social contract. One interpretation among many is Carter, *Rousseau*, pp. 78–86.

195 Rousseau, 'Discourse on Political Economy,' p. 25; *Oeuvres* III, p. 268. Cf. Jack S. Levy, 'Domestic Politics and War', *Journal of Interdisciplinary History*, 18 (1988), pp. 666–72.

196 Kenneth N. Waltz, *Man, the State and War. A theoretical Analysis* (New York: Columbia University Press, 1959), p. 6; cf. pp. 165–86. Useful discussions of Waltz's interpretation, which is also compared with Hinsley's and Hofmann's approach, are Roosevelt, *Reading Rousseau*, pp. 7–9, and Carter, *Rousseau*, pp. 194–6.

frontiers and to make it more absolute within them.'[197] In Rousseau's writings, there is an uneasy balance between second and third images. He emphasizes domestic or internal factors while at the same time offering a structural interpretation of international anarchy. Waltz has quoted and interpreted Rousseau's stag-hunt parable in support of his thesis: cooperation under anarchy is impossible, because participants must assume and fear that others will defect under favourable conditions, going for a hare while aborting the attempt to catch a stag in concert. As a claim that private interests and the general good do not naturally coincide, the parable holds. By contrast, the strong assertion that *any* cooperation among actors in an anarchical condition is impossible cannot be sustained. Authors like Axelrod have pointed out that the empirical evidence is mixed, and have demonstrated that certain factors such as reiterated interaction, the structure of payoffs, the prospects of continuing interaction and the number of players may promote cooperation.[198] However, it is debatable whether Rousseau really intended to support the strong assertion.

For Rousseau, the very structure of the international system lends itself to insecurity and war. Even a 'well-ordered republic', theoretically inclined towards peace, may be forced by interstate circumstances to 'wage an unjust war'.[199] Like Kant, Rousseau argues that domestic and international levels are linked. The dynamics of international anarchy, he holds, has already blocked the establishment of well-ordered republics. It has turned some nations into corrupt and decadent people incapable of republican government. Single units are hardly to blame, or at least not exclusively, since being 'sane in a world of madmen is in itself a kind of madness'.[200] Even republics ruled by the general will and more inclined towards peace are forced by circumstances to play the game of mutual suspicion, distrust, arms race, preventive measures and preemptive strikes. Rousseau offers a succinct and keen description of the

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197 Rousseau, 'Judgement', p. 90; *Oeuvres* III, p. 592. Marcel Pekarek, *Absolutismus als Kriegsursache. Die französische Aufklärung zu Krieg und Frieden* (Stuttgart: Kohlhammer, 1997) shows that criticizing absolutism has had a long tradition in France; Rousseau is the most militant commentator.

198 Waltz, *Man, the State*, pp. 167–70. Rousseau uses the phrase 'the present anarchy of Europe' (*l'impolice Européenne*), though not the term 'international' or 'interstate anarchy' itself. Cf. Jean-Jacques Rousseau, 'Saint-Pierre's Project of Perpetual Peace', p. 87; *Oeuvres* III, p. 588. See Robert Axelrod, *The Evolution of Co-operation* (New York: Basic Books, 1984) and Kenneth Oye (ed.), *Cooperation Under Anarchy* (Princeton: Princeton University Press, 1986) on the possibility of cooperation under certain conditions.

199 Rousseau, 'Discourse on Political Economy', p. 4; *Oeuvres* III, p. 246. See Fidler, 'Desperately Clinging', p. 128 and Carter, *Rousseau*, pp. 103f. and 185f. for the following.

200 Rousseau, 'First Version of the 'Social Contract', pp. 121f.; *Oeuvres* III, pp. 318f.; 'Saint-Pierre's Project for Peace', p. 88; *Oeuvres* III, p. 589.

European international society of his time. He sees it as anarchic in principle, though endowed with common heritage, religion, political culture, interests and values that go beyond state borders.[201] In contrast to many eighteenth-century political economists, Rousseau stresses the negative rather than the positive aspects of increased interaction and ensuing interdependence. Common interests and values in Europe are too weak to make much of a difference. He emphasizes tension, conflict and violence rather than elements that might help to overcome the anarchical condition. Whereas other authors saw economic interdependence as a chance to build mutual trust, establish reciprocal norms of international law and initiate international organizations, Rousseau thinks the opposite outcome will come true. Interdependence such as trade relations will create inequality, more conflicts of interest and more wars.

Rousseau supports his pessimistic conclusions with references to the law of nations and contemporary diplomacy. He holds that the norms of *le droit des gens* are nothing but 'mere illusions' (*chimères*) as they 'lack any sanction'. For Rousseau, diplomacy is a tool of tyrannical rulers, and war one of its consequences. He advises the Poles not to trust anybody, neither allies nor neighbours, with the exception of the non-Christian Turks, who have clear interests, and show 'more honesty and common sense' than European powers. But even they are not really trustworthy. To some extent, Rousseau's remarks reflect eighteenth-century practice: the ideal ambassador was an 'honourable spy', diplomacy was secret, pragmatic by nature, often supported post-Westphalian assumptions such as reason of state, the primacy of foreign policy, the balance-of-power doctrine, and the predominance of the great powers, and was run by aristocrats loyal to their sovereign, even if (s)he should pursue an aggressive foreign policy.[202] The core assumptions of Rousseau's criticism, however, are squarely rooted in a structural reading of Hobbes's state of nature: covenants without the sword are empty words, and laws without sanctions illusions. There are major differences between Hobbes's and Rousseau's analysis of international anarchy, however. Whereas Hobbes held that it was far more tolerable than anarchy among individuals, Rousseau emphatically points

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201 Rousseau, 'Abstract of Saint-Pierre's Project', pp. 54–9; *Oeuvres* III, pp. 564–8.

202 Rousseau, 'State of War', p. 44; *Oeuvres* III, p. 610; 'Project for Peace', p. 60; *Oeuvres* III, pp. 568f.; Jean-Jacques Rousseau, 'Constitutional Project for Corsica', in Hoffmann and Fidler, *Rousseau on International Relations*, p. 145; *Oeuvres* III, p. 905; 'Government of Poland', pp. 192f.; *Oeuvres* III, pp. 1037f. David Armstrong, *Revolution and World Order. The revolutionary State in international Society* (Oxford: Clarendon Press, 1993), pp. 244–72 tackles eighteenth-century diplomacy. A recent and reliable investigation into Rousseau's *droit de gens* is Olaf Asbach, 'Staatsrecht und Völkerrecht bei Jean-Jacques Rousseau', in Reinhard Brandt und Karlfriedrich Herb (eds), *Jean-Jacques Rousseau. Vom Gesellschaftsvertrag oder Prinzipien des Staatsrechts* (Berlin: Akademie Verlag, 2000), pp. 241–69.

out that it is probably worse. In contrast to Hobbes and all those like Spinoza, Pufendorf, or Hume who were willing to follow him in this respect, Rousseau is not only a reluctant political realist and pessimist, but also a profound moralist. His moral outrage at the carnage of wars is distinct from the complacent assertion that wars are probably a bad thing, but not *that* bad, and anyway inevitable: 'I see a scene of murder, ten thousand butchered men, the dead piled in heaps, the dying trampled under horses' hooves, everywhere the face of death and agony.'[203] Rousseau is a political realist in his analysis of international relations; he is a reluctant one because he sees war as a moral problem which *should* be solved. His enthusiasm about Saint-Pierre's 'noble', 'beautiful' and 'useful' project is sincere, while the gaps, tensions and distinctions between what is and what ought to be are constitutive of his political philosophy.[204] Rousseau also differs from Hobbes and some political realists with his assertion that restraints such as diplomacy, international law, or the balance of power do not work. Individuals are exposed to the misery of being morally torn between unjust oppression at home and unmitigated anarchy abroad, between tyranny and war, those 'greatest plagues of humanity'.[205] Finally, unlike Hobbes and his followers among international lawyers, Rousseau endorses in some of his writings a perfect domestic analogy. Like individuals, states must be placed under 'the authority of the law' and a common coercive power if the state of anarchy is to be truly overcome.[206]

I admit that my interpretation has so far suggested a coherence of Rousseau's writings many interpreters simply deny. They do not agree whether Rousseau sees a European, or worldwide, union – rather than federation – of states as a desirable goal. According to one interpretation, his focus on the nation, his endorsement of patriotism and rejection of cosmopolitanism and the *société générale* demonstrate that he wants to end international society: 'Rousseau turns what Grotians and Kantians view as positive and desirable into a source of

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203 Rousseau, 'State of War', p. 43; *Oeuvres* III, p. 609. A comparison between Rousseau and Hobbes can be found in Stanley Hoffmann and David P. Fidler, 'Introduction', Hoffmann and Fidler, *Rousseau on International Relations*, pp. xliv–li. The characterization 'reluctant realist' is Carter's; see Carter, *Rousseau*, p. 205 and 210–12. See also Michael C. Williams, 'Rousseau, Realism, and *Realpolitik*', *Millenium*, 18 (1989), pp. 185–203; Michael W. Doyle, *Ways of War and Peace. Realism, Liberalism, and Socialism* (New York, London: Norton & Company, 1997), pp. 137–60 and the studies by Carter and Rooselvelt on interpreting Rousseau as a representative of political realism. Williams correctly reminds us that Rousseau is neither an archetypal political realist nor simply a 'philosopher of despair'.

204 Rousseau, 'Abstract', p. 53; *Oeuvres* III, p. 563.

205 Rousseau, *Emile*, p. 466; *Oeuvres* IV, p. 848.

206 Rousseau, 'Project for Peace', p. 55; *Oeuvres* III, p. 564; ibid., p. 61; *Oeuvres* III, p. 569; ibid., p. 68; *Oeuvres* III, p. 574.

evil'.[207] Others see Rousseau as a pacifist republican who offers a convincing theory of an international organization. According to this interpretation, he aims at establishing some sort of peaceful coexistence among economically independent, small republics. The states involved would share common juridical principles and would thus be homogenous.[208] It is obvious that Rousseau develops different concepts in various writings; this may explain some of the divergent interpretations.

The key concept of modern European political philosophy is contained in the phrase *exeundum e statu naturali*: the state of nature must be left. Rousseau applies this principle to the domestic level (tyranny must be replaced by republicanism), and he does the same for the international level. However, his answer is more complex. All in all, he offers four different ways out of the state of anarchy.

Rousseau's first answer is included in his commentaries on Saint-Pierre's advocacy of an international organization in his *Projet pour rendre la paix perpétuelle en Europe* (1713).[209] Saint-Pierre endorsed a security alliance where state constitution is not an issue. All states should accept the status quo and promise that they will not try to change territorial boundaries. States are supposed to refrain from the use of force, unless a member state has been declared an enemy of the organization. Rousseau evaluates Saint-Pierre's project twice, in the *Extrait du Projet de Paix perpétuelle* (1756/1761) and in the *Jugement sur le projet de Paix perpétuelle* (1756/1782).[210] Like Saint-Pierre, he describes the eighteenth-century European system as anarchical: it lures countries into wars they sometimes do not want to wage but think they must because of neighbours they perceive as enemies. Like Saint-Pierre, Rousseau advocates a permanent congress of deputies, a common legislation and executive force. Although Rousseau cherishes Saint-Pierre's moral enthusiasm, he clearly perceives the major dilemma of his project. It is the enforcement problem (see end of III, 6, IV, 1 and end of V, 2): a union can

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207 Fidler, 'Kantian Sheep', p. 131.

208 This is the interpretation of Fetscher, *Rousseaus politische Philosophie*, pp. 125–7.

209 Charles Irénée Castel de Saint-Pierre, *Projet pour rendre la paix perpétuelle en Europe*, ed. Simone Goyard-Fabre (Paris: Garnier, 1981). My interpretation is based on Ernst-Otto Czempiel, *Friedensstrategien. Systemwandel durch Internationale Organisationen, Demokratisierung und Wirtschaft* (Paderborn: Schöningh, 1986), pp. 85–8, and Roosevelt, *Reading Rousseau*, pp. 90–119.

210 Rousseau's texts are printed in Hoffmann and Fidler, *Rousseau*, pp. 53–100. There are fine analyses of the texts by Roosevelt, *Reading Rousseau*, ch. 4, pp. 90–119 and Carter, *Rousseau*, ch. 5, pp. 120–57. See also my own study *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), pp. 48–9 and 79–80.

only be secured by 'violent means', for instance, by enforcing its decisions by waging a war on the public enemy who tries to be a free rider. This law enforcement would then contradict the main goal of the union, the establishment of peace. Rousseau thus ends his judgement on Saint-Pierre with the depressing remarks that a European league might be 'a thing more to be ... feared' than desired, as it 'would perhaps do more harm in a moment than it would guard against for ages'.[211] This leads us to Rousseau's second road to peace. He suggests that small republics could form loose defensive confederations to deter aggression.[212] However, Rousseau's scattered comments do not allow for a comprehensive reconstruction. We are thus left with the last two models. In the constitutional project for Corsica, peace is achieved through state isolation and autarky. In the writing on Poland, Rousseau advocates non-provocative defence based on Polish republican patriotism.[213]

Rousseau's remedy on the domestic level is a genuine social contract and the rule of the general will in a republic. Both can revert some of the decline from self-love, the innocent concern for one's self-preservation termed *amour de soi*, a positive force, into emulation and rivalry (*amour propre*) which happened once the presocial state of nature had been left.[214] If people are allowed to rule themselves, some form of virtue and political freedom can be regained. Rousseau holds that humans change fundamentally as soon as they enter the civil state. Citizens substitute justice for instinct, and give their actions 'the morality they previously lacked'.[215] Rousseau does not offer any convincing arguments concerning this alleged change of moral substance when entering a civil condition. Intuitively, the Hobbesian assumption that humans remain substantially the same while modifying their external behaviour out of fear of punishment, for instance, is more plausible. Rousseau's claim becomes intelligible if not credible when linked with his notion of republican patriotism and ideas on public education. The circumstances where the general will can be realized are very restricted. As Rousseau rejects representative democracy and large states, he winds up with a completely anachronistic ideal of small and autarchic communities of citizen farmers and artisans reminiscent of the idealized Greek city-states, or *poleis*. Like some contemporary

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211 Rousseau, 'Project for Peace', p. 100; *Oeuvres* III, p. 600.

212 Rousseau, 'Social Contract', 3.15, p. 145; *Oeuvres* III, p. 431; *Emile*, pp. 466f.; *Oeuvres* III, pp. 848f. Charles E. Vaughan, 'Introduction', in *The Political Writings of Jean Jacques Rousseau* (Oxford: Basil Blackwell, 1962), vol. 1, pp. 95–102; Fetscher, *Rousseau*, p. 126, and Carter, *Rousseau*, pp. 186–9 offer interpretations.

213 The conceptualization follows Doyle, *War and Peace*, pp. 149f.

214 See 'Second Discourse', p. 218 (Rousseau's own note XV); *Oeuvres* III, pp. 219f., and the discussion in Zev M. Trachtenberg, *Making Citizens: Rousseau's political theory of culture* (London: Routledge, 1993), pp. 82–4 and 93–6.

215 Rousseau, 'Social Contract', 1.8, p. 95; *Oeuvres* III, p. 364.

communitarians, Rousseau believes that republican ideas must be rooted in the sentiments, habits and the culture of the citizenry. This is where patriotism comes in. Rousseau thinks that a civic religion and patriotism are needed to support republicanism and to make sure that an autarkic agricultural economy is successful, because 'where there is no longer a fatherland, there can no longer be citizens.'[216] Love of *la patrie*, respect of the laws, and simple life mutually reinforce each other. Only emotional identification with the political community will enable citizens to abide by laws without being coerced to do so. Thus domestically, the main function of patriotism is to foster, facilitate or create civic virtue and solve the enforcement problem, the problem of realizing the general will and making it effective. As Rousseau puts it, the general will is accomplished if civic virtue dominates, the 'conformity of the individual will with the general will'. So the task is to 'enforce the influence and practice of virtue'.[217] This in turn prevents decadence, selfishness and all the vices associated with *amour propre*. The function of Rousseau's patriotism at the international level is twofold.[218] First, patriotism is designed to strengthen the bonds among citizens, make them content and confident as a nation, reduce their ambition to get into contact with foreigners or meddle into foreign affairs, and thus avoid international anarchy and war by a peaceful isolationist policy. Second, Rousseau estimates that patriotic nations would be a deterrent for other states. Citizen-soldiers would be dangerous enemies on the battlefield. He calls civic virtue, patriotic zeal and the national spirit shaped by institutions Poland's *only* rampart against its powerful enemies, especially the Russians.[219]

It has become widespread practice to distinguish between republican patriotism and nationalism.[220] Rousseau endorses the former, which is citizenship in and love of a free republic, its institutions, laws, and way of life that sustains political liberty. The true *patrie* must be a republic, and being French is connected with being a participating citizen. Nationalism, by contrast, tries

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216 Rousseau, *Emile*, p. 40; *Oeuvres* IV, p. 250. Cf. 'Political Economy', p. 22; *Oeuvres* III, p. 262, Fidler, 'Desperately Clinging', p. 129 and Mason, 'Forced to be free', p. 134.

217 Rousseau, 'Political Economy', p. 11; *Oeuvres* III, p. 252. The terminology is taken from Trachtenberg, *Making Citizens*, pp. 55–73. The enforcement problem has two aspects. First, the government might fail to enforce the general will and usurp power. Second, individual members of society might try to evade their share of burden. In our context, the second aspect is important.

218 Fidler, 'Desperately Clinging', p. 130.

219 Rousseau, 'First Version of the "Social Contract" ', pp. 133f.; *Oeuvres* III, pp. 339f.; 'Poland', pp. 168 and 176f.; *Oeuvres* III, pp. 960 and 1003f.; 'Constitutional Project for Corsica', p. 158; *Oeuvres* III, p. 937.

220 Fine recent studies on nationalism and patriotism are David Miller, *On Nationality* (Oxford: Clarendon Press, 1995); Viroli, *For Love of Country*, and Stephen Nathanson, *Patriotism, Morality, and Peace* (Lanham: Rowman & Littlefield, 1993).

to reinforce or defend a spiritual unity and homogeneity of an 'imagined community' connected to a certain territory and based on ethnicity, language, common history, or culture. Extreme nationalism or chauvinism entails the belief in the superiority of, and exclusive concern for, one's country and a desire for dominance over others.[221]

Rousseau's precepts are an attempt to win the hearts of republican citizens. Civic virtue and the spirit of community are supposed to replace the scrambling for material gains, property, economic competition and prosperity. The goal is to transform a mere aggregate of selfish individuals into a 'moral and collective body' (*corps moral et collectif*).[222] Patriotism and civic virtue coincide, and integrate *amour de soi* and *amour propre*. To achieve this goal, Rousseau advocates republican festivals such as military reviews, public balls designed to promote social unity, and public education, that is, education for citizenship as opposed to private education, designed to provide an emotional but also intellectual basis of patriotism.[223] After successful educational measures, the Poles, for instance, will be 'patriotic by inclination, by passion, by necessity'. Rousseau's texts seem to be ambivalent: they can be read as promoting *republican* education (the proper interpretation), as in the formulation that every 'true republican has drunk in love of country' and that '[n]ational education' is exclusively bound to free citizens, equality of education, respect for laws and the general will. They can also be interpreted as espousing *national* education independent of civic or republican virtues, as in the statement that a twenty-year-old Pole should be a Pole and nothing else, or that a newborn 'ought to see the fatherland, and up to the day of his death he ought never to see anything else.'[224] Rousseau himself tries to combine republican values with

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221 Viroli, *Love of Country*, pp. 1f, 63f. and 93f. The phrase 'imagined community' is borrowed from Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, New York: Verso, 1991). My definition of nationalism is loosely based on Miller, *On Nationality*, p. 27. See Nathanson, *Patriotism, Morality, and Peace*, pp. 29–49 and 185–211 on the distinction between moderate patriotism and extreme nationalism.

222 Rousseau, 'Political Economy', p. 11; *Oeuvres* III, p. 252; cf. 'Government of Poland', p. 165; *Oeuvres* III, p. 955; *Social Contract* 1.6, p. 93; *Oeuvres* III, p. 361. Viroli, *Love of Country*, pp. 78–94; Trachtenberg, *Making Citizens*, pp. 133–42; Fermon, *Passions*, pp. 122–41, and Roosevelt, *Reading Rousseau*, ch. 5 offer introductions to Rousseau's concept of patriotism.

223 Jean-Jacques Rousseau, *Politics and the Arts: Letter to M. d'Alembert on the Theatre*, transl. Allan Bloom (Ithaca, NY: Cornell University Press, 1960), p. 16; *Oeuvres* V, pp. 15f.; cf. Trachtenberg, *Making Citizens*, pp. 193–205; Starobinski, *Rousseau*, pp. 92–7; *Emile*, p. 40; *Oeuvres* III, p. 250.

224 'Government of Poland', p. 172; *Oeuvres* III, p. 966; 'Political Economy', pp. 21f.; *Oeuvres* III, p. 261. See Trachtenberg, *Making Citizens*, pp. 323–8 on Rousseau's public and patriotic education. Carter, *Rousseau*, pp. 177–89 as well as Roosevelt, *Reading Rousseau*, pp. 123–45 analyse the constitutional project for Poland.

patriotism, but his texts lend themselves to an interpretation isolating the patriotic element and developing it towards nationalism.

Rousseau's patriotism has been the target of some criticism, and seen as potentially nationalistic. This criticism is unjustified. Love of country (*amour de la patrie*) has been advocated by republican patriots such as Turgot and Montesquieu, and Rousseau should be placed within this tradition.[225] Moreover, Rousseau's advice is specifically tailored for Corsicans and Poles, and may after all not apply to other nations. His precepts are explicit, but they are understandable, as Poland, for instance, was a threatened state in a hostile international environment (Poland was subsequently partitioned, and finally 'abolished', between 1772 and 1795). Rousseau's patriotism is insular and defensive, not an aggressive nationalism.[226] Rousseau's examples of civic virtue sound extreme and morally dubious to late twentieth-century readers. He mentions Brutus, who sentenced his own sons to death and presided over their execution because they had conspired against the republic. The epitome of a female citizen is the Spartan woman who thanked the gods for the won battle, unmoved by the news that her five sons were killed in the fight.[227] The examples are extreme, but fittingly illustrate Rousseau's central message: individuals as members of the *moi commun* are willing to sacrifice themselves and members of their family for their republic. This may be morally dubious, but is not necessarily a symptom of nationalist fervour or fanaticism. Rarely anyone will doubt that a functioning community requires sacrifices on the side of its members, in some cases even risking one's own life.

I have already pointed out that Rousseau's alleged anti-cosmopolitan attitude must be qualified. His concept of defensive republican patriotism is compatible with genuine moral cosmopolitanism defined in the introductory sections. Properly interpreted, Rousseau tries to strike a balance between the two, perceiving the dangers of chauvinism that becomes 'exclusive and tyrannical and makes a people bloodthirsty and intolerant ... It is not permissible to strengthen the bond of a particular society at the expense of the rest of the human race.'[228] It may be argued that, if put into practice, Rousseau's precepts would inevitably do just this: strengthening particular societies while

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225 See, for example, Montesquieu, *Spirit of the Laws* 3.6, p. 26; Viroli, *Love of Country*, especially chs. 3 and 4, and my *Kant and the Theory and Practice*, pp. 139–40 for an analysis.

226 Cf. Hoffmann and Fidler, 'Introduction', pp. lxf., who draw upon Alfred Cobban, *Rousseau and the Modern State*, 2nd edn (London: Allen & Unwin, 1964), and Roosevelt, *Reading Rousseau*, p. 127.

227 Rousseau, 'First Discourse', p. 64; *Oeuvres* III, p. 72; *Emile*, p. 40; *Oeuvres* IV, p. 249; cf. Viroli, *Love of Country*, p. 80.

228 Rousseau, 'First Version', p. 131; *Oeuvres* III, p. 337. The passage is primarily directed against the possible distortions of civil religion.

weakening the global commonwealth. Rousseau might point out that this wasn't his intention, and we could defend him by pointing out that at least theoretically, both types of societies are not mutually exclusive. A critic in turn would quote the passage where Rousseau claims that

> [e]very particular society, when it is narrow and unified, is estranged from the all-encompassing [*la grande*] society. Every patriot is harsh to foreigners. They are only men. They are nothing in his eyes. This is a drawback, inevitable but not compelling [*cet inconvenient est inévitable, mais il est foible*]. The essential thing is to be good to the people with whom one lives.[229]

The critic would then point out that Rousseau cannot have it both ways. In practice, individuals draw closer together if they are alienated from other communities. But Rousseau sees this as a negative, albeit inevitable social development. Given his distinction between 'is' and 'ought', the historical and psychological analysis presented in the passage does not imply a moral endorsement.

Rousseau's main weakness is not his concept of republican patriotism, but the way he solves the enforcement problem. His theory entails the manipulation of *moeurs* and institutions with the help of public opinion, and state intervention into the familial sphere of privacy.[230] This manipulation creates the *effect* of civic virtue, but not necessarily virtue itself, which is the result of good intentions, as republicans like Montesquieu realized. Rousseau does not see the dilemma that using *amour propre* for societal ends, and for motivating civic virtue, creates puppets rather than citizens. His educational measures most likely create heteronomy and dependency on the opinion of a carefully manipulated society rather than thinking for oneself on behalf of the common good. His attempt to refine the poison of *amour propre* into a cure is bound to fail.[231] The precepts are not only morally dubious, but also politically self-defeating. Political legitimacy has to do with self-imposed obligation and liberty, which for Rousseau are synonymous terms, as 'obedience to the law

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229 'Toute societé partielle, quand elle est étroite et bien unie, s'aliéne de la grande. Tout patriote est dur aux étrangers; ils ne sont qu'hommes, ils ne sont rien à ses yeux. Cet inconvenient est inévitable, mais il est foible. L'essenciel est d'être bon aux gens avec qui l'on vit', Rousseau, *Emile*, p. 39; *Oeuvres* IV, pp. 248f.; cf. Fidler, pp. 125 and 138.

230 Rousseau, *Letter to M. d'Alembert on the Theatre*, p. 67; *Oeuvres* V, p. 65. Cf. 'Government of Poland', pp. 171f.; *Oeuvres* III, pp. 965f.; Trachtenberg, *Making Citizens*, p. 177, and Fermon, *Passions*, pp. 75f.

231 Montesquieu, *Spirit of the Laws*, 3.6, p. 26; Trachtenberg, *Making Citizens*, pp. 199f. and 209; pp. 237f.; Geraint Parry, 'Thinking one's own thoughts: autonomy and the citizen', *Rousseau and liberty*, ed. Wokler, pp. 102–6.

that one has prescribed for oneself is liberty.'[232] The problem of enforcing the rule of the general will is solved at the expense of legitimacy in this sense. In other words, when reading Rousseau we should not think of the terror of the French Revolution or Orwell's *1984*, but the more subtle – and definitely more effective – subliminal brainwashing and manipulation of Huxley's *Brave New World*, so that in the end 'the appearance of independence' rather than independence itself is achieved. The desire for homogeneity, for uniformity of *moeurs* in order to ensure the functioning of the community, leads to a hybrid attempt to change human nature.[233] The lesson to be learned is simple. A moral whole or *corps moral* cannot be 'produced' or 'made'. Kant, one of Rousseau's enthusiastic readers, but also independently-minded, keeps reminding us never ever to try to *enforce* morality or civic virtue, even if we should agree with Rousseau and contemporary communitarians that 'nothing can replace morality for the maintenance of government.'[234] The task to balance out education in and for society on the one hand and individual autonomy on the other is always a tricky one. In Rousseau, the balance is turned over.

Rousseau knows from personal experience that patriotism may be an ambivalent and potentially dangerous force. In the *Confessions*, he admits that his love of France during the war of 1733

> ... became so rooted in my heart, that when I later played the antidespot and proud republican at Paris, in spite of myself [*dépit de moi-même*] I felt a secret predilection [*prédilexion*] for that same nation that I found to be servile, and for that government which I affected to criticize. What was funny was that, since I was ashamed of an inclination so contrary to my maxims, I did not dare to admit it to anyone, and I scoffed at the French for their defeats, while my heart bled more than theirs.[235]

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232 Rousseau, *Social Contract*, 1.8, p. 96; *Oeuvres* III, p. 365; cf. Trachtenberg, *Making Citizens*, pp. 213f. and 244f.

233 Rousseau, *Emile*, p. 332; *Oeuvres* III, p. 661; *Social Contract*, 2.7, p. 108; *Oeuvres* III, p. 381. Mason, 'Forced to be free', pp. 134f.; Trachtenberg, *Making Citizens*, pp. 186–8.

234 Rousseau, 'Political Economy', p. 11; *Oeuvres* III, p. 252. The crucial Kantian passage is '[W]oe to the legislator who wishes to establish through force a polity directed to ethical ends!', in Immanuel Kant, *Religion Within the Limits of Reason Alone*, transl. intro. and Notes Theodore M. Greene and Hoyt H. Hudson (New York: Harper and Row, 1960), p. 87, probably directed against Robespierre.

235 'Si cette folie n'eut été que passagére je ne daignerois pas en parler; mais elle s'est tellement enracinée dans mon coeur sans aucune raison, que lorsque j'ai fait dans la suite à Paris l'antidespote et le fier républicain, je sentois en dépit de moi-même une prédilexion secrette pour cette même nation que je trouvois servile, et pour ce gouvernement que j'affectois de fronder. Ce qu'il y avoit de plaisant étoit qu'ayant honte d'un penchant si contraire à mes maximes je n'osois l'avouer à personne, et je raillois les Francois de leurs défaites, tandis que le coeur m'en saignoit plus qu'à eux', Jean-Jacques Rousseau, 'The Confessions', transl. Christopher Kelly, *The Collected Writings of*

'I unwillingly felt a secret partiality': patriotism is seen here as a strong emotion that clouds rational considerations of impartiality, a necessary condition of moral cosmopolitanism. A true cosmopolitan will judge nations and states impartially, by republican principles for instance. Rousseau admits that he himself is unable to do this, calling his partiality for France a 'madness' he could not cure. However, his ability to abstract and reflect upon himself helps him to understand patriotism as a strong, ambivalent, and often logically inconsistent emotion. Nevertheless, Rousseau's mad inclination ultimately triumphs over his rational maxims in the reported episode. His intellect attempts to explain the 'blind passion'; for Rousseau, it is caused by his continued and exclusive reading of French national heroic literature, an educational measure – or poison – he later advocates for Polish patriots.[236] Inciting mass patriotism has been called the opening of Pandora's box:[237] in the short term, it may be politically convenient, and even a funny experience for some intellectuals. In the long run, it can hardly ever be entirely controlled. Patriotism might develop into nationalism, creating a sense of identity and community in a nation, but may also lead to aggressive national policies. This is of course wisdom after the fact, a lesson people learned only after Rousseau, in the wars following 1793.

Rousseau's observation that 'the sentiment of humanity evaporates and grows feeble in embracing the entire world' is supported by psychology and everyday experience: the calamities of a central African state do not affect Europeans in a manner the suffering of Kosovo Albanians does. If Rousseau's ultimate ideal is the restoration of man's original universal moral horizon, it is lost sight of in his political philosophy. Whatever his intentions were, the thin line between republican patriotism and nationalism vanished in subsequent nationalist literature.

Rousseau, vol. 5 (Hanover, London: University Press of New England, 1995), p. 153; *Oeuvres* I, p. 182.

236 Ibid., pp. 153f.; *Oeuvres* I, pp. 182f.

237 Cf. Linda Colley, 'The Reach of the State, the Appeal of the Nation. Mass arming and political culture in the Napoleonic Wars', in Lawrence Stone (ed.), *An Imperial State at War: Britain from 1689 to 1815* (London, New York: Routledge, 1994), p. 181.

5. The synthesis of natural law and state practice: Vattel and Moser

It belongs to every free and sovereign State to decide in its own conscience what its duties require of it, and what it may or may not do with justice. (Vattel, *The Law of Nations or the Principles of Natural Law*)

It has been fashionable among historians of the law of nations to distinguish among various 'schools' or 'traditions'. Hobbes and Spinoza are usually seen as representative 'deniers of the law of nations'. They are distinguished from the naturalists of the natural law tradition, where three currents are discernible: the Suarezian/Grotian branch including the Oxford professor Richard Zouche (1590–1660), the German Samuel Rachel (1628–91) and the Dutch Cornelis van Bynkershoek (1673–1743); the Pufendorffian current encompassing Barbeyrac, Jean Jacques Burlamaqui and Thomasius, and finally the Wolffian current with Emer de Vattel (1714–67) as the most important pupil. Sometimes Zouche, Rachel and Bynkershoek are assigned to the camp of early positivists, followed by authors such as Johann Jakob Moser (1701–85) and Georg Friedrich von Martens (1756–1821).[238] As usual, boundaries are fuzzy. Is Pufendorf not in fact one of the deniers of the law of nations? Does Vattel not disengage himself from Wolff, and does this move not qualify him as a positivist? On the other hand, do not even the so-called positivists retain natural law elements, similar to Hobbes? One of my aims in this section is to suggest that Vattel is difficult to pigeonhole and that, like many other eighteenth-century figures, he is what is usually labelled a 'transitory thinker'. Vattel supports and reinforces the trend towards state sovereignty and positivism. This trend is, however, already discernible in authors like Pufendorf. The difference between the natural law tradition and the positivist school is a matter of degree rather than kind. I conclude the chapter with the widely unknown Moser.

Vattel can be seen as the perfect synthesis of a natural law theory and actual state practice. The number of thinkers who may have had an influence is impressive. Since the middle of the seventeenth century, collections of state treaties had been published, among others by Gottfried Wilhelm Leibniz (1646–1716), Jacques Bernard (1658–1718), Jean Dumont (1666–1727), Friedrich August Wilhelm Wenck (1741–1810), Georg Friedrich von Martens

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238 Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), pp. 144–85; Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos Verlagsgesellschaft, 1984), pp. 414–17; Francis H. Hinsley, *Sovereignty*, 2nd edn (Cambridge: Cambridge University Press, 1986), pp. 179–95; Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (München: Beck, 1994), pp. 193–6; Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris: Editions A. Pedone, 1998), pp. 20–7 and ibid., pp. 39–104, where she elaborates her distinctions. On Vattel's originality, see ibid., pp. 35 and 95f.

(1756–1821) and Gabriel Bonnot de Mably (1709–85). Their main focus was on the reality of the *droit public de l'Europe* and diplomatic practice. Positivistic tendencies gained momentum in the writings of authors such as Richard Zouche, who followed Gentili as Regius Professor of Civil Law in Oxford, Samuel Rachel, Johann Wolfgang Textor (1638–1701), and Cornelis van Bynkershoek.[239] Vattel's 'Preface' of the *Law of Nations* (1758) contains an explicit and famous rejection of Wolff's postulate of a *civitas maxima* (see beginning of IV, 5). Vattel claims that the idea of a universal commonwealth is redundant, because Europe is already 'a sort of Republic' with a balance of power-system.[240] Vattel holds that the main source of voluntary law is common practice and not some fictitious universal commonwealth. Unlike Wolff, Vattel equals *gentes* (nations or civil societies) with sovereign and independent states (*états souverains*).[241] They thus cannot be conceived as being under the authority of some superior entity. Finally, Vattel rejects the idea of a universal commonwealth because he thinks that it undermines the indispensable distinction between voluntary law (*droit des gens volontaire*) and necessary law (*droit des gens nécessaire*, or the 'inner law of conscience'). This distinction must be kept 'so that we may never confuse what is just and good in itself with what is merely tolerated through necessity'.[242] For Vattel, voluntary

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239 See Ziegler, *Völkerrechtsgeschichte*, pp. 194–6 and 199–202 for more.

