CHAPTER 2

James Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928

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James Brierly's *Law of Nations* has served as a companion for generations of international lawyers. The book is held in particular affection by those who found it unlocked the mysteries of international law and served as a constant companion as they pursued their careers. Brierly was born in Yorkshire in 1891 and died in 1955. He graduated from Oxford University with first class degrees in Classics and Jurisprudence, was called to the Bar in 1907 and joined the army in 1914. He was later appointed Professor of Law at Manchester University in 1920, and then to the Chair of International Law at Oxford University in 1922, his tenure lasting 23 years.

Brierly was appointed to the original International Law Commission and served as its Rapporteur on the law of treaties and as its Chairman in 1951. He served on multiple councils and committees (including the Advisory Committee dealing with the internment of enemy aliens) and sat as a Magistrate for the City of Oxford. His successor at Oxford, and the editor of the sixth edition of the *Law of Nations*, Professor Waldock, paid the following tribute:

> He was a man who inspired the greatest confidence alike in his colleagues on the bench or on the committee on which he sat, and in those on whose interests he adjudicated. This was due to his obvious ability, to his evident integrity and impartiality, but above all to his very real concern which he showed for the plight of refugees in England, whether from the consequences of the two world wars or of totalitarian oppression. He devoted himself unobtrusively and energetically to schemes giving them aid and he occupied himself actively right up to his death.[a]

The excerpt selected here from Brierly's introductory small book has remained more or less the same over the next six editions and has been quoted and

a H Lauterpacht and CHM Waldock (eds), *The Basis of Obligation in International Law and other Papers by the Later James Leslie Brierly* (Clarendon Press 1958) xii.

excerpted in multiple contexts. The exploration of the inadequacies of the theoretical explanations for the basis of international obligations remains fresh and relevant today. It is nevertheless worth noting that some of his assertions can no longer stand and this reveals how much international law has developed since the end of the Second World War.[b] However, Brierly was less interested in mapping what was or wasn't international law and more keen to explain why international law matters and why it influences behaviour. One formulation of his approach bears reproducing:

> The ultimate explanation of the binding force of all law is that individuals, whether as single human beings, or whether associated with others in a state, are constrained, in so far as they are reasonable beings, to believe that order and not chaos is the governing principle of the world in which they have to live.[c]

Part of the lore surrounding Brierly's book was the suggestion that it could be read in one go. In his 1963 book review Norman Marsh started out: "In the bad old days it was commonly said among undergraduates in at least one British university that an all-night reading of Brierly immediately before the examination in international law would ensure a satisfactory mark".[d] It is an indication of the influence of this short book that later editions were translated into Indonesian, Spanish, Norwegian, Hebrew, Japanese, Urdu, Italian, German, Portuguese, Russian and Vietnamese. And in 2018 the latest edition was translated into Chinese.

b For example, Brierly's classic formulation: "illustrations of matters which at present belong to 'domestic jurisdiction' and not to international law are a state's treatment of its own subjects", is clearly no longer correct in the age of international human rights law, and is no longer found in the latest edition.

c A Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press 2012) 53.

d N Marsh, 'Book review of JL Brierly *The Law of Nations,* 6th ed. H Waldock (ed)' (1963) 12 ICLQ 1049–50.

J. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (1st edn, Oxford Clarendon Press 1928).
Excerpt: Chapter 1, 'The Origin and Character of International Law', pp 1–39. Reproduced with the kind permission of Oxford University Press.

The Origin and Character of International Law

James Brierly

The Rise of Modern States and of the Doctrine of Sovereignty

§1. The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another. Rules which may be described as rules of international law are to be found in the history both of the ancient and medieval worlds; for ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. But as a definite branch of jurisprudence the system which we now know as international law is essentially modern, dating only from the sixteenth and seventeenth centuries, for its special character has been determined by that of the European state system, which was itself shaped in the ferment of the Renaissance and the Reformation. Some understanding of the main features of this modern state system is therefore necessary to an understanding of the nature of international law.

For the present purpose what most distinguishes the modern post-Reformation from the medieval state is the enormously greater strength and concentration of the powers of government in the former. The national and territorial state with which we are familiar to-day in Western Europe, and in countries which are founded on, or have adopted, Western European civilization, is provided with institutions of government which normally enable it to enforce its control at all times and in all parts of its dominions. This type of state, however, is the product of a long and chequered history; and throughout the Middle Ages the growth of strong centralized governments was impeded by many obstacles, of which difficulties of communication, sparcity of population, primitive economic conditions, are obvious illustrations. But two of these retarding influences deserve special notice because of the imprint which they have left even to this day on the modern state.

The first of these was feudalism. Modern historical research has taught us that, while it is a mistake to speak of a feudal *system*, the word 'feudalism' is a convenient way of referring to certain fundamental similarities which, in spite of large local variations, can be discerned in the social development of all the

peoples of Western Europe from about the ninth to the thirteenth centuries. Bishop Stubbs, speaking of feudalism in the form it had reached at the Norman Conquest, says:

> It may be described as a complete organization of society through the medium of land tenure, in which from the king down to the lowest landowner all are bound together by obligation of service and defence: the lord to protect his vassal, the vassal to do service to his lord; the defence and service being based on and regulated by the nature and extent of the land held by the one of the other. In those states which have reached the territorial stage of development, the rights of defence and service are supplemented by the right of jurisdiction. The lord judges as well as defends his vassal; the vassal does suit as well as service to his lord. In states in which feudal government has reached its utmost growth, the political, financial, judicial, every branch of public administration is regulated by the same conditions. The central authority is a mere shadow of a name.[1]

Thus to speak of a feudal 'state' is really a misuse of terms; for a feudal organization of society was a substitute for its organization in a state, and a perfectly feudal condition of society would be not merely a weak state, but the negation of the state altogether. Such a condition was never completely realized at any time or anywhere; but it is obvious that the tendency to disperse among different classes those powers which in modern times we regard as normally concentrated in the state, or at any rate as under the state's ultimate control, had to pass away before states in our sense could come into existence.

