

PERRY ANDERSON

## THE STANDARD OF CIVILIZATION

**I**N 1929 LUCIEN FEBVRE offered the first systematic reflection on the evolution of the meanings of the term ‘civilization’, from singular ideal, which he dated to the third quarter of the 18th century, to plural fact, which he placed at the close of the Napoleonic epoch. In 1944–45 he devoted his last lecture course to ‘Europe: genesis of a civilization’, and a year later added the word *Civilisations* to *Économies et Sociétés* in the title of the *Annales* journal itself. Just before he died, he penned a sharp note approving a colleague’s dismissal of Valéry’s famous dictum that this civilization had now realized it was mortal: ‘In fact, it is not civilizations that are mortal. The current of civilization persists across passing eclipses . . . Sober deflation of a windbag.’<sup>1</sup> A decade later, Fernand Braudel would concur: ‘When Paul Valéry declared “Civilizations, we know you to be mortal”, he was surely exaggerating. The seasons of history cause the flowers and the fruit to fall, but the tree remains. At the very least, it is much harder to kill.’<sup>2</sup>

How far has Braudel’s confidence—that usage of the term in the singular was no longer of much significance—proved justified? One way of approaching this is to look at a body of thought and practice where ‘civilization’ was historically conspicuous, namely international law. There, we can start by noting what might appear a paradox. The contemporary notion of international law immediately evokes the idea of relations between sovereign states. In the West, these relations are generally held to have developed into something like a formal system for the first time with the Treaty of Westphalia, which in 1648 brought an end to the Thirty Years’ War in Europe. It would seem logical to assume that a developed body of thought about international law would have arisen

around this turning-point. In fact, however, to pinpoint its origins we must go back to the 1530s. It was then that its history really started, in the writing of the Spanish theologian Francisco de Vitoria, whose concern was not with relations between the states of Europe, of which Spain was at that time much the most powerful, but with relations between Europeans—preeminently, of course, Spaniards—and the peoples of the newly discovered Americas.

### *Foundations*

Drawing on Roman notions of a *ius gentium*, or law of nations, Vitoria asked by what right Spain had recently come into possession of the larger part of the Western hemisphere. Was it because these lands were uninhabited, or because the Pope had allocated them to Spain, or because it was a duty to convert pagans to Christianity, if necessary by force? Vitoria rejected all such grounds for conquest of the New World. Did that mean it was therefore contrary to the law of nations? It did not, because when the Spaniards arrived in their lands, the savage inhabitants of the Americas had violated the universal ‘right of communication’—*ius communicandi*—that was an essential principle of the law of nations. What did such ‘communication’ mean? It meant freedom to travel and freedom to buy and sell, anywhere: in other words, freedom of trade and freedom to persuade, that is, to preach Christian truths to the Indians, as Spaniards called them. If Indians resisted these rights, the Spaniards were justified in defending themselves by force, building fortresses, seizing land and waging war against them in retribution. Should the Indians persist in their misdeeds, they were to be treated as treacherous foes, subject to plunder and enslavement.<sup>3</sup> The Conquests were therefore, after all, perfectly legitimate.

The first real building-block of what would, for another two hundred years, still be called the law of nations was thus constructed as a justification of Spanish imperialism. The second, still more influential, building-block came with the writing of Hugo Grotius in the early 17th century. Grotius is mainly remembered, and admired, today for his

---

<sup>1</sup> Lucien Febvre, ‘Une Histoire de la civilisation’, *Annales*, October–December 1950, p. 492, reviewing Joseph Chappey’s *Histoire générale de la civilisation d’Occident de 1870 à 1950*.

<sup>2</sup> Fernand Braudel, *Grammaire des civilisations*, Paris 1963.