240 Emer de Vattel, *The Law of Nations or the Principles of Natural Law* [1758], transl. Charles G. Fenwick (Washington DC: Carnegie Institution, 1916), book III, ch. III, para. 47 (from now on: 3.3.47), p. 251. Nicholas Greenwood Onuf, *The republican legacy in international thought* (Cambridge: Cambridge University Press, 1998), pp. 75–84 and Jouannet, *Vattel*, pp. 100–4 offer a comprehensive and excellent account of Vattel's rejection. Jouannet, *Emer de Vattel* is now the definitive study on Vattel. On Wolff's influence, see pp. 28f. Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's Le Droit des Gens* (Dobbs Ferry, NY: Oceana Publications, 1975); Johannes J. Manz, *Emer de Vattel. Versuch einer Würdigung* (Zürich: Schulthess, 1971), and Peter Pavel Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, preface Quincy Wright (The Hague: M. Nijhoff, 1960) are older studies. Andrew Hurrell, 'Vattel: Pluralism and its Limits', in Ian Clark and Iver B. Neumann (eds), *Classical Theories of International Relations* (Houndmills et al.: Macmillan Press 1996), pp. 233–55; Andrew Linklater, *Men and Citizens in the Theory of International Relations* (New York: St. Martin's Press, 1982), pp. 80–96; Frederick G. Whelan, 'Vattel's Doctrine of the State' [1988], in Knud Haakonssen (ed.), *Grotius, Pufendorf and Modern Natural Law* (Dartmouth, Aldershot et al.: Ashgate, 1998), pp. 403–34; Albert de Lapradelle, 'Introduction' in Vattel, *Law of Nations*, pp. i–lv, and Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki, Finnish Lawyers' Publishing Company, 1989), pp. 89–97 provide short assessments of Vattel's theory. An updated bibliography is offered in Jouannet, *Vattel*, pp. 444–8.

241 Vattel, *Law of Nations*, 'Preface', p. 7a, note k; cf. Onuf, *Republican legacy*, pp. 76f.

242 Vattel, *Law of Nations*, 'Preface', p. 11a. See Heinhard Steiger, 'Völkerrecht und

law is natural law adopted to the actual practice of sovereign states composing the society of nations and based on their presumed consent. As we shall see later on, the necessary law of nations obliges states to engage in commerce. However, they are free to choose whether to do so or not, and can refuse to trade with legal impunity. Thus the voluntary law of nations respects the states' freedom and judgement.

Vattel offers a synthesis of natural and positive law, establishing – against Pufendorf – that there is indeed a positive law of nations (Pufendorf claimed that *ius gentium* and *ius naturae* are identical). Vattel abandons the methodology of his predecessors. Previous chapters have demonstrated that Grotius and natural lawyers writing after him perceived the problem of how to mediate the abstract principles of natural law with given situations and contexts. In terms of the international sphere, many authors solved the problem in favour of the sovereign. Pufendorf, for instance, claimed that the licence (*licentia*) of warring states goes beyond that of individuals in a state of nature, limited vaguely by the 'law of humanity' (IV, 3). This trend towards a positivistic, state-centered, and pragmatic concept of *lois des gens* which sanctions a policy based on reason of state is reinforced by Vattel. The following passage drives the point home. Like Wolff, Vattel knows that the strict natural law must be modified and adapted 'when applied to the affairs of Nations'. In place of the normative ideal of a *civitas maxima* which structures this modification, Vattel, by contrast, puts 'the natural liberty of Nations, ... considerations of their common welfare, ... the nature of their mutual intercourse, ... their reciprocal duties, ... and the distinction between *internal* and *external*, *perfect* and *imperfect* rights'.[243] The content of the voluntary law is distinct from the inner law of conscience – it is absorbed by considerations of the common good or circumstances, partly losing its normative dimension.

Naturrecht zwischen Christian Wolff und Adolf Lasson', in Diethelm Klippel (ed.), *Naturrecht im 19. Jahrhundert. Kontinuität – Inhalt – Funktion – Wirkung* (Goldbach: Keip Verlag, 1997), pp. 48f. and Ruddy, *International Law*, chs. 3 and 4 for a full analysis.

243 '... que toutes les modifications, toutes les restrictions, tous les changemens, en un mot, qu'il faut apporter, dans les affaires des Nations, à la rigueur du Droit Naturel, et dont se forme le Droit des Gens *volontaire*; que tous ces changemens, dis-je, se déduisent de la Liberté naturelle des Nations, des intérêts de leur salut commun, de la nature de leur correspondance mutuelle, de leurs Devoirs réciproques, et des distinctions de Droit *interne et externe, parfait et imparfait*, en raisonnant à-peu-près comme M. Wolf a raisonné à l'égard des particuliers, dans son Traité du Droit de la Nature', Vattel, *Law of Nations*, 'Preface', p. 10a. See the comprehensive analysis in Jouannet, *Vattel*, pp. 133–40; James A. R. Nafziger, 'The General Admission of Aliens under International Law', *American Journal of International Law*, 77 (1983), pp. 812f., and Onuf, *Republican legacy*, pp. 79f.

Wolff distinguished between the normative fiction or postulate of a *civitas maxima* and the biological fact of a *societas magna humani generis*, the great society of the human race (IV, 5). Given the sharp distinction between the realm of conscience and 'what is merely tolerated through necessity', Vattel has no problems to endorse the concept of a *société humaine* while rejecting Wolff's *civitas maxima*. Humans are bound by conscience to assist each other as long as this imperfect duty of mutual assistance is compatible with the perfect duties towards oneself, and this moral obligation unites humans across the globe.[244]

So far I have followed a widespread interpretation of Vattel's thought. According to Andrew Linklater, his doctrine is state-centered, favours state libertarianism, and 'subjectivizes' natural law by allowing each nation to decide 'what its conscience demands of it, what it can or cannot do; what it thinks well or does not think well to do'.[245] Vattel seldom moves away from the political realities of his age, brings the theory of the law of nations into line with state practice, and moves towards 'classical' nineteenth-century European international law with its emphasis on sovereign, independent states as the principal actors and clear distinctions between law and morality, international and state law, and perfect and imperfect duties. The ultimate outcome is a society of sovereign states regulating their interactions by customary law: '*[L]e droit des gens vattelien constitue une sphère autonome des règles individualisées destinées à régir exclusivement la conduite des Etats souverains, autrement dit, ... il tend réellement à etre le système juridique de la communauté des Etats.*'[246] Individuals are mediated. After a long development, *ius inter gentes*, or 'classical' international law triumphs.

This interpretation is certainly one-sided. Like Wolff, Vattel is squarely rooted in the natural law tradition. He develops a theory of inalienable rights and, like Rousseau, abandons Grotius's insistence on consent. This leads to a rejection of slavery and an endorsement of the right of revolution if the sovereign violates the 'sacred natural law.'[247] Although state equality precludes the right to punish other nations, there is, as in Wolff, a natural right to unite against and subdue 'a restless and unprincipled Nation' injuring its

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244 Vattel, *Law of Nations*, 'Preface', p. 11a; 'Introduction', paras. 10–13, pp. 5f.; 3.12.189, pp. 304f.

245 Vattel, *Law of Nations*, 'Introduction', p. 6; Linklater, *Men and Citizens*, pp. 86f. For the following list of features see Hurrell, 'Vattel', p. 234. Hurrell himself wants to 'unsettle' but not overthrow this conventional picture with his article.

246 Jouannet, *Vattel*, p. 253. Cf. pp. 341 and 419–25; pp. 344–401 presents a history of the law of nations from Suárez to Wolff focusing on the role of individuals and states in the respective theories.

247 Vattel, *Law of Nations*, 3.13.201, pp. 310f.; 1.4.54, pp. 25f. See Jeremy Rabkin, 'Grotius, Vattel, and Locke: An Older View of Liberalism and Nationality', *The Review of Politics*, 59 (1997), pp. 302f. for more.

neighbours.[248] The distinction between perfect and imperfect duties and rights is of course very much in the natural law tradition. The same holds true for the separation between internal and external duties, and between duties towards oneself and towards others (III, 1; IV, 4 and 6).[249] For Vattel, natural law is the foundation of the law of nations. However, the central principle of this natural law is the idea of the state as a moral person, its freedom, and sovereignty. Put paradoxically, the very idea of natural law tends towards its own dissolution, a paradox virulent in Hobbes. Natural law allows some moral entity like the state a sphere of licence or liberty, while the exercise of this freedom may be diametrically opposed to the precepts of natural law (IV, 1). It is important to keep in mind that there is a trend towards this doctrine, and that Vattel tries to keep a precarious balance between the conscience of sovereigns, necessary law, and intrinsic justice on the one hand, and the 'external operation' of voluntary law and formal legality on the other. This balancing act amounts to a theory of juridical dualism.[250] It also fits well into my thesis of a gradual *transformation* of the natural law tradition (V, 3).

Following Pufendorf and Wolff, Vattel endorses the new paradigm of the state as a *persona moralis*, and the law of nations is the science of the rights and duties among these sovereign states.[251] Vattel defines sovereignty as the independence of any state from others. This state has its own public authority, government, and laws: 'Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State*.'[252] 'Under whatever form': this implies that international law is supposed to be neutral or impartial, between various confessions, but also between different forms of government such as democracy, aristocracy, or monarchy (Vattel follows Aristotle's classical distinction). Sovereignty is inalienable, but resides with civil society rather than with the prince: 'The state is not, and cannot be, a

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248 Vattel, *Law of Nations*, 2.4.53, p. 130.

249 Ibid., 'Introduction', para. 17, p. 7; 1.2.17, 18, p. 14, and passim. See Jouannet, *Vattel*, pp. 151–60 for a comprehensive analysis.

250 Vattel, *Law of Nations*, 3.12.189; Jouannet, *Vattel*, pp. 229f. There is an extensive reference to Vattel's predecessors and their own attempt to modify the law of nations when applied ibid., pp. 230–50.

251 See Vattel, *Law of Nations*, 'Introduction', paras. 2–4, and passim; see also Knut Ipsen, 'Ius gentium – ius pacis? Zur Antizipation grundlegender Völkerrechtsstrukturen der Friedenssicherung in Kants Traktat "Zum ewigen Frieden" ', in Reinhard Merkel and Roland Wittmann (eds), *'Zum ewigen Frieden'. Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant* (Frankfurt am Main: Suhrkamp, 1996), pp. 299f.; Otto Kimminich, *Einführung in das Völkerrecht*, 5. Auflage (Tübingen und Basel: Francke, 1993), pp. 71–4, and IV, 1 on sovereignty in Bodin and Hobbes.

252 Vattel, *Law of Nations*, 1.1.4, p. 11; see Jouannet, *Vattel*, pp. 319–40 and Quaritsch, *Souveränität*, pp. 103–7. The implications of this concept of statehood are spelled out by Whelan, 'Vattel's Doctrine', pp. 420–30.

patrimony, since a patrimony exists for the advantage of the possessor, whereas the prince is appointed only for the good of the state.'[253] This can be interpreted as a liberal defence of popular sovereignty, where the sovereignty of the prince is replaced by the sovereignty of the state and its moral personality. More precisely, Vattel distinguishes between sovereignty, the public authority created by the social contract and residing in civil society or the nation, and the sovereign, the government set up by the will of the people in order to exercise public powers.[254] Thus Vattel endorses the liberal or Lockean version of the social contract theory, assuming both a *pactum unionis* and a *pactum subjectionis*.

Vattel also follows the natural law tradition since Hobbes with the assertion that states in their relations with each other are in a state of nature. There is no superior to judge, apply and enforce the law of nature, or necessary law of nations. It is therefore up to each state to perform these functions: 'It belongs to every free and sovereign State to decide in its own conscience what its duties require of it, and what it may or may not do with justice ... If others undertake to judge of its conduct, they encroach upon its liberty and infringe upon its most valuable rights.'[255] In short, submission to a common authority is incompatible with state sovereignty and freedom. As there is no recognized judge, the legitimacy of claims cannot be assessed in an objective manner. States must settle with a compromise in the name of stability and peace. Even wars which are objectively unjust must be considered as giving rise to legal rights, otherwise wars and destruction would never end, and even neutrals would be drawn into the conflict. It is a compromise reminiscent of Grotius.

These considerations lead Vattel to a reformulation of the just-war theory, anticipated by several writers before him. Discussion in the seventeenth and eighteenth centuries often focused on the question whether wars can be just on both sides, because both parties might be convinced that they have a just cause. For the the natural lawyer Vattel, both sides cannot be just, because this would violate the principle of non-contradiction. For the diplomat Vattel, experience shows that most cases are 'doubtful', or that there are at least arguments defending what seem to be glaring examples of aggression, such as Louis's XIV attack on the Spanish Netherlands (1667) or Frederick's conquest of Silesia

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253 Vattel, *Law of Nations*, 1.5.61, p. 29. See Whelan, 'Vattel's Doctrine', pp. 404 and 409–20, and Rabkin, 'Grotius', pp. 301–4 on Vattel's liberalism.

254 Vattel, *Law of Nations*, 1.1, p. 11 and Whelan, 'Vattel's Doctrine', p. 411.

255 'Il appartient à tout Etat libre et souverain, de juger en sa Conscience, de ce que ses Devoirs exigent de lui, de ce qu'il peut ou ne peut pas faire avec justice ... Si les autres entreprennent de le juger, ils donnent atteinte à sa Liberté, ils le blessent dans ses droits les plus précieux', Vattel, *Law of Nations*, p. 7a (quoting Wolff), 2.13.201, p. 177, and 3.12.188, p. 304, the key passage. Cf. Jouannet, *Vattel*, pp. 224–30 and Whelan, 'Vattel's Doctrine', pp. 408f.

(1740).[256] Vattel's dualistic doctrine gives him the chance to argue for a compromise. A prince who wages an unjust war becomes guilty 'in his own conscience'. From the perspective of voluntary law, however, both sides should be accounted in the right.[257] This formal war or *guerre en forme* must be introduced in the name of peace, in order to mitigate wars and bloodshed. The evildoer will hopefully suffer from a bad conscience, but his conduct is made 'legal in the sight of men, and exempts him from punishment'.[258] Systematically, we have returned to Grotius's dilemma (see endings of III, 4 and 6). This impunity for the unjust aggressor may keep the door open for a peace agreement in the future, but also gives any state a *carte blanche* to start a war whenever it wants and can get away with it.

If individuals unite to form a civil society and establish a common authority to overcome the state of nature, why should not states do the same? Previous chapters and sections have shown that many authors followed the Hobbesian answer, which denied that there was a perfect domestic analogy and claimed that international anarchy was more tolerable. Vattel's originality in this respect is limited. In 1758, when Vattel's major work was published, the peace projects of Saint-Pierre and others had already been widely discussed all over Europe. Rousseau's 'Abstract' had been published two years earlier. Saint-Pierre held that the state of nature among European countries should be left by establishing a common authority, imitating the domestic level. Vattel decides to follow more familiar tracks. States are more self-sufficient than individuals, and thus less dependent on a society where mutual aid and assistance is offered.[259] In addition, Europe is already 'a sort of Republic', characterized by increased interaction, diplomatic activities, the custom of resident diplomacy, and a common interest, namely 'the maintenance of order and the preservation of liberty'.[260] The Enlightenment concept of a European republic can be interpreted as the secularized version of the older idea of a *respublica Christiana*. Order and state freedom are maintained by the balance-of-power system, at least in theory.[261] This is reminiscent of Wolff, and Vattel also seems to follow him in his endorsement of collective law enforcement against the disturber of public security, the power balance, and peace (see beginning of IV, 6).[262]

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256 Vattel, *Law of Nations*, 2.18.335, p. 226.

257 Vattel, *Law of Nations*, 2.18.335, pp. 226f.; 3.12.190, p. 305.

258 Ibid., 3.12.192, p. 305.

259 Vattel, *Law of Nations*, 2.1.3, p. 114; Hurrell, 'Vattel', p. 235 and Whelan, 'Vattel's Doctrine', p. 89.

260 Vattel, *Law of Nations*, 3.3.47, p. 251.

261 Ibid., 3.3.47–9, pp. 251f. Cf. Onuf, *Republican legacy*, pp. 83f.

262 Vattel, *Law of Nations*, 3.3.44f., pp. 248–50. A reliable analysis of Vattel's position can be found in Michael Walzer, *Just and Unjust Wars. A moral Argument with historical Illustrations* (New York: Basic Books, 1977), pp. 78–80.

In short, Vattel does not think that states should establish a common authority because he holds that their relations are already regulated and controlled by some sort of rule of law and common interests and norms.

However, there is a more pessimistic dimension in Vattel's thought. States must be more jealous than individuals to vindicate their honour and redress injuries, because magnanimity will inevitably be interpreted as weakness, and 'soon followed by more flagrant injuries'.[263] Vattel highlights one crucial aspect of the Hobbesian condition of anarchy. States may be peace-loving and willing to follow the precepts of morality, but their competitive situation urges them to adopt a policy contrary to their intentions. Vattel expands the traditional right of self-defence to include defence of one's dignity and reputation: 'Since a Nation's renown is a very real advantage, it has the right to defend that renown as it would any other possession. He who attacks its honor does it a wrong, and reparation can be exacted even by force of arms.'[264] Vattel insists on a careful distinction between signs of neglect and positive acts of insults, and warns against a hastiness to go to war. However, as states are their own judges, this distinction is bound to disappear. The overall effect is a worsening of inter-state relations, made more likely by another factor. Experience tells us that most states are inclined to dominate others, increase their strength at the expense of their neighbours, and violate their rights 'should the opportunity present itself'. For Vattel, this is rooted in the more generic tendency of humans to oppress others where there is 'the power to do so with impunity'.[265] In short, Vattel's description of intra-state relations is not all rosy and complacent, in spite of his reference to the European republic. Nevertheless, Vattel settles for state sovereignty, although the diplomat Vattel must have been aware that principles like state equality were constantly violated. The distinction between just and unjust wars is delegated to the sphere of morality or conscience.

So far my interpretation has stressed Vattel's limited originality. Systematically, we encounter problems familiar from Grotius and Hobbes. It might be argued that this assessment is one-sided, and that Vattel does not simply rehearse well-known assumptions about international anarchy, the balance of power and the domestic analogy. Vattel's importance and originality lies in his attempt to systematize eighteenth-century state practice, especially in terms of the *ius in bello*, where Vattel advocates a humanized law of war. Commentators have pointed out that these passages are recognizably modern in outlook.[266] Wars should be mitigated, non-combatants must be distinguished from soldiers,

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263 Vattel, *Law of Nations*, 2.18.325, p. 222; Whelan, 'Vattel's Doctrine', pp. 79 and 89.

264 Vattel, *Law of Nations*, 1.15.191, p. 79; cf. 1.14.177, p. 75; 2.3.48, p. 129.

265 Ibid., 2.1.16, p. 118 and 3.3.44, pp. 248f.

266 Hinsley, *Sovereignty*, p. 194, Whelan, 'Vattel's Doctrine', p. 403.

and the former should be protected, because wars are a relation between sovereign states, not their subjects.[267] In so far as he tries to bring state practices into a systematic whole, Vattel also breaks new ground with his account of the right of citizenship and immigration rights. He draws now widely accepted distinctions between natives, residents and permanent residents. Although natural law favours the *ius sanguinis* doctrine, specific problems such as whether children of citizens born abroad are also citizens are delegated to positive legislation in the respective countries, 'and such provisions must be followed.'[268] The laws may differ from state to state, but are binding 'when enacted by the lawful authority'.[269] In accordance with his natural law predecessors, Vattel asserts that nations, because of their 'natural liberty', have a right to refuse visitors. Legitimate reasons are 'evident danger', such as diseases, the possible corruption of morals, and public disorder. Prudence and charity, the right of ownership and the imperfect duties of humanity must be weighted against each other.[270] China and Japan exert a legitimate sovereign right when they refuse foreigners. Once they are admitted into the country, however, the sovereign has a duty to protect them. This is how Vattel defines hospitality.[271]

Vattel's passages on transnational commerce closely follow Wolff. States have an imperfect duty to mutual assistance, and thus to develop foreign trade.[272] The freedom of commerce is a natural right of all nations. Grotius and the Dutch were right when insisting on the *mare liberum*, and the Portuguese were wrong. Each nation decides whether it wants to engage in trade or not, it is 'perfectly free to buy or not buy a thing which is for sale'.[273] The duties towards oneself trump those towards others, which implies that the Chinese were entitled to prohibit foreign trade when they thought the state was in danger. In addition, even if a nation such as the Chinese should not have had plausible motives for its conduct, the others 'must put up with its decision, and even suppose that it is acting for good reasons'.[274] State sovereignty extends equally to all nations. It has absorbed all previously held claims that the natural right to interact and trade with other communities can be enforced: 'When the Spaniards attacked the American tribes on the pretext that the latter refused to

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267 Vattel, *Law of Nations*, 3.12–18.188–296, pp. 304–40.

268 Ibid., 1.19.212–14, p. 87; 1.19.215, p. 87. See Ruddy, *International Law*, pp. 188–91 for more.

269 Ibid., 1.19.222, pp. 89f.

270 'Introduction', para. 16, pp. 6f; 1.19.230, p. 92; 2.10.135–7, pp. 154f.

271 Ibid., 2.8.100, p. 144; 2.8.104, p. 145.

272 Ibid., 1.8.86, p. 39; 2.2.21, p. 121. See also Ruddy, *International Law*, pp. 148–54 and 176–80.

273 Ibid., 2.2.24, p. 121; 1.8.89, p. 40; 1.8.92, p. 41.

274 Ibid., 1.8.94, p. 41; 2.2.27, p. 122.

trade with them, they were but attempting to conceal their insatiable avarice.'[275] Vitoria is not mentioned, but his first just title implicitly rejected. As in Wolff, an agreement or treaty turns the imperfect right into a perfect one.[276] Since a country is allowed to refuse to trade with one particular country while maintaining commercial relations with others, Vattel leaves room for economic warfare. His framework is mercantilist. He denounces the 'pest of luxury', thinks that foreign trade is more advantageous than domestic, and warns against an unfavourable balance of trade.[277]

In eighteenth-century customary law of nations, ownership had to be linked to effective occupation. The symbolic occupation by raising flags, erecting crosses, planting trees or inscriptions no longer counted, and the Papal donations were rejected as mere unilateral proclamations. Although Tasman discovered and formally occupied Australia for the Dutch East India Company in the 1640s, the British actually occupied the continent after James Cook's voyages in the decades following 1788. In conformity with widespread practice, the Dutch did not claim ownership, in spite of being there first.[278] Like most natural lawyers, Vattel endorses the idea of an original community of ownership. He states that discovery establishes merely a *ius ad occupationem*, a rudimentary and inceptive title contingent upon follow-up effective occupation: 'Hence the Law of Nations will only recognize the *ownership* and *sovereignty* of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them.'[279] Vattel supplements this theory of effective occupation with the argument of better use: '[N]ature ... destines the earth for the needs of all mankind, and only confers upon individual Nations the right to appropriate territory so far as they can make use of it.'[280] In other words, humans may only legitimately claim as much territory as they actually need and use. The argument was rejected by Wolff, but endorsed by Locke (see IV, 6 and V, 2). In practice, it favoured agricultural nations at the expense of nomadic tribes. Vattel distinguishes among three types of nomads. First, there are the 'ancient Germans' and 'modern Tartars', who plunder, pillage and injure others and should therefore be 'exterminated like wild beasts of prey'. The second group

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275 Ibid., 2.2.25, p. 122.

276 Ibid., 1.8.93, p. 41; 2.2.27–30, pp. 122f.

277 Ibid., 1.2.24, p. 15, 1.8.85, p. 39; 1.8.98, p. 43. Cf. Stephen C. Neff, *Friends but No Allies: Economic Liberalism and the Law of Nations* (New York: Columbia University Press, 1990), pp. 25f.

278 Grewe, *Epochen*, pp. 463–8.

279 Vattel, *Law of Nations*, 1.18.208, p. 85; cf. 207, p. 84: 'provided that actual possession has followed shortly after'. See Grewe, *Epochen*, pp. 466–70 for an analysis.

280 Vattel, *Law of Nations*, 1.18.208, p. 85; 1.18.209, pp. 85f. cf. Fisch, *Expansion*, pp. 275f.

of nomads, like the native Americans, is more peaceful. However, their territory can be settled without injustice, provided sufficient land is left to them. Finally, there are the Arabs who do not use the soil efficiently, but may do it their way as long as cases of 'urgent necessity' of territory do not arise.[281]

As pointed out, the argument of better use is closely following Locke's agricultural argument. Vattel's reasoning includes the following steps. The cultivation of the soil is an obligation of natural law. There is an additional utilitarian calculus involved. Population increases made an intensive use of the soil necessary. Pastoral and hunting ways of living are no longer deemed feasible, and must give way to an agricultural form of existence, which is economically superior. This utilitarian calculus is supported by the aforementioned emphasis on effective occupation: nomads do not occupy their hunting grounds in a strict sense, as they roam over rather than inhabit them. Vattel calls this 'uncertain occupancy'. Actual occupation, that is, settlement and use are decisive.[282] Vattel concludes: '[W]hile the conquest of the civilized Empires of Peru and Mexico was a notorious usurpation, the establishment of various colonies upon the continent of North America might, if done within just limits, have been entirely lawful.'[283] The emphasis on the status of the Peruvian and Mexican 'empires' as civilized supports the familiar distinction between civilized and savage peoples. The group of civilized nations is no longer exclusively European. However, contemporary critics will be quick to point out that Vattel has not really cast off his own ethnocentric biases. His reasoning conveniently dismisses the Spanish conquests of the past (perpetrated by Catholics), while legitimizing the current colonial enterprises of Protestants. Like some contemporaries, Vattel is willing to see English colonialism in a very favourable light. He is full of praise for the 'moderation of the English Puritans' and William Penn.[284] Put polemically, Vattel presents a new ideology and myth. Spanish avarice is contrasted with English generosity. This juxtaposition may be rooted in a confessional prejudice, although this is mere speculation, similar to Vattel's assumption about 'real' Spanish motivation. Vattel can be defended with his insistence on the idea of justice, specified in the phrase 'if done within just limits'. In addition, sufficient land has to be left to the natives. As we have

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281 Vattel, *Law of Nations*, 1.7.81, pp. 37f.; 2.7.97, p. 143; 2.7.97, p. 143; cf. Fisch, pp. 276f.

282 Vattel, *Law of Nations*, 1.7.81, pp. 37f.; 1.18.209, p. 85. Flanagan, 'Agricultural Argument', pp. 595f.

283 Vattel, *Law of Nations*, 1.7.81, p. 38.

284 Ibid., 1.18.209, pp. 85f. Fisch, *Expansion*, pp. 275–80 analyses all relevant Vattelian passages, and also points at forms of the agricultural argument in Morus, Hutcheson, Pütter and Achenwall. See also Leslie Claude Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), pp. 73–8.

seen, however, it is up to the sovereign state to decide where to draw this line, and given the human propensity to abuse power, an assumption Vattel himself subscribes to, there is little reason to suspect that the English in North America would do any better than the Spaniards.

Vattel has often received a favourable interpretation. This may have several reasons. For many, he presents the first markedly modern treatise on the law of nations. With considerable justification, Vattel can be interpreted as *the* representative of classical international law focusing on state sovereignty. His popularity in some nineteenth-century European states and the United States was surpassed probably only by Grotius.[285] Vattel's popularity among US-Americans may have also been rooted in his unmitigated endorsement and justification of the North American settlement. My interpretation has emphasized his shortcomings. However, I want to point out that I have not presented a comprehensive account here, covering all aspects of his work such as the right of neutrality, the laws of war, or the rights of ambassadors.

Vattel's popularity in German-speaking countries has been considerably smaller. His move towards positivism and state sovereignty is not unique for his time, as writers such as Moser, Martens and Martini testify. Moser bases the law of nations on actual practice and *natürliche Billigkeit* (which corresponds with a natural sense of justice), customary among civilized (European) sovereign states. He distinguishes his own inductive approach grounded on experience from the deductive school referring to abstract principles.[286] Moser dismisses the idea of justice and both divine as well as natural law as legitimate sources of the law of nations. In terms of justice, Moser holds that large sections of the law of nations have more to do with arbitrary conventions. Whenever justice is an issue, scholars and jurists are in no position to judge, and apart from that, their opinions are irrelevant and without impact. As a faithful Pietist, Moser reserves

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285 Nussbaum, *History*, pp. 161–3; Whelan, 'Vattel's Doctrine', p. 407, and Ruddy, *International Law*, pp. 281–315.

286 Johann Jakob Moser, *Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegszeiten*, 10 Teile in 12 Bänden (Frankfurt am Main: Varrentrapp Sohn und Wenner, 1777–80), vol. 1, pp. 11, 13 and 17f. A comprehensive study of Moser in English is Mack Walker, *Johann Jakob Moser and the Holy Roman Empire of the German Nation* (Chapel Hill: University of North Carolina Press, 1981). There is an excellent article by Adolf Laufs, 'Johann Jakob Moser', in Michael Stolleis (ed.), *Staatsdenker im 17. und 18. Jahrhundert. Reichspublizistik, Politik, Naturrecht*, 2., erweiterte Aufl. (Frankfurt am Main: A. Metzner, 1987), pp. 284–93. Moser's law of nations is treated by Alfred Verdross, 'J. J. Mosers Völkerrecht der Erfahrung' [1922], in: Josef Tittel (ed.), *Multitudo legum, ius unum. Festschrift Wilhelm Wengler* (Berlin: Interrecht, 1973), vol. 1, pp. 685–91; Walker, *Moser*, pp. 337–42, and Nussbaum, *History*, pp. 175–9. More literature is listed in Laufs, 'Moser', pp. 292f.; Gerd Kleinheyer and Jan Schröder, *Deutsche Juristen aus fünf Jahrhunderten*, 3rd edn (Heidelberg: C.F. Müller Verlag, 1989), pp. 204–8, and Walker, *Moser*, pp. 348–54.

the capacity to judge with competence for God 'at the great general Day of Judgment'.[287] He dismisses natural law because it is an unreliable source. Its principles are so abstract that they are of little use in specific situations. It leaves too much room for interpretation, and even detached scholars hardly agree on fundamental principles. If they agree, this fact is important, not the alleged convergence of this agreement with right reason. Dilemmas such as the problem of interpretation have been with the natural lawyers for a long time (see end of III, 6 and IV, 1, for instance). However, there was widespread conviction that these difficulties could be overcome by one's own improved methodology or theory. Moser has lost this faith. *Ex factis ius oritur*, and the relevant facts are treaties as well as *Herkommen*, custom and tradition.[288]

Critics can point at three shortcomings. First, despite his professed intention in the 'Introduction', Moser does in fact establish principles, proceeds deductively, but fails to justify these principles with his illustrations and examples. In short, Moser's methodology is internally inconsistent and thus unsatisfactory, and his law of nations instead of a systematic whole 'an unstable mix of positives and principles, of political cynicism and the will to find a true order'.[289] Second, in his attempt to avoid the prescriptive utopianism of writers like Saint-Pierre, Moser turns into an apologist of the powers that be: might makes right.[290] Finally and more generally, Moser's positivism is exposed to a familiar logical circle. The distinction between the 'real' sources of the law of nations such as treaties and custom on the one hand, and illegitimate ones on the other, is itself normative, and implies a judgement on right and wrong which Moser claims we are not entitled to make. Like extreme forms of relativism (see I, 2 and 4), Moser's positivism is self-defeating.

Moser's incomplete positivism has interesting consequences. He advances the thesis that only sovereign states can occupy territories in a manner consistent with the law of nations. The natural law question whether European states have a right to occupy non-European territories in the first place is excluded from the analysis.[291] Moser's theory goes beyond European practice, which for all its shortcomings rarely advanced the radical thesis that non-Europeans were outside the legal sphere (see end of III, 4). In other words, Moser's positivism is more positivist than state practice would allow. In earlier

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287 Moser, *Versuch des Völkerrechts*, vol. 1, pp. 17–20, especially p. 20: '*dieses (Urteil) bleibet dem grossen allgemeinen Gerichtstage Gottes ... anheimgestellt*'.

288 Walker, *Moser*, pp. 340f. and Nussbaum, *History*, pp. 176f.

289 Walker, *Moser*, pp. 341.

290 Walker, *Moser*, pp. 339 and 342; Nussbaum, *History*, pp. 177f.

291 Moser, *Versuch des Völkerrechts*, vol. 5, pp. 392–4 and p. 448; Johann Jakob Moser, *Grund-sätze des jetzt-üblichen Europäischen Völker-Rechts in Friedens-Zeiten* (Hanau, 1750), 4.2, p. 349–52, and Fisch, pp. 268f.

and later work, he follows the same doctrine: ownership and sovereignty over territories are reserved for sovereign, that is European, states, which thus enjoy exclusive rights. Only European law is relevant. Moser's theory has been called the secularized counterpart of the Papal donations based on the belief that the supreme pontiff is the monarch of the whole world.[292] Vitoria refuted Papal and imperial claims and the right of discovery on natural law grounds, arguing that even non-Christian 'barbarians' possessed true dominion and ownership (II, 2 and 3). This natural law basis is partly gone in Moser, and replaced by a Eurocentric and positivist notion of ownership.

The passages on international hospitality fit into this picture. Natural law doctrine, Moser holds, provides a right of each nation to engage in interaction and trade with others. This 'natural freedom', however, has been limited by contracts among European sovereigns, and by the practice of some non-European peoples. Those limits on the freedom of commerce have to be respected, with the exception of cases of necessity. Ships which are in dire straits, for instance, should be helped, and this obligation is based on the 'rights of humanity' (*Rechte der Menschlichkeit*).[293] As in Vattel, we get a curious mix of natural law and positivistic elements, arguably without much systematic coherence.

There is no need to interpret Moser as an ideologist of European conquest. Born in Württemberg and arguably the first professor to teach positive law of nations in the Empire (at Tübingen), there was no need to 'justify' any colonial enterprises. What is more, Moser does not refrain from criticizing the conduct of 'the so-called Christians, or rather Unchristians' in the thirteen colonies, where natives were decimated and African slaves tortured by 'barbarian' masters. He takes it for granted that from a natural law perspective, European conquest is unjustified. Moser is fascinated by the native Americans, especially the amount of freedom and independence they seem to enjoy.[294] How do these moral judgements fit with Moser's bracketing of them in his law of nations? The correct answer may be quite simple. Moser holds that his judgements are nothing more than his own, privately held opinion.

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292 Fisch, *Expansion*, p. 270. Moser, *Versuch des Völkerrechts*, vol. 5, pp. 448f. reports that in his age all European states had abandoned claims based on Papal donations.

293 Moser, *Versuch des Völkerrechts*, vol. 7, pp. 675–702; the quotation ibid. p. 701.

294 Ibid., vol. 5, p. 448; Moser, *Nord-America nach den Friedensschlüssen vom Jahre 1783*, 3 vols (Leipzig, 1784–5), vol. 1, pp. 109–47, following Mack, *Moser*, pp. 344f.