On the other hand there were elements in the feudal conception of society capable of being pressed into the service of the unified national states which were steadily being consolidated in Western Europe from about the twelfth to the sixteenth centuries, and influential in determining the form that those states would take. Thus when its disintegrating effects on government had been eliminated, the duty of personal loyalty of vassal to lord which feudalism had made so prominent was capable of being transmuted into the duty of unquestioning allegiance of subject to monarch in the national state; the intimate association of this personal relationship with the tenure of land made the transition to *territorial* monarchy easy and natural; and the identification

* [Editors' note: All footnotes in the original text re-started at No. 1 on every page. These have been amended to continuous order for the purposes of the present anthology].

1 *Constitutional History of England*, vol. i, p. 274.

with rights of property of rights which we regard as properly political led up to the notions of the absolute character of government, of the realm as the 'dominion' or property of the monarch, and of the people as his 'subjects' rather than as citizens. Feudalism itself had been an obstacle to the growth of the national state, but it left a legacy of conceptions to its victorious rival which strongly emphasized the absolute character of government.

The other influence which retarded the growth of states in the Middle Ages was the Church. It is not necessary here to speak of the long struggle between Pope and Emperor, although one incidental effect of this was to assist the growth of national states by breaking up the unity of Christendom. More significant in the present context is the fact that never until after the Reformation was the civil authority in any country regarded as supreme. Always governmental authority was divided; the Church claimed and received the obedience of those who were also the subjects of the state, even in matters far beyond the purely spiritual sphere. Even in England, always somewhat restive under papal interference, the idea of the omni-competence of the civil power would have been unthinkable. Men might dispute exactly how far the powers of each of the rival authorities extended; but that there were limits to the power of the state, that the Church had *some* powers over the members of the state which it neither derived from, nor held by the sufferance of, the state, was certain. States might often act as arbitrarily as any absolute state of the post-Reformation world; they might struggle against this or that claim of the Church; but neither in theory nor in fact were they absolute. But just as the state was gradually consolidating its power against the fissiparous tendencies of feudalism within, so it was more and more resisting the division of authority imposed upon it by the Church from without; and this latter process culminated in the Reformation, which in one of its most important aspects was a rebellion of the states against the Church. It declared the determination of the civil authority to be supreme in its own territory; and it resulted in the decisive defeat of the last rival to the emerging unified national state. Over about half of Western Europe the rebellion was completely and evidently successful; and even in those countries which rejected Protestantism as a religion, the Church was so shaken that it could no longer compete with the state as a political force. The Peace of Westphalia, which brought to an end in 1648 the great Thirty Years War of religion, marked the acceptance of the new political order in Europe.

The new order led naturally to a new theory of the nature of the state, the theory of 'sovereignty', first perhaps explicitly stated by Jean Bodin in his *De republica*, published in 1556. According to Bodin it was of the essence of every state that there should exist within it a central force, which was the sole source of laws, but was not itself bound by them; '*majestas est summa in cives*

ac subditos legibusque soluta potestas'. This *majestas* or sovereignty was not necessarily vested in an individual monarch, though Bodin thought it best that it should be; theoretically it might equally well be in a minority of the citizens, when the state would be an aristocracy, or in a majority, when it would be a democracy. In Bodin himself the full rigour of the theory was mitigated by being combined with the medieval doctrine of the law of nature; his sovereign, though not bound by the law of the land, was bound by divine law, by the law of nature, and also by the laws of nations. Further he held, though rather inconsistently with his main doctrine, that even some laws of the state were so fundamental that the sovereign might not alter them; but these mitigations of the theory disappeared in later political speculation. The whole theory was essentially a deduction from the political facts existing at the time of its formulation, which have been shortly described above. Everywhere in Western Europe unified national states were emerging out of the loosely compacted and limited states of medieval times. Everywhere too, the civil authority of government was decisively establishing its supremacy over the ecclesiastical and every other rival claimant of power, and the process was taking the form of the rise of strong personal monarchies. The doctrine exactly expressed these, the most conspicuous, facts in the political aspect of Europe at the end of the sixteenth century; but it never expressed the whole truth, and the truth that it expressed was not an eternal one. It was not the whole truth because even in the age of European absolutism which followed in the seventeenth and eighteenth centuries, no monarch's power was ever wholly without limitations; and its truth was not eternal, because, as we now know, the age of absolutism was only a temporary phase in European history.

The implications of such a theory in a world in which different states have to live in relations with one another were full of portent, for it led logically to the assertion of the complete separateness and irresponsibility of every state. It gave the death-blow to the lingering notion that Christendom, in spite of all its quarrels, was in some sense still a unity, and left the relations between states not only uncontrolled in fact, as they had often been before, but uninspired by any unifying ideal. For the first time the state seemed to have become the final goal of unity. Machiavelli's *Prince*, written in 1513, though it did not formulate a theory, is a relentless analysis of the art of government based on this conception of the nature of the state, as an entity absolutely self-sufficing and non-moral. But, fortunately, at the very time when European political development seemed about to justify the whole theory of sovereignty, other causes were at work which were to make it impossible for the world to accept the absence of any bonds between state and state which was its logical consequence, and to show that the new national states, so far from being destined to live

in isolation from one another, would be brought into far more intimate and constant relations than in the days when their theoretical unity was accepted everywhere.[2] Among these causes may be mentioned (1) the impetus to commerce and adventure caused by the discovery of America and the new route to the Indies; (2) the common intellectual background created by the Renaissance; (3) the sympathy which co-religionists in different states felt for one another, creating a loyalty which transcended the boundaries of states; and (4) the common feeling of revulsion against war, caused by the savagery with which the wars of religion were waged. All these causes co-operated to make it certain that the state, such as the theory of sovereignty conceived it, could never in reality become the final and perfect form of human association, and that in the modern as in the medieval world it would be necessary to recognize the existence of a wider unity. The rise of international law was the recognition of this truth; for in a sense it may be regarded as a protest against the full implications of the doctrine of sovereignty. It accepted the abandonment of the medieval ideal of a world-state and took instead as its fundamental postulate the existence of a plurality of states, secular, national, and territorial; but it denied their absolute separateness and irresponsibility, and held that they were bound to one another under the supremacy of law. Thus it reasserted the medieval conception of unity, but in a form which took account of the new political structure of Europe.