<sup>3</sup> Francisco de Vitoria, *Relecciones sobre los Indios* [1538/9], Madrid 1946, I, 3: I, 2, 6, 7, 8.

treatise on ‘The Law of War and Peace’—*De iure belli ac pacis*—of 1625. But his actual entry into international law, as we now understand it, began with a text that would come to be known as ‘On Booty’—*De iure praedae*—written twenty years earlier. In this document, Grotius set out a legal justification for the seizure by a captain of the Dutch East India Company, one of his cousins, of a Portuguese ship carrying copper, silk, porcelain and silver to the value of three million guilder, a figure comparable to the total annual revenue of England at the time—an act of plunder on an unprecedented scale, causing a sensation in Europe. In its fifteenth chapter, subsequently published as *Mare Liberum*, Grotius explained that the high seas should be regarded as a free zone for both states and armed private companies, and his cousin was well within his rights—so providing a legal brief for Dutch commercial imperialism, as Vitoria had for Spanish territorial imperialism.

By the time Grotius came to write his general treatise on the laws of war and peace, two decades later, the Dutch had become interested in colonies on land too, soon seizing parts of Brazil from Portugal, and Grotius now argued that Europeans had the right to wage war on any peoples, even if they were not attacked by them, whose customs they regarded as barbarous, as retribution for their crimes against nature. This was *ius gladii*—the right of the sword, or of punishment. He wrote: ‘Kings, and those who are invested with a power equal to kings, have a right to exact punishments not only for injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but are, in any persons whatsoever, grievous violations of the Law of Nature or Nations.’<sup>4</sup> In other words, Grotius offered licence to attack, conquer and kill whosoever stood in the way of European expansion.

To these two cornerstones of early modern international law, *ius communicandi* and *ius gladii*, were added two more justifications for colonization of the world beyond Europe. Thomas Hobbes proposed an argument from demography: there were too many people at home, and so few people overseas that European settlers in hunter-gatherer lands had the right, not to ‘exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground, to snatch what they find’<sup>5</sup>—a straightforward programme for the reservations into which the native inhabitants of North America would eventually

---

<sup>4</sup> Hugo Grotius, *De Jure Belli ac Pacis*, II, XL.

<sup>5</sup> Thomas Hobbes, *Leviathan*, Oxford 2012, p. 540.

be driven. Obviously, if lands could simply be deemed unoccupied, even this would be unnecessary. To that widely held view, John Locke added the further argument that if there were local inhabitants on the spot, but they failed to make the *best use* of the land available to them, then Europeans had every legal right to deprive them of it, since they would fulfill God's purpose for it by increasing the productivity of the soil.<sup>6</sup> With this, the repertoire of justifications for European imperial expansion was, by the end of the 17th century, complete; the rights of communication, of punishment, of occupation and of production all warranted seizure of the rest of the planet.

### *Limited to the civilized*

By the 18th century, relations between states within Europe had become the foreground of writings on the law of nations, and there were voices of the Enlightenment—Diderot, Smith, Kant among them—questioning the morality of colonial seizures of lands beyond Europe, though none actually proposed reversing them. Characteristically, far the most influential of the new treatises, *Le Droit des gens*, was by the Swiss thinker Emer de Vattel. In it, Vattel coolly remarked: ‘The earth belongs to all mankind and was designed to furnish them with subsistence: if each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not therefore deviate from the views of nature in confining the Indians within narrower limits.’<sup>7</sup>

Continuous in this respect with its predecessors, Vattel's work nevertheless marked a discursive turning-point, towards a more secular version of the divinely decreed laws of nature justifying earlier versions of the law of nations. Without in any way disappearing, religion ceased to be the first-order warrant for the colonization of the rest of the world. That position passed, henceforward, to another term. Vattel's treatise was published in 1758. Just one year earlier, in 1757, appeared the first traceable use of the noun *civilization*—still absent from the relevant volume of *Encyclopédie*

---

<sup>6</sup> John Locke, *Two Treatises of Government* II, § 32–46.

<sup>7</sup> As for nomads: ‘Those peoples (such as the ancient Germans, and some modern Tartars), who inhabit fertile countries, but disdain to cultivate their lands, and chuse rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts’: VII, § 81. Emer de Vattel, *Le Droit des gens, ou Principes de la loi naturelle*, XVIII, § 209.

that had come out in 1753—in a text by Mirabeau's father. Within a few years, Adam Ferguson introduced it, independently, in Scotland.