Chapter 6

Kant and the *Ius Cosmopoliticum*

I cannot but regret the proneness of German philosophy to vague and misty abstraction.
(John Austin, *The Province of Jurisprudence Determined*)

I have pointed out in the Introduction that contemporary authors often refer to Kant in the context of international hospitality, current trends in international law, or international politics. Kant is frequently seen as the first advocate of a cosmopolitan commonwealth 'beyond Westphalia' that regards individuals rather than states as the primary normative units. A recent commentator has argued that Kant developed the 'paradigm of hospitality to global difference' in his works. Kant's third definitive article on cosmopolitan right in *Perpetual Peace* is then supposedly the most innovative one, replacing classical international law among states with the rights of the world citizens.[1]

The first three sections of this chapter prepare the ground for an analysis of Kant's cosmopolitan right. In the first section, I argue that Kant can be considered a natural lawyer, especially because he rejects empirical consent theories and endorses the primacy of natural right over positive legislation. However, many natural lawyers would have regarded Kant's doctrine both blasphemous and foolish. Kant goes beyond the natural law tradition with his insistence on autonomy, pure moral philosophy, the concept of right, his antivoluntarism, his theory of moral motivation and his rejection of natural teleology in jurisprudence. Kant's moral philosophy is a climax in the natural lawyers' quest for a transcultural standard of thin justice. Whereas Kant's reworking of natural law theory amounts to a revolution in moral philosophy, his politics are a synthesis of the civic humanist and natural law traditions. Kant accepts the natural lawyers' theses of ineradicable conflicts among humans

[1] Michael J. Shapiro, 'The Events of Discourse and the Ethics of Global Hospitality', *Millenium: Journal of International Studies*, 27 (1998), p. 698; Jürgen Habermas, 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight', in James Bohman and Matthias Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal* (Cambridge, MA, London: MIT Press, 1997), pp. 113–53, here p. 113; Daniele Archibugi, 'Models of international organization in perpetual peace projects', *Review of International Studies*, 18 (1992), pp. 312–14.

and of a basically ambivalent propensity called 'unsocial sociability'. Kant follows Hume and Smith in a teleological interpretation of history where selfish interests have beneficial unintended consequences. At the same time, however, Kant endorses Rousseau's moral criticism of commercial society because it does not form a *moral* whole. He puts a big question-mark behind the European belief that progress in culture and civilization implies, amounts to, or leads to moral improvement.

Kant's reservations about his predecessors and his own willingness to go beyond previous theories of international law are expressed in the famous passage where he characterizes Grotius, Pufendorf and Vattel as 'sorry comforters' (*leidige Tröster*). The second section shows why Kant is a strong supporter of the domestic analogy, albeit in a qualified sense. Kant does not buy the Hobbesian contention that the transnational state of nature is incomparable with and more tolerable than the natural condition among individuals. States are obliged to leave the state of nature and enter a civil condition, which is fully achieved by a coercive world republic. Convenants and laws without the sword of 'a common external constraint' are but words. Kant's global commonwealth has three dimensions: one commercial, one juridical or legal, and one moral. His distinction between legal and moral spheres enables him to supplement his advocacy of legal cosmopolitanism with its moral version. Kant expresses this in the idea of a 'kingdom of ends' or 'kingdom of God'.

The third section investigates Chinese and Japanese isolationist policies and highlights Chinese willingness to assimilate European law of nations in the early nineteenth century. It points at epistemological problems involved in an assessment of European perceptions of diverse cultures. In particular, a sweeping reference to the category of 'the Other' is of little help. The story that there was a eurocentric grand narrative about the inferior Other may itself turn into another grand narrative. The section focuses on three eighteenth-century authors analysed in detail above, Montesquieu, Hume and Smith (V, 1 and 2). Montesquieu is the key author who helped to revert seventeenth-century sinophilistic tendencies, probably without intending it. Divergent Asian regimes and facts are pressed into an inadequate conceptual strait-jacket. Hume's more empirical approach abandons Montesquieu's inflexible typology, which helps him to appreciate the Chinese monarchy as an almost perfect moderate government securing the liberty of popular assemblies. His favourable remarks on China's economy obscure the fact that in the first place, isolationist states miss the opportunity of dynamic gains from international trade such as transfer of technology and know-how. In contrast to Montesquieu, Hume, or any of the natural lawyers, Smith explicitly drives this point home. In Smith, we find the most succinct thesis in the eighteenth century that, though perhaps permissible by the law of nations, Chinese isolationism is economically self-defeating. Well-intentioned as it may have been, the natural

lawyers' defence of Chinese and Japanese isolationism was utterly futile in a condition of international anarchy.

Kant's cosmopolitan right is very limited: any inhabitant of the earth is only entitled to offer oneself to engage in any form of interaction or commerce. A special pact is required between visitors and those being visited for more extensive entitlements. I raise some objections against what I will label the globalist interpretation of Kant's cosmopolitan right, and present a modified approach which stresses the problem of institutionalization. Current enthusiasm about global governance, non-state actors and international organizations often downplays the importance of accountability. For Kant, cosmopolitan right does not replace classical law among states or nations, but complements it. How does Kant justify cosmopolitan right? Kant seems to follow the natural lawyers and ground it in the conventional idea that the earth is a common possession. It might be argued that the innate right to freedom provides a better and truly comprehensive justification. However, the two argumentative strategies are not mutually exclusive, but basically identical, ultimately referring to the principle of rational consistency and the universality of right.

1. Revolution and synthesis

> Novelty in itself contains nothing false or wrong ... We should stop asking how new or old a doctrine is and investigate only how true or false it is. (Samuel Pufendorf, *The Law of Nature and Nations*)

It has already been pointed out that Kant rejects empirical consent theories for reasons similar to Hume (end of III, 2). Kant modifies social contract theory in a way that contract becomes hypothetical and part of an abstract thought experiment of the legislator. Its function is to help a ruler in a pre-republican condition to determine what citizens could have consented to: 'In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it ... it is unjust.'[2] I have argued that this coincides with the features of universalizability and free, possible and universal consent, or the appeal to what can be willed for all, of the introductory chapter (I, 4). More precisely, we

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[2] Immanuel Kant, 'On the common saying: That may be correct in theory, but is of no use in practice', in *Practical Philosophy*, transl. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), p. 297; *Kant's gesammelte Schriften*, ed. Preußische Akademie der Wissenschaften (Berlin, Leipzig: de Gruyter, 1900ff.), vol. 8, p. 297 (from now on: 8: 297, following the English translation). See Allen D. Rosen, *Kant's Theory of Justice* (Ithaca, London: Cornell University Press, 1996), pp. 129–39, and Leslie Arthur Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990), ch. 9 on Kant's social contract theory.

can distinguish between the principle of consistency and that of universality. The former translates into the principle of right, that the external freedom of choice of each person should coexist with that of everyone else under a system of constraints 'in accordance with a universal law'.[3] According to the principle of universality, this system of mutual constraints should demarcate everyone's external freedom equally. We have thus arrived at rightful external freedom under laws of justice or civil liberty and legal equality. Together with co-legislation and the separation of powers, they are the constituent features of Kant's republican condition.[4]

Natural lawyers commonly distinguished between natural and positive law, a distinction that can also be found in Smith (V, 1). Kant follows suit: 'As systematic *doctrines*, rights are divided into *natural right*, which rests only on *a priori* principles, and *positive* (statutory) right, which proceeds from the will of a legislator.'[5] The legitimacy or authority of positive law is rooted in natural right. In other words, the lawgiver is morally entitled to obligate others by his or her will only if positive legislation is preceded by a natural right. Positive laws should conform to natural right, or should at least not be incompatible with it. This reasoning gives Kant the opportunity to reject Hobbes's incipient legal positivism (end of IV, 1), and call the claim that the sovereign cannot do the citizens any wrong 'appalling'.[6] However, though natural right is logically prior, Kant does not push this point very far. Even unjust positive laws are real laws, and Kant is notorious for his willingness to give non-republican states a provisional legitimacy. Kant's key argument in this respect is consistent with his natural-right framework. A deficient juridical condition is still better than the state of nature without any, not even nascent, forms of external justice.[7]

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[3] Immanuel Kant, 'The metaphysics of morals Part I: Metaphysical first principles of the doctrine of right' [1797], in *Practical Philosophy*, p. 387; 6: 230.

[4] The distinction between the consistency principle and that of universality is taken from Thomas Pogge, 'Kant's Theory of Justice', *Kant-Studien*, 79 (1988), p. 414. The relationship of the principle of right to the categorical imperative as its ethical basis is a complex and tricky problem. There is no room to go into this any further. The most reliable studies on the issue are Mulholland, *System of Rights*; Rosen, *Theory of Justice*, and Wolfgang Kersting, *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie* (Frankfurt am Main: Suhrkamp, 1993).

[5] Kant, 'Doctrine of Right', p. 393; 6: 237. For the following see ibid., p. 379; 6: 224. Mulholland, *System of Rights*, pp. 10f. and Rosen, *Theory of Justice*, pp. 111–14 discuss the distinction between positive and natural right.

[6] Kant, 'On the common saying: That may be correct in theory, but is of no use in practice', in *Practical Philosophy*, p. 302; 8: 303.

[7] Kant, 'Doctrine of Right', p. 475; 6: 334. I can also not go into the widely discussed issue of Kant's denial of a right of revolution. There are useful analyses in the works of Rosen, Mulholland and Kersting. See also my *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), pp. 16f. and 64–6 (with more references).

What is now this natural right, according to Kant? It is already contained in the above definition of the principle of right. There is only one natural or 'innate' right, namely equal freedom of choice. This external freedom is rightful 'insofar as it can coexist with the freedom of every other in accordance with a universal law.'[8] Against Grotius and with Rousseau, Kant holds that neither military conquest nor contracts can nullify this equal freedom. In short, persons lose it only by committing crimes, but not by any rightful deed. Kant's rejection of social contractualism and his tempered endorsement of the primacy of natural right over positive legislation qualify him as a proponent of the natural law tradition. Kant has indeed often been seen in this way, and praised as the tradition's most forceful and systematic thinker.[9] Kant is a modern natural lawyer, but it is doubtful whether representatives of the tradition would have appreciated his modifications, and accepted him as one of them. As observed earlier, Kant goes beyond the natural law tradition, advocating autonomy, pure moral philosophy, the pure concept of right, antivoluntarism, and rejects natural teleology in jurisprudence. Autonomy in the Kantian sense is self-legislation and self-obligation of rational beings such as humans in moral matters. Kant holds that previous moral philosophers and the natural lawyers failed in their efforts because they did not understand that humans are only subject to laws they have given themselves and that they are bound only to act in conformity with their own will.[10] This autonomy of the will is identical with the supreme principle of morality, the categorical imperative. By imposing an obligation on themselves, humans also provide themselves with a motive to

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8 Kant, 'Doctrine of Rights', p. 393; 6: 237; cf. 'Theory and Practice', pp. 293f.; 8: 293 for the following.

9 Mulholland, *System of Rights*, pp. 13f. quotes Battaglia, D'Entrèves, Finnis and Höffe. Mulholland himself follows their evaluation, and I consider it convincing. Cf. ibid., pp. 278–81 and 378–88.

10 Kant, 'Groundwork of the Metaphysics of Morals', in *Practical Philosophy*, p. 82; 4: 433; cf. p. 89; 4: 440; 'Critique of Practical Reason', in *Practical Philosophy*, p. 166; 5: 33. My discussion of Kant's relationship to the natural lawyers is much indebted to Jerome B. Schneewind, *The invention of autonomy. A history of modern moral philosophy* (Cambridge: Cambridge University Press, 1998), pp. 483–530; 'Kant and natural law ethics', *Ethics*, 104, (1993), pp. 53–74; 'Autonomy, obligation, and virtue: An overview of Kant's moral philosophy,' in Paul Guyer (ed.), *The Cambridge Companion to Kant* (Cambridge: Cambridge University Press, 1992), pp. 309–41; Mary J. Gregor, 'Kant on "Natural Rights" ', in Ronald Beiner and William James Booth (eds), *Kant and Political Philosophy. The Contemporary Legacy* (New Haven, CT: Yale University Press, 1993), pp. 50–75, and Mulholland, *System of Rights*, pp. 215–17, 386–8, and passim. Thomas E. Hill, Jr, 'The Importance of Autonomy', in Eva Feder Kittay and Diana T. Meyers (eds), *Women and Moral Theory* (Totowa, NJ: Rowman and Littlefield, 1987), pp. 129–38 offers a convincing interpretation of the notion of autonomy in Kant.

obey. As a consequence, no authority external to humans is required to establish or promulgate the demands of morality.

This concept of autonomy as self-legislation and self-obligation is often traced back to Rousseau, and sometimes also to Hutcheson, Hume, Wolff and Crusius. Rousseau, for instance, famously declared in the *Contrat social* that 'obedience to the law that one has prescribed for oneself is liberty.'[11] However, Kant understands autonomy in a way that is far more radical and revolutionary than anything his predecessors wrote. Most natural lawyers distinguished between advising or counselling and obligation. Something obligatory is commanded by a proper superior who backs up the command with the threat of punishment. According to this doctrine, one of God's crucial roles in morality is to attach effective sanctions. Grotius's theory of the law of nations is a case in point (see III, 3 and end of III, 6). Pufendorf also does not distinguish between motivating and justifying reasons in terms of obligations. He has serious problems to provide a convincing motive for moral obligation (see IV, 3). Kant argues that these theories lead us to mere counsels of prudence or means-ends obligation, but not to moral obligation or moral necessity. Threat of punishment relies on the principle of self-love and amounts to contingent advice or counsel: 'The determining ground would still be only subjectively valid and merely empirical and would not have that necessity which is thought in every law, namely objective necessity from *a priori* grounds.'[12] For Kant, a proper theory of obligation entails the concept of reason becoming practical by imposing an obligation upon itself, without being moved or motivated by natural impulses like fear.

Comparisons of authors with their predecessors are always fraught with a problem: we tend to exaggerate the differences at the expense of similarities. Sometimes this is done with a polemical purpose, for instance, when Thomasius contrasts the brilliant Grotius with corrupt scholastic filthiness (beginning of III, 1). In a similar fashion, Carl Friedrich Stäudlin (1822) holds that Kant created a revolution in moral philosophy all by himself.[13] Kant's

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11 Jean-Jacques Rousseau, 'On Social Contract', in Alan Ritter and Julia Conaway Bondanella (eds), *Rousseau's Political Writings* (New York: Norton, 1988), 1.8, p. 96; *Oeuvres complètes, vol. III: Du contrat social, écrits politiques* (Paris: Éditions Gallimard, 1964), p. 365. Schneewind, *Invention*, pp. 487–92, 513–15 and 'Autonomy', pp. 312–14 correctly emphasizes Rousseau's importance for Kant, but also points out that he was not the only figure. See also Thomas E. Hill, Jr, *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca, NY, London: Cornell University Press, 1992), pp. 76–96.

12 Kant, 'Critique of practical reason', p. 160; 5: 26. See Gregor, 'Kant', pp. 60f. and Schneewind, 'Kant', pp. 66–71 for more.

13 Carl Friedrich Stäudlin, *Geschichte der Moralphilosophie* (Hannover, 1822), pp. 960f., quoted in Schneewind, *Invention*, p. 508.

predecessors then tend to wind up at the losing end. In addition, Kant, like many philosophers, seems to display a very limited amount of clemency towards them, and interpreters are quick to point out that he often criticizes a caricature of Wolffian philosophy, for instance, rather than this philosophy itself.[14] Nevertheless, when all qualifications have been considered, there remains the fact that Kant is indeed a turning-point in modern moral philosophy, even though he does not 'invent' the concept of autonomy out of the blue. This can be illustrated by his methodological approach, the programme of a pure moral philosophy, or 'completely isolated metaphysics of morals, mixed with no anthropology, theology, physics, or hyperphysics and still less with occult qualities'. According to Kant, the moral philosophers must fulfil three tasks: establish the supreme principle of morality, examine the capacity of practical reason, and apply this principle to obtain a system of human duties and rights. Crucial is the distinction between empirical and rational concepts and motives. Previous philosophers, especially the so-called *Popularphilosophen*, were, according to Kant, unable or unwilling to keep them apart. For them, the basis of moral laws is 'the special determination of human nature ... now perfection, now happiness, here moral feeling, there fear of God, a bit of this and also a bit of that in a marvellous mixture'.[15] Kant emphatically rejects this approach. One consequence of this isolated pure moral philosophy is Kant's antivoluntarism.

I have already pointed out that Kantian autonomy implies that no authority external to humans is required to establish or promulgate the demands of morality. Grotius made the famous assertion that natural law would be binding on humans 'even if God did not exist' (III, 1). Natural lawyers like Pufendorf and Thomasius further weakened the connection between theology and natural law. With the exception of unbelievers like Hume or some radical French *philosophes*, however, most thinkers held that in some way or another God was essential to morality. In conventional terminology (III, 1), Kant is a radical rationalist or intellectualist. As a previously quoted passage indicated, moral philosophy is independent of theology. God's will does not ground morality. In terms of legislation, Kant even compares the human will 'by analogy with the Deity'. Both humans and God are equal legislators in the kingdom of ends.[16] Kant can be compared with Grotius in so far as he distinguishes between God's will and moral philosophy for *methodological* reasons. In both cases, their

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[14] See Kant, 'Groundwork', pp. 46f.; 4: 390f. on Kant's criticism of Wolff and Jean Ferrari, *Les sources françaises de la philosophie de Kant* (Paris: Klincksieck, 1979) for one of those publications which illustrate Kant's less than charitable dealings with some of his predecessors.

[15] Kant, 'Groundwork', p. 64; 4: 410.

[16] Kant, 'Groundwork', pp. 45f.; 4: 389; 'Theory and Practice,' p. 282; 8: 280 note. Cf. the discussion in Schneewind, *Invention*, pp. 509–13 with more quotations.

personal devotion to Christianity should not be doubted. As in Grotius, Kant seems to take with one hand what he has given with the other when he qualifies his antivoluntarism:

> A law that binds us *a priori* and unconditionally by our own reason can also be expressed as proceeding from the will of a supreme lawgiver, that is, one who has only rights and no duties (hence from the divine will); but this signifies only the idea of a moral being whose will is a law for everyone, without his being thought as the author of the law.[17]

This keeps Kant's core thesis intact. God cannot be conceived as 'the author of the law' itself, as this would amount to divine, positive and direct legislation and thus to heteronomy. But hypothetically and from a religious perspective, God may be thought of as the authority obliging 'in accordance with the law', though humans perceive their obligations as self-imposed in the first place. In the words of the first critique, God is a regulative idea of reason, not a constitutive one that grounds moral obligation in the strict sense.

Kant also differs from the natural lawyers with the distinction between rights and virtue. Traditionally, most natural lawyers separated perfect from imperfect rights or duties, arguing that the former were essential for the existence of society, whereas the latter were not. As Pufendorf puts it, imperfect duties go beyond mere rules of coexistence, aiming at 'improved existence.' The distinction shaped reflections on hospitality rights. The duty to engage in commerce turned into an imperfect one. For Wolff and for many others, '[i]t depends on the will of any nation whether it desires to engage in commerce with another nation or not.' (III, 1; IV, 3, and IV, 6). Eighteenth-century thinkers like Smith, Diderot and Vattel followed this tradition (V, 1, 2 and 5). Kant drops the standard of social utility. The distinction between rights and virtue is not based on their greater or smaller usefulness for the existence of society. Rights refer to external freedom of choice, they require the performance or omission of actions which are therefore enforceable. Virtue by contrast calls for the adoption of ends which are morally required. Nobody can be coerced to adopt certain ends: 'only I myself can *make* something an end.' External coercion is thus assigned to juridical duties (*Rechtspflichten*), and free self-constraint to duties of virtue (*Tugendpflichten*).[18] The two duties differ because they are enforced in different

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17 'Das Gesetz, was uns a priori und unbedingt durch unsere eigene Vernunft verbindet, kann auch als aus dem Willen eines höchsten Gesetzgebers, d. i. eines solchen, der lauter Rechte und keine Pflichten hat, (mithin dem göttlichen Willen) hervorgehend ausgedrückt werden, welches aber nur die Idee von einem moralischen Wesen bedeutet, dessen Wille für alle Gesetz ist, ohne Ihn doch als Urheber desselben zu denken', Kant, 'Doctrine of Rights', p. 381; 6: 227. The following quotation ibid.

18 Kant, 'The metaphysics of morals Part II: Metaphysical first principles of the

ways, and imposed by divergent types of laws. Kant keeps the natural lawyer's distinction between perfect and imperfect duties. At times it seems that it is identical with the difference between duties of right and those of virtue. However, for Kant, there are also duties of virtue that are perfect, such as lying. In short, duties of right are always perfect or narrow, whereas duties of virtue or ethical duties may be either perfect or imperfect/wide. As ethical duties, unlike juridical ones, 'prescribe only the maxim of actions, not actions themselves', they sometimes leave 'a playroom [*latitudo*] for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do by the action [*Handlung*] for an end that is also a duty.'[19] In other words, wide ethical duties such as benevolence allow some leeway or *Spielraum* in mediating the moral law or categorical imperative. It is up to personal judgement how far morally obligatory ends are pursued, and how they are balanced out with others. Imperfect duties are not less important than perfect ones. On the contrary, they are the ones that enable humans to acquire merit and the subsequent entitlement to happiness.

Kant's programme of a pure moral philosophy has two additional implications. Kant cannot ground the principle of justice, which limits spheres of external freedom so that they are mutually compatible, teleologically in happiness or the need of self-preservation. Kant's opposition to teleological or consequentialist positions is not new in the history of moral philosophy.[20] What is new, however, is Kant's radical solution of the problem of motivation. It has already been pointed out that several natural lawyers could account for obligation only in terms of hypothetical counsels of prudence, to use Kantian terminology. Obligation was contingent upon the obliged person's readiness to be moved by fear of punishment, for instance. Hume can be interpreted as pushing the problem a bit further. He perceived that even hypothetical imperatives are normative, and that their prescriptivity is just as problematic as

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doctrine of virtue' [1797], in *Practical Philosophy*, pp. 512–14; 6: 379–82. There are useful and more extensive discussions in Rosen, *Theory of Justice*, ch. 3 and Hill, *Practical Reason*, ch. 8.

19 '[W]enn das Gesetz nur die Maxime der Handlungen, nicht die Handlungen selbst gebieten kann, so ists ein Zeichen, daß es der Befolgung (Observanz) einen Spielraum (latitudo) für die freie Willkür überlasse, d. i. nicht bestimmt angeben könne, wie und wie viel durch die Handlung zu dem Zweck, der zugleich Pflicht ist, gewirkt werden solle', Kant, 'Doctrine of Virtue', p. 521; 6: 390. See Rosen, *Theory of Justice*, pp. 101–3 and Schneewind, *Invention*, pp. 525–30 for the following.

20 Schneewind, 'Kant', pp. 54f. and Mulholland, *System of Rights*, p. 386. A contemporary analytical critique of consequentialist positions, especially of forms of utilitarianism, is Julian Nida-Rümelin, *Kritik des Konsequentialismus* (München: Oldenbourg, 1995).

that of categorical ones.[21] Kant tries to answer both Hume's scepticism and the natural lawyers. It amounts to what can be labelled 'radical internalism': the reasons for accepting a principle as morally right, and the reasons for acting on this principle, are identical. In Kantian terminology, the agent is moved by respect or reverence (*Achtung*) for the moral law itself.[22] Kant's point is simple. Once agents have self-legislated their own law, they do not need additional reasons to obey it. The motive for compliance with the moral law is not something outside this law, but its own intrinsic rationality.

Kant's claim that practical reason itself is motivating should be seen as an implicit criticism of Hume's naturalist ethics. Hume famously asserted that 'Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.'[23] Hume is a motivational scepticist: he doubts the capacity of practical reason to motivate action. By contrast, Kant holds that this reason is not impotent, but practical, and 'proves its reality and that of its concepts by what it does'.[24] Previous chapters have shown how natural lawyers since Grotius squarely faced the challenge of skepticism, and tried to respond to it in a convincing manner (for example, III, 1). Matters are not different with Kant. The problem is not so much the content and scope of the moral law or the principle of justice. As we have seen, Kant presents extremely thinned down versions of them. They are defined by formal principles such as consistency and universality. It can be argued that Kant's moral philosophy is the last stage in the natural lawyer's quest for a transcultural standard of thin justice. Kant thus faces above all the problem of motivational scepticism. Kant could argue against Hume that in the above quotation, the transition from 'is' to 'ought' is problematical (see end of V, 3). He could also point out that Hume's notion of justice is self-contradictory, because it wavers between two types of interests: an abstract interest in or sense of justice on the one hand, and a pragmatic self-interest in the strict sense on

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21 Jean Hampton, 'Does Hume Have an Instrumental Conception of Practical Reason?', *Hume Studies*, 21 (1995), pp. 70f.

22 Kant, 'Groundwork', p. 55; 4: 400. The concept of ethical 'internalism' is developed in Christine M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), pp. 316f. See Schneewind, *Invention*, pp. 520–2, 'Autonomy', pp. 325–8 and Rosen, *Theory of Justice*, pp. 61f. on the problem of moral motivation.

23 David Hume, *A Treatise of Human Nature* [1739–40], ed., with an Analytical Index, Sir Lewis Amherst Selby-Bigge, 2nd edn by Peter Harold Nidditch (Oxford: Clarendon Press, 1992), 2.3.3, p. 415. See Hampton, 'Instrumental Reason', passim and James King, 'The Moral Theories of Kant and Hume: Comparisons and Polemics', *Hume Studies*, 18 (1992), pp. 441–59 on a comparison between Hume and Kant. Korsgaard, *Kingdom of Ends*, ch. 11 distinguishes between content and motivational scepticism and discusses the latter.

24 Kant, 'Practical Reason', p. 139; 5: 3.

the other.[25] However, Kant primarily seems to rely on two strategies. First, he attempts to defeat Hume's motivational scepticism with the latter's own epistemological scepticism. Kant pushes Hume's claim that our human understanding has very 'narrow limits' much further. According to the *Critique of Pure Reason*, we have no insight into the intrinsic nature of things, or the noumena. As things in themselves and appearances do not coincide for the human mind, the concepts of the autonomy of practical reason and the freedom of the will can be saved.[26] In short, Kant's radical epistemological scepticism about the limits of knowledge turns into a powerful weapon to fight off motivational scepticism in moral philosophy. This first argument does of course not prove the actuality of practical reason, but only its logical possibility. All our explanations end beyond the realm of experience, 'and nothing is left but *defense*, that is, to repel the objections of those who pretend to have seen deeper into the essence of things and therefore boldly declare that freedom is impossible.'[27] Kant's second strategy goes beyond this first, negative or defensive one. Against Hume, he asserts that our awareness of being categorically obligated by our own legislation contains the awareness of moral freedom, or the capacity to act on the moral law. Ought implies can. Kant calls this moral awareness or practical knowledge 'the fact [*Faktum*] of reason'.[28] He holds that the consciousness of the moral law and the awareness of the freedom to exercise it are undeniable, and constitutive of all rational beings.

There is no room to go much further into these issues, which are open to debate. I want to restrict myself to a few concluding remarks. First, there is little

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25 See Duncan Forbes, *Hume's Philosophical Politics* (Cambridge: Cambridge University Press, 1975), p. 89 and Knud Haakonssen, *The Science of a Legislator. The Natural Jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge University Press, 1981), pp. 35f. and 26 for these and similar criticisms.

26 Immanuel Kant, *Critique of Pure Reason*, transl. and ed. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), p. 375; A 277 (this refers to the original pagination of Kant's work). Recent studies among many of Kant's epistemology and metaphysics are Henry E. Allison, *Idealism and Freedom. Essays on Kant's Theoretical and Practical Philosophy* (Cambridge: Cambridge University Press, 1996), Part I and Rae Langton, *Kantian Humility. Our Ignorance of Things in Themselves* (Oxford: Clarendon Press, 1998). Kant makes use of his epistemology in 'Groundwork', pp. 98f.; 4: 451f. and 'Practical Reason', pp. 180–6; 5: 50–7, an extensive discussion of Hume's criticism of causality. Kant is a sceptic of a peculiar kind; see John Christian Laursen, *The Politics of Skepticism in the Ancients, Montaigne, Hume, and Kant* (Leiden, New York, Köln: Brill, 1992), pp. 193–212 on the sceptical method (distinct from scepticism) which leads to critical philosophy. The previous quotation is from Hume, *Treatise*, p. 657.

27 Kant, 'Groundwork', p. 105; 4: 459.

28 Korsgaard, *Kingdom of Ends*, pp. 330f., Schneewind, 'Autonomy', pp. 330f. and p. 340, and *Invention*, pp. 522–5 mention secondary sources and analyse Kant's position.

doubt that many natural lawyers would have considered Kant's doctrine both blasphemous and foolish. They might have pointed out that God or nature, but certainly not our own will prescribe laws. Like many modern commentators, they might have asserted that Kant failed to ground morality, and wound up with a vicious circle (the moral law grounds freedom and *vice versa*) and dogma (the fact of reason). By contrast, Kantians stick to the claim that morality needs no, and cannot admit of, grounds beyond itself. Philosophically, both positions are open to endless criticism. Historically, there is no doubt that with Kant, the transformation of natural law in the eighteenth century (see V, 1 and 3) has reached a new quality. As Schneewind puts it, 'Kant subverts natural law theory in the course of reworking some of its central tenets.'[29] I consider Kant's restructuring successful and constructive rather than destructive. The key difference with most natural lawyers is Kant's concept of autonomy. Matters are different with the principle of justice. A central theme of this study has been the claim that natural lawyers resorted to a thin concept of justice as impartiality, starting with Vitoria, who can be reinterpreted as granting both European and non-European communities equal spheres of external freedom in principle (II, 4). Although all the natural lawyers and Kant differ in their respective moral theories, they do share a core moral standard. Kant provides the best philosophical explication of this standard. We have also seen that these authors often converge in terms of hospitality rights (IV, 4 and 6). A comparison between Smith and Kant can further illustrate this convergence. No matter what their differences are, they agree that justice has to do with the impartial judgement of a neutral spectator. In the words of Smith, one and the same person can be both agent and judge or spectator. As a spectator, I abstract from my own position or perspective (I, 4) by placing myself in another's situation, 'and by considering how it would appear to me, when seen from that particular point of view'.[30] The impartial spectator is a recurrent theme in Kantian philosophy, as the *Contest of Faculties* testifies, among other writings. More

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29 Schneewind, *Invention*, p. 522. Cf. 'Autonomy', p. 314.

30 Adam Smith, *The Theory of Moral Sentiments* [1759], ed. D. D. Raphael and A. L. Macfie (Oxford: Oxford University Press, 1976), 3.1.6, p. 113. Cf. Kant, 'Groundwork', p. 49; 4: 393. See Haakonssen, *Science*, chs. 4 and 5, and Jerry Z. Muller, *Adam Smith in his Time and ours. Designing the decent Society* (New York: Free Press, 1993), ch. 8 on Smith's theory of justice; Arnold Meyer-Faje and Peter Ulrich (eds), *Der andere Adam Smith. Beiträge zur Neubestimmung von Ökonomie als Politischer Ökonomie* (Bern und Stuttgart: Verlag Paul Haupt, 1991), passim, especially pp. 76–8, 158–70; Knud Haakonssen, *Natural law and moral philosophy. From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), pp. 148–53, and Samuel Fleischacker, 'Values behind the Market: Kant's Response to the *Wealth of Nations*', *History of Political Thought*, 17 (1996), pp. 379–407 on the Smith-Kant connection.

than anyone else, the impartial spectators are in a position to enlarge their own thinking and aim in their judgements at the universality and consistency which is the hallmark of the moral law.[31]

Kant is sometimes considered as having his head in the clouds, and the previous passages on his ideas of a pure moral philosophy and autonomous self-legislation might have reinforced this impression. However, so far the analysis has been restricted to moral philosophy proper. Kant is of course concerned about human beings of flesh and blood and the ways they act in the world. This is when anthropology, political philosophy and the philosophy of history become important. Kant holds that 'common human reason' has the 'compass' of the categorical imperative in hand. At the same time, human will or *Willkür* as the capacity of choice is at the crossroads, torn between moral self-obligation and material incentives.[32] Kant considers that we may be immune to moral motivation. In a passage of the 'Groundwork' which is most certainly influenced by the corresponding section in Smith's *Wealth of Nations*, Kant asserts that the shopkeeper who does not overcharge anyone and serves everybody honestly, even small children, may after all not act morally. In almost dogmatic fashion, Kant writes that 'the action was done neither from duty nor from immediate inclination but merely for purposes of self-interests.'[33] Kant shares with the natural lawyers a similar starting point: it is the tendency among humans to get into conflicts, and the insight that these conflicts are ineradicable. Kant detects a 'desire for honour, power, or property' (*Ehrsucht, Herrschsucht, Habsucht*) in humans. Above all, Kant accepts the later natural lawyers' thesis of a basically ambivalent human propensity called 'unsocial sociability' (see V, 1). We are unsocial and tend to isolate ourselves because we want to manipulate everything in our own favour, resisting the wishes and interests of others but also knowing that we will encounter their own, likewise resistance. On the other hand, the desires for honour, power and

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31 Kant, 'The Contest of Faculties', in Hans Reiss (ed.), *Kant. Political Writings*. 2nd edn (Cambridge: Cambridge University Press, 1991), pp. 182f. Cf. Kant, *The Critique of Judgement*, transl. by James Creed Meredith (Oxford: Clarendon Press, 1980), p. 153; 5: 294f.; reflection no. 6864, *Akademieausgabe*, 19: 184f. and Haakonssen, *Natural law*, p. 150.

32 Kant, 'Groundwork', p. 58; 4: 404; p. 55; 5: 400. The classical essay on the distinction between moral *Wille* and *Willkür* is Lewis White Beck, 'Kant's Two Conceptions of the Will in Their Political Context', in Ronald Beiner and William James Booth (eds), *Kant and Political Philosophy. The Contemporary Legacy* (New Haven and London: Yale University Press 1993), pp. 38–49. See also his *A Commentary on Kant's Critique of Practical Reason* (Chicago: University of Chicago Press 1960), 177ff. Daniel Guevara, 'The Two Standpoints on the Will', *Kantian Review*, 1 (1998), pp. 82–114 highlights some of the tricky philosophical problems involved.