The Influence of the Doctrine of the Law of Nature

§2. Though the system of international law is essentially modern, it had, like the modern state itself, a medieval foundation. Bodin, as we have seen, qualified the full effect of his new doctrine of the state by holding that even a sovereign is bound by the law of nature; and it was out of the conception of such a law that the early writers on international law developed their systems. Modern legal writers, especially in England, have sometimes ridiculed the conception of a law of nature, or they have recognized its great historical influence but treated it as a superstition which the modern world has rightly discarded. Such an attitude, however, proceeds from a misunderstanding of the medieval idea; for under a terminology which has ceased to be familiar to us the phrase stands for something which no progressive system of law either does or can discard. Some knowledge of what a medieval writer meant by the term is necessary if

2 Cf. Westlake, *Collected Papers*, p. 55.

we would understand either how international law arose, or how it develops to-day.

A long and continuous history,[3] extending at least as far back as the political thought of the Greeks, lies behind the conception; but its influence on international law is so closely interwoven with that of Roman law that the two may here be discussed together. The early law of the primitive Roman city-state was able to develop into a law adequate to the needs of a highly civilized world empire, because it showed a peculiar capacity of expansion and adaptation which broke through the archaic formalism which originally characterized it, as it characterizes all primitive law. In brief, the process of expansion and adaptation took the form of admitting side by side with the *jus civile*, or original law peculiar to Rome, a more liberal and progressive element, the *jus gentium*, so called because it was believed or feigned to be of universal application, its principles being regarded as so simple and reasonable that it was assumed they must be recognized everywhere and by everyone. This practical development was reinforced towards the end of the Republican era by the philosophical conception of a *jus naturale* which, as developed by the Stoics in Greece and borrowed from them by the Romans, meant, in effect, the sum of those principles which ought to control human conduct, because founded in the very nature of man as a rational and social being. In course of time *jus gentium*, the new progressive element which the practical genius of the Romans had imported into their actual law, and *jus naturale*, the ideal law conforming to reason, came to be regarded as generally synonymous. In effect, they were the same set of rules looked at from different points of view; for rules which were everywhere observed, i.e. *jus gentium*, must surely be rules which the rational nature of man prescribes to him, i.e. *jus naturale*, and vice versa. Medieval writers later developed this conception of a law of nature, sometimes elaborating it in ways which appear to the modern mind both fanciful and tedious; but so powerful had its influence on men's minds become, that the Church was impelled to give it a place in the doctrinal system, and St. Thomas Aquinas, for example, taught that the law of nature was that part of the law of God which was discoverable by human reason, in contrast with the part which is directly revealed. Such an identification of natural with divine law necessarily gave the former an authority superior to that of any merely positive law of human ordinance, and some writers even held that positive law which conflicted with natural law could not claim any binding force.

The effect of such a conception as this, when applied to the theory of the relations of the new national states to one another is obvious; for it meant

3 Cf. Pollock, *Essays in the Law*, CH. ii.

that it was not in the nature of things that those relations should be merely anarchical; on the contrary they must be controlled by a higher law, not the mere creation of the will of any sovereign, but part of the order of nature to which even sovereigns were subjected. Over against the theory of sovereignty, standing for the new nationalistic separation of the states of Europe, was set the theory of a law of nature denying their irresponsibility and the finality of their independence of one another. No doubt it was impossible to point to any authentic text of this law, and different interpretations of it were possible; but the belief that in spite of all appearance, the whole universe, and included in it the relations of sovereigns to one another, must be ruled by law, remained. Moreover, the difficulty of discovering the dictates of this law presented itself to a medieval writer with much less force than it does to the modern mind. For he had in fact a special guide ready to his hand in Roman law.

The position of Roman law in Europe in the sixteenth century has an important bearing on the beginnings of international law. There were some countries, such as Germany, in which a 'reception' of Roman law had taken place; that is to say, it had driven out the local customary law and had been accepted as the binding law of the land. In other countries the process had not gone so far as this; but even in these the principles of Roman law were held in great respect and were appealed to whenever no rules of local law excluded them. Everywhere in fact Roman law was regarded as the *ratio scripta*, written reason; and a medieval writer, seeking to expound the law of nature had only to look about him to see actually operative in the world a system of law which was the common heritage of every country, revered everywhere as the supreme triumph of human reason. Moreover, this law had a further claim to respect from its close association with the Canon law of the Church.

Thus Roman law reduced the difficulty of finding the contents of natural law almost to vanishing point; and in fact the founders of international law turned unhesitatingly to Roman law for the rules of their system, wherever the relations between states seemed to them to be analogous to those of private persons. Thus, for example, the rights of a state over territory, especially when governments were almost everywhere monarchical and the territorial notions of feudalism were still powerful, bore an obvious resemblance to the rights of an individual over property, with the result that the international rules relating to territory are still in essentials the Roman rules of property. It is not difficult, therefore, to see how the belief in an ideal system of law inherently and universally binding on the one hand, and the actual existence of a cosmopolitan system of law everywhere revered on the other, should have led to the founding of international law on the law of nature. We have to inquire further, however, whether this foundation is valid for us today.