The success of Vattel's work, principally concerned with relations between European states, but covering their relations with the rest of the world, was inseparable from its timing. It appeared in the midst of the first global conflict, the Seven Years' War pitting France against Britain, fought out not only in Europe, but in North America, the Caribbean, the Indian Ocean and South-East Asia—in its turn, a dress-rehearsal for the titanic struggles within Europe, with their extensions across the world, unleashed by the French Revolution. By the time these came to an end with the victory of the combined *anciens régimes* over Napoleon in 1815, three significant changes to what had once been the law of nations had occurred. In 1789, criticizing the ambiguity of the formula—wasn't *jus gentium* a misnomer for *jus inter gentes*?—Bentham coined the term 'international law', which gradually took hold in the next century. By then, the normative dividing line between Europe and the rest of the world had become 'civilization', rather than primarily the Christian religion, although the latter remained a vital attribute of the former.

Lastly, in the second decade of the 19th century, where Vattel had in keeping with the diplomatic conventions of the time assumed the nominal equality of sovereign states, the Congress of Vienna for the first time introduced a formal hierarchy of states *within* Europe, a distinction of rank between five 'Great Powers'—the so-called Pentarchy of England, Russia, Austria, Prussia and France—which were accorded special privileges and settled the map of the continent, and every other state. This was an innovation designed to seal the unity of the counter-revolutionary coalition that had defeated Napoleon and restored monarchies throughout Europe. But it was one which outlasted the Restoration period itself. By the 1880s, the leading Scottish jurist James Lorimer could remark that the equality of states 'may now, I think, safely be said to have been repudiated by history', not to speak of reason, as a 'more transparent fiction than the equality of all individuals'.<sup>8</sup>

Together with these changes came the emergence, alongside classical diplomacy, of international law as a profession. Its first major statement came from a former American ambassador to Prussia, Henry Wheaton,

---

<sup>8</sup> James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, Edinburgh and London 1883, Vol. I, pp. 44, 170.

whose *Elements of International Law*, published in 1836, was widely translated abroad—in French, German, Italian, Spanish, by the 1860s Chinese—and set the benchmark for definition of the discipline. Citing Grotius, Leibniz, Montesquieu and others, Wheaton explained that with few exceptions ‘the public law of nations has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin’—for it was ‘the progress of civilization, founded on Christianity’ which had generated it.<sup>9</sup> By the time the first Institut de Droit International came into being, in Brussels in 1873, an association with religion was no longer required: civilization sufficed.

### *Classifications*

This was the standard that divided the world, in a period that saw the intrusion of European imperialism, no longer into lands of weak opponents—hunter-gatherers or states without fire-arms, as in the Americas, which had occasioned the writings of Vitoria or Grotius, Locke or Vattel—but into major Asian empires and other developed states, more capable of defending themselves. This expansionist surge had already begun during the Napoleonic Wars themselves, when the British seized much of Mughal and Maratha India, and the French occupied Ottoman Egypt. But after 1815 it notably escalated, bringing the Opium Wars to China, naval penetration of Japan, conquest of Burma, Indochina and most of what is now Indonesia, not to speak of the whole littoral of North Africa, repeated invasions of Afghanistan and more.

How were these states to be classified and handled? Did they enjoy the same rights as the European powers? Tacitly, the Congress of Vienna had given its answer: barred from the Concert of Powers to which its proceedings gave birth was the Ottoman Empire, where the Concert would ultimately come to grief. That exclusion could still be referred to matters of faith. In place of this, there developed in subsequent decades the doctrine of ‘the standard of civilization’. Only those states that could be regarded as civilized in European eyes were entitled to be treated on an equal footing with the powers of Europe. Just as there was now an accepted hierarchy within the comity of European nations, so the uncivilized world too was divided into different categories. Lorimer produced the most systematic theorization of this new doctrine, which became an accepted feature of writing about international law at the

---

<sup>9</sup> Henry Wheaton, *Elements of International Law*, London 1836, pp. 16–17, 21.