33 Kant, 'Groundwork', p. 53; 4: 397. Smith's influence on Kant is the topic of Fleischacker, 'Kant's Response', passim.

property have an intrinsic social dimension, and can only flourish in civil society. So we are driven towards sharing company with others while at the same time being inclined to isolate ourselves.[34] The mentioned desires constantly threaten to destroy this very society. In addition, Kant endorses Rousseau's moral criticism of commercial society. A nation of self-interested shopkeepers may form a '*pathologically* enforced social union' at best. As citizens, they might be clever enough to submit themselves to coercive laws that restrict equally and impartially their respective spheres of external freedom. But Kant knows with Rousseau (see V, 4) that these law-abiding citizens could be nothing but moral hypocrites who oppose each other 'in their private attitudes' and secretly want to exempt themselves from the laws they obey. In short, commercial society does not form a '*moral* whole'.[35]

This short introduction should suffice to demonstrate that Kant's political philosophy, which mediates the principle of justice with human features and the real world, takes part in the eighteenth-century debate on sociability, commercial society and history. Kant aims at a synthesis which combines the tenets of the analysts and advocates of commercial sociability as well as those of the civic humanist tradition. In other words and put bluntly, Kant's political philosophy combines Hume, Smith and Rousseau. Kant shares Hume's scepticism concerning civic humanist romance about antiquity. He dismisses Rousseau's anachronistic ideal of a *polis*-like direct democracy, and endorses Hume's defence of a representative system. In Kant's dry words, direct democracy is 'necessarily a *despotism*' because the majority handles the public will as if it was a private one.[36] The act of legislation must be separated from the execution of laws, which implies a representative system. The ancient republics did not know it and subsequently degenerated into despotism, a fate modern European states can avoid. Kant thinks historically in these matters, and, similar to Hume and Smith, assumes a 'regular process of improvement

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[34] Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in *Political Writings*, p. 44; 8: 20f.; cf. Kant, *Anthropology from a Pragmatic Point of View*, transl. Victor Lyle Dowdell (Carbondale: Southern Illinois University Press, 1978), p. 175; 7: 268. See the paper by John Christian Laursen, 'Kant and Schlözer on Unsocial Sociability: The Assimilation of "Publicity" into Natural Law', delivered at the International Workshop organized by Hans Erich Bödeker and Istvan Hont, 'Unsocial Sociability and the 18th Century Discourse of Politics and Society', Max Planck Institute for History, Göttingen, West Germany, 26–30 June 1989; Schneewind, 'Kant', pp. 57–60; Allen Wood, 'Unsocial Sociability: The Anthropological Basis of Kantian Ethics', *Philosophical Topics*, 19 (1991), pp. 325–51, and Natalie Brender, *Precarious Positions: Aspects of Kantian Moral Agency*, PhD dissertation, (Baltimore: Johns Hopkins University, 1997).

[35] Kant, 'Idea', p. 45 and 'Toward Perpetual Peace', in *Practical Philosophy*, p. 335; 8: 366.

[36] Kant, 'Perpetual Peace', p. 324; 8: 352.

in the political constitutions' of Europe.[37] Unlike moral progress, this legal progress can be demonstrated by an investigation into constitutional history. Kant also sides with the natural lawyers and Hume against Rousseau when emphasizing legal coercion rather than civic virtue. It has already been pointed out that Rousseau tends to advocate 'violent methods' in order to create virtuous citizens (end of V, 4). Kant dismisses these attempts, arguing that duties of right are distinct from duties of virtue, and that the latter cannot and must never be enforced. Like Hume, Kant holds that continental European monarchies actually have reformed themselves towards a republican government of laws as opposed to the arbitrary rule of the sovereign. Kant's writings contain a clear appreciation of the Prussian monarchy as partially republican and representative in spirit.[38] Kant also does not subscribe to Rousseau's theory that humans curiously transform into moral beings as soon as they enter the civil state. Instead, he endorses the Hobbesian and more plausible thesis that becoming a law-abiding good citizen does not imply turning into a *morally good* human being.[39]

Kant follows Hume and Smith in a teleological interpretation of history where selfish interests have beneficial unintended consequences. Kant asserts that

> Civil freedom can no longer be so easily infringed without disadvantage to all trades and industries, and especially to commerce, in the event of which the state's power in its external relations will also decline. But this freedom is gradually increasing. If the citizen is deterred from seeking his personal welfare in any way he chooses which is consistent with the freedom of others, the vitality of business in general and hence also the strength of the whole are held in check. For this reason, restrictions placed upon personal activities are increasingly relaxed, and general freedom of religion is granted. And thus ... *enlightenment* gradually arises.[40]

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37 Ibid., p. 325; 8: 353; 'Idea', p. 52.

38 The key passage is Kant, 'Perpetual Peace', pp. 324f.; 8: 352f. See my analysis in *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999), ch. 1 for more.

39 Kant, 'Perpetual Peace', p. 335; 8: 366.

40 '[B]ürgerliche Freiheit kann jetzt auch nicht sehr wohl angetastet werden, ohne den Nachtheil davon in allen Gewerben, vornehmlich dem Handel, dadurch aber auch die Abnahme der Kräfte des Staats im äußeren Verhältnisse zu fühlen. Diese Freiheit geht aber allmählig weiter. Wenn man den Bürger hindert, seine Wohlfahrt auf alle ihm selbst belibiege Art, die nur mit der Freiheit anderer zusammen bestehen kann, zu suchen: so hemmt man die Lebhaftigkeit des durchgängigen Betriebes und hiemit wiederum die Kräfte des Ganzen. Daher wird die persönliche Einschränkung in seinem Thun und Lassen immer mehr aufgehoben, die allgemeine Freiheit der Religion nachgegeben; und so entspringt allmählig mit unterlaufendem Wahne und Grillen *Aufklärung*', Kant, 'Idea', pp. 50f.; 8: 27f. See my analysis in *Theory and Practice*, pp. 38–40 and Fleischacker, 'Kant's Response', pp. 385f.

The European system of international anarchy, deplorable as it is, nevertheless has morally desirable consequences. As if there was an invisible hand, it fosters competition among states, which are driven to support economic freedom which enhances state power. This in turn subverts despotism. Foreign policy becomes the incentive and stimulus of domestic reforms. Prussia is of course a case in point. Following their self-interests, the rulers of enlightened absolutism promote the 'internal culture' of their countries to enhance their status as a major power. It is significant that Kant mentions the rise of enlightenment. As his famous essay on the topic shows, Kant considers the overcoming of immaturity or *Unmündigkeit* as something that must be learned and thus has a historical dimension. The process of enlightenment requires some internal dispositions, such as the willingness to overcome one's lethargy and cowardice. These are necessary, but not sufficient conditions. In addition, enlightenment requires a favourable political situation, such as a benevolent ruler who grants some freedom of the pen and a nascent public sphere. It can also be argued that Kant, probably similar to Smith, holds that the free market has an intrinsic moral value in so far as it is a training ground for political and intellectual freedom.[41] Finally, Kant shares the optimism of some of his predecessors that 'the *spirit of commerce* [*Handelsgeist*] ... cannot coexist with war and ... sooner or later takes hold of every nation.'[42] Many eighteenth-century authors held that economic interests conflict with war and that commercial interdependence has overall beneficial effects on international relations. However, a careful analysis of Smith, for instance, shows that his position on trade relations was nuanced. If a state adopted a mistaken mercantilist policy, it had disastrous consequences for its relationship with other states (see V, 2). Unlike Smith, however, Kant does not elaborate his thesis on the commercial spirit. It is open to a number of objections. However, it should be kept in mind that the passage is part and parcel of Kant's philosophy of history, which is in turn a conscious teleological *interpretation* of historical events with a moral purpose in mind. This philosophical history is a matter of moral and religious *faith* and personal conviction rather than objective scientific knowledge.[43]

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41 Kant, 'An Answer to the Question: What is Enlightenment?', in *Practical Philosophy*, pp. 17f.; 8: 35–7; 'What does it mean to orient oneself in thinking?', in *Religion within the Boundaries of Mere Reason and other Writings*, transl. and ed. Allen Wood and George di Giovanni (Cambridge: Cambridge University Press, 1998), p. 12; 8: 144. See Fleischacker, 'Kant's Response', pp. 379 and 401–7 as well as (indispensable, as usual) my own *Theory and Practice*, pp. 22–8.

42 Kant, 'Perpetual Peace', pp. 336; 8: 368.

43 Consider the crucial passage in Kant, 'Theory and Practice', p. 306; 8: 308f. Extensive analyses of Kant's philosophy of history can be found in my *Theory and Practice*, ch. 3; *Pax Kantiana. Systematisch-historische Untersuchung des Entwurfs 'Zum ewigen Frieden' (1795) von Immanuel Kant* (Wien, Köln, Weimar: Böhlau-

So far I have emphasized Kant's closeness to the authors of commercial society. As in Smith, his moral balance-sheet is nuanced, and mixes apologetic and critical elements, exposing the ambivalences, paradoxes and negative side-effects of commercial development (see end of V, 1). Colonial aggression of the English and the Dutch demonstrate for Kant that commercial states can be extremely unjust in their dealings with outsiders. Commercial or civilized nations may be as savage as the so-called barbarians. In an utterly cynical passage, Kant sees little difference 'between the European and the American savages' from a moral perspective: both violate the categorical imperative not to use others as mere means, though in different ways. European 'superiority' consists in a more refined pragmatic calculus. Prisoners of war are not killed, but integrated into one's army to be used for 'more extensive wars'.[44] In other words, Kant puts a big question-mark behind the European belief that progress in culture and civilization implies, amounts to, or leads to *moral* improvement. As pointed out, Kant could find some of this scepticism in Smith. The more important influence is certainly Rousseau, though his impact has probably been exaggerated.

Kant was both an enthusiastic and critical reader of Rousseau's writings. His enthusiasm is documented by Kant's confession that 'Rousseau set me straight.' Kant displays his critical attitude in the reflections which state that after a while, Rousseau's 'beauty of expression' and 'noble sweep of genius' subside, and astonishment at his 'peculiar and nonsensical notions' (*widersinnische Meinungen*) takes root.[45] Rousseau has especially sharpened Kant's awareness of the moral ambiguities of commercial society. As pointed out, Kant distinguishes between cultivation, civilization and moral maturity, and agrees with Rousseau that Europeans can brag about the first two, while 'we are still a long way from the point where we could consider ourselves *morally* mature ... all good enterprises which are not grafted on to a morally good attitude of mind are nothing but illusion and outwardly glittering misery' (*nichts als lauter Schein und schimmerndes Elend*).[46] However, according to Kant's moral teleology, humans have the task to develop all their capacities

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Verlag, 1992), chs. 9 and 10, and Pauline Kleingeld, *Fortschritt und Vernunft: Zur Geschichtsphilosophie Kants* (Würzburg: Königshausen und Neumann, 1995).

44 Kant, 'Perpetual Peace', p. 329; 8: 358; p. 326; 8: 354f.

45 *Akademieausgabe*, 20: 44 and 43. The reflections are translated in *Rousseau's Political Writings*, p. 208. See especially Ernst Cassirer, *The Question of Jean-Jacques Rousseau*, transl. Peter Gay, 2nd edn (New Haven: Yale University Press, 1989) for Rousseau's importance.

46 'Aber uns für schon *moralisiert* zu halten, daran fehlt noch sehr viel ... Alles Gute aber, das nicht auf moralisch-gute Gesinnung gepfropft ist, ist nichts als lauter Schein und schimmerndes Elend', Kant, 'Idea', p. 49; 8: 26.

and talents, including their moral potential. Since Kant accepts Smith's analysis of modern commercial society as accurate, the question arises whether the acquisition of virtuous behaviour in the absence of a moral disposition, that is, of moral legality (*Legalität*, not *Moralität*), might still be morally significant, and foster genuine morality in the long run. Kant tends to answer in the affirmative, and his key argument is that the opposite assumption would be morally unacceptable and disastrous. We cannot afford not to believe in some sort of moral progress, even if it is just the thinned-down version of legal improvement in the spheres of domestic, international and cosmopolitan right. All things considered, however, I interpret Kant as highly ambivalent on the issue. There is certainly a darker side in Kant's thought. Humans are crooked woods, and perfect solutions in human affairs are impossible, even with divine assistance.[47] In spite of his doubts about human goodness and willingness to realize what we ought to do, Kant does not waver in his insistence that our ultimate moral vocation in the realm of politics and law is to establish what he sometimes calls a 'cosmopolitan condition'. The following sections will be devoted to this issue.

2. Kant's global commonwealth

In the previous section, I have argued that two divergent trends coincide in Kant's legal and political philosophy, one revolutionary and the other aiming at a synthesis. The element of synthesis can be found especially in the passages of the 'Doctrine of Right' relating to the law of nations. A lot of what Kant writes there is rather conventional. Kant subscribes to Bynkershoek's distinction between *mare liberum* and *mare clausum* based on cannon range (III, 6), accepts a right to go to war in the state of nature in case of an inflicted injury or the threat of an overwhelming power, defends territorial integrity and prohibits military intervention, and claims – reminiscent of Wolff and Vattel, for instance – that allied forces are entitled to fight what he calls the 'unjust enemy'.[48] Kant,

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47 Kant, 'Idea', p. 46; 8: 23. See my more extensive discussion in *Pax Kantiana*, pp. 287–96. Rosen, *Theory of Justice*, pp. 77–81 offers useful critical remarks on Kant's hope about the moral whole.

48 All of these issues are covered by my study *Theory and Practice*. The implicit reference to Bynkershoek is in 'Doctrine of Right', pp. 416f.; 6: 265 and p. 420; 6: 269f. Relevant literature on what is conveniently labelled Kant's theory of international relations and the law of nations can be found in *Theory and Practice*, pp. 204–9. More recent publications not mentioned there include Sharon Byrd et al. (eds), *200 Jahre Kants 'Metaphysik der Sitten'*, Jahrbuch für Recht und Ethik, vol. 5 (Berlin: Duncker & Humblot, 1998); Charles Covell, *Kant and the Law of Peace. A Study in the Philosophy of International Law and International Relations* (New York: St. Martin's Press, 1998);

however, is commonly perceived as a revolutionary in the field of international relations. This reputation is partly based on his concept of cosmopolitan right (see VI, 4), partly on two more paradigm shifts he advocates in international right. First, it moves from the traditional focus on the right of war (*ius belli*) to the right directed towards peace (*ius pacis*). Second, Kant takes over the concept of state sovereignty from international law, but reinterprets it as popular sovereignty.[49]

Kant's reservations about his predecessors and his own willingness to go beyond previous theories of international law are expressed in the famous passage where he characterizes Grotius, Pufendorf and Vattel as 'sorry comforters' (*leidige Tröster*).[50] Kant's cryptic and passing statement deserves careful attention. Interpretations have so far been rather unconvincing, especially in view of the crucial term *leidig*. It has two meanings in eighteenth-century German. It may either mean *beschwerlich* (troublesome, but also tiring) or *unangenehm* (unpleasant, inconvenient). Thus Kant either wants to tell us that the doctrines of the mentioned natural lawyers are in fact only subtle justifications of more wars, and as such unconvincing. Or he intends to stress that their treatises are inconvenient in so far as they remind ruthless power politicians of the demands of morality, and cause at least occasionally some pangs of remorse. Kant's text actually supports both interpretations. On the one hand, the authors can conveniently be cited 'in *justification* of an offensive war'. On the other hand, the very abuse of the language of rights and duties indicates that there is a 'dormant, moral predisposition' in humans – a sense of

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Otfried Höffe, 'Some Kantian Reflections on a World Republic', *Kantian Review*, 2 (1998), pp. 51–71; Otfried Höffe (ed.), *Immanuel Kant: Metaphysische Anfangsgründe der Rechtslehre* (Berlin: Akademie Verlag, 1998); Dieter Hüning and Burkhard Tuschling (eds), *Recht, Staat und Völkerrecht bei Immanuel Kant. Marburger Tagung zu Kants 'Metaphysischen Anfangsgrunden der Rechtslehre'* (Duncker und Humblot: Berlin, 1998), especially the essays by Olaf Asbach, Otfried Höffe and Hans-Christian Lucas. The current section builds upon my previous work on Kant, highlighting aspects I have not covered there.

49 See *Theory and Practice*, ch. 2 for more.

50 Kant, 'Perpetual Peace', p. 326; 8: 355. Cf. Jacob and Wilhelm Grimm, *Deutsches Wörterbuch. Sechster Band* (Leipzig: Hirzel, 1885), p. 676 on the term *leidig*. Covell, *Kant*, pp. 94–7 provides a mistaken interpretation, because he assumes that Kant abandoned natural law in favour of the empirical will and agreement of states. Knut Ipsen, 'Ius gentium – ius pacis? Zur Antizipation grundlegender Völkerrechtsstrukturen der Friedenssicherung in Kants Traktat "Zum ewigen Frieden" ', in Reinhard Merkel and Roland Wittmann (eds), *'Zum ewigen Frieden'. Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant* (Frankfurt am Main: Suhrkamp, 1996), p. 303 is more reliable. There is also a short reference in Matthias Lutz-Bachmann, 'Kant's Idea of Peace and the Philosophical Conception of a World Republic', in Bohman, *Perpetual Peace*, p. 68. My account builds upon *Theory and Practice*, p. 56.

justice in contemporary terminology (see I, 4 and 'Conclusion') – which cannot be eradicated.[51]

Kant's use of the word 'comforters' is also revealing. Kant disagrees with the natural lawyers' often apologetic description of international anarchy. As we have seen (IV, 2), Kant joins those who are strong supporters of the domestic analogy. By contrast, most natural lawyers including Pufendorf and Vattel took up the Hobbesian contention that the transnational state of nature cannot be compared with and is more tolerable than the natural condition among individuals. This is in agreement with their assessment of war as a kind of lawsuit, as the continuation of legal procedures by different means. The idea of war as a lawsuit can be found from Grotius to Smith.[52] In addition, many natural lawyers assumed that sociability, common interests, or some vision of international or European society would mitigate the structural problems endemic to any anarchical condition: the conflicts over interpretations and the dilemma of law enforcement (see end of III, 6 and IV, 1 and 2). Kant's disagreement with the natural lawyers can be summarized by showing how he translates Ulpian's formula *suum cuique tribue*. It turns into the juridical duty (*Rechtspflicht*) to leave the state of nature and enter a civil condition 'in which what belongs to each can be secured to him against everyone else'.[53] Kant's main criticism is that authors like Pufendorf and Vattel do not postulate this duty, although they could have perceived that states are indeed 'like lawless savages' in a condition of war (though not necessarily of actual warfare). Whereas Kant reluctantly grants a provisional entitlement to go to war in a condition that must be overcome, Vattel, for instance, sees war as an acceptable and inevitable part of a condition which cannot or need not be disposed of. For Vattel, even aggressive wars can be legitimate and just, because he believes in just causes, for example, 'if something evidently just is at stake, such as the recovery of ... property'.[54] Kant's revolutionary idea is to design an international legal system that outlaws war. This is one of the paradigm shifts in Kant's doctrine of the right of nations. For Kant, war cannot be compared with a lawsuit, because the latter assumes a juridical condition with external legislation, a procedure of impartial jurisdiction, and a common coercive power – all of which is absent in a condition where interstate war takes place. Therefore Kant declares that strictly speaking, there cannot be a just war, as justice is incompatible with the

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51 Kant, 'Perpetual Peace,' pp. 326f.; 8: 355.

52 See III, 3 and Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford: Clarendon Press, 1978), (B) 340, p. 545.

53 Kant, 'Doctrine of Right', p. 393; 6: 237.

54 Vattel, *Law of Nations*, book III, ch. III, § 37 (from now on: 3.3.37), p. 246, contrasted with Kant, 'Doctrine of Right', p. 482; 6: 344.

unilateral use of force, lawless external freedom, and being judge in one's own cause.[55]

It is significant that Kant does not subsume Wolff under the 'sorry comforters', because Wolff's insistence on the postulate of a *civitas maxima* could be interpreted as the call for some global commonwealth going beyond conventional balance-of-power doctrines (IV, 5). Kant's rejection of many natural lawyers in terms of the exeundum principle is paralleled by his enthusiasm for idealists such as Saint-Pierre and Rousseau. Kant could find in these writers what is missing in the thick volumes of Pufendorf, for instance: a devastating description of international anarchy, a refusal to downplay its horror, and an insistence on a federation with coercive powers which establishes the juridical condition required to overcome the continuous threat of warfare (see V, 4). Kant, however, rejects Rousseau's geographically limited federation. Rousseau follows Saint-Pierre in designing an exclusive alliance for European states. As a writer in the civic humanist tradition, he is of course worried that the martial spirit might decline if Europe was actually transformed into a zone of peace. However, there was always the possibility to fight the Turks, the African Corsairs, or the Tartars at Europe's borders: 'The armies of the federation will, in this way, be the school of Europe. Men will go to the frontiers to learn war, while in the heart of Europe there will reign the blessings of peace. The advantages of war and peace will be combined.'[56] From Kant's predominantly moral and legalistic perspective, there is little room to ponder possible 'advantages of war'. Kant's ultimate aim is to establish a juridical condition on a global scale. In this respect, he is close to Crucé, who was widely unknown in the eighteenth century and most certainly also to Kant. Crucé ridiculed writers who preached a holy war against the Turks. He proposed a federation that consciously included non-Europeans.[57]

So far I have argued that Kant's assessment of Grotius, Pufendorf and

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55 Kant, 'Perpetual Peace', p. 328; 8: 356. Cf. my book *Theory and Practice*, pp. 53–7.

56 '[L]es armées de la confédération seront à cet égard l'école de l'Europe; on ira sur la frontiere apprendre la guerre; dans le sein de l'Europe, on jouira de la Paix; et l'on réunira par ce moyen les avantages de l'une et de l'autre', Jean-Jacques Rousseau, 'Saint-Pierre's Project for Peace' [1756], in Stanley Hoffmann and David P. Fidler (eds), *Rousseau on International Relations* (Oxford: Clarendon Press, 1991), p. 84; *Oeuvres complètes, vol. III: Du contrat social, écrits politiques* (Paris: Éditions Gallimard, 1964), p. 586. A similar eurocentric bias can be found in Saint-Pierre; see Tomaz Mastnak, 'Abbé de Saint-Pierre: European Union and the Turk', *History of Political Thought*, 19 (1998), pp. 570–98.

57 Eméric Crucé, *The New Cineas* [1623], transl. and intro. C. Frederick Farrell and Edith R. Farrell (New York, London: Garland Publishing, 1972), pp. 44–6 and 56; Cavallar, *Theory and Practice*, pp. 48–50 and *Pax Kantiana*, pp. 199–201 for more.

Vattel is basically correct, because they did offer only the sorry comfort that international anarchy is 'not that bad' and nothing to worry about. However, this evaluation tends to become somewhat unfair, because it blurs the differences among these writers, who can be defended with some arguments. In favour of Grotius, it can be pointed out that he wrote before Hobbes and thus did not have the conceptual tools to distinguish between a state of nature and a civil condition. Moreover, we could argue that Grotius's world-view was still at least partly medieval, and consequently relied on factors such as divine punishment subsequently eliminated by relatively more secular authors. In other words, the problem of international anarchy did not pose itself for Grotius in full vigour, simply because he neither had a modern notion of 'international' nor of 'anarchy'. Finally, we should grant in all fairness that Grotius did perceive the relations among European communities or states as dangerous and precarious, and their continuous wars as horrible. In defence of Pufendorf, we can point out that he advocated a system of states (end of IV, 3) which would have partially overcome the Hobbesian state of nature, analogous to Kant's own proposal. Kant's assessment is probably most accurate in the case of Vattel. Certainly not surprisingly so, because he seems to have been the only author of the three Kant actually read. As argued above (V, 5), Vattel's positivistic tendencies push him too close to political realities.[58] His attempt to keep morality or the inner voice of conscience and natural law separated from and largely out of international law invites his condemnation as a mere apologist of power politics and pragmatism.

A final argument in favour of all three authors is historical. The conceptual framework of many European authors especially in the eighteenth century was often limited, and shaped by the binary opposition of the idea of a universal monarchy on the one hand and the balance-of-power doctrine on the other. There was widespread consensus that a universal monarchy or the hegemony by one power was a bad thing, because it threatened or destroyed state independence. The fight against the *monarchia universalis* took place both in the realm of ideas and in politics. It is no coincidence that a string of authors including Grotius and Pufendorf rejected Dante in this respect (see I, 5; III, 3, and IV, 3). In terms of European politics, the universal monarchy was perceived by many, especially by Protestants, as a real threat during the reigns of Charles V, Ferdinand II and Louis XIV. A balance-of-power system was then seen as the logical, desirable and only feasible alternative. In short, there was an absence of practical alternatives to the balance-of-power doctrine. Things changed after 1763, when balance-of-power practices led to a security crisis on the continent,

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[58] This is the explanation offered by Andrew Hurrell, 'Vattel: Pluralism and its Limits', in Ian Clark and Iver B. Neumann (eds), *Classical Theories of International Relations* (Houndmills et al.: Macmillan Press 1996), pp. 249 and 251.

a crisis that was systemic and structural rather than contingent. Balance-of-power politics exacerbated the very problems they were supposed to solve. Most importantly, deficiencies of the system were perceived by politicians and writers alike, in stark contrast to the analyses of, say, Wolff, Hume, or Vattel in the middle of the century. Count Ludwig Cobenzl, Austrian ambassador at Petersburg, was one of those politicians who became increasingly pessimistic about the dilemmas of a major power in a hostile environment. In a *Denkschrift* of August 1787, when a new Russo-Turkish war loomed on the horizon, he wrote: 'But, one will say to me, always more war, always more conquests! This language breathes the politics of the last 34 years. ... No doubt we could be content with what we have, if all the other powers were willing to do likewise.'[59] In 1793, Kant made fun of the European balance-of-power system, comparing it with the precarious fragility of Swift's house which collapsed 'as soon as a sparrow alighted upon it.'[60] For Kant, the balance of power is no proper long-term solution to international anarchy, as it tends to perpetuate rather than overcome this predicament. It is thus at best a short-term remedy.

Kant's passage on the 'sorry comforters' must thus be qualified, and in support of Kant we can point out that he also calls them 'important men'. Kant's key argument certainly makes sense: convenants and laws without the sword of 'a common external constraint' are but words.[61] Above, I have described Saint-Pierre and Rousseau as idealists. It is crucial to distinguish between utopianism and anticipatory idealism.[62] Utopianism is generally assumed to be a theory which cannot be put into practice as it is located in a 'nowhere'. The principles of natural justice, by contrast, are meant to be realized. Kant's

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59 Cf. Paul W. Schroeder, *The Transformation of European Politics 1763–1848* (Oxford: Clarendon Press, 1994), pp. 46–52, with Cobenzl's text ibid., p. 48. Franz Bosbach, *Monarchia Universalis. Ein politischer Leitbegriff der frühen Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1988) portrays the career of the universal monarchy as a key concept of European foreign policy from 1500 to 1800.

60 Kant, 'On the Common Saying', p. 309; 8: 312. See *Theory and Practice*, pp. 107, 125 and 152. Kant's arguments against the universal monarchy can be compared with those of Hume and other eighteenth-century authors (cf. V, 2) and are analysed in ibid., pp. 116f.

61 Kant, 'Perpetual Peace', p. 326; 8: 355.

62 On the distinctions between utopian, idealistic, architectonic, normative and anticipatory thinking see Nicholas Greenwood Onuf, *The republican legacy in international thought* (Cambridge: Cambridge University Press, 1998), ch. 4; Onuf, *Theory and Practice*, 'Conclusion'; end of III, 2; Roland Wittmann, 'Kants Friedensentwurf – Antizipation oder Utopie?', in Merkel and Wittmann, *Zum ewigen Frieden*, pp. 150–2, and Lucian Hölscher, 'Utopie', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1990), vol. 6, pp. 733–88, especially pp. 775–7 and 768f.

republican principles (see VI, 1), for instance, are not an 'empty figment of the imagination' (*Hirngespinnst*), but normative standards of evaluation which can be partly actualized. However, that they will one day be completely put into practice is but a 'pleasant dream'.[63] In short, Kant steers a middle course between political realism and utopianism. Kant is closer to the realist tradition than is usually assumed. Like Rousseau (V, 4), he can be characterized as a reluctant political realist, because he perceives international anarchy and war as moral problems which *should* be solved.

So far I have implied that the logic of Kant's structural reading of the Hobbesian state of nature propels him to favour a coercive world republic over a federation of states. Kant in fact wavers in his writings between the two. According to my own evolutionary (and favourable) interpretation, Kant sees the non-coercive federation as the beginning or first step of a gradual development towards a world republic, which alone can guarantee a complete juridical condition and thus world peace.[64] Like individuals, states have a legal duty (*Rechtspflicht*) to leave the state of nature and enter a civil condition. This duty is contained in the proposition that persons are entitled to the use of their external freedom of choice. If – and this is Kant's minimalist empirical assumption – moral persons such as individuals or states cannot avoid getting into physical contact with each other, simply because the world is limited in space, then a civil condition must be instituted that secures their spheres of external freedom and mutual rights. Only a world republic can guarantee this full juridical condition. A key passage drives the point home:

> ... However well disposed and law-abiding human beings might be, it still lies *a priori* in the rational idea of ... a condition ... that is not rightful ... that before a public lawful condition is established individual human beings, peoples and states

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63 'Contest of Faculties',Reiss p. 187; 7: 91; ibid., p. 188 note; 7: 92. See *Theory and Practice*, p. 152 on convergences between Kant and political realism.

64 Recent publications on the topic are my own *Theory and Practice*, ch. 8; Otfried Höffe, 'Eine Weltrepublik als Minimalstaat. Zur Theorie internationaler politischer Gerechtigkeit', in Merkel and Wittmann, *Zum ewigen Frieden*, pp. 154–71; same, 'Kantian Reflections'; Pierre Laberge, 'Kant on Justice and the Law of Nations', in David R. Mapel and Terry Nardin (eds), *International Society. Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998), pp. 82–102; Lutz-Bachmann, 'Kant's Idea of Peace'; Francis Cheneval, 'Das Problem der supranationalen Zwangsgewalt am Beispiel Kants', *Archiv für Rechts- und Sozialphilosophie*, 83 (1997), pp. 175–92. See Wolfgang Kersting, *Die politische Philosophie des Gesellschaftsvertrags. Von Hobbes bis zur Gegenwart* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1994), pp. 212–16 on the global dimension of Kant's social contract. Karlfriedrich Herb and Bernd Ludwig, 'Naturzustand, Eigentum und Staat – Immanuel Kants Relativierung des "Ideal des Hobbes"', *Kant-Studien*, 83 (1993), pp. 283–316 offer a fine analysis of the state-of-nature concept.

> can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this. So, unless it wants to renounce any concepts of right, the first thing it must resolve upon is the principle that it must leave the state of nature, in which each follows its own judgement, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into ... a civil condition.[65]

The quotation underlines that for Kant, the problem is not one of anthropology in the first place (whether humans are 'well disposed and law-abiding' or not), but structural (see IV, 1). The federation of states is only the '*negative* surrogate' of a world republic, the first step in the right direction, but certainly not the last one.

Why does Kant propose a surrogate?[66] In the first place, because Kant sides with political realists and the 'moral politician' who take pragmatic considerations into account. It would be 'contrary to all political prudence' to establish a world state at once if the nations reject this notion according to their present understanding of the law of nations.[67] Kant apparently refers here to what we have nowadays historicized as the classical law of nations, epitomized by Vattel's doctrine. Kant does not accept this rejection as unalterable fate, but he takes it into account. After all, people may gradually realize, especially after wars, that a federation with a stronger central authority is necessary. As entities that have partially realized the principle of justice, states have outgrown external compulsion (see IV, 2). Still, one day they might find it convenient to submit *voluntarily* to a world government. Many objections have been raised against the desirability or feasibility of a world state. The objections are serious, but ultimately inconclusive. The world state would have to be republican in the Kantian sense (see VI, 1) with very limited central authority curtailing above all

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65 '[Menschen] mögen auch so gutartig und rechtliebend gedacht werden, wie man will, so liegt es doch a priori in der Vernunftidee eines solchen (nicht-rechtlichen) Zustandes, daß, bevor ein öffentlich gesetzlicher Zustand errichtet worden, vereinzelte Menschen, Völker und Staaten niemals vor Gewaltthätigkeit gegen einander sicher sein können, und zwar aus jedes seinem eigenen Recht zu thun, was ihm *recht und gut dünkt*, und hierin von der Meinung des anderen nicht abzuhängen; mithin das Erste, was ihm zu beschließen obliegt, wenn er nicht allen Rechtsbegriffen entsagen will, der Grundsatz sei: man müsse aus dem Naturzustande, in welchem jeder seinem eigenen Kopfe folgt, herausgehen und sich mit allen anderen (mit denen in Wechselwirkung zu gerathen er nicht vermeiden kann) dahin vereinigen, sich einem öffentlich gesetzlichen äußeren Zwange zu unterwerfen, also ... er solle vor allen Dingen in einen bürgerlichen Zustand treten', Kant, 'Doctrine of Right', p. 456; 6: 312. Cf. the parallel passage in 'Perpetual Peace', p. 328; 8: 357.

66 Kant, 'Perpetual Peace', p. 328; 8: 357. A comprehensive answer to this question can be found in Laberge, 'Kant on Justice', pp. 92f.

67 Kant, 'Perpetual Peace', p. 340; 8: 372; p. 328; 8: 357.

external state sovereignty, or what Kant calls their 'lawless' freedom. The task is to find a viable middle path between the despotism of a world state (also feared by Kant) and the impotence of a loose federation. States would remain the key actors, with their integrity and self-determination guaranteed, and would not be reduced to mere derivative and provisional entities.[68]

Previous sections (I, 5 and V, 4) have distinguished among various forms of cosmopolitanism, such as thick or cultural, moral, economic, or institutional types. Kant does not write much about the economic or commercial version. He seems to hold that modern history moves towards a global economy, where the South American gold and silver mines, for instance, are inextricably linked with European manufacture of goods. Both productive industries stimulate each other, causing a mutually reinforcing process: 'In this way industry [*Fleiss*] always keeps pace with industry.'[69] We have already seen that the effects of commercial interdependence were assessed in different ways during the eighteenth century (V, 2 and 4). On the one extreme, Rousseau asserted that interdependence breeds wars. On the other end of the spectrum, it was claimed to have the opposite effect. Smith offered the compromise that interdependence *may* create wars, depending on the economic theory embraced: if free-trade policies rather than balance-of-trade mercantilism are adopted, peaceful interaction is more likely. Kant accepts Smith's contention that transnational interactions have become progressively more global in the modern age, with important moral repercussions: 'Since the ... community of the nations of the earth has now gone so far that a violation of right on *one* place of the earth is felt in *all* ... .'[70] This sounds like the wishful thinking of a moral philosopher. A cynic might point out that violations of right may be registered in other parts of the world, but not necessarily everywhere, that they might not always be felt, and that this feeling (of moral outrage, for instance), if existent at all, may make no difference anyway. Kant's point seems to be that more intense interaction on a global scale propels people to look for solutions to the moral problems connected with this increased interaction. In other words, Kant is looking for forces that might promote his cosmopolitan ideal of a world community. The

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68 For a full analysis of the features of a world republic, see the publications of Otfried Höffe, the most recent ones being 'Für und Wider eine Weltrepublik', in Christine Chwaszcza and Wolfgang Kersting (eds), *Politische Philosophie der Internationalen Beziehungen* (Frankfurt am Main: Suhrkamp, 1998), pp. 204–22, 'Kantian Reflections', passim, and *Demokratie im Zeitalter der Globalisierung* (München: Beck, 1999). A fine analysis is also included in Christoph Horn, 'Philosophische Argumente für einen Weltstaat', *Allgemeine Zeitschrift für Philosophie*, 21 (1996), pp. 229–51.

69 Kant, 'Doctrine of Right', p. 435; 6: 288. See Sigrid Thielking, *Weltbürgertum. Kosmopolitische Ideen in Literatur und politischer Publizistik seit dem 18. Jahrhundert* (München: W. Fink, 2000) on eighteenth-century cosmopolitanism.