The medieval conception of a law of nature is open to certain criticisms. In the first place, when all allowances have been made for the aid afforded by Roman law, it has to be admitted that it implied a belief in the rationality of the universe which seems to us to be exaggerated. It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human reasoning could discover it, and not, of course, that the results to which any and every individual's reasoning led him was natural law. The foolish criticism of Jeremy Bentham: 'a great multitude of people are continually talking of the law of nature; and then they go on giving you their sentiments about what is right and what is wrong; and these sentiments, you are to understand, are so many chapters and sections of the law of nature,'[4] merely showed a contempt for a great conception which Bentham had not taken the trouble to understand. Medieval controversialists might use arguments drawn from natural law to support almost any case, but there was nothing arbitrary about the conception itself, any more than a text of Scripture is arbitrary, because the Devil may quote it. But what medieval writers did not always realize was that what is reasonable, or, to use their own terminology, what the law of nature enjoins, cannot receive a final definition: it is always, and above all in the sphere of human conduct, relative to conditions of time and place. We realize, as they hardly did, that these conditions are never standing still. For us as for them, a rational universe, even if we cannot prove it to be a fact, is a necessary postulate both of thought and action; and the difference between our thought and theirs is mainly that we have different ways of regarding the world and human society. When a modern lawyer asks what is reasonable, he looks only for an answer that is valid now and here, and not for one that is finally true; whereas a medieval writer might have said that if ultimate truth eludes our grasp, it is not because it is undiscoverable, but because our reasoning is imperfect. Some modern writers have expressed this difference by saying that what we have a right to believe in to-day is a law of nature *with a variable content*.

In the second place, when medieval writers spoke of natural law as able to overrule positive law in a case of conflict, they were introducing an anarchical principle which we must reject. But this was a principle which died hard, and even in the eighteenth century Blackstone could write: 'This law of nature being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times; *no human laws are of any validity, if contrary to this*.'[5] In Blackstone,

4 *Principles of Morals and Legislation*, CH. ii.

5 *Commentaries on the Laws of England*, Introduction.

however, such words were mere lip-service to a tradition, and had no effect on his exposition of the law. To hold, however, that unreasonableness can invalidate a rule of law is to confuse the function of legislation with that of ascertaining what existing law is. Law could never perform its proper function of a controlling force in society if courts of law did not hold themselves bound to subordinate their own ideas of what is reasonable to an assumed superior reasonableness in the law; and even if that assumption is not always well founded, it is still necessary to our social security that it should be acted upon until the law is altered.

These are valid criticisms, but they do not affect the permanent truths in the conception of a law of nature, and those truths are in fact recognized and acted upon as fully to-day as they ever were. For one thing it stands for the existence of *purpose* in law, reminding us that law is not a meaningless set of arbitrary principles to be mechanically applied by courts, but that it exists for certain ends, though those ends have to be differently formulated in different times and places. Thus where we might say that we attempt to embody social justice in law, giving to that term whatever interpretation is current in the thought of our time, a medieval thinker might have said that positive law ought to conform to the higher law of nature. Natural law, therefore, or a like principle under some other name, is an essential underlying principle of the art of legislation. But that is not all; it is also a principle that is necessarily admitted into the actual administration of law. This is so because the life with which any system of law has to deal is too complicated, and human foresight too limited, for law to be completely formulated in a set of rules, so that situations perpetually arise which fall outside all rules already formulated. Law cannot and does not refuse to solve a problem because it is new and unprovided for; it meets such situations by resorting to a principle, outside formulated law, whose presence is not always admitted. In fact it falls back on the solution which the court or the jury think to be reasonable in all the circumstances. Even a slight acquaintance with the working of the English Common law shows it perpetually appealing to reason as the justification of its decisions, asking what is a reasonable time, or what is a reasonable price, or what a reasonable man would do in given circumstances. We do not suppose that our answers to those questions will be scientific truths; it is enough if they are approximately just; but on the other hand we do not attempt to eliminate this test of reasonableness by substituting fixed rules, because it would be impossible to do so. But this appeal to reason is merely to appeal to a law of nature. Sometimes, indeed, English law still uses the term 'natural justice', and our courts have to do their best to decide what 'natural justice' requires in particular circumstances; for example, in 1924 the Northern Rhodesia Order in Council, providing for the administration

of that protectorate, enacted that in civil cases between natives Rhodesian courts were to be guided by native law as far as applicable and *not repugnant to natural justice*. The Rhodesian courts will probably experience no difficulty in interpreting this instruction.

'The grandest function of the law of nature', Sir Henry Maine has written, 'was discharged in giving birth to modern international law.'[6] But in the seventeenth and eighteenth centuries the medieval tradition began to be distorted by later writers, whose use of the old terminology in senses of their own went far to justify the obloquy which has been poured on the whole conception in modern times. But before considering this development and its unfortunate effects on international law it will be convenient to say something of the men whose writings first gave it systematic form.