time. Three types of state failed to meet the standard of civilization. There were criminal—what today would be called outlaw or rogue—states, like the Paris Commune or fanatical Muslim societies: if Russia were to fall prey to Nihilism, it would join their ranks. There were states that did not defy civilized European norms in the same way, but—‘semi-barbarous’—did not embody them either, like China or Japan. There were also states either senile or imbecile, that could not be treated as responsible agents at all—what today would be called ‘failed states’. None of these categories formed part of international society proper, and the first and third required armed suppression by it—‘Communism and Nihilism are forbidden by the Law of Nations’, Lorimer explained. But diplomatic relations could be maintained with the second group, the semi-barbarous, provided that European powers acquired extra-territorial rights within them.<sup>10</sup>

Lorimer was writing on the eve of the Conference at Berlin in 1884 that settled the fate of Africa, as the Congress of Vienna had once the fate of Europe, with a vast division of colonial spoils among the assembled European states. Of these, the largest single mass of booty was acquired by the country where the emergent discipline of international law had its seat, in the form of a private company controlled by the King of Belgium. In Brussels, the Institut de Droit International celebrated the acquisition, its journal declaring in 1895 that under Leopold’s rule there was ‘a full body of legislation whose application protects the indigenous people against all forms of oppression and exploitation’.<sup>11</sup> Estimates vary of the number of deaths for which its reign in the Congo was responsible: some as high as 8 to 10 million inhabitants killed.

By the turn of the century, five Asian states—China, Japan, Persia, Siam and Turkey—had graduated from semi-barbarous status to admittance to the first Hague Peace Conference, called by the Russian Czar in 1899, along with nineteen European countries, the United States and Mexico. Did that signify a new equality of position? At the second Hague Conference of 1907, called this time by Theodore Roosevelt, participation was enlarged to include the republics of South and Central America and the monarchies of Ethiopia and Afghanistan. The key proposal before the conference was the creation of an International Court of Arbitration. Who was to be represented on this? The United States and

<sup>10</sup> Lorimer, *Institutes*, pp. 123–33, 155–61.

<sup>11</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge 2001, p. 160.

the major European powers took it for granted that *they* would appoint permanent members of it, other states merely rotating in temporary posts around them. To their astonishment and indignation, Brazil, in the person of the distinguished anti-slavery thinker and statesman Rui Barbosa, attacked the Anglo-German-American scheme stipulating this, declaring that it spelt ‘a justice whose nature would be characterized by a juridical distinction of values between the States’, ensuring that ‘the Powers would then no longer be formidable only by the weight of their armies and their fleets. They would also have the superiority of right in the international magistracy, by arrogating unto themselves a privileged position in the institutions to which we pretend to entrust the meting out of justice to the nations.’<sup>12</sup>

Staunchly upholding the principle of the juridical equality of all sovereign states, Barbosa rallied support from what one European observer called the ‘ochlocracy of smaller states’—the classical Greek term for government by the mob—to insist that the future International Court must give equal, not hierarchical, representation to the states summoned to it. Naturally, the Great Powers refused to concede this, and the Conference broke up without a result. The futility of its nominal goal of helping to secure international peace became plain seven years later, with the outbreak of the First World War.

### *The principle of hierarchy*

At the end of the War, the victor powers England, France, Italy and the United States called the Versailles Conference to dictate terms of peace to Germany, redraw the map of Eastern Europe, divide up the Ottoman empire and—not least—create a new international body devoted to ‘collective security’, to ensure establishment of durable peace and justice between states, in the shape of the League of Nations. At Versailles, the United States not only made sure that Rui Barbosa was excluded from the Brazilian delegation, but that the Monroe doctrine—Washington’s

---

<sup>12</sup> ‘Hitherto, the States, however diverse because of their extent of territory, their wealth, their power, had nevertheless, among themselves, one point of moral commensuration. This was their national sovereignty. Upon this point their juridical equality could be established unshakeably. In this fortress of an equal right for all, and equally inviolable, inalienable, incontrovertible, each State, large or small, felt that it was so truly its own master and even as safe with regard to the rest, as the free citizen feels within the walls of his own house’: *The Proceedings of the Hague Conferences*, Vol. II, New York 1921, pp. 645, 647.

open presumption of dominion over Latin America—was actually incorporated into the Covenant of the League as an instrument of peace. A Permanent Court of International Justice was set up in the Hague, its Article 38 continuing to invoke ‘the general principles of law recognized by civilized nations’. Among those who drafted its Statutes was the author of a 600-page defence of the admirable record of Belgian administration in the Congo.