70 Kant, 'Perpetual Peace', p. 330; 8: 360.

key factor he mentions in this respect is the spirit of commerce (*Handelsgeist*), supposedly incompatible with war, 'which sooner or later takes hold of every nation'.[71] The last remark is another endorsement of Smith's analysis. All communities move naturally through various stages, until they become commercial societies. This historical development has a moral potential, or at least Kant hopes that it does. Commercialization leads to increased interaction, which in turn urges peoples to look for institutional solutions to transborder problems – a federation, ultimately a world republic – which again might transform a mere aggregate into a moral whole (end of VI, 1), not only domestically, but also internationally.

Eighteenth-century writers distinguished commercial society from the civic humanist tradition, but also from the ideal of a Christian society based on mutual benevolence (V, 1). Kant's clear-cut distinction between legal and moral spheres, one focusing on mutual restrictions of domains of external freedom, the other on the free adoption of ends (VI, 1), enables him to supplement the advocacy of legal with moral cosmopolitanism. Kant expresses this in the idea of a 'kingdom of ends' or 'kingdom of God', where humans unite freely into and organize a commonwealth, rational beings are respected as ends in themselves, and a moral whole of all ends is achieved. This ethical commonwealth is founded by God, the author of its constitution (but not the organizer), who also guarantees the harmony of nature and morality. In history, this kingdom takes the visible form of a church.[72] Unlike Rousseau and more secularized authors, Kant does not merge legal and moral spheres in the idea of a perfect republic. Thus Kant's global commonwealth has three dimensions: one commercial, one juridical or legal, and one moral. The juridical commonwealth builds upon the commercial one, in so far as the latter provides the stimulus or incentive. The moral commonwealth requires and presupposes the juridical one, in so far as Kant hopes (and it is exactly this, a moral and religious hope) that 'the good moral education [*Bildung*] of a people is to be expected from a good state constitution' and peaceful international relations and not the other way round.[73]

How cosmopolitan is Kant? I have already pointed out that Kant's federation and world republic is designed to be truly global, not regional. This suggests that Kant is not eurocentric, in contrast to Hume, for instance. There is also

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71 Ibid., p. 335f.; 8: 368.

72 Kant, 'Groundwork', p. 83; 4: 433; 'Practical Reason', p. 243; 5: 128; *Religion within the Boundaries of Mere Reason and other Writings*, transl. and ed. Allen Wood and George di Giovanni (Cambridge: Cambridge University Press, 1998), p. 151f.; 6: 151–3. See my 'Kants Religionsphilosophie im Spiegel neuerer Arbeiten', *Zeitschrift für philosophische Forschung*, 52 (1998), pp. 460–70 for references to relevant studies on Kant's philosophy of religion.

73 Kant, 'Perpetual Peace', p. 336; 8: 366.

plenty of evidence that Kant rejects nascent German nationalism in the wake of the French Revolution, and endorses what he calls cosmopolitan enthusiasm.[74] However, Kant rejects thick or cultural cosmopolitanism. In addition, he seems to endorse Rousseau's bottom-up procedure: civic patriotism prepares for the evolution of a genuine 'love of humanity'. This is an educational process. The general will is nurtured 'from the inside out' (see V, 4). The major challenge of Kant's cosmopolitan attitude is the accusation that he endorses a racist theory. There are several ugly Kantian passages on non-Europeans. I offer only a brief selection: 'The race of the American cannot be educated. ... They hardly speak, do not caress each other, care about nothing and are lazy.' By contrast, Africans can be educated 'but only as servants (slaves), that is they allow themselves to be trained.' As inhabitants of hot zones, they are unexceptionally lazy. Kant buys the eighteenth-century cliché of Asian immutability and stagnation (see next section): 'The Hindus always stay the way they are, they can never advance.' Kant sees little difference among various Asian peoples; stagnation holds true for the Chinese, Turks, Hindus and Persians alike. The white race is superior to all others, because it 'possesses all motivating forces [*Triebfedern*] and talents in itself'.[75]

These racist statements do not fit well together with Kant's defence of the rights of the Khoikhoin or Hottentots and the Evenki or Tungusi against European intrusions.[76] The Khoikhoin are a people of southern Africa, the Evenki indigenous to the tundra belts of Siberia. Both thus belong to the African and Asian races Kant qualifies as inferior to the Europeans. Second, Kant's racist statements do not well go together with his explicit rejection of the agricultural argument. We have seen that authors like Locke and Vattel held

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74 See my *Theory and Practice*, pp. 140–4 for a full analysis. Kevin Paul Geiman, 'Enlightened Cosmopolitanism: The Political Perspective of the Kantian "Sublime"', in James Schmidt (ed.), *What Is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Questions* (Berkeley, Los Angeles, London: University of California Press, 1996), pp. 517–32 argues that the analysis of the sublime can serve to orient (but not direct) cosmopolitan action. The contention that modern nationalism dates back to the French revolution must be qualified, of course. See for instance Winfried Schulze, 'Die Entstehung des nationalen Vorurteils. Zur Kultur der Wahrnehmung fremder Nationen in der europäischen Frühen Neuzeit', in Wolfgang Schmale and Reinhard Stauber (eds), *Menschen und Grenzen in der Frühen Neuzeit* (Berlin: Berlin Verlag, 1998), pp. 23–49.

75 *Kants philosophische Anthropologie: Nach handschriftlichen Vorlesungen*, ed. Friedrich Christian Starke (Leipzig, 1831), pp. 352f., translated in Emmanuel Chukwudi Eze, 'The Color of Reason: The Idea of "Race" in Kant's Anthropology', in Katherine M. Faull (ed.), *Anthropology and the German Enlightenment: Perspectives on Humanity* (London and Toronto: Associated University Presses, 1995), pp. 200–41, here pp. 215f. Ibid., p. 201 lists more relevant publications on Kant's racism.

76 Kant, 'Doctrine of Right', p. 417; 6: 266; p. 490; 6: 353.

that the farming Europeans were culturally superior to nomads and hunters, and were entitled to deprive them of their lands (V, 2 and 5). Like Vitoria and other subsequent natural lawyers, Kant assumes that both non-Europeans and non-Christians can have true ownership, and that property rights are not dependent on labour: 'When first acquisition is in question, developing land is nothing more than an external sign of taking possession, for which many other signs that cost less effort can be substituted.'[77] The external 'signs' employed by the American Indians or the Hottentots are thus fully legitimate, and must be respected by the Europeans. Finally, Kant rejects the teleological argument that civilized nations have a right or duty to civilize the barbarians.[78] Right does not have a teleological structure. It focuses on mutual spheres of external freedom, and Europeans simply violate these spheres when they advocate the use of force in the name of civilizational progress.

How can Kant's inconsistencies be explained? A cheap way out of the dilemma is to deny that there are inconsistencies. We then prefer to ignore or downplay either Kant's racist statements or his cosmopolitan streak. This is hardly convincing. More promising is the thesis that the conflicting passages belong to two different periods, supplemented by the contention that the earlier lectures are of lesser quality than the published writings later on. Kant scholars conveniently distinguish between a pre-critical and a critical period. Only critical works such as the 'Doctrine of Right' would thus deserve full attention, whereas the lectures could be neglected. This also seems to hold true for Kant's *Anthropology* (1798), which seems to be largely based on previous materials from lectures. In addition, it is significant that the incriminating passages about the non-Europeans are missing in this publication. We get some entertaining, but hardly convincing remarks about the Europeans and their 'national spirit', but next to nothing on the 'character of races'.[79] A second useful strategy is to point at Kant's radical split between ethics and anthropology. Kant would then hold that even racially or culturally inferior nations enjoy natural rights. He would thereupon join the illustrious bunch of white Western males who were on the right track in terms of legal or moral theories, but failed to apply them properly to 'the Other' – such as women or indigenous populations. The third and final strategy would take this line of reasoning a bit further and argue *ad hominem*: there is a split between Kantian theory, emphasizing formal universal principles, individual dignity and moral egalitarianism going beyond ethnocentric prejudices on the one hand, and Kant's personality on the other, falling short of all of the above.

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77 Ibid., p. 417; 6: 265.
78 Ibid., p. 417f.; 6: 266 and p. 490; 6: 353.
79 Kant, *Anthropology*, pp. 236f.; 7: 320f.

3. Political and cultural contexts: European perspectives on Chinese and Japanese isolationism

An Oriental government never had more than three departments: finance (plunder at home), war (plunder at home and abroad), and public works. (Friedrich Engels)

It has already been pointed out (beginning of III, 4) that in Asia, European states and trade companies had to adapt themselves to existing regional political structures which were often much older than their own. Privileges and concessions to foreign merchants on the west coast of India, for instance, went back to the eight century. No matter what their intentions may have been, Europeans often had to resort to negotiations and treaties, which were based on revocability and equality until the middle of the eighteenth century. Then treaties tended to become unequal in favour of the Europeans. An example is the treaty of 1765 concluded between the English Company and the rulers of Bengal.[80] In the sixteenth and seventeenth centuries, natural lawyers like Grotius did not object to commercial treaties with non-Christians, but rejected treaties of war directed against another Christian community. Actual practice was often more permissive. In 1535, the two major enemies of Charles V, the Ottomans and the French, concluded a pact. It was widely criticized, but started a period of treaty making. Both the Islamic and the Christian sides proved sufficiently flexible. In spite of the standard Muslim view of a world divided into the land of the unbelievers (*dar al-harb*) and the land of the believers (*dar al-Islam*) and the obligation to fight the unbelievers, the Turks were willing to use the writings of Grotius in their favour during the negotiations at Niemirow in 1737.[81]

A similar tendency can be found in Chinese culture. We have seen that many natural lawyers, from Gentili to Vattel, defended the right of non-European

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80 See Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967), passim. More of his publications are listed in Wilhelm G. Grewe, 'Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des "europazentrischen" Bildes der Völkerrechtsgeschichte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 42 (1982), pp. 450f., who criticizes some of Alexandrowicz's theses. However, not all of this criticism is conclusive; see the ending of my 'Introduction'. See also Adam Knobler, *Missions, Mythologies and the Search for non-European Allies in anti-Islamic Holy War, 1291–1540* (PhD dissertation, Cambridge University, 1989), a history of European attempts to create peaceful relations with Asian peoples.

81 Alexandrowicz, *Introduction*, p. 237; James Piscatori, 'Islam in the International Order', in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), pp. 309–21; Adam Watson, *The Evolution of International Society. A comparative historical analysis* (London, New York: Routledge, 1992), pp. 112–19.

communities to refrain from interaction and trade. It is thus not surprising that Vattel's respective passages were among the earliest European writings to be translated into Chinese. In 1839, Imperial Commissioner Lin Tse-hsü followed exactly the course of action suggested by Vattel's treatise.[82] This is interesting for two reasons. First, it illustrates that legal principles cut both ways. It has already been pointed out that the claim that European law of nations was exclusively designed to support European claims overseas rests on shaky assumptions (V, 3). Even if this should have been the writers' intention, their works sometimes had what could be called universalist potential. Incidentally, the British did not deny Chinese sovereign authority to decide upon foreign trade policy at the beginning of the Opium War (1839–42). They claimed that the alleged mistreatment of British nationals constituted a legitimate right to go to war.

Second, mentioned Turkish and Chinese practices illustrate the capacity of divergent cultures to assimilate foreign ideas in spite of cultural, ideological, or religious barriers, even if only for pragmatic reasons. Anthropologists and historians point at the widespread 'us-them' distinctions in most cultures all over the globe. Several authors such as Wang Fuzh in the seventeenth century expressed their belief in the superiority of Chinese civilization, and held that barbarians should stick to their own barbarian ways of life.[83] Traditionally the conception of international relations in Chinese thought was hierarchical, and up to the 1840s Europeans had to accept a subordinate status as tributaries. Within the Chinese tribute system, trade was restricted to the ritualistic exchange of 'tribute' from the 'southern barbarians' (the Europeans) and 'gifts' from the Chinese emperor as the Son of Heaven, destined to rule over the whole world, both 'civilized' (Chinese) and not yet 'civilized'. Theoretical concepts themselves are difficult to assess. The Confucian notion of *tien-hsia*, literally, 'all under Heaven', can be narrowly interpreted. Then it refers to the kingdom of the Son of Heaven, that is, the king of China. According to the broader interpretation, *tien-hsia* encompasses the entire world. At any rate, the Confucian view of world order resembles standard features of European thinking on the law of nations: unauthorized use of force is condemned, but

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82 Immanuel C. Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase 1858–1880* (Cambridge: Harvard University Press, 1960), pp. 123–5; Stephen C. Neff, *Friends but No Allies: Economic Liberalism and the Law of Nations* (New York: Columbia University Press, 1990), p. 53.

83 Wolfgang Ommerborn and Peter Weber/Schäfer, 'Die politischen Ideen des traditionellen China', in Iring Fetscher and Herfried Münkler (eds), *Pipers Handbuch der Politischen Ideen*, vol. 1 (München, Zürich: Piper, 1988), pp. 41–84; Hans Heinz Holz, *China im Kulturvergleich: ein Beitrag zur philosophischen Komparatistik* (Köln: Dinter, 1994); Peter M. Kuhfus (ed.), *China. Dimensionen der Geschichte* (Tübingen: Attempto, 1990).

self-defence, humanitarian intervention and punitive expeditions are regarded as permissible. The treaty of Nertschinsk between Russia and China in 1689 was a synthesis of the legal traditions of the two countries, and showed that some sort of common denominator and way of understanding could be found between divergent cultures. The signed treaty implied that the Chinese emperor accepted the Russian tsar as a sovereign equal.[84] In short, Confucian views were different, but not necessarily incompatible with European ones. In the end, what mattered was not the theory of the law of nations or divergent concepts of civilization or world views, but superior European firepower, demonstrated in the battle of Chuenpi in November 1839. China's economy was self-sufficient, and the Ghing government consequently perceived trade with the Europeans as unnecessary.[85] When Commissioner Lin Tse-hsü took rigid measures to protect the health of China's population and destroyed British chests of opium, he could have found support for that policy in the doctrines of several European natural lawyers. His scant knowledge of Vattel, based on deficient translations, apparently convinced him that his course of action was in agreement with normative standards of the European law of nations. Alas, as in the case of the Native Americans, it was a matter of military power rather than the power of legal arguments. Might prevailed over right.

Unlike China, Japan opted for a policy of seclusion primarily because of domestic political reasons. The Bakufu, the central administration in Japan headed by a Shogun, was interested in preventing the feudal lords or Daimyos from forming alliances with foreign powers and increasing their wealth and might by transnational trade.[86] Japan under the House of Tokugawa expelled the

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[84] Frederick Tse-Shyang Chen, 'The Confucian View of World Order', in Mark W. Janis (ed.), *The Influence of Religion on the Development of International Law* (Dordrecht, Netherlands, Boston, London: Martinus Nijhoff Publishers, 1991), pp. 32f., pp. 37–42; Nagendra Singh, 'History of the Law of Nations, Regional Developments: South and South-East Asia', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam et al.: Elsevier, 1995), vol. 2, pp. 824–39. The definitive study on the treaty of Nertschinsk is now Henning Scheu, *Das Völkerrecht in den Beziehungen Chinas zu den europäischen Seemächten und zu Rußland* (dissertation, Frankfurt am Main, 1971). See also Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (München: Beck, 1994), p. 208.

[85] Gerrit W. Gong, 'China's Entry into International Society', in Bull and Watson (eds), *Expansion of International Society*, pp. 171–83; Hsü, *China's Entrance*, chs. 7–9; Bernhard Hellig, *Chinas Außenpolitik am Vorabend des 'Opiumkrieges' (1839–1842)* (dissertation, Tübingen, 1987), and Heinz Duchhardt, *Balance of Power und Pentarchie. Internationale Beziehungen 1700–1785* (Paderborn et al.: Schöningh, 1997), pp. 227–32. More literature is mentioned in Winfried Baumgart, *Europäisches Konzert und nationale Bewegung. Internationale Beziehungen 1830–1878* (Paderborn et al.: Ferdinand Schöningh, 1999), p. 454.

[86] For this and much of what follows, see Hidemi Suganami, 'Japan's Entry into

Portuguese and Spanish by seclusion edicts, which left the Dutch as the sole European trading partners. They had to accept several humiliating restrictions: they were confined to a small island in the port of Nagasaki and had to send envoys with gifts to the Shogun on a regular basis. Communication with the natives was permitted only through interpreters. However, the Dutch profited from the trade with precious metals, especially silver. Unlike the Portuguese and the Spaniards, they cleverly did not get involved in issues of religion (the Jesuits were expelled from Japan in 1614). The Bakufu legislated several laws to implement its policy of isolation, one of them in 1791. The edicts of 1806 and 1842 were particularly lenient, refusing landings, but assuring aid to ships in distress. This was in striking agreement with several natural lawyers such as Kant and their distinction between the perfect rights of states and cases of necessity (see VI, 4).

According to a widespread historiographical approach, past Europeans, including intellectuals, regularly understood themselves in contrast to 'the Other'. They constructed binary oppositions between their own allegedly superior civilization and savage, barbarian non-Europeans. If there was little point in denying some standard of civilization to 'the 'Other' such as the Chinese, then the Europeans would inevitably create the myth of a static, despotic and inferior civilization.[87] As previously indicated, there is little point in denying that 'us-them' distinctions are widespread among cultures. However, some post-colonial historiography is exposed to the same kind of criticism it raises against European discourses: it commits the fallacy of binary

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International Society', in Bull and Watson (eds), *Expansion of International Society*, pp. 185–99, and Duchhardt, *Balance of Power*, pp. 225–7. See also Om Prakash, 'Trade in a Culturally Hostile Environment: Europeans in the Japan Trade, 1550–1700', in *European Commercial Expansion in Early Modern Asia* (Aldershot: Variorum, 1997), pp. 117–28, and Ronald P. Toby, 'The "Indianness" of Iberia and changing Japanese iconographies of Other', in Stuart B. Schwartz (ed.), *Implicit Understandings. Observing, Reporting, and Reflecting on the Encounters between Europeans and other Peoples in the early modern Era* (Cambridge: Cambridge University Press, 1994), pp. 323–51.

87 Edward W. Said, *Orientalism* (New York: Vintage Books, 1979) and James Morris Blaut, *The Colonizer's Model of the World. Geographical Diffusionism and Eurocentric History* (New York, London: Guilford Press, 1993) are cases in point. See Melvin Richter, 'Europe and "The Other" in Eighteenth-Century Thought', in Karl Graf Ballestrem, Volker Gerhardt, Henning Ottmann and Martyn Thompson (eds), *Politisches Denken Jahrbuch 1997* (Stuttgart: Metzler Verlag, 1997), pp. 25–47 for more examples. See also his 'The Comparative Study of Regimes and Societies in the Eighteenth Century', in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge: Cambridge University Press, forthcoming) and Dorothy M. Figueira, 'Oriental Despotism and Despotic Orientalisms', in Katherine M. Faull (ed.), *Anthropology and the German Enlightenment: Perspectives on Humanity* (London, Toronto: Associated University Presses, 1995), pp. 182–5. I am much indebted to Richter's account.

opposition. More precisely, there are often several types of over-schematization involved: the cliché of a coherent 'Europe' and corresponding totalizing discourse, the sweeping reference to the category of 'the Other', and the myth of 'the Enlightenment'. In terms of the latter, historians have repeatedly pointed at the diversity and 'multiple discourses' of eighteenth-century thought (see V, 1). Racist positions such as Hume's were criticized from within the tradition, by Henri Grégoire, James Beattie and James Ramsay. There are many examples of the European ideology of superiority, and Engel's statement about the typical Oriental government preoccupied with almost nothing but 'plunder at home and abroad' is an illustrating case in point.[88] However, there is a looming danger of reading back nineteenth-century ideas into previous ones. If there were many who propagated the cliché of despotic and unchanging Asia, there were others who used Asian societies in order to criticize politics at home. In short, intellectual history must become self-reflective in a way that it avoids the fallacies it sets out to expose (see I, 3). The story that there was a eurocentric grand narrative about the inferior Other may itself turn into another grand narrative.

As in the case of Native Americans, many European writers were more interested in stressing the similarities rather than the differences with the Other when discussing Asian cultures. Jesuit scholars, especially, were keen to show that Asian peoples were receptive to the ideas of Christianity and thus extremely suitable for the propagation of the faith. The Jesuits offered an idealized picture of a strong, law-abiding and self-sufficient Chinese society ruled by a benevolent despot and administered by a wise scholar bureaucracy.[89] For Enlightenment authors like Leibniz or Wolff, Chinese philosophy demonstrated that there was a transcultural natural morality available to any reasonable human being without the help of divine revelation. Leibniz in particular suggested that China could send missionaries to teach Europeans what they lack, such as good laws, the practice of natural religion, and moral philosophy.[90]

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88 Engels is quoted in Blaut, *Colonizer's Model*, p. 83. See Richard H. Popkin, 'Eighteenth-Century Racism', in *The Columbia History of Western Philosophy* (New York: Columbia University Press, 1999), pp. 508–15 on Hume and his critics.

89 Raymond Stanley Dawson, *The Chinese Chameleon: An Analysis of European Conceptions of Chinese Civilization* (London: Oxford University Press, 1967), pp. 35–64.

90 Gottfried Wilhelm Leibniz, 'Preface to the Novissima Sinica' [1697/1699], in *Writings on China*, transl. and intro. Daniel J. Cook and Henry Rosemont, Jr (Chicago, La Salle: Open Court, 1994), pp. 45–59; 'Discourse on the Natural Theology of the Chinese' [1716], in ibid., pp. 75–138. There is a fine introductory essay, ibid., pp. 1–44. See also Julia Ching and Willard G. Oxtoby, *Moral Enlightenment. Leibniz and Wolff on China* (Sankt Augustin: Institut Monumenta Serica; Nettetal: Steyler, 1992), pp. 11–60; Wenchao Li and Hans Poser (eds), *Das Neueste über China. G. W. Leibnizens*

Wolff praised the virtues of the Chinese and claimed that Confucian teachings were universal and in harmony with his own ethical doctrine (beginning of IV, 5). Montesquieu is the key author who helped to revert seventeenth-century sinophilistic tendencies, probably without intending it. In the *Spirit of the Laws*, Montesquieu endorses the myth of Oriental immutability: religion, mores, manners, laws, even fashion in clothing have not changed in 'a thousand years'.[91] Divergent Asian regimes are pressed into one conceptual strait-jacket. Montesquieu's shortcomings seem to have two roots. First, there are the conceptual limits of his division of governments into monarchies, democracies and despotism (see V, 1). Second, Montesquieu's negative assessment of Asian, especially Chinese, government is motivated by domestic concerns and polemical purposes. He sets out to fight against the supposed enemies of political liberty who defended French absolutism, sometimes via a favourable description of the Chinese. Jesuit missionaries, who provided the bulk of European reports in the seventeenth century, seem to have been the main target: 'Our missionaries speak of the vast empire of China as of an admirable government, in whose principle intermingle fear, honour and virtue. I would therefore have made an empty distinction in establishing the principles of the three governments.'[92] According to Montesquieu's ideal theory, despotism is characterized by fear, monarchy by honour, and democracy by virtue. Facts are squeezed into this unquestioned conceptual framework. The missionaries cannot be right simply because if they were, theory would have to be abandoned or at least modified. But this consequence is unacceptable. Thus Montesquieu recycles myths about Oriental despotism tracing back to the Greeks and their descriptions of the Persian empire. He praises the government for encouraging agriculture. Apart from that, China is a disaster: the mandarins are bandits,

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'Novissima Sinica' von 1697 (Stuttgart: Franz Steiner, 2000); Yuen-Ting Lai, 'China and Western Philosophy in the Age of Reason', in Popkin, *Columbia History*, pp. 412–21, especially pp. 416f.; Adolf Reichwein, *China and Europe: Intellectual and Artistic Contacts in the Eighteenth Century* (New York: Knopf, 1967).

91 Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws* [1748], transl. and ed. Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (Cambridge et al.: Cambridge University Press, 1989), 14.4, p. 235. My account is much indebted to Richter, 'Europe and "the Other" ', pp. 37–42. See also Figueira, 'Oriental Despotism', pp. 185f. and Dawson, *Chinese Chameleon*, pp. 65–89 (on Chinese immutability).

92 'Nos missionnaires nous parlent du vaste empire de la Chine, comme d'un gouvernement admirable, qui mêle ensemble dans son principle la crainte, l'honneur et la vertu. J'ai donc posé une distinction vaine, lorsque j'ai établi les principes des trois gouvernements', Charles de Secondat, baron de Montesquieu, *De l'Esprit des Loix* [1748], 2 vols (Paris: Société les belles lettres, 1950), vol. 1, p. 225, transl. in Montesquieu, *Spirit of the Laws*, 8.21, pp. 126f.

subjects must be beaten into work, and merchants are unscrupulous deceivers. In the end, the 'spirit of servitude' in all of Asia can conveniently be contrasted with the 'genius for liberty' in Europe.[93]

Montesquieu's assessment of Japan focuses on commercial activities. His main argument against Japanese isolationism and exclusive trade with the Dutch and the Chinese is economical: 'It is competition that puts a just price on goods and establishes the true relations between them.'[94] The Japanese work against their own interests by inviting both the Chinese and the Dutch to overcharge commodities. Though Montesquieu is much indebted to the mercantilist tradition (see V, 2) and holds that some states might be better off not to engage in trade, Japan would be served best by moderate exports and imports and a competitive market which would 'produce a thousand advantages for the state'.[95]

Hume's key move is to abandon his friend's rationalistic and inflexible framework which neatly assigns three mutually exclusive dispositions or emotions to three types of government. For Hume, a civilized monarchy can provide for at least some political freedom and the rule of law. The widespread juxtaposition of free England and despotic France breaks down (V, 1). Hume also provides an interesting psychological argument. Feelings of malice and envy, he claims, are usually strongest among individuals or nations with close interactions: 'this is the reason why travellers are commonly so lavish of their praises to the *Chinese* and *Persians*, at the same time, that they depreciate those neighbouring nations, which may stand upon a foot of rivalship with their native country.'[96] In short, our fair judgements are clouded by our emotional involvement with a potential neighbouring rival. Psychological insights do not prevent Hume to be quite lavish himself in his praise of the Chinese. As we have seen, Montesquieu is hampered by the tendency to adapt reality to his conceptual framework. Hume's more empirical approach is better suited to take the complexities of reality into account. He holds that the Chinese monarchy is not absolute in the strict sense. Unlike European states, it is no longer threatened by a powerful external enemy. The quality of the army has consequently deteriorated and is no longer in a position to suppress the huge population: 'The sword ... may properly be said to be always in the hands of the people.' The government's only disadvantage is its weakness against foreign enemies. Otherwise it is perfect, combining 'the tranquillity attending

93 Ibid., 14.18, pp. 237f.; 8.21, p. 127; 17.6, pp. 283f.

94 Ibid., 20.9, p. 344.

95 Ibid., 20.23, p. 353.

96 Hume, *Treatise*, 2.2.8, p. 379. A fine analysis is again Richter, 'Europe and "the Other"', pp. 19–22.

kingly power' with 'the moderation and liberty of popular assemblies'.[97] Thus, for Hume, China embodies a political system that was for Montesquieu a theoretical impossibility.

Another group of Humean comments touches upon international political economy. We have already seen that Hume holds that poorer countries can undersell richer ones, as long as they are industrious and ambitious (V, 2). For Hume, China is a good example, although it is disadvantaged by the long distance from Europe and the ensuing high prices on shipping. Were China 'as near [to] us as France or Spain, every thing we use would be Chinese, till money and prices came to a level.'[98] China also serves as an example of a country which, once commercialized, can afford to reduce most of its foreign trade: 'China is represented as one of the most flourishing empires in the world; though it has very little commerce beyond its own territories.'[99] However, Hume's favourable remarks on China obscure the fact that in the first place, isolationist states miss the opportunity of dynamic gains from international trade such as transfer of technology and know-how (see again V, 2). According to Hume's account, this would be especially troublesome for a empire like China, whose vastness is the key factor to explain slow progress in the sciences. The authority of one teacher or scientist is quickly propagated all over the country, and subsequent scholars find it next to impossible to challenge his reputation or resist popular opinion.[100] In short, Hume's overall international political economy implicitly qualifies the explicit and favourable statements on Chinese self-sufficient economy.

Chinese disadvantages are specifically stressed by Adam Smith. He only briefly touches upon politics, suggesting that China, 'though it may perhaps stand still, does not seem to go backwards'.[101] This leaves room for Montesquieu's cliché of an immutable or unchanging China, although Smith refrains from a definite judgement. He is particularly shocked by the reported custom of exposing or drowning children, and holds that the lower ranks of

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97 David Hume, 'Of the rise and progress of the arts and sciences' [1742], in *Political essays*, ed. Knud Haakonssen (Cambridge, UK, New York: Cambridge University Press, 1994), pp. 66f. note. Ibid., pp. 290f. mentiones Jean Baptiste du Halde's account *Description géographique, historique, chronologique et physique de l'Empire de la Chine* (Paris, 1735) as a possible source.

98 Letter to James Oswald of Dunnikier, 10 February 1751, in *The Letters of David Hume*, ed. John Young Thomson Greig (Oxford: Clarendon, 1932; reprint New York, London: Garland Publishing, 1983), vol. 1, p. 144.

99 Hume, 'Of Commerce', in *Political Essays*, p. 102.

100 Hume, 'Rise and progress', p. 66.

101 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776], ed. R. H. Campbell, A. S. Skinner and W. B. Todd (Oxford: Clarendon Press, 1976), 1.8.25, p. 90.

people are much poorer than in Europe.[102] This poverty contrasts with the generic 'high degree of opulence' in the country, which is possible in spite of the fact that 'the greater part of its exportation trade ... [is] carried on by foreigners.'[103] China emphasizes agriculture and has little foreign trade, which is partly balanced out by a large domestic market. Smith mentions geographical location as a key factor that explains Chinese preferences of agriculture and interior trade over foreign commerce. A 'great nation surrounded on all sides by wandering savages and poor barbarians' has little further options.[104] Smith shares a widespread classification of non-European communities. Several empires of the East Indies including the Chinese and Japanese are classified as civilized, together with Mexico and Peru, and contrasted with 'mere savages'. These civilized empires then qualify as good trading partners with the Europeans. However, while the 'savage injustice' of Europeans in the Americas spoiled the possibility of a truly global free-trade economy, it was narrow-minded European insistence on monopolies which had the same effect in East Asia.[105] In short, these Smithian passages fit well into his generic critique of mercantilist fallacies and the myths of the balance-of-trade doctrine (V, 2). In contrast to Montesquieu, Hume, or any of the natural lawyers, Smith explicitly points out that China misses the dynamic gains from foreign trade. Its huge home market which can be compared with all of Europe, and subsequent sophisticated division of labour are in the long run insufficient to improve manufacturing industries:

> By more extensive navigation, the Chinese would naturally learn the art of using and constructing themselves all the different machines made use of in other countries, as well as the other improvements of art and industry which are practised in all the different parts of the world. Upon their present plan they have little opportunity of improving themselves by the example of any other nation; except that of the Japanese.[106]

Foreign commerce could stimulate Chinese economic development and reverse the apparent stationary conditions, especially as China has potential advantages in lower wages and thus in the export of manufactures. These opportunities are missed. In Smith, we find the most succinct thesis in the eighteenth century that,

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102 Ibid., 1.8.24, pp. 89f. As in Hume, a possible source is du Halde's *Description geographique*. See also the footnote in *Wealth of Nations*, p. 90.

103 Ibid., 3.1.7, pp. 379f.

104 Ibid., 4.9.40, pp. 679f.; 4.3.c.11, p. 495.

105 Ibid., 4.1.33, pp. 448f.

106 Ibid., 4.9.41, p. 681. There is a fine analysis in Hla Myint, 'Adam Smith's Theory of International Trade in the Perspective of Economic Development', *Economica*, 44 (1977), pp. 235–7.

though perhaps permissible by the law of nations, Chinese isolationism is an imprudent policy.

Like most natural lawyers, Kant accepts that the Chinese and Japanese restrictions were justified, given the inhospitable, immoral and oppressive conduct of European commercial states. However, unlike Smith, Kant ignores the consequences of these isolationist policies for the domestic economies. Instead, he stresses that European violence and inhospitality is self-defeating, demonstrated by trading companies which are 'on the verge of collapse'.[107] While insisting that colonialism is a failure (he seems to push this point too far), Kant misses the central dilemma highlighted by Smith: an isolationist policy leads to technological inferiority, which in turn subverts the very isolationist policy and the natural right proclaiming it *vis-à-vis* outside powers, because this right or the corresponding policy can no longer be enforced. Well-intentioned as it may have been, the natural lawyers' recurrent defence of Chinese and Japanese isolationism was utterly futile in a condition of international anarchy. This was perceived by Leibniz (1699), who wrote in a spirit reminiscent of Hobbes and anticipating Rousseau that wisdom and morality are out of place in an anarchic environment. In a way, Leibniz claimed provocatively, the Chinese are the better Christians because 'they are averse to war' and despise ferocity: 'They would be wise indeed if they were alone in the world. But as things are, it comes back to this, that even the good must cultivate the arts of war, so that the evil may not gain power over everything.'[108] In the nineteenth century, while authors such as Franz von Liszt criticized with actually recycled arguments Chinese and Japanese isolationism as violating the laws of 'sociability' and 'solidarity' (see VI, 5), European military power verified Smith's and Leibniz's contentions.

4. The scope and legitimacy of cosmopolitan right

I have already pointed out that Kant's third definitive article on universal hospitality is often praised as the most progressive element of his philosophy of international relations. Some see his cosmopolitan right as a conceptual tool that helps to understand contemporary trends that seem to undermine the modern Westphalian system of a society of sovereign states (see I, 2). Individuals, such as the foreigner who visits hospitable peoples abroad, and no longer states, are the central normative units of the global community. International hospitality is then seen as a plausible compromise between the

107 Kant, 'Perpetual Peace', p. 330; 8: 359.
108 Leibniz, 'Novissima Sinica', p. 46.

extremes of a splendid isolation of independent states on the one hand and a world government on the other. The theory of international hospitality is embedded in the endorsement of a cosmopolitan juridical and/or moral commonwealth, or of a global civil society based on shared political principles. International hospitality can then be interpreted as a means and vehicle to promote the evolution of this commonwealth. In this section, I will raise some objections against this interpretation, and offer a modified approach which stresses the problem of institutionalization.

Kant's account of international hospitality is well known. He grants foreigners a right to visit and 'to seek commerce [*Verkehr*] with the old inhabitants',[109] but specifies that they must behave peaceably and hospitably themselves. Kant apparently thinks of all forms of interaction, not only of its economic version, and emphasizes that cosmopolitan right has clear limitations as it excludes the right of settlement. The right is injured if peaceful foreigners are met with inhospitable behaviour, or if they themselves should become aggressive colonialists and oppress the natives. In contrast to Vitoria, Kant's right to visit is very limited. A special pact is required between visitors and those being visited for more extensive entitlements. Kant thus proceeds on two levels: abstract principles give travellers a right to try to establish contacts. On an empirical level, the actual consent of the people visited is required. Anything that goes beyond the natural 'right of resort' requires a 'special beneficient pact' or *Vertrag*.[110] We have already seen that several authors after Vitoria such as de Soto emphasized the importance of the actual consent of the natives (II, 6). Kant marks the transition from the *a priori* level of natural rights to the empirical level of agreements with the distinction between the right to visit and the right to be a guest. We have also argued that Kant modified the conventional distinction of natural lawyers between perfect and imperfect duties (VI, 1). The right of hospitality is a juridical, not an ethical principle: it focuses on external spheres of freedom, not on the adoption of ends. It is not simply an imperfect right that must take a back seat in case of conflict with a perfect one. The right can be enforced, either by the visitor who is exposed to his or her own

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109 Kant, 'Doctrine of Right', p. 329; 8: 358. Relevant publications on Kant's cosmopolitan right are listed in my *Theory and Practice*, pp. 58–60 and p. 199 footnote 44. More recent publications are Pauline Kleingeld, 'Kant's Cosmopolitan Law: World Citizenship for a Global Order', *Kantian Review*, 2 (1998), pp. 72–90; Giuliano Marini, *Tre studi sul cosmopolitismo Kantiano* (Pisa, Roma: Istituti editoriali e poligrafici internatzionali, 1998); Klaus Dicke, 'Das Weltbürgerrecht soll auf die Bedingungen der allgemeinen Hospitalität eingeschränkt sein', in Dicke and Kodalle, *Republik und Weltbürgerrecht*, pp. 115–30, and Thomas Mertens, 'Cosmopolitanism and Citizenship: Kant Against Habermas', *European Journal of Philosophy*, 4 (1996), pp. 328–47. I am much indebted to Pauline Kleingeld.