The Classical Writers on International Law

§3. The first writer of a work which can properly be called a work on international law is Alberico Gentili, commonly known as Gentilis, who lived from 1551 to 1608. Earlier writers had written on some of the topics which fall within modern international law, especially on the treatment of ambassadors and on the usages of war; but they did not separate the legal from the theological and ethical, nor the domestic from the international, aspects of such questions. Thus side by side with questions such as whether war is ever justified, what causes for going to war are lawful and what unlawful, what means of waging war are permissible, and the like, they discussed questions of tactics, of military discipline, or of the duties of a vassal to help his lord, without feeling that they were treating together topics which properly belonged to different subjects. Gentilis's service was that he definitely separated international law from theology and ethics and made it a branch of jurisprudence. 'Let theologians hold their peace', he writes, 'in work that belongs to others than they.' This attitude was natural in one who was a protestant and a layman, and not, like the earlier writers, a catholic and a priest. Born in Italy, he fled to England to escape persecution for his religion, and became Professor of Civil Law in Oxford University. His most important work was the *De jure belli* published in 1598. To this book, Gentilis's more famous successor, Hugo de Groote, or Grotius, was, as he himself admitted, greatly indebted, but otherwise it appears to have exercised little influence, and the very name of Gentilis was almost forgotten until recent times. He is a forerunner of the 'positive' school of international lawyers; for

6 *Ancient Law*, CH. iv.

although he recognized the law of nature as binding between states, he was chiefly interested in deducing the law from their actual practice.

Grotius was born in Holland in 1583, and died in 1645, and he is more generally and on the whole rightly regarded as the founder of international law. Even as a boy he acquired a European reputation for learning, and as a man he became master of every subject to which he turned his interest. He was a lawyer, a historian, a poet, and above all a theologian, whose great desire was to see the reunion of the Christian Church. Yet he did not live the life of a student, but of a man of affairs, practising the law and serving in official positions. He became involved in a quarrel arising out of the Arminian heresy, a quarrel nominally theological but really turning on the political question whether the provinces of Holland should form a loose federal union or be consolidated under the House of Orange. Grotius supported the former and the losing cause. He was imprisoned for over two years, escaped by the devotion of his wife in a box supposed to contain books, and eventually became ambassador of Sweden at the French Court.

Grotius wrote two works on international law, the *De jure praedae* in 1604, and the *De jure belli ac pacis* in 1625. The former of these, in which he supported the claim of the Dutch East India Company to the capture of a prize from the Portuguese, was never published, and was only discovered in 1872. It was then found that a short work which he published anonymously in 1609, the *Mare liberum*, contending, in opposition to the claims of the Portuguese, that the open sea could not be appropriated by any state, had been written as one of the chapters of the *De jure praedae*.

Few books have won so great a reputation as the *De jure belli ac pacis*. This was not wholly due to the merits of the book itself, though they are great; it was partly due to the time and circumstances of its publication. When he wrote it in 1625 Grotius was already so eminent that anything from his pen would have attracted attention. Further, he had the advantage of belonging to the country which in the seventeenth century was in many ways the leading country in Europe. The successful war of liberation by the Dutch against Spain in the previous century had heralded the rise of the modern state system; it had been the first great triumph of the idea of nationality, and the successful assertion of the right of revolt against universal monarchy. In the seventeenth century they were the leaders of European civilization, teaching to other countries not only new methods of commerce but new conceptions of government based on freer institutions and on some measure of religious toleration. When the issue between absolutism and liberty was still doubtful in England, and when everywhere else absolutism was triumphant and destined to remain so until the French Revolution, the Dutch had settled the issue in their own country in

favour of liberty. Even some of the qualities which render the book tedious to a modern reader, especially its voluminous citation of authorities from ancient history and the Bible, and its excessively subtle distinctions, commended it to the taste of contemporaries still familiar with the tradition of scholasticism.

Grotius's purpose was practical. He wrote on the laws of war because, as he says:

> I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.[7]

In contrast with this anarchy he proclaimed that even states ought to regard themselves as members of a society, bound together by the universal supremacy of justice. Man, he said, is not a purely selfish animal, for among the qualities that belong to him is an *appetitus societatis*, a desire for the society of his own kind, and the need of preserving this society is the source of natural law, which he defines as:

> The dictate of right reason, indicating that an act, from its agreement or disagreement with the rational and social nature of man, has in it moral turpitude or moral necessity, and consequently that such an act is either forbidden or commanded by God the author of nature.[8]

Besides being subject to natural law, he says, the relations of peoples are subject to *jus gentium*; for just as in each state the civil laws look to the good of the state, so there are laws established by consent which look to the good of the great community of which all or most states are members, and these laws make up *jus gentium*. It is obvious that this is a very different meaning from that which the term bore in the Roman law; there, as we have seen, it stood for that part of the *private* law of Rome which was supposed to be common to Rome and other peoples; whereas in Grotius it has come to be a branch of *public* law, governing the relations between one people and another. It is important, Grotius tells us, to keep the notions of the law of nature and the law of nations (to adopt a mistranslation of *jus gentium* which its new meaning makes almost necessary) distinct; but he is far from doing so himself. Nor was

7 *Prolegomena*, 28.

8 Book I, CH. i §. 10 (1).

it possible for him to do so, as is apparent from his own statement of how their respective contents are to be discovered. He used, he tells us, the testimony of philosophers, historians, poets, and orators, not because they were themselves conclusive witnesses, but because when they were found to be in agreement, their agreement could only be explained in one of two ways: either what they said must be a correct deduction from the principles of reason and so a rule of the law of nature; or else it must be a matter in which common consent existed, and so a rule of the law of nations. Thus in effect the two notions, as we have already seen, are still the theoretical and the practical sides of the same idea.

Like all thinkers who try to understand the meaning and bases of law, Grotius had to meet the perennial and plausible arguments of those who would identify justice with mere utility. His answer was clear and convincing. Justice, he said, is indeed the highest utility, and merely on that ground neither a state nor the community of states can be preserved without it. But it is also more than utility, because it is part of the true social nature of man, and that is its real title to observance by him.