The US Senate eventually declined American entry into the League, but the design of the new organization faithfully reflected the requirements of the victor powers, since its Executive Council—the predecessor of today’s UN Security Council—was controlled by the other four great powers on the winning side of the War, Britain, France, Italy and Japan, who were given exclusive permanent membership of it, on the model of the American scheme at the 1907 Hague Conference. In the face of this blatant imposition of a hierarchical order on the League, Argentina refused to take part in it from the start, and a few years later Brazil—when its demand that a Latin American country be given a permanent seat in the council was rejected—withdraw. By the end of the thirties, no less than eight other Latin American countries, large and small, had pulled out of it. Undeterred, the leading textbook of the period on international law, still widely used today, credited to Lassa Oppenheim and Hersch Lauterpacht, noted with satisfaction that ‘the Great Powers are the leaders of the Family of Nations and every advance of the Law of Nations during the past has been the result of their political hegemony’, which had now finally received, for the first time, in the Council of the League a formal ‘legal basis and expression’.<sup>13</sup>

---

<sup>13</sup> Lassa Oppenheim, *International Law* (fifth edition), London 1937, pp. 224–25. Oppenheim, a wealthy immigrant from Hesse with a chair at Cambridge, published the first two editions of the book (1909 and 1912) before the First World War, and died in 1919, having largely completed the third (1920). By the time the fifth edition appeared in 1937, the book was no longer his. Lauterpacht, its editor, explained in his preface that he had ‘deemed it proper, on many occasions, to put forward views which differ from those propounded in the former editions of this treatise’. Nowhere more so than in deleting Oppenheim’s unequivocal statement, now following his original description of the Great Powers, that the League of Nations had not ‘turned their political hegemony into a legal hegemony, because this preponderance is the fruit only of their political influence’ (third edition, p. 200), and inserting its opposite: that the League had on the contrary given their hegemony a ‘legal basis and expression’ (fifth edition, p. 225). So much for philological, let alone evidential, scruple in the exposition of international law. In all subsequent editions of the treatise, Lauterpacht had become its co-author.

Lauterpacht, whose attainments are widely held to have been unsurpassed by any international lawyer of the last century, remains a touchstone of liberal jurisprudence in this one. He had no time for complaints that powers like the US or UK misbehaved when it suited them. 'Are we actually confronted', he asked of American foreign policy, 'with examples of clearly immoral conduct which will make the ordinary citizen blush?' The detachment of Panama from Colombia might have been illegal, but could it be termed immoral? Or was it not rather 'a case in which a State, in the absence of an international legislator, has been called upon to act as a legislator for the wider good of the international community. The issue was whether a beneficent and civilizing enterprise should be delayed or obstructed by a State which happened to be in possession of the territory in question.' Britain's bombardment of Copenhagen, capital of a peaceably neutral Denmark, in 1807 and destruction of its fleet? If 'the very existence of Great Britain was at stake', such a sudden attack 'would not have been inconsistent either with international law or with international morality', for 'law and morals may legitimately be made to yield to the good of the international community' (synonymous with the defeat of France).<sup>14</sup>

Lauterpacht would leave it to others to show 'the reasonableness and straightforwardness' of his country's dealings with humanity at large, adhering to principles without which 'it would cease to be part of the civilized world'. But he could 'submit confidently that a survey of the foreign policy of modern states will show that the immorality of international conduct is something in the nature of a myth'—a 'fiction'. Such a verdict was not panglossian. The necessary jurisprudence had some gaps, which needed to be made good. But that was no reason for pessimism: 'international law should be regarded as incomplete and in a state of transition to the finite and attainable ideal of a society of States under the binding rule of law as recognized and practised by civilized communities within their borders.'<sup>15</sup> The ultimate, perfectly feasible goal

---

<sup>14</sup> Hersch Lauterpacht, *International Law. Collected Papers. Vol II, The Law of Peace*, Cambridge 1975, pp. 72–73, 83.