110 Kant, 'Perpetual Peace', p. 329; 8: 358.

destruction, or by the natives if the visitor turns out to be inhospitable. In traditional natural law terminology, both sides have a right of self-defence in the state of nature, or a natural right to defend their mutual spheres of external freedom. In contrast to many natural lawyers, Kant is not preoccupied with a distinction between perfect and imperfect rights. Rather he attempts to outline the spheres of external freedom of both visitors and natives, assuming that they fall into the domain of right rather than virtue.

The addressees of cosmopolitan right are individuals as 'citizens of the earth'. In this respect Kant clearly anticipated contemporary developments in international law, where individuals are no longer exclusively mediated by the state, but elevated to bearers of rights they can assert on an international level.[111] This may lead us to three complementary conclusions. First, we might claim that in spite of Kant's emphasis on state rights, he subscribes to normative individualism, the thesis that the most fundamental moral categories on a transnational level are individuals rather than states. As a consequence, state rights would ultimately be subordinated to those of individuals, especially in cases such as humanitarian intervention or secession.[112] Second, if individuals are entitled to assert their rights on an international level, we might argue that Kant's cosmopolitan right is close to and reflected in the right of EU citizens, for instance, to press charges or file complaints against governments of member states where they are not citizens.[113]

Finally, Kantian hospitality rights are sometimes generously interpreted as anticipating a global and democratic civil society. According to Kant, one major feature of juridical laws is that they can be enforced. In the *Metaphysics of Morals*, Kant argues that the right to use coercion can be deduced analytically from the concept of right.[114] In both the *Metaphysics of Morals* and in *Perpetual Peace*, Kant undermines this identification of right and coercion. His federation of states is voluntary, and not based on coercive laws, at least in its early stages (see VI, 2 above). Kant weakens his strict, rigid concept of right, which is analytically linked with a sovereign, irresistible power. This does not imply that rights and ethics necessarily coincide. States and individuals are still subject to public laws which prescribe external actions, not dispositions. However, the sovereign power has, at least for the time being, been replaced by the initially weak or soft power of cosmopolitan civil society and the sphere of

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111 Kleingeld, 'Cosmopolitan Law', pp. 83–5, referring to Alfred Verdross and Bruno Simma; James Bohman and Matthias Lutz-Bachmann, 'Introduction', in *Perpetual Peace*, pp. 7f.; Archibugi, 'Models', pp. 312–14.

112 Cf. I, 5 and especially Fernando R. Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), pp. 8f.

113 Volker Gerhardt, *Immanuel Kants Entwurf 'Zum ewigen Frieden': eine Theorie der Politik* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1995), p. 106.

114 Kant, 'Doctrine of Right', pp. 388f.; 6: 231f.

the public opinion of world citizens it creates. In other words, the cosmopolitan public sphere as a 'negative substitute' takes over the provisional control of international relations and looks after law enforcement, temporarily replacing the missing coercive authority among states.[115] The upshot of Kant's argument would be that neither do republics control or 'punish' despotic states nor does a world state rule: but that individuals, for instance intellectuals or NGOs, watch over governmental action. 'Each inhabitant of the planet is elevated to the position of international "magistrate".'[116] Ultimately, this interpretation would lead us far away from Kant's narrowly conceived concept of cosmopolitan right, and would widen its scope beyond hospitality. Archibugi and Held, for instance, propose the normative model of a cosmopolitan democracy where individuals have 'a voice, input and political representation in international affairs, in parallel with and independently of their own government'.[117]

There are several objections against these globalist interpretations. Kant might have disputed that a world moving 'beyond Westphalia' is desirable. For him, cosmopolitan right does not replace classical law among states or nations, but *complements* it. Some interpreters take it for granted that Kant wanted to replace or abolish the classical approach epitomized by Vattel (see V, 5). Hedley Bull, for instance, holds that Kantian international community would 'sweep the system of states into limbo'.[118] However, it is mistaken to assume that the second and third definitive articles are incompatible with each other, and that we must choose between the two. As already pointed out, Kant's cosmopolitan right is very limited, and this limited conception goes well with his proposed federation of states. It is the more generous globalist interpretation of some contemporary Kantians which clashes with the state-centric assumptions of the second definitive article.

If some globalist interpretations go well beyond Kant's text, we should ask if there are any plausible reasons why Kant might have shrunk back from a more daring and far-reaching cosmopolitan right. As a careful reader of Hobbes, Kant might have perceived that an uncoercive global civil society

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115 James Bohman, 'The Public Spheres of the World Citizen', in Bohman and Lutz-Bachmann, *Perpetual Peace*, pp. 179–200, especially 180f.; Archibugi, 'Models', p. 312.

116 Ibid.

117 Daniele Archibugi and David Held (eds), *Cosmopolitan Democracy. An Agenda for a New World Order* (Cambridge: Polity Press, 1995), p. 13; cf. Archibugi, 'Models', pp. 312 and 316 and Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998).

118 Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* [1977], 2nd edn (New York: Columbia University Press, 1995), p. 24. Cf. Bohman and Lutz-Bachmann, 'Introduction', p. 3, and Habermas, 'Kant's Idea', p. 113.

as the negative substitute of a world government would undermine the effectiveness of any citizenship rights. Governments are required to administer justice, and current examples of failed states illustrate the point. In short, unmediated citizenship, where the citizens' freedom is not interceded by states, is a risky adventure. In addition, some observers have recently pointed out that enthusiasm about global governance, non-state actors and international organizations often downplays the importance of accountability. Rights violations which are not attributable to state actors are difficult to prevent and enforce, especially as international organizations often enjoy immunity status when private law claims are involved.[119] This brings us back to the problem of institutionalization. If, for instance, world public opinion instead of coercive laws is supposed to 'enforce' human rights, we may legitimately ask about both its effectiveness and its impartial administration. At worst, global citizenship would rely exclusively on 'good moral culture'.

It is not my intention here to dismiss globalist interpretations out of hand. The global civil society may be indispensable for the evolution of a world republic. However, the systematic function of the third definitive article is not to establish a global civil society, to facilitate economic commerce, or to promote peace. In Kant's dry words, cosmopolitan right overcomes the state of nature in all respects, thus complementing (again: not replacing) domestic and international right. All persons 'who can mutually affect one another must belong to some civil constitution'.[120] All spheres of external freedom must be subject to the rule of law.

How does Kant justify cosmopolitan right? Kant seems to follow the natural lawyers and ground it in the 'original community of the land' or the idea that the earth is in common possession. In a recent essay, Pauline Kleingeld has pointed out that Kant's argument can only deliver a partial grounding for cosmopolitan right, and holds that the innate right to freedom provides a better and truly comprehensive justification. My point is that the two argumentative strategies are not mutually exclusive, but basically identical.

Kant seems to share with natural lawyers like Grotius, Locke, or Wolff the same starting point: 'All human beings are originally in *common possession* of the land of the entire earth.'[121] However, the 'original community' is, analogous to the original contract, not a historical fact but a rational idea. 'Original' refers to principles of reason, in contrast to a 'primitive' community, which has a historical or temporal dimension.[122] Kant thus states explicitly that the

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119 Cf. August Reinisch, 'Securing the Accountability of International Organizations', *Global Governance*, 7 (2001), pp. 131–49.

120 Kant, 'Perpetual Peace', p. 322; 8: 349.

121 Kant, 'Doctrine of Right', p. 418; 6: 267; cf. 'Perpetual Peace', p. 329; 8: 358.

122 'Doctrine of Right', p. 411; 6: 258; cf. p. 636.

original community of land is *not* a community of possession but a community of possible interaction.[123] Kant agrees with Locke that unilateral external acquisition in the state of nature is possible. He departs from him by claiming that this acquisition is only provisional and has to be sanctioned by the general will after the establishment of a civil condition. Physical possession 'holds *comparatively* as rightful possession' only in anticipation of this public lawgiving, where it is acquired conclusively. In Kant's terminology, external original acquisition or *occupatio* entails three principles: apprehension, declaration (not necessarily labour), and finally the appropriation by the general will.[124] Kant rejects Locke's labour theory of property and the agricultural argument (see V, 2 and 5). There are many 'forms' or 'external signs' of taking possession or first acquisition: developing land is just one of them. As a consequence, Kant condemns European colonialism in North America, defended by liberal authors such as Vattel. First acquisition does not dispense us of the duty to sign a contract for conclusive or peremptory acquisition. In view of the common possession of the earth, a regionally limited social contract on the state level, though indispensable, is not sufficient. Any acquisition will remain provisional unless the social contract 'extends to the entire human race'.[125] The universal idea of an original community requires a global implementation.

Kant's main idea is the moral necessity and practical possibility of a universal juridical commonwealth. The ultimate goal in the distant future (we can approach it asymptotically) is an original contract that encompasses all humans. Then, and only then, the juridical relations among people and their property rights have become peremptory. From a cosmopolitan perspective, the sovereign state, even if it has turned into a republic, is a necessary but incomplete step in the evolution of right.[126] This would also mean that the third definitive article becomes obsolete as soon as a full juridical condition (the world republic, if this is Kant's ultimate ideal) has been established. Domestic, international and cosmopolitan right would finally merge.

Given Kant's interpretation of the notion of original community as one of possible interaction, it is plausible to see it as coinciding with the argument

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123 Ibid., p. 489; 6: 352.

124 Ibid., p. 411; 6: 258. Cf. pp. 409f.; 6: 255–7 and pp. 416–18; 6: 264–6. Wolfgang Kersting, 'Eigentum, Vertrag und Staat bei Kant und Locke', in Martyn P. Thompson (ed.), *John Locke and Immanuel Kant. Historical Reception and Contemporary Relevance* (Berlin: Duncker und Humblodt, 1991), pp. 109–34 is a profound comparison between Locke's and Kant's theory of property.

125 Ibid., p. 418; 6: 267. Cf. Kersting, 'Eigentum', pp. 127f.

126 Karlfriedrich Herb and Bernd Ludwig, 'Naturzustand, Eigentum und Staat – Immanuel Kants Relativierung des "Ideal des Hobbes"', *Kant-Studien*, 84 (1993), pp. 313f.

from external freedom. For Kant, the innate human right to freedom entails, *inter alia*, the authority to attempt communication. It encompasses the communication of one's thoughts, economic transactions, is reciprocal and based on legal equality. Historically speaking, Kant tackles the traditional right to missionize here, often considered a key prerogative of Christians (see III, 5). In Kant, the belief in the substantial superiority of Christianity has been abandoned by a formal principle defining reciprocal spheres of interaction. Any person may communicate one's thoughts, but it is up to the natives 'whether they want to believe him or not'.[127] That is to say, Jesuit missionaries may propagate their faith in China and 'offer' it to the natives, provided that they behave peacefully. By the same token, Chinese sages would be entitled to communicate their thoughts in Europe. Both the argument from original ownership and that from innate freedom thus amount to the right to attempt or offer communication, interaction, or commerce. Kant's two argumentative strategies are substantially identical.

Kant's complex reasoning can be summarized as follows. He combines empirical with *a priori* elements. The empirical or *a posteriori* ones are all in all two. Land is by nature continuous and limited. No section of land is absolutely separate from others; even water can be crossed. The earth has a spherical surface. Humans are thus 'enclosed ... within determinate limits'.[128] Second, humans thus cannot avoid getting into contact with others, and their use of external freedom of choice may conflict. Kant claims an unavoidable conflict of unrestrained freedom, no matter how human nature is perceived. The universal element is expressed by the principles of equality, the innate right to freedom, and impartiality. No one has a right to determine unilaterally the limits of the land to which she is entitled. They must be determined by the united will of all, or their rational, hypothetical consent (see III, 2). Therefore private ownership presupposes original collective possession, not as an empirical fact, but as a rational concept. In his preliminary work, Kant writes: 'Also muß man sich eine allgemein vereinigte Willkühr als einen juridischen Act *denken* durch den nothwendig jedem sein Platz als durch einen gesamten Willen bestimt wird mithin einen *Gesammtbesitz* (communio originaria) von dem jeder mögliche Besitz abgeleitet wird.'[129] Original collective possession must be conceptualized if we want to think of private ownership consistently and universally. (The reasoning does not specify, however, how much property someone may own.) Thus Kant's train of thought integrates both the argument

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127 Kant, 'Doctrine of Right', p. 394; 6: 238.

128 Ibid., pp. 414f.; 6: 262; p. 489; 6: 352; 'Vorarbeiten zur Rechtslehre', 23: 322. My analysis is much indebted to Mulholland, *System of Rights*, pp. 273–8 and Kersting, *Wohlgeordnete Freiheit*, pp. 267–72.

129 Kant, 'Vorarbeiten', 23: 322.

from freedom and that based on original possession. They are part of the same argumentative strategy, ultimately referring to the principle of rational consistency and the universality of right.

Three problems remain to be addressed: Kant's reference to the spirit of trade, immigration rights, and the idea of a moral commonwealth. Kant stresses the beneficial results of transborder interactions (see end of VI, 1). These relations can 'eventually become publicly lawful and so finally bring the human race ever closer to a cosmopolitan constitution'.[130] Kant's hope that the spirit of commerce will guarantee cosmopolitan right is too optimistic: commercial interaction normally leads to exclusive hospitality rights, without extending to *all* humans. Implementation of cosmopolitan right currently depends on states, their interests and their power, and thus is often arbitrary and selective.[131] Again, a form of differentiated sovereignty and a minimal world republic seem to be a feasible way to overcome this problem of implementation. Kant could be defended with the argument that he saw commercial interactions based on mutual self-interests as a short-term remedy with beneficial results, admittedly incomplete, but still a step in the right direction. After all, Kant's understanding of world history stresses its paradoxical elements. For instance, the European conquerors who did not distinguish between visiting and conquering a country committed injustices and brought havoc upon the natives, while at the same time these very activities opened up the trade routes between the continents, contributing to a possible cosmopolitan world order which approaches the ideal of just and peaceful relations among nations.[132]

Kant specifies that visitors to other countries can be refused on condition that this can happen without their death, or *Untergang*.[133] Contemporary interpreters sometimes infer that Kant implicitly supported immigration and many of the modern refugee rights. However, this obscures the fact that Kant's cosmopolitan right is quite restrictive. Kant supports immigration only in those grave cases when the refugees would face certain destruction on returning to their own country. If this is not the case, the natives or residents are free to decline the request. A specific contract is required for anything that goes beyond the mere right to visit and the offer to engage in interaction. As a consequence, xenophobic politicians in Europe and elsewhere could defend a

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130 Kant, 'Perpetual Peace', p. 329; 8: 358.

131 Ibid., pp. 336f.; 8: 368; Kleingeld, 'Cosmopolitan Law', pp. 82f. and Habermas, 'Kant's Idea', pp. 121f.

132 My *Theory and Practice*, ch. 1 emphasizes some of the paradoxical elements in Kant's account of Frederick's rule. Anthony Pagden, *Lords of all the World. Ideologies of Empire in Spain, Britain and France, c. 1500 – c. 1800* (New Haven, London: Yale University Press, 1995), pp. 61f. points at the paradoxes of conquest.

133 Kant, 'Perpetual Peace', p. 329; 8: 358.

restrictive immigration policy on Kantian grounds, provided that they find a solid majority among the native population.

Finally, Kant's advocacy of a cosmopolitan society based on the natural right of hospitality should not be identified with the idea of an 'ethical commonwealth'.[134] As noted above (VI, 2), Kant keeps both types of commonwealths apart, though they are related to each other. The right to visit regions and to engage in interaction, though justified deontologically as being based on innate freedom and original collective possession, has the function to promote a possible 'communion of all nations'.[135] Kant apparently expected that complex interdependence and globalization as empirical phenomena would drive humans towards, and urge them to establish, a global commonwealth under the rule of law. However, this union aims at the compatibility of external actions, not at morally good dispositions. Moral progress in this respect seems to have been Kant's additional, religious hope.

In terms of content, there is little new in Kant's cosmopolitan right, in spite of the fact that some contemporary scholars, not knowing its prehistory, are overly enthusiastic. Many natural lawyers were ready to criticize European colonialism before Kant, and defend aboriginal rights. Diderot anticipated Kant's distinction between the right to visit and the right to be a guest (VI, 2). The close relationship between Wolff and Kant has already been emphasized (end of IV, 6). Wolff's universal commonwealth, admittedly a fictitious 'moral person' without a ruler, but with a rector/curator/tutor who establishes principles of international right, can be read as an anticipation of Kant's rational ideas of an original contract and original community. Wolff's reference to a fiction might be understood in Kantian terms, specifying that individuals should act 'as if' the universal commonwealth was possible and could be realized.[136] In other words, Wolff's fiction is a regulative idea and a practical

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134 Howard Williams, *Kant's Political Philosophy* (New York: St. Martin's Press, 1983), pp. 260–8, tends to identify both. Hurrell has followed William's reasoning: see Andrew Hurrell, 'Kant and the Kantian Paradigm in International Relations', *Review of International Studies*, 16 (1990), pp. 202f.

135 Kant, 'Doctrine of Right', p. 489; 6: 352.

136 Cf. Kant, 'Theory and Practice', p. 309; 8: 313 and 'Perpetual Peace', p. 328; 8: 357. Some of the links between Wolff and Kant are analysed in Karl Bärthlein, 'Die Vorbereitung der Kantischen Rechts- und Staatsphilosophie in der Schulphilosophie', in Hariolf Oberer and Gerhard Seel (eds), *Kant. Analysen – Probleme – Kritik* (Würzburg: Königshausen und Neumann, 1988), pp. 221–71, especially 233ff., and Nicholas Greenwood Onuf, *The republican legacy in international thought* (Cambridge: Cambridge University Press, 1998), pp. 102f. Soo Bae Kim, *Die Entstehung der Kantischen Anthropologie und ihre Beziehung zur empirischen Psychologie der Wolffschen Schule* (Frankfurt am Main et al.: Lang, 1994) focuses on rational psychology and anthropology.

postulate guiding the maxims of actions towards a certain goal, the highest political good. Wolff does not belong to Kant's 'sorry comforters' (although he is never explicitly mentioned either, unlike Saint-Pierre and Rousseau), and Kant uses a similar notion to denote this ideal of reason: it is called *civitas gentium* (instead of *civitas maxima*) or 'society of peoples'.[137] In contrast to Kant, who only states general principles, Wolff tries to specify hospitality rights in some detail.

In terms of content, then, there is a considerable degree of continuity, especially among eighteenth-century authors. The originality of Kant's critical philosophy is once more underlined by his revision of key natural law concepts. Revising the traditional argument from original ownership, Kant offers a new justification of hospitality rights. If Kant marks the climax of natural law philosophy, it is also the end of an era.

5. Epilogue: The rights of strangers in the nineteenth century

The task of this section is to bridge the gap between the late eighteenth century and our own age. I have somewhat attempted to do this in the 'Introduction'. Here I can only offer a short sketch, not a comprehensive study. I will not write about the idea of an international society. The discussion related to this issue more or less keeps the framework established by Kant.[138] I will partly cover the development of natural law theories. The main focus is on hospitality rights, or what is called the rights of aliens, especially the right of free movement. First, I will return to the question, raised in the 'Introduction' of why this study ends with Kant. In doing so I will present a general description of nineteenth-century international law, and then proceed with hospitality rights in selected lawyers such as Heffter, Bluntschli, Hall, Martens and Liszt. I conclude with some aspects of twentieth-century international legal theory, which takes us full circle back to the beginning of this study.

I have already argued in the 'Introduction' why this study ends with Kant. I want to elaborate my arguments here. There were international political developments. The end of French attempts to hegemony also terminated the French period in international relations and the history of the law of nations and inaugurated the English period (1815–1918). This categorization is endorsed by major historians of the law of nations, such as Grewe, Preiser, Ziegler and

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137 Kant, 'Perpetual Peace', p. 326; 8: 354 and p. 328; 8: 357. Onuf, *Republican Legacy*, pp. 87–109 offers an extensive discussion of Plato's ideal of a 'good city', Wolff's 'virtual republic' and Kant's practical 'as if' philosophy. Onuf writes: 'The great republic exists materially to the degree that people act as if it does' (p. 103).

138 See my *Pax Kantiana*, pp. 436–59 and *Theory and Practice*, pp. 113–31.

Scupin.[139] European politics assumed a new quality. According to Paul W. Schroeder, the Vienna era was a genuine 'breakthrough to a new system', not simply a restoration of eighteenth-century balance-of-power politics or a passing lull in international conflict and rivalry. The main features of this new system were the success of peacekeeping practices and institutions of the European Concert, a reversal of values from bellicist to pacific, and a political solution to the key eighteenth-century causes of war. For Schroeder, the Vienna system was the result of a 'conscious process of collective learning'.[140] Most European states introduced obligatory passports for foreigners. This was a symptom of the consolidation of the territorial state, which came to be understood as a distinct entity consisting of territory, boundaries, population and government. The inside-outside distinction Hobbes had been one of the first to introduce into political philosophy (see IV, 1) became manifest in protected borders perceived as deliberate delineations that structured vast spaces. In the Habsburg monarchy, for instance, a directive for inns (1804) proclaimed that only persons with a passport were allowed to stay overnight. Repeated efforts were made to distinguish between citizens and aliens, and to categorize the latter.[141]

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139 Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos Verlagsgesellschaft, 1984), Part Four; Wolfgang Preiser, 'History of the Law of Nations, ancient times to 1648', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam et al.: Elsevier, 1995), vol. 2, pp. 722–49; Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (München: Beck, 1994), pp. 210f., and Hans-Ulrich Scupin, 'History of the Law of Nations, 1815 to World War I', in Bernhardt, *Encyclopedia*, pp. 767–93, here p. 767.

140 Paul W. Schroeder, 'The Vienna System and Its Stability: The Problem of Stabilizing a State System in Transformation', in Peter Krüger and Elisabeth Müller-Luckner (eds), *Das europäische Staatensystem im Wandel. Strukturelle Bedingungen und bewegende Kräfte seit der Frühen Neuzeit* (München: Oldenbourg Verlag, 1996), pp. 107–22, the quotations ibid., pp. 114f. See also his 'Did the Vienna System Rest Upon a Balance of Power?', *American Historical Review*, 97 (1992), pp. 683–706 and the references in Dieter Langewiesche, *Europa zwischen Restauration und Revolution 1815–1849*, 3rd edn (München: Oldenbourg, 1993), p. 176 and pp. 229f. and in Schroeder, 'Vienna System and Its Stability', p. 107.

141 Hannelore Burger, 'Passwesen und Staatsbürgerschaft', in Waltraud Heindl and Edith Saurer (eds), *Grenze und Staat. Paßwesen, Staatsbürgerschaft, Heimatrecht und Fremdengesetzgebung in der österreichischen Monarchie 1750–1867* (Wien, Köln, Weimar: Böhlau, 2000), pp. 76–87; Zdenka Stoklásková, 'Fremdsein in Böhmen und Mähren', ibid., pp. 619–718. Wolfgang Schmale and Reinhard Stauber (eds), *Menschen und Grenzen in der Frühen Neuzeit* (Berlin: Berlin Verlag, 1998) is a fine volume on the intellectual, political and cultural history of borders and collective identities. See especially Bernard Heise, 'From Tangible Sign to Deliberate Delineation: The Evolution of the Political Boundary in the Eighteenth and Early-Nineteenth Centuries. The Example of Saxony', ibid., pp. 171–86, an essay that stresses the differences between early modern and modern European political boundaries.

Especially in the eighteenth century, there had been a prevalent awareness of a clear distinction between the *Ius publicum Europaeum* or *Droit public d'Europe* on the one hand and the legal structures pertaining to the law of nations outside Europe on the other. The European law of nations after 1648, termed *Droit public d'Europe* in the eighteenth century, evolved out of the older *respublica Christiana* (see ending of I, 5), and consisted of several overlapping layers or spheres of legal rules such as the constitutional law of the powers, the rules of succession and the ancient feudal system of the Empire. The law of nations was the dominant factor among several other layers of legal rules.[142] Outside Europe, Europeans sometimes had to adapt themselves to existing 'international' relations structures (see III, 4). In East Asia for instance, European states signed various treaties, implicitly accepting the contracting party as a subject of international law. Examples are the treaty concluded between the Viceroy in Goa acting for Portugal and the Peshwa, the head of the Maratha state in India (4 May 1779) or the treaties concluded between natives in North America and France.[143] In the nineteenth century, things would fundamentally change. The *Droit public d'Europe* was modified into international law, which gradually became global. Military superiority enabled European maritime powers to force other parts of the world and isolated states like China or Japan into their legal structures, and decide upon membership in an originally exclusive European club.

Trends towards positivism, historicism and nationalism were reinforced in the 1800s. Because of their impact, Jeremy Bentham (1789) and John Austin (1832) were probably the key authors in the positivist transformation of the law of nations. Although Bentham asserted that he was simply replacing the term 'international law' for what had earlier been called 'the law of nations', he changed the boundaries of the discipline in two respects. First, he assumed that international law was only about the rights and obligations of states among themselves, and not about those including individuals. These would turn into mere objects of international law. Second, Bentham denied that cases involving

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142 Heinhard Steiger, 'Rechtliche Strukturen der Europäischen Staatenordnung 1648–1792', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 59 (1999), pp. 609–47.

143 Stephan Verosta, 'Der Vertrag zwischen Portugal und dem Marathen-Staat von 1779 – europäisches oder universelles Völkerrecht', in Alexander Böhm, Klaus Lüderssen and Karl-Heinz Ziegler (eds), *Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen. Festgabe für Wolfgang Preiser* (Baden-Baden: Nomos Verlagsgesellschaft, 1983), pp. 95–109; Charles Henry Alexandrowicz, 'The Afro-Asian World and the Law of Nations', *Recueil des Cours*, 123 (1968), I, pp. 130–3, and Christophe N. Eick, *Indianerverträge in Nouvelle-France. Ein Beitrag zur Völkerrechtsgeschichte* (Berlin: Duncker & Humblot, 1994).

foreign transactions adjudicated by local courts were decided by the norms of the law of nations. For him, they were a matter of internal rules.[144] Austin also drew a sharp distinction between international and domestic spheres. In a famous passage, he declared that international law was not really law in the strict sense:

> ... the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[145]

Austin's main premise and challenge is that law is set by sovereign authority. As the norms regulating the conduct of sovereign states are by definition not regulated or enforced by an outside authority, international law is not really law at all. The natural lawyers had of course argued in different ways, for instance that natural law was based on the sovereign authority of God as the supreme lawgiver or on right reason, 'even if God did not exist'. Legal positivism rejected any axiom of natural law. True law was only positive law defined as created law (*gesetztes Recht*). The legal force of law derived from a competent authority prior and superior to the law, normally the sovereign power of the state. Sometimes legal positivism degenerated into sheer state voluntarism, the belief (or myth) that the will of the state was the only source of the law.

The details of the transformation are a matter of debate, but there is consensus that in the course of the nineteenth century, natural law doctrine was replaced by legal positivism. In the 1820s, Dugald Stewart recorded that the natural lawyers had fallen into 'just neglect' (V, 1). The intellectual climate gradually turned against them. The English scholar William Manning is symptomatic in this respect. In a work on international law (1839), he wrote that natural law was beyond doubt the fundamental source of the law of nations,

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144 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), ed. J. H. Burns and H. L. A. Hart (London: Athlone, 1970), pp. 293–300. See the interpretation in Mark W. Janis, *An Introduction to International Law*. 2nd edn (Boston et al.: Little, Brown and Company, 1993), pp. 227–35.

145 John Austin, *The Province of Jurisprudence Determined* (1832), p. 208, quoted in Janis, *Introduction*, p. 4. See Roberto Ago, 'Positivism', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam et al.: Elsevier, 1997), vol. 3, pp. 1072–80 with more secondary literature, and Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (Freiburg, München: Verlag Karl Alber, 1958), vol. 2, pp. 1–38.

but found it better to make little reference to it, as the public was 'embarrassed and disgusted' by protracted discussions.[146]

Finally, the idea of civilization became center stage in the course of the nineteenth century, culminating in John Stuart Mill's clear-cut distinction between civilized nations and barbarians and the assertion that the rights of barbarians 'as a *nation*' cannot be violated because they have none: 'To characterize any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject.'[147] It is important to keep in mind that Mill does not deny certain rights pertaining to individual barbarians. His main point is that barbarous people as an entity are not subjects of international law, an assumption held by several legal positivists of the century. The emphasis on civilizational values was prepared by Enlightenment thinkers (V, 1 and 2). However, with the exception of some racists like Hume, they usually refused to develop this into a full-fledged theory of culturally inferior and superior nations. Wolff, for instance, admitted cultural differences, but did not allow them to play any role in his system of the law of nations (IV, 6). Some late nineteenth-century international lawyers can be compared with some Spaniards of the sixteenth, with the key difference that 'Christianity' had been replaced by 'civilization'. Both positions were diametrically opposed to the assertion of Vitoria and other natural lawyers that the natives enjoyed both *dominium civile* and *imperium*.

By now it should have become clear that there are plausible reasons to distinguish the nineteenth from the preceding century, and to finish a study on the history of the law of nature and nations with Kant. It is quite easy to proceed with a brief characterization of nineteenth-century international legal theory. It is easy, because some of its features have just been mentioned: the emphasis on sovereignty, the territorial state, civilization, eurocentrism and legal positivism. According to the conventional picture, sovereignty was the key reference point of the discipline, perceived as absolute and an all-or-nothing affair.[148]

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146 William Manning, *Commentaries on the Law of Nations* (1839), pp. 3f., quoted in Janis, *Introduction*, p. 61.

147 John Stuart Mill, 'A Few Words on Non-Intervention' [1859], in *Essays on Equality, Law, and Education*, ed. John M. Robson, intro. Stefan Collini (University of Toronto Press: Routledge and Kegan Paul, 1984), p. 119; Grewe, 'Völkerrecht', pp. 465–75, on Mill p. 471; Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart*, Beiträge zur Kolonial- und Überseegeschichte Bd. 26 (Stuttgart: Steiner, 1984), pp. 293–5.

148 See for the following David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Nordic Journal of International Law*, 65 (1996), pp. 385–420 (with more literature ibid., p. 385); David J. Bederman, 'The 1871 London Declaration, Rebus sic Stantibus and a Primitivist View of the Law of Nations', *American Journal of International Law*, 82 (1988), pp. 1–40; John A. Andrews, 'The

Europeans founded an exclusive community of civilized states. Authors emphasized intellectual, technological and industrial innovations of European commercial societies. They disagreed about minimum standards of civilization, but all shared a common belief in the superiority of European civilization, and in its inevitable spread across the globe. European arrogance and belief in progress reached a climax at the turn of the century. Lewis Morgan formulated widespread assumptions in 1878, stating that it 'can now be asserted upon convincing evidence that savagery preceded barbarism in all the tribes of mankind, as barbarism is known to have preceded civilization. The history of the human race is one in source, one in experience, and one in progress.'[149] European self-confidence became manifest at congresses and conferences, for example at the Berlin Congo Conference (1884/85), where Africa was seen as an uncivilized continent waiting to be redeemed by the blessings of Western civilization and to be opened up for commerce. It was at this conference that Mr Kasson, the United States delegate, stated that 'Modern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory', and that 'the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression' was required.[150] This was not only the voice of impartiality, but also that of the natural lawyers. However, the conference refused to take any decision following the US proposal. For its policies, it could rely on the doctrines of ownerless sovereignty and effective occupation. The General Act of the Congo Conference (February 1885) thus avoided references to possible native rights. Africa was an object of European conquest, and the powers agreed among themselves to notify each other of acquisitions and protectorates 'in the territories occupied'.[151] A previous

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Concept of Statehood and the Acquisition of Territory in the Nineteenth Century', *The Law Quarterly Review*, 94 (1978), pp. 408–27, and Paul Keal, '"Just Backward Children": International Law and the Conquest of Non-European Peoples', *Australian Journal of International Affairs*, 49 (1995), pp. 198–206.

149 Lewis Henry Morgan, *Ancient Society, or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization* (New York, 1878), pp. Vf.; Jörg Fisch, 'Zivilisation, Kultur', in Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe* (Stuttgart: Klett-Cotta, 1992), p. 744. See also Fisch, *Expansion*, pp. 284–97; Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984), and Charles Henry Alexandrowicz, 'The Afro-Asian World and the Law of Nations', *Recueil des Cours*, 123 (1968), I, pp. 169–210.

150 Protocol of 31 January 1885. Parliamentary Paper c. 4361, p. 209; quoted in Grewe, *Epochen*, p. 646.

151 General Act of the Congo Conference, Berlin, 26 February 1885, Art. 34 and 35, in Wilhelm G. Grewe, *Fontes Historiae Iuris Gentium. Volume 3: 1815–1945* (Berlin, New York: Walter de Gruyter, 1992), pp. 317f. See Fisch, *Expansion*, pp. 497f.

section has pointed at the various relationships between theory and practice (IV, 7). In the case of late nineteenth-century international legal theory, this relation was simple: it accomodated almost completely to European practice.

Mr Kasson's sweeping reference to modern international law could be challenged. Doctrinal assumptions had moved away from the generous 'recognition of the right of native tribes' so widespread among natural lawyers. The doctrine of unattributed territory or *res nullius* specified that territory had to be considered ownerless even if inhabited by nomads or barbarians, and could be occupied at will by members of the civilized community. Occupation was defined as establishing territorial sovereignty (*Gebietshoheit* or *imperium*) over stateless domain. The consent of those who were affected was irrelevant.[152] A similar argument had been developed by Moser's incomplete positivism. He had advanced the thesis that only sovereign states could occupy territories in a manner consistent with the law of nations (see end of V, 5). However, his radical thesis that non-Europeans – living in communities not regarded as equivalent to sovereign states – were outside the international legal sphere was not typical of the eighteenth century. At the end of the nineteenth, it had become mainstream.