Grotius's work then consisted in the application of these fundamental principles to war; for he says:

> It is so far from being right to admit, as some imagine, that in war all rights cease, that war ought never to be undertaken except to obtain a right; nor, when undertaken, ought it to be carried on except within the bounds of right and good faith. ...Between enemies those laws which nature dictates or the consent of nations institutes are binding.[9]

The first book, therefore, inquires whether war can ever be *justum*, lawful or regular; and as Grotius was of opinion that one requirement necessary to make a war lawful was that it should be waged under the authority of one who held supreme power in the state, he was led to inquire into the nature of sovereignty. His treatment of this subject was confused and unsatisfactory, because for practical reasons it was necessary for him, writing when he did, to admit the lawfulness of wars waged by princes who were sometimes far from being independent. In the second book he dealt with the causes of wars, and in effect reduced the causes of lawful wars to two, the defence of person or property and the punishment of offenders. This necessitated an examination both of what constituted the property of a state, for example, how far the sea may do so, and how property is acquired and lost, and of many other questions which

9 *Prolegomena*, 25, 26.

a modern writer would either place under the international law of peace, or exclude from international law altogether. In the third book he dealt with topics which fall under the modern laws of war, that is to say, with the question what acts are permissible and what are forbidden in the conduct of war. Here his plan was not only to state the strict laws of war, but to add what he called *temperamenta*, alleviations or modifications designed to make war more humane.

It is usual in estimating the work of Grotius to speak of its remarkable and instantaneous success; and if it is a proof of success that within a few years of its author's death his book had become a university text-book, that it has since been often appealed to in international controversies, that it has been republished and translated scores of times, and that every subsequent writer treats his name with reverence, however widely he may depart from his teaching, then Grotius must be accounted successful. But if by success it is meant that the doctrines of Grotius as a whole were accepted by states and became part of the law which has since his time regulated their relations, then his work was an almost complete failure. It is true that some of his doctrines have since become established law. For instance, the doctrine that the open sea cannot be subjected to the sovereignty of any state, and many of the *temperamenta* of war that he suggested have been incorporated into international law; but these particular changes were due at least as much to changes in the character of navigation and in the technique of war respectively as to Grotius. At the heart of his system lay the attempt to distinguish between lawful and unlawful war; he saw clearly that international order is precarious unless that distinction can be established, just as national order would be precarious if the law within the state did not distinguish between the lawful and the unlawful use of force. Yet this distinction never became part of actual international law; and even in the theory of the subject it was retained by most of Grotius's successors more as an ornament to their theme than as a doctrine in which they seriously believed. Finally it disappeared even from theory, and international law came frankly to recognize that all wars are equally lawful. As the most authoritative of modern English writers on the subject says:

> International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights.[10]

10 W.E. Hall, *International Law*, 8th ed., p. 82.

It was not until the foundation of the League of Nations in 1919 that any real attempt was made to falsify this confession of weakness and to embody in actual law the cardinal principle of Grotius's system.

Grotius supplied then, not a system of law, but a philosophy of inter-state relations which could be set against Machiavelli's brutal description of those relations as they often were, and he is great enough to dispense with the undiscriminating adulation which is often showered upon him. This adulation has done disservice to international law by encouraging a servile imitation of his methods. It was natural that Grotius, intending not merely to regulate the conduct of war but to distinguish between its lawful and unlawful occasions, should relegate the law of peace to a wholly subordinate place in his system; but when it had come to be generally accepted that this latter task must be shirked and that all that the law could do in relation to war was to attempt to mitigate its horrors by regulation, it was unreasonable that the laws of war should continue, as they did, to monopolize the interest of writers and statesmen. If the law cannot regulate the outbreak of war, as Grotius vainly tried to do, then the service next in value to which its development ought to be directed is the improvement of the laws of peace, for in them lies the best hope of making wars less frequent.

Grotius's influence has also been unfortunate in that it has encouraged the 'patrimonial' view of the relation between ruler and ruled, from which political thought has not even to-day wholly escaped. As we have seen, he was concerned with the nature of sovereignty only as one of the tests of the lawfulness of a war; to him the right to make war was bound up with the right to rule. Thus he tended to assimilate powers of government to the rights of private property. In the seventeenth century this view was a natural legacy of feudalism, but it is a view for which the world of the twentieth century ought to have no use.

Richard Zouche, 1590–1660, Professor of Civil Law in Oxford University and judge of the Court of Admiralty, was a prolific writer on legal subjects, among his works being one on international law, the *Jus feciale*, published in 1650. Without abandoning the law of nature as one of the bases of international law, Zouche's main interest was in the actual practice of states. Like Gentilis before him he was therefore a precursor of the 'positive' school of international lawyers, who regard the practice of states as the only source of law. Zouche introduced one important improvement of method, for he was the first writer to make a clear division between the law of peace and the law of war. This was necessary before war could be regarded, as it ought to be, as an abnormal relation between states.

Samuel Pufendorf, 1632–94, Professor at Heidelberg, and afterwards at Lund in Sweden, published his *De jure naturae et gentium* in 1672, and was the founder of the so-called 'naturalist' school of writers. He denied all binding force

to the practice of nations and based his system wholly on natural law, but on a natural law in the new and debased form of a law supposed to be binding upon men in an imaginary *state of nature*. There are traces of this conception in Grotius, but it had little influence on his system; for his law of nature was a law of reason directing men at all times, whether organized in political societies or not, and only in this sense has the conception any permanent validity.

Cornelius van Bynkershoek (1673–1743), a Dutch judge, was the author of works on special parts of international law, of which the most important was the *Quaestiones juris publici*, published in 1737. Bynkershoek had an intimate knowledge of questions of maritime and commercial practice, and he has an important place in the development of that side of international law. He belongs to the 'positive' school of writers, basing the law on custom; but he also held that custom must be explained and controlled by reason, which he refers to as '*ratio juris gentium magistra*'.[11] In giving this twofold basis to international law he anticipated the best modern thought. He rightly held also that the recent practice of states was more valuable evidence of custom than the illustrations from ancient history with which his predecessors had generally adorned their works, since, 'as customs change, so the law of nations changes';[12] but he attached more weight to the stipulations of particular treaties as evidence of the existence of custom than modern practice would allow.

Emerich de Vattel (1714–69), whose work *Le droit des gens* was published in 1758, was a Swiss who served in the diplomatic service of Saxony. He intended his work as a manual for men of affairs, and was a popularizer of other men's ideas rather than an original thinker; yet he has probably exercised a greater permanent influence than any other writer on international law, and his work is still constantly cited as an authority in international controversies. He accepted the doctrine of the *state of nature*; 'nations being composed of men naturally free and independent, and who before the establishment of civil societies lived together in the state of nature; nations or sovereign states must be regarded as so many free persons living together in the state of nature'; and since men are naturally equal, so are states; 'strength or weakness produce in this regard no distinction. A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom' (Introduction). Thus the doctrine of the equality of states, a misleading deduction from unsound premises and not found in Grotius, was introduced into the theory of international law.

11 *Quaestiones*, Book I, CH. 12.

12 Ibid., *Ad lectorem*.

According to Vattel the law of nations *in its origin* is merely the law of nature applied to nations, it is not subject to change, and treaties or customs contrary to it are unlawful. But other elements have been admitted into the law; for, says Vattel, natural law itself establishes the freedom and independence of every state, and therefore each is the sole judge of its own actions and accountable for its observance of natural law only to its own conscience. Other states may *request* it to reform its conduct; but what they may actually *demand* from it is something much less. This lower standard of *enforceable* duties Vattel calls the *voluntary* law of nations, because it is to be presumed that states have agreed to it, in contrast with the other element of natural or, as he calls it, *necessary* law. 'Let each sovereign make the *necessary* law the constant rule of his conduct; he must allow others to take advantage of the *voluntary law of nations*' (Book III, CH. 12).

This exaggerated emphasis on the independence of states had the effect in Vattel's system of reducing the natural law, which Grotius had used as a juridical barrier against absolute conceptions of sovereignty, to little more than an aspiration after better relations between states; yet for the *voluntary* law which was the only part of Vattel's system which had a real relation to the practice of states, he provided no sound basis in theory, for he was unable to explain the source of the obligation of states to observe it. The results of this unsatisfactory division were unfortunate. For instance, Vattel tells us that by the *necessary* law a state has a duty to maintain freedom of commerce, because this is for the advantage of the human race; but by the *voluntary* law it may impose such restrictions upon it as suit its convenience, for its duties to itself are more important than its duties to others (Book II, CH. 2). By *necessary* law, again, there are only three lawful causes of war, self-defence, redress of injury, and punishment of offences; but by *voluntary* law we must always assume that each side has a lawful cause for going to war, for 'princes may have had wise and just reasons for acting thus, and that is sufficient at the tribunal of the voluntary law of nations' (Book II, CH. 18).

In some respects, however, Vattel's system was an advance on those of his predecessors. He stood for a humaner view of the rights of war. He emphatically rejected the patrimonial theory of the nature of government; 'this pretended right of ownership attributed to princes is a chimera begotten of an abuse of the laws relating to the inheritances of individuals. The state is not, and cannot be a patrimony, since a patrimony exists for the good of the owner, whereas the prince is appointed only for the good of the state' (I. 5). He recognized in certain circumstances the right of part of a nation to separate itself from the rest (I. 17), a doctrine which partly explains his great popularity in the United

States, where a copy of the work was first received in 1775. Professor De Lapradelle has justly written of him that,

> before the great events of 1776 and 1789 occurred, he had written an international law, based on the principles of public law which two Revolutions, the American and the French, were to make effective.... Vattel's *Law of Nations* is international law based on the principles of 1789 ... the projection upon the plane of the law of nations of the great principles of legal individualism. That is what makes Vattel's work important, what accounts for his success, characterizes his influence, and eventually, likewise, measures his shortcomings. Grotius had written the international law of absolutism, Vattel has written the international law of political liberty.[13]

None the less the survival of Vattel's influence into an age when the 'principles of legal individualism' are no longer adequate to international needs, if they ever were, has been a disaster for international law. By making independence the 'natural' state of nations, he made it impossible to explain or justify their subjection to law; yet their independence is no more 'natural' than their interdependence. Both are facts of which any true theory of international relations must take account; the former is merely a more conspicuous, but not a more real, fact than the latter. It is true that in Vattel's own day the interdependence of states was less conspicuous in international practice than it is to-day; and this partly excuses the one-sidedness of his system. None the less by cutting the frail moorings which bound international law to any sound principle of obligation he did it an injury which has not yet been repaired.

Modern Theories of the Basis of Obligation in International Law

§4. The traditional division between the naturalist and the positivist schools above referred to is maintained in the current literature of international law. But a purely naturalist view, like that of Pufendorf, denying any obligatory force to a positive or voluntary law of nations is practically obsolete; the modern naturalist school generally adopts an intermediate position, and recognizes a twofold basis in natural and positive law. This school has been called the 'eclectic' school; it is also sometimes known as the 'Grotian' school, on the ground that Grotius too based his system on the twofold basis of *jus naturae* and *jus gentium*. But the claim of this school to carry on the Grotian tradition

13 Introduction to Carnegie edition of Vattel, 1916.

cannot be sustained, because it is not to the Grotian law of nature, but to Pufendorf's and Vattel's debased version of it that the school generally appeals. Minor differences of doctrine must here be disregarded, but it may be said that on the whole the field is divided fairly equally between writers who agree in recognizing an element of natural law in this sense by the side of a positive law element, and those who profess to recognize nothing but positive law. Almost all English and American writers belong to the positivist school. Most of the adherents of both schools are agreed in conceiving of international law as a law between states only; states are 'international persons', the only true 'subjects' of the law, and individuals are merely 'objects' of the law, with a status comparable to that of an animal in municipal law. The two views which may be regarded as in the orthodox tradition of international legal theory are therefore (1) a naturalist view, holding that the principles of the law or at least the most fundamental of them can be deduced from the essential nature of state-persons; and (2) a positivist view which regards the law merely as the sum of the rules by which these state-persons have consented to be bound. Either view involves a conception of the nature of the state which is tending to disappear from progressive political thought, and neither affords an adequate explanation of the fact for which it professes to account, namely, international law as it may be observed in actual operation in the intercourse of states.