It is now time to qualify the above picture of the bad and ugly nineteenth century. Boundaries are fuzzy, change is gradual, and we should stay clear of the fallacy of binary oppositions, where the nineteenth century is separated from the previous and the following centuries by a deep ravine. It is useful to distinguish the first half of the century from the later decades. In fact, when people refer to the nineteenth century in an international context, they usually have the period from roughly 1870 to 1914 or 1918 in mind. Recent scholarship has shown that a new era of natural law after Kant dominated the intellectual scene at least in the states of the German Confederation (*Deutscher Bund*) up to 1850. The doctrines were politically more liberal than those written during the age of Enlightened Absolutism, emphasizing human and civil rights. Authors perceived the historical nature of created law *and* believed in natural law – deduced *a priori* from rational principles – at the same time. It was only at the end of the century that a sharp distinction was drawn between natural law and legal philosophy, and natural law was seen as one way among others of doing legal philosophy.[153]

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152 Fisch, *Expansion*, p. 306 mentions a long list of authors from Field in 1872 to Ghirardini in 1912. See also pp. 297–314 and 349–58 and Andrews, 'Concept of Statehood', pp. 415f. The most comprehensive study on the topic is Jan Hendrik Willem Verzijl, *International Law in Historical Perspective*, 10 vols (Leyden: Sijthoff, 1971), vol. 4.

153 Diethelm Klippel (ed.), *Naturrecht im 19. Jahrhundert. Kontinuität – Inhalt – Funktion – Wirkung* (Goldbach: Keip Verlag, 1997), especially the introduction, and also edited by the same author, 'Legitimation, Kritik und Reform. Naturrecht und Staat in Deutschland im 18. und 19. Jahrhundert', special volume in *Zeitschrift für Neuere*

Differences can also be seen in international legal theory. For the early nineteenth century, sovereignty was not perceived as incompatible with an international legal order, nor thought of as preceding the law. At the end of the century, however, the relationship between sovereignty and territory seems to have been understood as analogous to that between individuals and their property. Now people apparently believed that sovereignty did not go together with being subject to a higher law. Up to the 1870s, international lawyers were not much interested in questions related to European expansion and conquest.[154] Nevertheless, if change took place later than usually assumed, it did happen. In Germany, international legal theory turned from naturalism to positivism, the idea of a global commonwealth was abandoned, and the law of nature (*Naturrecht*) and the law of nations (*Völkerrecht*) were seen as distinct entities.[155]

Yet another distinction applies to European military and commercial expansion. Historians differentiate between early imperialism or the 'imperialism of free trade' (1815–81) and the proper age of imperialism (1881–1914). The former relied on indirect control and was more interested in economic dominance. After 1881, European states tended to aim at direct control, and nationalism at home saw imperial expansion more and more as a matter of national prestige. The old maxim 'the flag follows the trade' was replaced by 'the trade follows the flag.'[156]

Previous chapters have shown that most natural lawyers shared a common understanding of hospitality rights: individuals have an imperfect right to visit foreign communities, which may in turn prefer isolation over interaction. The

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Rechtsgeschichte, 22 (2000), particularly pp. 3–10; Heinz-Jürgen Böhme, *Politische Rechte des einzelnen in der Naturrechtslehre des 18. Jahrhunderts und in der Staatstheorie des Frühkonstitutionalismus* (Berlin: Duncker & Humblot, 1993); Peter Goller, *Naturrecht, Rechtsphilosophie oder Rechtstheorie? Zur Geschichte der Rechtsphilosophie an Österreichs Universitäten (1848–1945)* (Frankfurt am Main et al.: Lang, 1997); Annette Brockmöller, *Die Entstehung der Rechtstheorie im 19. Jahrhundert in Deutschland* (Baden-Baden: Nomos Verlagsgesellschaft, 1997), and Gerald Hartung, *Die Naturrechtsdebatte. Geschichte der Obligatio vom 17. bis 20. Jahrhundert* (München: Verlag Karl Alber, 1998), part II. Lothar Gall, *Europa auf dem Weg in die Moderne 1850–1890*, 3rd edn (München: Oldenbourg Verlag, 1997) is a general introduction to the period.

154 Kennedy, 'International Law', pp. 408f.; Fisch, *Expansion*, p. 284.

155 Heinhard Steiger, 'Völkerrecht und Naturrecht zwischen Christian Wolff und Adolf Lasson', in Klippel, *Naturrecht im 19. Jahrhundert*, pp. 45–74.

156 Joseph Gallagher and Richard Robinson, 'The Imperialism of Free Trade' [1953], reprinted with related essays in William Roger Louis (ed.), *Imperialism. The Robinson Gallagher Controversy* (New York, London: New Viewpoints, 1976). For an introduction, see Gregor Schöllgen, *Das Zeitalter des Imperialismus*, 3rd edn (München: Oldenbourg, 1994), pp. 45–66, 142–54 and pp. 223–30.

majority assumed that states like China had a perfect right to restrict or altogether refrain from international trade, especially for reasons of self-preservation. Vattel's theory was more ambiguous than the teachings of his natural law predecessors. For a start, he developed the agricultural argument which amounted to discriminating against some non-European groups. Second, his theory was openly dualistic. According to external law, states were entitled to deny access to their territories. International lawyers of the nineteenth century usually absorbed this part of the doctrine, while ignoring that according to the same Vattel, states also had duties under the internal law of conscience (V, 2 and 5). The end of the nineteenth century witnessed two phenomena. On the one hand, members of the European society of states came to assert that no sovereign state had a legal duty to admit aliens. This was the era of restrictions on immigration, and Vattel was often quoted in support. Admission was usually denied to certain classes of aliens. Discriminatory exclusion laws were enacted in the United States and Canada, for instance, to stop Oriental migration.[157] On the other hand, the majority of authors tacitly agreed with Vitoria's first title: Europeans may travel, trade and settle down anywhere in the world. The doctrine of ownerless sovereignty conveniently provided a partial justification. Once European individuals had found their way into foreign territory, it was easy for their governments to intervene on their behalf if their rights had been infringed upon. The natural lawyers would have argued that those individuals should not have been on alien territory in the first place. Now it was assumed that the natives who were unfit or unwilling to protect the whites could be occupied, or forced to assume responsibility. The Anglo-Chinese treaty of Nanking (August 1842) which ended the Opium War (see end of VI, 3) found the appropriate words for this new way of thinking.

> The Government of Her Britannic Majesty having been obliged to send out an expedition to demand and obtain redress for the violent and unjust proceedings of the Chinese High Authorities towards Her Britannic Majesty's officer and subjects, the Emperor of China agrees to pay the sum of 12,000,000 of dollars, on account of the expenses incurred.[158]

The phrase that the British had been 'obliged to send out an expedition' leaves out the crucial fact that they had been unwilling to respect Chinese territorial sovereignty for years, and accept the force of Vattel's arguments.

I will now turn to selected authors. Most of them wrote widespread textbooks in international law, and all of them dealt with hospitality rights.

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157 James A. R. Nafziger, 'The General Admission of Aliens under International Law', *American Journal of International Law*, 77 (1983), pp. 815f.

158 Anglo-Chinese Peace Treaty, 29 August 1842, Nanking, Art. 6, in Grewe, *Fontes*, p. 260. My argument follows Fisch, *Expansion*, pp. 290 and 307f.

August Wilhelm Heffter (1796–1880) is representative of those writing in the first half of the nineteenth century. In his major work *Contemporary European Law of Nations* (1844), he distinguished between *ius gentium* and the *ius publicum Europaeum*, which was limited to Christian nation-states within and outside of Europe.[159] He held that governments decide if and how long aliens might stay in their territory. However, isolationist policies and arbitrary rejection of individuals violated the *ius publicum europaeum*.[160] What about non-European communities? Did it amount to an injury or offence (*Beleidigung*) if they isolated themselves? In a later passage, Heffter gave a clear answer. In full agreement with the natural lawyers, he held that humans can't be occupied, even if they were members of 'stateless and uncivilized nations' (*rohe Völker*). In a manner reminiscent of Kant, Heffter distinguished between a right to visit and a right to be a guest, claimed that there was only a right to visit (*sie können lediglich Verkehr mit denselben suchen*), and insisted that a territory had to be ceded voluntarily.[161] Thus Heffter fits well into the picture of a moderate first half of the nineteenth century, where interest in issues related to overseas expansion was limited, and the natural law tradition was sometimes still intact. The claim that attitudes changed towards the end of the century is supported by the commentator Geffcken (1888). He was apparently very unhappy with Heffter's restrictive specifications and felt obliged to add in a footnote that isolationist policies in general were unacceptable if 'the existence and progress of the human race' was at stake.[162] Little did it matter that this was incompatible with Heffter's express position.

One of the most respected international lawyers of the century was Johann Caspar Bluntschli (1808–81). He can partly be assigned to the camp of the natural lawyers, partly not. As he pointed out in his *The modern Law of Nations of Civilized States* (1868), the basis of the law of nations is human nature shared by all (§§ 2 and 6), a generic sense of justice and the 'eternal principles of natural human right'.[163] All states are members of the human race (§ 2), the law

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159 August Wilhelm Heffter, *Das europäische Völkerrecht der Gegenwart* [1844], 8th edn, by Heinrich Geffcken (Berlin: Verlag Müller, 1888), pp. 1–22 and 22–30.

160 Ibid., p. 140.

161 Ibid., p. 157. See also the interpretation in Fisch, *Expansion*, pp. 284 and 315f.

162 Heffter, *Völkerrecht*, p. 158, note 2.

163 Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten* [1868], 3rd edn (Nördlingen: Beck, 1878), Introduction, pp. 1f. Bluntschli divided the text into paragraphs. On Bluntschli in general, see Gerd Kleinheyer and Jan Schröder, *Deutsche Juristen aus fünf Jahrhunderten*, 3rd edn (Heidelberg: C.F. Müller Verlag, 1989), pp. 43–6; Adalbert Erler and Ekkehard Kaufmann, *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 1971), vol. 1, pp. 456f. Stephan Hobe, 'Das Europakonzept Johann Kaspar Bluntschlis vor dem Hintergrund seiner Völkerrechtslehre', *Archiv des Völkerrechts*, 31 (1993), pp. 367–79 covers his proposal of a European confederation of states.

of nations unites people of all religious denominations, and there is a sharp difference between religion and law (*Recht*; § 6). The law of nations is truly global in scope, even though it originated in Europe (§ 7). It is universal in content (§ 11) and the *consensus gentium* is one of its basis (§ 13). These universalist tendencies, and the emphasis on the idea of a global commonwealth and on human rights (§§ 411 and 562) link Bluntschli with the natural law tradition.

Bluntschli's defence of the law of nations against the attacks of international scepticism went beyond traditional natural law. A comparison with Grotius is helpful in this respect (see III, 1). Whereas Grotius had referred to his political anthropology and his theory of minimalist natural law, Bluntschli argued that surrogates of domestic legislation, jurisdiction and executive turned the law of nations into an efficient institution. There were congresses and multilateral agreements of civilized states which created binding law, the legislation of individual states with impact on the international legal sphere, the teachings of competent lawyers, international arbitration and other peaceful means of settling disputes. Bluntschli believed in the progress and refinement of international law.[164] Reason and justice manifested themselves in history. The law of nations was real law after all.

Where did Bluntschli depart from the natural lawyers in terms of hospitality rights? Like many nineteenth-century authors, Bluntschli distinguished between barbarians and civilized nations, which were characterized by a higher degree of moral development (§ 5). He did not consider nomadic peoples as forming a genuine sovereign government. They were thus subjects of the law of nations in a limited sense (§ 20). Civilized states had the right to spread the blessings of civilization, and to educate and guide the barbarians. However, the latter did have some rights, and Bluntschli admitted abuse by the Europeans (§ 280). He defended a position located between Vattel and the doctrine of ownerless sovereignty. Civilized nations had a right to civilize the world, but ownerless sovereignty did not suffice to justify occupation.[165] States that isolated themselves violated basic principles of the law of nations, and caused the 'disapproval' (*Missbilligung*) of the civilized world and could be 'called to account'. This can be interpreted as a hint at the practice of intervention by European powers. Unlike the majority of natural lawyers, Bluntschli held that Europeans were justified in putting an end to Chinese and Japanese isolationist policies. Sometimes, he conceded, the exclusion of some foreigners was justified, for instance in order to protect public safety. Bluntschli seems to hold that this did not apply to the Chinese or Japanese, because they rejected all

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164 Bluntschli, *Völkerrecht*, pp. 2–12. See the interpretation in Steiger, 'Völkerrecht', pp. 69f.

165 Fisch, *Expansion*, pp. 304f.

foreigners indiscriminately 'without cause' and in an 'indecent manner'.[166] Bluntschli also had some sympathies for European practices to protect the rights of their citizens and ambassadors abroad by the use of force, especially in the 'dark' African continent (§§ 191–226, 380, 471f.).

How did Bluntschli justify hospitality rights? He held that complete isolation violated natural human right amd the destiny of the human race, and contradicted the primacy of the international community over state sovereignty.[167] Bluntschli went beyond most natural lawyers in two respects here. First, his argument based on the destiny of the human race was teleological and introduced some sort of philosophy of history into the legal discourse. Second, he conceptualized Vitoria's first just title, the right to communicate and interact, as a perfect and enforceable right. As we have seen, the natural lawyers after Vitoria had quickly turned his first just title into an imperfect, unenforceable right (see II, 6). In Bluntschli, a thick conception of the good (the value of civilization) trumped the thin concept of impartial justice.

William Edward Hall (1835–94) can be seen as a typical representative of legal positivism, where the traditional balance between *bellum-solenne* doctrine and the just-war theory is abandoned in favour of the former. In a condition of anarchy, states have by definition an unlimited right to go to war (*ius ad bellum*). The *Treatise on International Law* (1880) declares: 'As international law is destitute of any judicial or administrative machinery, it leaves states, which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognises war as a permitted mode of giving effect to its decisions.'[168] The structural interpretation of the state of anarchy resembles Kant's (see VI, 2). Unlike Kant, however, Hall does not postulate a legal duty to enter a public lawful condition. In stark contrast to natural law theory, Hall also refrains from stating general principles which could define just causes of war. He has three arguments for this. First, there is the familiar problem of judgement. Disputes usually cannot be related with certainty to principles. This sceptical argument has been with us since Grotius (III, 1). Second, Hall pushes scepticism a bit further and suggests that people have 'divergent notions' even of the principles themselves (most natural lawyers would have considered this claim heretical and absurd). Finally, in times of war the laws are usually silent, and interests and violence collide. There is no room for rational argument and deliberation. Hall's conclusion is a complete rejection of just-war theory: 'It is

166 Bluntschli, *Völkerrecht*, pp. 26–8 and §§ 382 and 384.

167 Ibid., pp. 27f. and § 381.

168 William Edward Hall, *A Treatise on International Law* [1880], 7th edn (Oxford: Clarendon Press, 1917), p. 61.

not therefore possible to frame general rules which shall be of any practical value, and the attempts in this direction, which jurists are in the habit of making, result in mere abstract statements of principles, or perhaps of truisms, which it is unnecessary to reproduce.'[169] The rhetoric of pragmatism triumphs over idealistic notions of justice. If there are no general principles of any value operative in terms of the *ius ad bellum*, there are some in other respects. For instance, states have a sovereign right to punish violations of law. A case in point might be China neglecting its 'international duties' during the Boxer uprising in 1900, and the subsequent intervention of the established members of the international society.[170]

In terms of hospitality rights, Hall repeats the conventional doctrine that it is up to the state alone to decide whether emigrants or refugees shall be permitted or not. This right is based on state sovereignty, '[a] state being at liberty to do whatever it chooses within its own territory'. Hall explicitly rejects Vitoria's first just title as well as the claims of Grotius, Heffter and Bluntschli. However, this right to refuse hospitality (Hall actually uses this term) is qualified and 'tempered by the facts of modern civilization'.[171] All states are members of 'the brotherhood of civilised peoples', and complete isolation would amount to withdrawing oneself from this international society. States thus better have some 'reasonable or at least plausible cause' at hand to justify their politics of exclusion. Hall does not tell us when exactly the interests of the international society of civilized states trump state sovereignty. He refrains from specifying his principles, and holds that they are plain enough. This does not fit together with his sceptical stance mentioned earlier with respect to the *ius ad bellum*. In any case, the text opens a door for military intervention on behalf of rejected or expelled nationals. If the causes of expulsion are not deemed 'at least plausible ... [,] a government is thought to have the right of interfering in favour of its subjects in cases where sufficient cause does not in its judgment exist.'[172] The reader is left with familiar problems. Hall attempts to strike a balance between the rights of states and those of the international community (the rights of individuals are excluded from the picture). However, the dividing line is a matter of judgement, and the abstract principles involved may be interpreted in an arbitrary fashion. How can states be judges in their own causes? Hall's own sceptical arguments fully apply to his account of hospitality rights. This somewhat contrasts with another passage where Hall points out that there is no legal duty of a state to permit commercial and other intercourse, even though isolationism would amount to a nation becoming an outlaw of international

169 Ibid., p. 62.
170 Ibid., pp. 56 and 295, added in later editions, probably not by Hall himself.
171 Ibid., p. 223 and 224.
172 Ibid., p. 224.

society.[173] Here Hall does not ponder possible limits to this sovereign right. His position is less ambivalent, more straightforward, and in line with Vattel's external law.

Friedrich von Martens (1845–1909) was born into a family of Baltic Lutherans and later became professor in St. Petersburg. For Martens, international law is exclusively the law of states, not of nations or individuals.[174] This inter-state law is furthermore restricted to the 'states of European civilization'.[175] To qualify for membership in this exclusive society of civilized states, the 'basic principles of European culture' have to be accepted. Any true community (*Gemeinschaft*), Martens holds, has to share interests, endeavours and the same cultural goals.[176] In contrast to other international lawyers of his time, Martens is not happy with the entry of the Ottoman Empire into this exclusive society (traditionally, the peace treaty of 1856 is regarded the turning point). In his opinion, the existence of consular jurisdiction (see beginning of IV, 7) indicates that the Turks are still outlaws.

Martens's position is problematic for several reasons. In historical terms, consular jurisdiction or capitulations did not imply inequality or inferiority for non-Europeans. Up to the eighteenth century, reciprocity often prevailed, with Asians exercising consular jurisdiction in European states.[177] Even during his own time, Martens was confronted with the fact of a plurality of opinions among international lawyers concerning the criteria for membership. He tends to restrict it to states geographically located in Europe and with European roots (the Americas), thus contradicting widespread doctrine and practice: apart from the Ottoman Empire, Japan, China, Siam and Persia were accepted into the society of civilized states in the late nineteenth century. Martens could distinguish between his preferred strong cultural concept of community (with standards even many European states were arguably unable to meet) and a weaker version, such as the idea of a legal community, where shared culture is not a decisive criterion. This distinction is implied in the writings of several natural lawyers. Vattel, for instance, differentiated between the European republic and the wider international community of the human race (V, 5). Especially in the eighteenth century, there was a prevalent awareness of a clear

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173 Ibid., pp. 57f.

174 Friedrich von Martens, *Völkerrecht. Das internationale Recht der civilisirten Nationen* (Berlin: Weidmann, 1883), §§ 3 and 4, pp. 18, 21; § 53, p. 231. Walter Habenicht, *Georg Friedrich von Martens* (Göttingen: Vandenhoeck and Ruprecht, 1934) is a useful introduction.

175 Martens, *Völkerrecht*, § 39, pp. 177f.; § 41, p. 181.

176 Ibid., § 41, pp. 181–3 and § 46, pp. 202–5. See § 41, pp. 182f. for the following.

177 Charles Henry Alexandrowicz, 'The Afro-Asian World and the Law of Nations', *Recueil des Cours*, 123 (1968), I, pp. 124 and 150–7.

distinction between the *ius publicum Europaeum* or *Droit public d'Europe* on the one hand and the legal structures pertaining to the law of nations outside Europe (see above). In addition, it might be argued against Martens that nothing more than the acceptance of the principle *pacta sunt servanda* is necessary to guarantee working relations among communities of divergent cultures or religious denominations. At any rate, Martens sides with Mill and criticizes Bluntschli for his alleged cosmopolitan fantasy.[178]

We might expect that at this point, Martens jumps to the convenient conclusion that those outside the exclusive international community are also outside the sphere of law proper. However, he refuses to do so. Relations with uncivilized nations or barbarians must follow the precepts of natural law (*natürliches Recht*), that is, those principles of morality which are rooted in the nature and reason of humans.[179] Thus Martens does not deserve the label 'legal positivist' in the full sense of the term. Although his focus is on positive law in the first place, he also considers the idea of an international society (again, it is the exclusive society of civilized states) and the 'idea of right' which helps us to criticize existing laws.[180] The idea of an international community is crucial for Martens's justification of hospitality rights. As members of this society, states have a basic right to international interaction, contacts, dealings and commerce. However, Martens qualifies this right with the familiar reference to state sovereignty, which implies the right to specify the exact conditions of immigration.[181] Civilized states may *not* force barbarians to open up their territories, for the simple reason that they are not members of the same community and lack reciprocity in their dealings. However, Martens leaves open a back door for the justification of European imperialism: the use of force is legitimate if the barbarians display 'illoyal behaviour' (*illoyales Betragen*).[182] Presumably, this constitutes an injury. The passage itself remains somewhat obscure. Martens does not define this 'illoyal behaviour', and we are left to speculate about its content and scope.

Franz von Liszt's (1851–1919) ongoing reputation is based on his works in the field of criminal law. More than Martens, Liszt sides with positivism and bases international law on customary law, specific treaties and the overlapping legal convictions of the civilized states (*übereinstimmende Rechtsüberzeugung der Kulturstaaten*). In his widely used *The Law of Nations presented in a systematic Manner* (1898), he emphatically rejects natural law and legal

178 Martens, *Völkerrecht*, § 41, p. 184.
179 Ibid., § 41, p. 182.
180 Ibid., § 39, pp. 178f.
181 Ibid., § 79, pp. 306f.; cf. § 87, p. 339.
182 Ibid., § 79, pp. 307f.

philosophy as possible sources. There is no law above positive law.[183] As in Martens, only civilized states (*Kulturstaaten*) qualify for membership in the *communauté du droit des gens*, and nomadic tribes are explicitly excluded.[184] Liszt endorses the doctrine of ownerless sovereignty which was widespread at the end of the century (see above). In Liszt's words, nomadic negro tribes are not subjects of the law of nations. Occupation is establishing territorial sovereignty (*Gebietshoheit* or *imperium*) over stateless domain. Occupation requires effective rule and the will to do so. The consent of those who are affected is irrelevant, and humans can be occupied.[185]

Liszt's concept of hospitality rights goes beyond the accounts of Hall or Martens. Whereas they tried to strike a balance between sovereignty and the international community (and found themselves in a quandary), Liszt returns to Vitoria's first just title full force. States have the right and the duty to engage in interactions (*Verkehr*) with all other members of the community, and this *ius commercii* or right of sociability can be enforced. My interpretation is at least suggested by the sentence that a state which refrains from interaction with another one while keeping relations with the rest provides a legitimate right to go to war. Liszt also seems to accept that states which do not qualify as civilized such as China are entitled to limit or even prohibit immigration or any contacts.[186] Here he returns to the familiar doctrine of state sovereignty. Trying to establish some coherence in his writings, we could argue that Liszt provides three categories of political communities: apart from the group of civilized states, there are those which are not (yet) included, and finally there are nomadic tribes. Liszt documents the focus of late nineteenth-century international law on issues related to Africa. As nomadic tribes and their territory can be occupied, hospitality rights in this respect become obsolete.

It is somewhat misleading to hold that we have come full circle, and that Liszt – or Bluntschli, for that matter – has returned to Vitoria's position. Vitoria conceived hospitality – like humanitarian intervention – as a universal right or entitlement, which anyone could assert. So theoretically, hospitality rights could have been claimed by the Chinese in the eighteenth century, or can be claimed by African refugees in our time (especially if they are exposed to starvation). In fact, of course, only the Europeans were in a position to maintain

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183 Franz von Liszt, *Das Völkerrecht systematisch dargestellt* [1898], 10th edn (Berlin: Springer, 1915), § 2, p. 11 and p. 12. For secondary literature, see Kleinheyer and Schröder, *Deutsche Juristen*, pp. 169–73 (with more titles), Erler and Kaufmann, *Handwörterbuch*, vol. 3, pp. 11–13, and Susanne Ehret, *Franz von Liszt und das Gesetzlichkeitsprinzip* (Frankfurt am Main: Lang, 1996).

184 Liszt, *Völkerrecht*, § 1, pp. 3f.; § 5, p. 48

185 Ibid., § 10, pp. 100f.

186 Ibid., § 8, pp. 72f. and § 12, p. 113; § 12, pp. 120f.

this right. Exclusive rights, by contrast, are reserved to subjects who meet conditions which cannot be fulfilled by all members of a community. Examples are the rights of those who believe in the true religion or have developed civilized states.[187] Liszt and Bluntschli insist on the universal right of hospitality, but unlike Vitoria justify it with reference to the exclusive right of Europeans to spread the blessings of civilization.

At the turn of the century and the end of the classical period, two books specifically dedicated to the issue of the rights of aliens were published. Hans Frisch distinguished in *Das Fremdenrecht* (1910) between the domestic and the international rights of foreigners, and focused on the former. In his account, the legal position of aliens in the domestic sphere was based on international treaties, private law and public law. The aliens enjoyed political as well as civil rights, left to the discretion of the host state. He also distinguished between the right to visit (*Aufenthalt*) and the right to settle (*Niederlassung*).[188] Frisch left out the problem of the admission of aliens. His focus was on their status once they had been admitted. Decisions were apparently a matter of the sovereign state. As a representative of legal positivism, Frisch wondered if there could be human rights and thus 'subjective rights' of aliens once the natural law doctrine was dead. He contended that there was no general legitimizing principle.[189]

Edwin M. Borchard shared Frisch's very optimistic history of the rights of aliens in his comprehensive *The Diplomatic Protection of Citizens Abroad* (1915). As believers in the idea of progress, both assumed that the legal position of aliens had moved from absolute lawlessness to full equality with the natives.[190] Borchard's main focus was also on the rights of aliens once they had been admitted. The common consent has established a standard of conduct the host state is obliged to meet:

> In the absence of any central authority capable of enforcing this standard, international law has authorized the state of which the individual is a citizen to vindicate his rights by diplomatic and other methods sanctioned by international law. This right of diplomatic protection constitutes, therefore, a limitation upon the territorial jurisdiction of the country in which the alien is settled or is conducting business.[191]

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187 Fisch, *Expansion*, pp. 485f.

188 Hans von Frisch, *Das Fremdenrecht. Die staatsrechtliche Stellung der Fremden* (Berlin: Carl Heymanns Verlag, 1910), pp. 115–18 and 119–21.

189 Ibid., p. 227: 'Im voraus sei noch bemerkt, daß sich eine allgemein giltige Formel dafür, welche Grundrechte den Staatsangehörigen und welche auch Fremden zustehen, nicht aufstellen lässt.'

190 Frisch, *Fremdenrecht*, p. 1 and Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York: Banks Law Publishing, 1922), p. 33.

191 Ibid., p. V.

This concerns issues such as equality of treatment, treaty obligations, or denial of justice. We have already seen that customary law of nations in the eighteenth century progressively put the enforcement of the rights of aliens into the hands of their respective governments (see IV, 7). Borchard follows the nineteenth-century trend where individuals were mediated by international law and seen as 'objects'. His approach is also unabashedly positivistic. Borchard notes the familiar tension between the right of international intercourse and state sovereignty, and settles for the usual compromise. It is suggested by the facts of international life:

> The network of commercial treaties by which the states, of the white race at least, are bound together, has practically established the rule of freedom of international intercourse. A government that would seek to-day to take advantage of its right to exclude all aliens would violate the spirit of international law and endanger its membership in the international community.[192]

Theoretically, states are sovereign and may exclude all aliens, but they are advised not to do so, because they might get ostracized. The freedom of international intercourse is thus part of modern customary law, at least as far as the club of Europeans or whites is concerned. State sovereignty is limited, states should better not exclude all aliens, but they may keep out some of them, such as undesirable aliens, and specify the conditions of admission. In this respect, almost anything seems to go. Borchard mentions the United States's practice to regard 'alien races considered inferior' as one category of undesirable aliens. A few lines further down, he reports on the same United States protesting against 'discriminations against certain classes of American citizens excluded because of race, profession or creed'.[193] Might not there be an inconsistency, because in both cases, certain groups of people are discriminated against? Borchard refuses to comment. State practice seems to count more than reference to abstract standards of human rights.

Borchard's positivistic approach also becomes evident when dealing with the issue how the international responsibility of states can be enforced. In a manner reminiscent of Hall, he holds that states are judges in their own causes, and may resort to a wide range of self-help measures, including the display of force, the use of armed force, termed 'non-belligerent interposition', and distinguished from intervention, reprisals and war.[194] Borchard distinguishes between stronger and weaker countries, and his examples demonstrate that the European powers and the United States form the first group. He also concedes

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192 Ibid., p. 46.
193 Ibid., p. 47.
194 Ibid., pp. 48, 177–80, and 446–56.

occasional abuse of self-help measures, but ultimately believes that they are mostly justified, because weak states are by definition internally unable to guarantee the international standard required in the treatment of aliens. The 'interposition' of the Western powers in China during the Boxer uprising in 1900 is one of his examples.[195]

Some concluding remarks on the nineteenth century are now perhaps in order. There is no need to expose the theories of conquest, of titles based on civilization, of enforceable hospitality rights and of occupation to criticism. This has already been done by natural lawyers such as Wolff and Kant at some length. We should also beware of the temptation to turn the century into a demonic age – not least because each period tends to see the preceding one in an unfavourable light (see beginning of III, 1). Alexandrowicz's flattering assessment of the classical authors from Vitoria to Vattel can and must be qualified in turn: all of them weren't that nice either. However, especially late nineteenth-century writers lack the sophisticated conceptual tools of the natural lawyers, for instance the distinction between perfect and imperfect duties, and often resort to rather blunt theorems like the theory of occupation. One is indeed tempted to construct a story of the 'decline of the law of nations' in the nineteenth century. Perhaps the widespread assumption of the twentieth century that Europeans in the past were eurocentric, racist and engaged in a 'discourse of conquest' is mostly based on evidence from the late nineteenth century, and to some extent a historiographical cliché.

I have already shown in the 'Introduction' how twentieth-century international legal theory as well as international law tried to dissociate themselves from the preceding century. Historians have suggested that the changes were so fundamental that 'classical' law of nations came to an end and was followed by 'post-classical' or contemporary international law, characterized by the end of the *ius ad bellum*, the advent of international organizations such as the League of Nations and the United Nations, the gradual waning of the sovereign state, and a stronger emphasis on individuals, international organizations and NGOs as subjects of international law. General principles of law, *ius cogens*, *erga-omnes* norms, the idea of an international community of states, and inalienable rights of individuals have played an increasingly important role in international law. Sovereignty among states has become limited. As Judge Alvarez put it in 1949, it has turned into 'an institution, an international social function of a psychological character, which has to be exercised in accordance with a new international law'.[196] The 'assault' on sovereignty has led to a reduced

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195 Ibid., p. 452 and 456.

196 The Corfu Channel Case, 1949, International Court of Justice Reports 1, 43 (individual opinion by Judge Alvarez). On the changes, see the literature mentioned in the footnotes of the 'Introduction' and section I, 2, especially Gerd Seidel, 'Die

role of domestic law and brought more issues within the scope of international law, for instance the protection of human rights. The process of decolonization urged scholars such as Alexandrowicz to rethink basic nineteenth-century discriminations. Nineteenth-century authors tended to see European conquest and hospitality rights as a story of progress culminating in their own century which finally discovered the correct principles such as effective occupation. The next century reverted this picture into the opposite. In a landmark decision (1975), the International Court of Justice rejected nineteenth-century assumptions and ruled that Spain had considered the Western Sahara, thinly populated by nomadic tribes, a territory which could only be acquired 'through agreements concluded with local rulers' rather than as *terra nullius*.[197]

It has already been suggested in the 'Introduction' that some aspects of the natural law tradition were rediscovered in the twentieth century, especially in connection with the modern doctrine of international human rights.[198] International legal theory moved away from a wholesale endorsement of legal positivism. Scholars like James Brown Scott, Hersch Lauterpacht, Charles De Visscher and Alfred Verdross challenged the positivists' rejection of natural law as a source of international law. Scott in particular returned to Vitoria in his quest for a nonconsensual moral basis of the science. Commentators point at the diversity of the development, but hold that 'especially since the second World War, a general revival of natural law can be observed.'[199] A number of twentieth-century philosophers revived natural law doctrines, among them Leo Strauss, Leonard Krieger, Friedrich von Hayek, John Finnis, Johannes Messner and Robert George, although aspects of international relations or law were

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Völkerrechtsordnung an der Schwelle zum 21. Jahrhundert', *Archiv des Völkerrechts*, 38 (2000), pp. 23–47.

197 International Court of Justice, Advisory Opinion on the Western Sahara, 16 October 1975, in *International Legal Materials*, 14 (1975), §§ 80 and 81, pp. 1381f. See Fisch, *Expansion*, pp. 346–8, 363–77 and Kennedy, 'International Law', pp. 392f., 390 and 405 for more on the reversal of opinions.

198 See Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), and, among many others, Norbert Brieskorn, *Menschenrechte. Eine historisch-philosophische Grundlegung* (Stuttgart, Berlin, Köln: Kohlhammer, 1997) as well as Robert P. George, *In Defense of Natural Law* (Oxford: Oxford University Press, 1999).

199 Josef L. Kunz, 'Natural-law Thinking in the modern Science of International Law', *American Journal of International Law*, 55 (1961), pp. 951–8, the quotation p. 953; Heinrich Rommen, *Die ewige Wiederkehr des Naturrechts* [1936], 2nd edn (München: Beck, 1947); Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague et al.: Kluwer, 1998). Alexander Somek and Nikolaus Forgno, *Nachpositivistisches Rechtsdenken: Inhalt und Form des positiven Rechts* (Wien: WUV-Univ.-Verlag 1996) is one among many systematic studies on issues related to positivism.

often neglected. It is of course a matter of debate whom to assign to the camp of the natural lawyers. As usual, boundaries are fuzzy. Among possible candidates, the Marburg Neo-Kantians and the Neo-Thomists have been mentioned. A case can be made that Kantians like Rawls, O'Neill, or Höffe should be assigned to the camp as well, although only in a qualified sense (see I, 4 and VI, 1).[200] Usually two explanations are offered for the revival of natural law. First, it is claimed that legal positivism is helpless in the face of totalitarian practices or gross violations of basic standards of justice or human rights. Second, legal positivism is said to be unable to cope with new problems in a rapidly changing world.

Twentieth-century international law has widely followed the late nineteenth century with the claim that no state has a legal duty to admit aliens, and that, although complete isolation would violate the standards of international law, the sovereign state may set limits and specify conditions.[201] State have their own detailed municipal law regarding aliens.[202] However, in the fields of political science, legal philosophy, and even among international lawyers, there is a wide range of opinions, and some of them challenge current international law related to the rights of aliens, and especially related to immigration (see the 'Introduction' and 'Conclusion' for more). It is perhaps too early to assess the whole twentieth century in a comprehensive manner, so a brief section on one of its most respected international lawyers must do.

Alfred Verdross (1890–1980) consciously returns to the natural law tradition: the normative basis of any positive law is human sociability, the idea

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200 Charles Covell, *The Defence of Natural Law. A Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshot, F. A. Hayek, Ronald Dworkin and John Finnis* (New York: St. Martin's Press, 1992); the review essay by Malachi Haim Hacohen, 'Leonard Krieger: Historicization and political Engagement in intellectual History', *History and Theory*, 35 (1996), pp. 80–130; Robert P. George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999); Alfred Klose (ed.), *Johannes Messner* (Paderborn, Wien: Schöningh, 1991). Gustav Radbruch's thesis that legal positivism turned German jurists and lawyers into willing executioners of National Socialist ideology must be qualified; see the remarks in Alexander Somek, *Rechtssystem und Republik. Über die politische Funktion des systematischen Rechtsdenkens* (Wien, New York: Springer-Verlag, 1992), pp. 1–3 (with more literature).