The former of these two doctrines holds that every state, by the very fact that it is a state, is endowed with certain fundamental, or inherent, or natural, rights. Writers differ in enumerating what these rights are, but generally five rights are claimed, namely, self-preservation, independence, equality, respect, and intercourse. It is obvious that the doctrine of fundamental rights is merely the old doctrine of the natural rights of man transferred to states. That doctrine has played a great part in history; Locke justified the English Revolution by it, and from Locke it passed to the leaders of the American Revolution and became the philosophical basis of the Declaration of Independence. But hardly any political scientist to-day would regard it as a true philosophy of political relations, and all the objections to it apply with even greater force when it is applied to the relations of states. It implies that men or states, as the case may be, bring with them into society certain primordial rights not derived from their membership of society, but inherent in their personality as individuals, and that out of these rights a legal system is formed; whereas the truth is that a legal right is a meaningless phrase unless we first assume an objective legal system from which it gets its validity. Further, the doctrine implies that the social bond between man and man, or between state and state, is somehow less natural, or less a part of the whole personality, than is the individuality of the man or the state, and that is not true; the only individuals we know are individuals-in-society. It is especially misleading to apply this atomistic view of the nature

of the social bond to states. In its application to individual men it has a certain plausibility because it seems to give a philosophical justification to the common feeling that human personality has certain claims on society; and in that way it has played its part in the development of human liberty. But in the society of states the need is not for greater liberty for the individual states, but for a strengthening of the social bond between them, not for the clamant assertion of their rights, but for a more insistent reminder of their obligations towards one another. Finally, the doctrine is really a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of states, it overlooks the fact that their attribution to states is merely a stage in an historical process; we know that until modern times states were not regarded either as independent or equal, and we have no right to assume that the process of development has stopped. On the contrary it is not improbable, and it is certainly desirable, that there should be a movement towards the closer interdependence of states, and therefore away from the state of things which this doctrine would stabilize as though it were part of the fixed order of nature.

The positivist doctrine rightly looks to the practice of states and not to *a priori* deductions for the rules of international law, but it generally also attempts to explain the binding force of those rules as arising from the supposed fact that states have consented to be bound by them, and this latter part of the doctrine is both untrue in its assumptions and inadequate as an explanation. Law by its very nature is imperative; there must exist an *obligation* to obey it, however we may explain the origin of that sentiment. But to say that a man or state is *obliged* only by what he or it consents to is meaningless; no obligation can arise in such a case. If we say, as of course most positivist writers imply, that consent once given cannot be retracted, we are deserting our premises and calling to our aid an unacknowledged source of obligation, which, whatever it may be, is certainly not the consent of the state, for that may have ceased to exist. Modern German writers do not shrink from facing the full consequences of the theory of a purely consensual basis for the law; they have inherited from Hegel a doctrine known as the 'auto-limitation of sovereignty', which teaches that states are sovereign persons, possessed of wills which reject all external limitation, so that if we find, as we appear to do in international law, something which limits their wills, this limiting something can only proceed from themselves. Most of these writers admit that a self-imposed limitation is no limitation at all; and they conclude therefore that so-called international law is nothing but 'external public law' (*äusseres Staatsrecht*), binding the state only because, and only so long as, it consents to be bound. There is no flaw in this

argument; the flaw lies in the premises, because these are not derived, as all positivist theory professes to be, from an observation of international facts.

It is quite impossible to fit the facts into a consistently consensual theory. Every positivist writer has to admit that we cannot point to an *express* consent by every state to every rule of international law; it is necessary to rely on an *implied* or *tacit* consent in order to establish most of the rules. But this may mean either of two things: it may mean that a state has in fact consented to a certain rule, but that it has done so not in express words but by conduct from which we are justified in inferring consent; or it may mean that although there has been no consent in fact we must presume consent, and treat the state in question as though it had consented. If 'implied consent' has the former meaning, then the doctrine does not fit the facts; international practice habitually treats a state as bound by rules of international law, though it may be clear that it has never consented to them in any way whatever, for example, a state newly come into existence. If the phrase has the latter meaning, we are entitled to ask why, for the sake of supporting an untenable theory, we should be asked to import a fiction into our attempt to find the true nature of international rules. In actual fact, states do not regard their international legal relations as resulting from consent, except when the consent is *express*;[14] and what gives a certain plausibility to the consensual theory is merely the fact that, in the absence of any international machinery for legislation by majority vote, a *new* rule of law cannot be imposed upon a state merely by the will of other states. Obligations may arise from consent, as in a contract or a treaty, but only within a legal system which has already, somehow or other, binding force; the system cannot be founded on a consensual basis.

Both the doctrines of the nature of international law which we have considered proceed by making certain assumptions about the nature of states; the naturalist that they have certain rights inherent in their statehood, the positivist that they are incapable of being 'bound' by anything outside their own wills. These assumptions we shall examine later.[15] In the meantime we shall consider from what sources the rules and principles of law which states actually observe towards one another in their intercourse are derived.

14 Cf. Reeves, *La Communauté internationale*, p. 40.

15 *Infra*, p. 62. [Editors' note: not included in this Anthology].