201 Richard B. Lillich, 'Duties of States regarding Civil Rights of Aliens', *Recueil des Cours*, 161 (1978), III, pp. 329–442, here p. 339; Nafziger, 'General Admission', p. 804; Knut Ipsen, *Völkerrecht. Ein Studienbuch*, 4th edn (München: Beck, 1999), p. 705 (more sources pp. 703f.); Ignaz Seidl-Hohenveldern, *Völkerrecht*, 8th edn (Köln: Carl Heymanns Verlag, 1994), p. 356 (more sources ibid., pp. 354f.).

202 See for Austria, for instance, Erich Feil, *Fremdenrecht. Gesetzestexte, Materialien, Rechtsprechung, Literatur* (Wien: Linde Verlag, 1995), and Michael Schmidt, Wolfgang Aigner, Wolfgang Taucher and Gabriela Petrovic (eds), *Fremdenrecht* (Wien: Österreichische Staatsdruckerei, 1993).

of right or 'natural justice'. He dismisses sweeping legal positivism and Kelsen's theory of *Grundnorm*.[203] Verdross distinguishes between absolute and relative sovereignty: up to the nineteenth century, international legal theory (Vattel is quoted approvingly) perceived sovereignty as self-rule and independence from other states, while accepting that sovereign states are subject to the demands of morality and the norms of the positive law of nations. The nineteenth century distorted this understanding of relative sovereignty, claiming that states are sovereign in an absolute sense, even independent from morality and legal norms.[204] Verdross dissociates himself from the nineteenth century in other respects. Although he refers to 'civilized states' (*Kulturvölker*), this is done without a European bias.[205] He also considers the doctrine of a stateless domain (*terra nullius*) obsolete.[206]

Verdross follows conventional doctrine when emphasizing that individuals are in principle not subjects of international law. Thus they have no legitimate claims pertaining to the law of nations against states. The rights of aliens (*Fremdenrecht*) is the body of norms specifying the duties of states *among themselves* how to treat foreigners. Verdross's approach is state-centered: aliens who do not belong to another state are excluded by definition.[207] The international rights of aliens are distinguished from the domestic sphere. Most norms are specified in bilateral treaties. Systematically, three parts can be distinguished: the admission of aliens, their legal status once admitted, and their expulsion.[208] The general principles (*droit international commun des étrangers*) are but a few, especially in terms of admission. Although states may not isolate themselves completely in an arbitrary fashion, they are not obliged to admit aliens for permanent settlement. Entry (*Einreise*) can be linked to specific requirements or even be refused out of 'reasonable causes' (*vernünftige Gründe*). These causes are not specified. It would amount to an

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203 Alfred Verdross, 'Les règles internationales concernant le traitement des étrangers', *Recueil des Cours*, 37 (1931), III, pp. 327–412, here p. 332, and *Völkerrecht* [1937], 5th edn (Wien: Springer Verlag, 1964), pp. 13–25. Verdross's work is evaluated in a special issue of *European Journal of International Law*, 6 (1995) and in Herbert Miehsler, Erhard Mock, Bruno Simma and Ilmar Tammelo (eds), *Ius Humanitatis. Festschrift zum 90. Geburtstag von Alfred Verdross* (Berlin: Duncker & Humblot, 1980). The essays of Bruno Simma and Ota Weinberger (ibid., pp. 23–53 and 321–39) focus on his theory of natural law. See also Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, 36 (1998), pp. 541–4 and 616.

204 Ibid., pp. 7f.

205 Ibid., pp. 149, 364 and 'Règles', pp. 334f.

206 *Völkerrecht*, p. 297.

207 Ibid., pp. 216f. and 360; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht. Theorie und Praxis*, 3rd edn (Berlin: Duncker & Humblot, 1984), pp. 798f.

208 *Völkerrecht*, pp. 362–72 and 'Règles', pp. 327 and 337–88.

abuse of right (*abus de droit*), however, if a thinly populated country refused any immigration.[209] Verdross is one of the first to offer a short history of hospitality rights in the writings of the natural lawyers. He holds that there was a turning-point in Wolff and Vattel, who are said to have opted for state sovereignty and weakened the previous emphasis on the international community (this interpretation is mistaken). Verdross finally discovers a nineteenth-century *renaissance vitorienne* in the writings of authors such as Bluntschli.[210] Verdross could have gone beyond conventional doctrine. He emphasizes the Christian idea of personality as one of the sources of the rights of aliens. However, Verdross neither establishes a connection with modern human rights nor follows Vattel's dualistic approach, which also leaves room for the moral dimension. Verdross sometimes hints at a 'monist' understanding of the relationship between international and national law, where both are part of one single 'universal legal order' and national law is subordinate. The minimum-standard treatment is a case in point.[211] Again, this is not used as a point of departure to move beyond the positive law of nations.

209 *Völkerrecht*, pp. 239 and 362.
210 'Règles', pp. 338–40.
211 Ibid., pp. 330 and 337.

Conclusion

Geschichte ist weder zu begreifen als System noch als Totalität, sie besitzt den Charakter des Fragments. (Hans Michael Baumgartner, *Kontinuität und Geschichte. Zur Kritik und Metakritik der historischen Vernunft*)

This study has focused on the international dimension of the natural law tradition in modern European thought since Vitoria. It has emphasized the relationship between *ius gentium* and natural law, the latter's diversity and gradual transformation, especially in the hands of Hume, Smith and Kant. The main emphasis was on the idea of justice, and on the concepts of a global commonwealth and of transborder hospitality. One legacy of the natural law tradition is the gap or binary opposition between positive and natural law, the ensuing dilemma of the 'theory of law' since the nineteenth century, and current attempts to go beyond the dichotomy. The second and more important legacy of the natural law tradition to the modern age is the doctrine of human rights. In this section, I will try to summarize the results of my investigation (assuming that there are some, and that they can be summed up and properly communicated). I start with the issue of hospitality and finish with the idea of justice.

My analysis has shown a surprising continuity of arguments among the natural lawyers. With the notable exception of Vitoria, most of them assumed a natural right to attempt interaction or commerce with other communities, provided that the natives did not object. Equally interesting is their recurrent defence of isolationist policies practiced by China and Japan. I have also emphasized that the intellectual history of the right of hospitality is dominated by a systematic tension between natural justice on the one hand and implicit, virtual, or explicit consent on the other. The second systematic problem focused on how to draw a line between what Suárez called reasonable as opposed to unreasonable constraints on free (commercial) intercourse. It seems that later authors tend to delegate the authority to judge in these matters to the state actors, implicitly accepting even capricious or 'unreasonable' decisions.

One of the key assumptions (perhaps unfounded) of this study is that many, if not all, of the problems tackled by the natural lawyers are indeed of systematic relevance in our own time. One example among others was the problem of humanitarian intervention. Though we are no longer shocked by horror stories about acts of cannibalism, we wonder when human rights abuses become so serious that they would allow for humanitarian intervention in

principle. I have also pointed out (see VI, 4) that hospitality rights as specified by our authors relate to current debates about immigration. Is migration right a basic human right and the inside/outside, citizen/alien distinction an illusion? Should the concept of national citizenship be abandoned in favour of 'cosmopolitan citizenship', whatever this may imply? Or do communities have a right to restrict immigration by legislation and based on majority decisions? What if these laws should be unjust, selective, or arbitrary?[1] Again, these questions lead us back to the tension between justice and consent. The issue will be taken up later on.

The topics of hospitality rights and the global commonwealth intersect in many respects. I have argued for a conceptual distinction among various types of cosmopolitanism and visions of a global commonwealth, where humankind was either seen as a biological unit, or as a moral entity (all humans share the same capacity for moral reasoning, or are equally rational creatures and moral beings), or forms, or tries to establish, some sort of legal commonwealth: it was this doctrine of the natural law community of humankind which claimed center stage. In addition, we have encountered several types of international society: the world government, the society of states and its balance of power, Wolff's universal commonwealth, Kant's dynamic federation of states, to mention just a few. I have pointed out that many natural lawyers were hampered by unfortunate juxtapositions, such as that between the universal monarchy and the society of states. Only subsequent authors such as Rousseau and Kant were capable of surpassing binary oppositions, and paved the way for more nuanced analyses. I have clearly favoured the strong supporters of the domestic analogy, and suggested that the structural problems endemic to an anarchical condition can only be overcome peremptorily when a common legislation, jurisdiction and executive force is established. In my account, the 'Grotian heritage' were the problems of interpretation and of law enforcement (by contrast, the question of obligation is more of an academic nature). Nowadays the task is to find a properly designed supernational federation, the correct balance between federalism and a minimal republican world government based on 'differentiated sovereignty'.[2]

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[1] See Alexander Somek, 'Einwanderung und Soziale Gerechtigkeit', in Christine Chwaszcza und Wolfgang Kersting (eds), *Politische Philosophie der Internationalen Beziehungen* (Frankfurt am Main: Suhrkamp, 1998), pp. 409–48; William James Booth, 'Foreigners: Insiders, Outsiders and the Ethics of Membership', *The Review of Politics*, 59 (1997), pp. 259–92; Juliann Carens, 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics*, 49 (1987), pp. 251–73, and Andrew Linklater, *The Transformation of Political Community. Ethical Foundations of the Post-Westphalian Era* (Columbia: University of South Carolina Press, 1998), ch. 6 for introductions to the problem.

[2] James A. Yunker, *World Union on the Horizon. The Case for Supernational*

I have claimed above that 'many, if not all, of the problems tackled by the natural lawyers are indeed of systematic relevance in our own time'. This statement must be qualified, and leads to what we may call the weak or sceptical thesis on hospitality rights. Although Skinner's methodology should be criticized (I, 3), we can agree with him that past texts do not solve our own immediate problems, even though they may be a key to our self-awareness. We must do our own judging ourselves. There may be some sort of sameness between past and present on an abstract level (the level of justice as impartiality, for instance), but concrete answers or solutions cannot be expected.[3] This thesis is in agreement with my overall claim that the abstract standard of justice is universal, but our concrete judgements are contextual and relative. The weak or sceptical thesis can be contrasted with a more daring strong thesis, which establishes specific imperatives or rules for our time. According to the cosmopolitan perspective, we would point out that there is a moral obligation of the industrialized countries to allow free movement unless the fabric of the legal system is in danger. It is argued in favour of this obligation that the sovereignty and jurisdiction of a state is an essentially relative question, that free movement is a natural right, and that restrictions on migration contradict the very liberal principles the constitutions of Western immigration countries like the United States espouse. According to this strong thesis, free movement is legitimate even if it leads to less income and welfare in the host states or endangers ethnic and cultural coherence. The strong thesis raises a number of familiar questions of borderline: if there is a human right of free movement, does it always trump the right to extradite aliens or to restrict immigration? May not ethnic or cultural disunion and alienation undermine the fabric of the legal system in the long run? How do we balance the right of the political community to self-preservation with the right of the individuals to free movement? In short, we run into familiar problems of judgement. In addition, it is obvious that the

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Federation (Lanham, New York, London: University Press of America, 1993) maintains that we should aim at a world republic, which is 'both attainable and desirable' in our age (p. 271). One prominent philosopher arguing in favour of a world republic is Otfried Höffe. See his most recent 'Für und Wider eine Weltrepublik', in Chwaszcza and Kersting, *Politische Philosophie*, pp. 204–22, 'Some Kantian Reflections on a World Republic', *Kantian Review*, 2 (1998), pp. 51–71, and *Demokratie im Zeitalter der Globalisierung* (München: Beck, 1999). A fine analysis is also included in Christoph Horn, 'Philosophische Argumente für einen Weltstaat', *Allgemeine Zeitschrift für Philosophie*, 21 (1996), pp. 229–51. A useful volume is David R. Mapel and Terry Nardin (eds), *International Society. Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998).

[3] Quentin Skinner, 'Meaning and Understanding in the History of Ideas' [1969], in James Tully (ed.), *Meaning and Context: Quentin Skinner and His Critics* (Cambridge: Polity Press, 1988), pp. 66f.

strong thesis does not automatically follow from an analysis of the natural law tradition. All we get are abstract principles such as the provision that refugees must be admitted if refusing them would lead to their death (for instance, if people are exposed to starvation in their home countries).

Cosmopolitan law becomes important when globalists argue in favour of a horizontal concept of legal order, emphasizing global civil society, public opinion and non-state actors. I have claimed in a previous section (VI, 4) that reliance on Kant in this respect is not justified, as he shares with other natural lawyers a very narrow understanding of hospitality rights.[4] However, going beyond Kant here is certainly not wholly unwarranted and in my opinion more promising than rehearsing the democratic peace proposition. Historically, the thesis that liberal/republican/democratic states are more peaceful than despotic systems, or tend not to go to war against each other, is fairly new. Its roots go back to Machiavelli and (I am glad to report) to eighteenth-century natural lawyers (granted they deserve this title) such as Montesquieu, Rousseau and Kant. In recent years, particularly Kant has been turned into the intellectual father of this proposition, though his writings do not have much in common with, say, Doyle's interpretation of them. At any rate, the empirical evidence assembled in favour of the democratic peace proposition is, to put it mildly, not totally convincing. Conflicting data is often conveniently swept under the carpet.[5] The globalist, cosmopolitan approach to world politics is more promising.

The introductory chapter linked current trends in globalization with quests for global ethics or transcultural, worldwide standards of justice. Sometimes analysts point at the increasing political, ecological, cultural, or economic interdependence among communities or states in the modern world and infer from it (implausibly, some contend) the normative claim that they should cooperate, or increase, or improve, or institutionalize their cooperation, or supplement it with

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4 Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998) assembles some essays of writers with a globalist bent. Daniele Archibugi, 'Models of international organization in perpetual peace projects', *Review of International Studies*, 18 (1992), pp. 295–317 distinguishes among various types of peace projects.

5 Fine publications among myriads of studies are Michael E. Brown, Sean M. Lynn-Jones and Steven E. Miller (eds), *Debating the Democratic Peace. An International Security Reader* (Cambridge, MA: MIT Press, 1997), a collection of previously published essays; Steve Chan, 'In Search of Democratic Peace: Problems and Promise', *Mershon International Studies Review*, 41 (1997), pp. 59–91; John MacMillan, *On Liberal Peace: Democracy, War and the International Order* (London: I. B. Tauris, 1998), and, last but not least, my own modest contribution to the debate: 'Kantian Perspectives on Democratic Peace: Alternatives to Doyle', *Review of International Studies*, 27 (2001), pp. 229–48.

a moral code which meets the requirements of a global society. My study shows that elements of this reasoning can be found among several natural lawyers, for instance, the Spanish neo-Scholastics. Suaréz subscribes to the Thomist (and Vitorian) notion that sovereign states, commonwealths or kingdoms constitute perfect communities in themselves. But he also points out that even these 'perfect states' are 'never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need'.[6] The reasoning combines an economic, basically pragmatic, argument referring to welfare and advantage with a moral one. Suaréz is obviously thinking of Christian virtues of love and mercy here. The natural lawyers of the eighteenth century progressively emphasized the pragmatic element, implying that self-love, utility, and morality often converge in commercial society. I have also emphasized that reservations about trade, and in particular free trade, were often widespread. Even Adam Smith severely qualified his advocacy of unimpeded commercial interaction. Again, this reminds us of our present age.[7] Opinions are divided if and how much trade barriers should be lowered, whether globalization has gone too far, or expanding trade is morally objectionable. It seems as if the latitude Smith granted the politician in certain areas, for instance when deciding whether economic retaliation (in order to secure abolition of trade restrictions) should be employed or not, has become the motto of the day, and compromises abound. (*The Economist* deplores the fact that even the World Trade Organization has made a pact 'with the devil, or, to be more precise, with the doctrine of mercantilism'.)[8]

It has become widely accepted that historians must stay clear of imaginary meta-narratives, and I have repeatedly pointed out where some have been inclined to commit this fallacy. One of these stories would tell how international political economy overcame mercantilism and found the truth in Smith's free trade doctrine. Stories in history have a complex plot. What holds

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[6] Francisco Suárez, 'A Treatise on Laws and God the Lawgiver' [1612], in *Selections from Three Works of Francisco Suárez. Vol. 2: Translations* (Oxford: Clarendon Press, 1934), p. 349.

[7] For introductions to the debate, see for instance Peter Koslowski (ed.), *Weltwirtschaftsethos – Global Exonomic Ethos. Globalisierung und Wirtschaftsethik – Globalization and Business Ethics* (Wien: Passagen Verlag, 1998); Joan Edelman Spero and Jeffrey A. Hart, *The Politics of International Economic Relations*, 5th edn (New York: St. Martin's Press, 1997); Thomas W. Zeiler, *Free Trade, Free World. The Advent of GATT* (Chapel Hill, London: University of North Carolina Press, 1999), and Stefano Guzzini, *Realism in International Relations and International Political Economy* (London, New York: Routledge, 1998).

[8] *The Economist*, 4 December 1999, p. 92.

true for international political economy is equally valid for other aspects of the natural lawyers' international dimension. My story has emphasized the ruptures and discontinuities of the intellectual history of *ius gentium*. Wolff is a case in point. There is simply no linear development from natural law doctrine to positivism, from the Christian brotherhood to a global commercial society, and from the moral and/or legal idea of a *societas humani generis* to a society of sovereign states. If there are some trends, such as the gradual emphasis on state sovereignty and positive international law, culminating according to my analysis in writers such as Vattel and Moser (V, 5), then these new developments evolve out of conceptually opposed positions and never cut their links with them. Natural lawyers did not merely replace the right to missionize with the right to bring the blessings of European civilization. There is no homogeneous, totalizing discourse of European conquest. In addition, many categorizations of individual authors are misleading or mistaken. It makes little sense to label Smith a cosmopolitan and Rousseau an anti-cosmopolitan, or Pufendorf a positivist and Wolff a naturalist. With all due modesty, I want to add here that this may also apply to labels such as 'globalists' (employed above) or 'natural lawyers,' especially in the cases of Hobbes, Hume, Rousseau, Vattel and Kant. They are all natural lawyers of such a particular blend, that we might as well remove the label, emphasize their uniqueness and originality, or resort to paradoxical formulations ('natural jurisprudence without natural law').

The incredulity towards meta-narratives and convenient pigeon-holes must be supplemented by doubts about decisive paradigm shifts in intellectual history. The transition from natural law doctrine to positivism in *ius gentium*, for instance, is a matter of degree rather than kind, and it does not get us anywhere to try to pin down the one person who 'made the decisive move' or 'ultimately reversed' whatever. Nevertheless, paradigm shifts are sometimes plausible theses, as in the case of Hobbes (structural reading of the state of nature) and Kant (nature of obligation).

As pointed out above, theories of hospitality rights are fraught with the systematic tension between justice and consent. One key assumption of this study is that starting with Vitoria, natural lawyers converge on a thin concept of justice. In addition, we could infer a meta-narrative from my story: gradually, the concept of justice, originally embedded in a rich and thick account, gets thinner, until the pale sun at Königsberg, East Prussia has melted all thickness away. Kant's practical philosophy is then the climax in the history of modern Western philosophy to find and develop a thin conception of political justice and a theory of cross-cultural moral minimalism, while constantly confronted with the challenge of relativism/particularism.

The story certainly does not end with Kant, who held that the basis and justification of moral laws cannot be found in something empirical like our knowledge of human nature, but in 'a completely isolated metaphysics of

morals'.[9] It is this Kantian claim of isolated moral philosophy which has been criticized and rejected by almost all major intellectual movements in the West over the last two hundred years, starting roughly with Hegel and the historical school. Kant claims that obligation involves 'the relation of a will to itself insofar as it determines itself only by reason'. This capacity of the will to obligate itself has been flatly denied. An introductory section (I, 4) tried to show that Aristotle, Kant and Hegel are still the major figures in current debates about moral minimalism. We do not have to rehearse the arguments here. I suggested that each position is confronted with internal inconsistencies, and the debate winds up with a draw, where the universalist-particularist dichotomy dissolves. I do not think that my study has substantially changed the scenario, in spite of the fact that my sympathies are admittedly on the side of the cosmopolitan, universalist natural lawyers. I will try to give my reasons in the following paragraphs, starting with the idea of a natural sense of justice.

Kant wrote that 'no government has so far dared to declare freely and openly: that right and wrong are mere illusions to which it need not pay any attention, and that it is therefore entitled to make its absolute will the law of the land. On the contrary, governments always appeal to the sense of right which their subjects possess as free moral beings.'[10] It can be argued that people like Cortés resemble these hypocritical politicians. He did not declare that justice is an illusion, but tried to make his actions compatible with 'the sense of right,' arguing for instance that he was merely defending himself and his property. Kant inferred from the phenomenon of hypocrisy that there is a moral predisposition in humans: 'This homage that every state pays to the concept of right (at least verbally) nevertheless proves that there is to be found in the human being a still greater, though at present dormant, moral predisposition to eventually become master of the evil principle within him (which he cannot deny) and also to hope for this from others.'[11] The quotations includes two

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9 Immanuel Kant, 'Groundwork of the Metaphysics of Morals', in *Practical Philosophy*, transl. and ed. Mary J. Gregor, The Cambridge Edition of the Works of Immanuel Kant (Cambridge: Cambridge University Press, 1996), p. 64; *Kant's gesammelte Schriften*, ed. Preußische Akademie der Wissenschaften (Berlin, Leipzig: de Gruyter, 1900ff.), vol. 4, p. 410 (from now on: 4: 410). The following quotation ibid., p. 78; 4: 427.

10 Kant, *gesammelte Schriften*, vol. 19, p. 610 (reflection no. 8077), following the translation in Immanuel Kant, *Political Writings*, ed. with intro. and notes Hans Reiss, transl. H. B. Nisbet, 2nd edn (Cambridge: Cambridge University Press, 1991), p. 272: 'Daher es auch noch keine Regierung gewagt, sich frey und offen zu erklären: Recht und Unrecht wären Schimären, auf die sie keine Rücksicht nähme und daß sie dem zu Folge blos ihren absoluten Willen zum Gesetz mache, sondern sie wendet sich immer an das Rechtsgefühl ihrer Unterthanen als freyer, moralischer Wesen.'

11 Immanuel Kant, 'Perpetual Peace', in *Practical Philosophy*, pp. 326f.; 8: 355: 'Diese Huldigung, die jeder Staat dem Rechtsbegriffe (wenigstens den Worten nach)

Kantian claims. First, he asserts that humans are aware of 'the concept of right,' and let us assume for the sake of argument that it is identical with our thin concept of justice. Second, Kant adds that as moral beings, we should hope that this predisposition is 'at present dormant', in conflict with 'the evil principle', and will eventually triumph.

Modern sceptics have problems with both theses, and I will focus on the first here. There are several ways to challenge Kant's claims, and to deconstruct their meaning. First, we could argue that the hypocritical rhetoric of politicians is just that, rhetoric and only a manner of speech, without any implicit substantial moral assertion behind it. Next, historians might claim that Cortés repeated standard ingredients of a historically contingent imperial ideology. Finally, philosophically, we may say that Kant shows that moral reasoning and judgements presuppose *some* kind of morals, but not necessarily a minimalist, transcendental morality. There may be a sense of justice, but it is historically or socially contingent and not natural in the sense of pertaining to humans as rational creatures irrespective of their history, culture, or ethnicity. The first argument brings us back to our familiar circle. We do in fact not know if there is or is not any implicit substantial moral claim 'behind' mere rhetoric. We can only assume it if we postulate that humans are, from a 'practical perspective', free moral beings, and that it is reasonable to make this assumption. The second argument does not necessarily contradict Kant's analysis. It can be conceded that in Cortés, there is an imperial ideology at work. But why this elaborate attempt to justify it? This question brings us back to our theory of moral minimalism.

The third argument is the most challenging one. It is easy to deconstruct the assumption of a sense of justice with analytical tools (and perhaps philosophical arrogance). Examples are always open to divergent interpretations. Richard Rorty's criticism is a fine case in point. In his defence of 'postmodernist bourgeois liberalism' based on Hegelian notions of community and Dewey's pragmatism, he writes that Kantians 'think there are such things as intrinsic human dignity, intrinsic human rights, and an ahistorical distinction between the demands of morality and those of prudence'.[12] This quotation includes two claims, and both must be qualified. The first one is a description of the Kantian position: there are intrinsic human rights. Kant did not write about 'rights' but about only one single human 'right': external juridical

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leistet, beweist doch, daß eine noch größere, obzwar zur Zeit schlummernde, moralische Anlage im Menschen anzutreffen sei, über das böse Princip in ihm (was er nicht ableugnen kann) doch einmal Meister zu werden und dies auch von anderen zu hoffen.'

12 Richard Rorty, 'Postmodernist Bourgeois Liberalism', in *Objectivity, Relativism, and Truth. Philosophical Papers, vol. 1* (Cambridge, MA: Cambridge University Press, 1991), p. 197.

freedom.[13] This right consists of two elements: one is external freedom as 'independence from being constrained by another's choice', a freedom that can be seen as the key element of a hypothetical state of nature and constitutive of human existence in so far as our being-in-the-world entails making choices. The other element is the coexistence of this freedom with that of 'every other in accordance with a universal law', which brings us back to standards of impartial justice developed above. Though Kant uses the notion 'innate right', it does not have to be read as an ontological claim. It is equally plausible to reinterpret external juridical freedom as a necessary *structural* element of a just framework of rules among persons, as the 'basic structure of society' (see VI, 1). The upshot is that we can, but are not obliged to, understand all natural law theories or theories of justice as making ontological assertions. Rather than pointing at alleged essentialism, criticism would have to show that the two key assumptions, external freedom and impartial justice, are unfounded. Rorty's second claim about the supposedly 'ahistorical distinction' between morality and prudence rests on shaky foundations. A look into the history of Western ethics shows that it has not been invented by Kant, and that it prevails in the writers discussed here. We can find the distinction in Machiavelli, Hobbes, or Vitoria – and the list could be expanded.[14] If the distinction is shared by people over the centuries, it can hardly be ahistorical. Why not see the difference as a structural feature of our moral reasoning, analogous to our categories?

So one familiar strategy against sceptics such as Rorty is to highlight internal inconsistencies. Another, perhaps more successful approach would look for

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13 Kant, 'The Metaphysics of Morals', p. 393f.; 6: 237f. with the following quotations. Natural and human rights are synonymous terms. They are the rights 'that people have, not by virtue of any particular role or status in society, but by virtue of their very humanity,' quoted from Brian Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150–1626* (Atlanta: Scholars Press, 1997), p. 2. See also Ramesh Thakur, 'Human Rights: Amnesty International and the United Nations', in Paul F. Diehl (ed.), *The Politics of Global Governance. International Organizations in an Interdependent World* (Boulder, CO, London: Lynne Rienner Publishers, 1997), pp. 248f.

14 The distinction underlies the whole *Prince*. See, for example, Niccolo Machiavelli, *The Prince*, 2nd edn (New York: Norton, 1992), ch. XVIII, where he writes that it is 'praiseworthy' to keep promises, but that there are sometimes situations when pragmatic considerations must overrule morality (p. 47). Thomas Hobbes, *Leviathan* [1651], ed. Richard Tuck, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1996), ch. 15 (p. 104), usually regarded as a champion of materialistic reductionism in ethics, defines the unjust man as someone whose will is not framed by considerations of natural justice, 'but by the apparent benefit of what he is to do'. Francisco de Vitoria, 'On the American Indians', in *Political Writings*, ed. Anthony Padgen and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. 291.

standards of moral minimalism in non-European cultures. I admit that my study has been hopelessly eurocentric in this respect. I can only hint at what should be the focus of an extensive investigation. In recent years, scholars from various cultures outside the rather narrow Western academic world have joined the universalist/particularist debate, and often sided with the former. In particular, scholars point out that the simplistic juxtaposition of 'West' and 'East' is mistaken, that contrasts are often overdrawn, that the two cultures are 'different yet compatible'. Sophisticated analysts point out that the current overemphasis on difference in the wake of Foucault and others makes us turn a blind eye on sameness (if not identity) and creates yet another myth, that of 'the Other'. Several authors claim that Confucianism or Chinese civilization, for instance, are in principle compatible with human rights doctrines, and that the 'universalist potential' is not an exclusive European matter.[15] There is an overlapping consensus in some areas, and if not all elements of modern Western culture are acceptable to non-Europeans, then probably justifiably so, because they cannot claim to be universal.

The underlying assumption of all natural law theory, moral minimalism and theories of impartial justice is indeed that people do have what Rawls describes in terms reminiscent of Kant as an 'effective sense of justice'.[16] Books on justice would be pointless if this sense did not exist. There is reason to believe that it can be effective among third parties, or among the people involved. We could cite the willingness of European authors to criticize the conduct of their own governments, the overlapping consensus on hospitality rights, or the widespread rejection of slavery, unjust oppression and colonialism. Evidently this study also includes an appeal to my readers' sense of justice. Philosophers like Rawls or Habermas, who have absorbed the lessons of historicism,

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15 Wm. Theodore de Bary and Tu Weiming (eds), *Confucianism and Human Rights* (New York: Columbia University Press, 1998); Zhang Longxi, *The Tao and the Logos. Literary Hermeneutics, East and West* (Durham, London: Duke University Press, 1992); the special issue 'Non-Western Political Thought', *The Review of Politics*, 59, no. 3 (1997), pp. 421–647; John Charvet, 'The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights', *Millenium. Journal of International Studies*, 27, no. 3 (1998), pp. 523–4; Gertrud Nunner-Winkler, 'Moralischer Universalismus – kultureller Relativismus. Zum Problem der Menschenrechte', in Johannes Hoffmann (ed.), *Universale Menschenrechte im Widerspruch der Kulturen* (Frankfurt am Main: Verlag für Interkulturelle Kommunikation, 1994), pp. 79–103, and Ramesh Thakur, 'Human Rights: Amnesty International and the United Nations', in Diehl (ed.), *The Politics of Global Governance*, pp. 248–52. See also Christoph Müller, 'Der heutige Kampf um die Universalität von Menschenrechten: Rückfragen bei Samuel Pufendorf', in Bodo Geyer and Helmut Goerlich (eds), *Samuel Pufendorf und seine Wirkungen bis auf die heutige Zeit* (Baden-Baden: Nomos Verlagsgesellschaft, 1996), pp. 150, 159.

16 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), para. 86 (pp. 567–77).

emphasize that an effective sense of justice is (also) the result of successful education, political culture and practice.[17] However, they do not assume that it thus turns into something 'relative', but keeps its universalist potential. The proper position seems to lie between conventional opposites, where conceptual distinctions break down, dividing lines get very thin or are difficult to draw, and a precarious balance is kept. It has been pointed out in previous sections that our conception of thin justice is always embedded in visions of thick justice, and that we do not get the one without the other. This is a clever compromise, but does not solve the systematic problem of where exactly to draw the line between the thick and the thin elements.

Adam Smith remarked that the principle of impartiality is 'so perfectly self-evident, that it would be absurd to attempt to prove it.'[18] This is perhaps an apt summary of the present dilemma. A formal proof is impossible; we can only refer to something already taken for granted (a natural sense of justice). The search for an overlapping consensus to pin down what Walzer coins reiterative moral minimalism resembles Grotius's *a posteriori* approach – and is philosophically unconvincing. Finally, the theory of justice as impartiality faces the following dilemma. It has been pointed out that a formal standard such as impartiality is open to divergent interpretations. If we consider humanitarian intervention, for instance, the standard does not tell us where to draw the line between cases that are 'grave' and those which are not. In other words, reasonable people will disagree in their judgements about details of a given case. Most of us are 'ethically multilingual', in the sense that we can understand others, even if and especially when we disagree with them. A principle such as impartiality, however, is indispensable yet non-algorithmic: there are no algorithms for judgement, which means that we cannot apply a particular scheme or recursive procedure whereby a number of norms or maxims can be generated.[19] It was this problem of interpretation and of judgement which probably led many to question natural law theories in the past, among them Rousseau and Vattel (see V, 4 and 5). Rousseau attempts to link the idea of justice with the consent of those who govern themselves in a republic. Vattel's solution is not to abandon the standard itself, but to allow for considerable

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[17] For references, see the profound study by Alexander Somek, *Rechtssystem und Republik. Über die politische Funktion des systematischen Rechtsdenkens* (Wien, New York: Springer-Verlag, 1992), pp. 415–29.

[18] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776], ed. R. H. Campbell, A. S. Skinner, and W. B. Todd (Oxford: Clarendon Press, 1976), 4.8.49, p. 660.

[19] Onora O'Neill, 'Abstraction, Idealization and Ideology in Ethics', in John David G. Evans (ed.), *Moral Philosophy and Contemporary Problems* (Cambridge: Cambridge University Press, 1987), pp. 55–69, especially pp. 58, 64 and 67.

licence and latitude in mediating it with given cases. Kant, who admits that in terms of wide ethical duties, indeed 'the law cannot specify precisely in what way one is to act',[20] might counter that even if there are no algorithms for judgement (which he does not dispute), the idea of impartiality sets up certain limits and constraints, and that there is a fundamental difference between judging in an internally consistent way and arbitrariness.

This study started with a description of the running battle between divergent ethical approaches, and it is not my intention to claim that the battle can be stopped. I just want to add a final consideration. Even if we should arrive at what some globalists and universalists propose, namely moral homogeneity on a global scale (Hans Küng's *Weltethos*, for instance) where certain fundamental values are shared, then this does not imply less conflict about the *interpretation* of these values.[21] Consider that Europe during Grotius's lifetime was considerably homogeneous in terms of culture, religion and morals. This did not prevent Europeans clashing over divergent interpretations of their common heritage. Impartiality is a formal principle. It sets up limits, but does not specify, or give precise answers. Some latitude of judgement, even among reasonable people, cannot be eliminated.

It is difficult for a partly postmodern, partly playful study – which declares its allegiance to late modernity – to finish in a linear fashion. As a postmodern bourgeois liberal cosmopolitan, I tried to raise the level of the debate, not to resolve issues. A conclusion is supposed to offer results, but I can only present fragments. I expressed sympathy with impartiality and moral minimalism while being aware of the fallacy of essentialism. I looked for a plot in a story (for instance: the law of nations does not impose a way of life or thick concept of the good, but provides a framework within which divergent states and communities can coexist on a footing of equality) where I should have avoided the traps of scientific Whiggism and an eurocentric grand narrative. I was trying to avoid the mistakes – knowing that I will make these and additional new ones.

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20 Kant, 'Doctrine of Virtue', in *Practical Philosophy*, p. 521; 6: 390.

21 Rudolf Burger, 'Globale Ethik: Illusion und Realität', in Rudolf Burger, Ernst-Peter Brezovsky and Peter Pelinka (eds), *Ethik global. Illusion oder Realität* (Wien: Czernin Verlag, 1999), pp. 51f.; Alexander Somek, 'Begründen und Bestimmen. Das moralische Urteil als Praxis', *Deutsche Zeitschrift für Philosophie* (1999), p. 401 and *Rechtssystem und Republik*, pp. 428f.; Nunner-Winkler, 'Moralischer Universalismus', pp. 79–103.

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