<sup>15</sup> Lauterpacht, *International Law. Collected Papers. Vol II*, pp. 28, 73, 75, 19. An ardent Zionist in his youth, without in any way abandoning the cause of Israel—for which he eventually drafted a Declaration of Independence—Lauterpacht avoided direct involvement in political activities of any kind after he reached England in 1923. But intellectually his original concerns persisted. Around 1927 he composed a set of reflections on 'Some Biblical Problems of the Law of War', in which he distinguished between those campaigns of the Children of Israel that were

of international law was the emergence of a supra-national Federation of the World devoted to peace. Lauterpacht's equally high-minded colleague Alfred Zimmern, another intellectual pillar of the League, was more realistic, confessing in an unguarded moment that international law was little more than 'a decorous name for the convenience of the Chancelleries', which was most useful when it 'embodied a harmonious marriage between law and force'.<sup>16</sup>

### *Words and swords*

Such was the position in the inter-war period. Out of the Second World War came a new dispensation. With much of the continent in ruins, or in debt, the primacy of Europe was gone. When the United Nations was founded at San Francisco in 1945, the principle of hierarchy inherited from the League was preserved in the new Security Council, whose permanent members were given still greater powers than their predecessors in the Executive Council of old, since they now possessed rights of veto. But Western monopoly of this privilege was broken: the USSR and China were now permanent members, alongside the United States and a diminished Britain and France, and as decolonization accelerated over the next two decades, the General Assembly became a forum for resolutions and demands increasingly uncomfortable to the hegemon and its allies.

Surveying the scene in 1950, in his commanding retrospect *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, Carl Schmitt observed that in the 19th century: 'The concept of international

---

commanded by God and those campaigns that were permitted by God. The former enjoined the extermination of all those against whom holy wars were waged—men, women and children: 'thou shalt leave nothing that breatheth'. The latter allowed, without necessarily stipulating, milder treatment. Whatever the atrocities of the first, Lauterpacht observed, they were 'religious wars of a purity unequalled in ancient times'. For in conquering Canaan, 'the Israelites went out to subdue and exterminate those peoples in the fulfilment, they believed, of God's judgement, not for selfish reasons'. The more lenient, if less codified, character of wars by permission offered a contrast whose influence, Lauterpacht mused, might be traceable in rabbinical influence on mediaeval Christian doctrines of just and unjust war. With the arrival of the League of Nations, these had now found their proper habitat in modern international law: see Hersch Lauterpacht, *International Law. Collected Papers. Vol V, Disputes, War and Neutrality*, Cambridge 2004, pp. 717–23.

<sup>16</sup> Alfred Zimmern, *The League of Nations and the Rule of Law (1918–1935)*, London 1977, pp. 94, 95.

law was a specifically *European* international law. This was self-evident on the European continent, especially in Germany. This was also true of such worldwide, universal concepts as *humanity*, *civilization* and *progress*, which determined the general concepts and theory and vocabulary of diplomats. The whole picture remained Eurocentric to the core, since by “humanity” was understood, above all, *European* humanity, civilization was self-evidently only *European* civilization, and progress was the linear development of this civilization’. But, Schmitt went on, after 1945 ‘Europe was no longer the sacred centre of the earth’ and belief in ‘civilization and progress had sunk to a mere ideological façade’. ‘Today’, he announced, ‘the former Eurocentric order of international law is perishing. With it the old *nomos* of the earth, born of the fairytale-like, unexpected discovery of a New World, an unrepeatable historical event, is vanishing.’<sup>17</sup> International law had never been truly international. What had claimed to be universal was merely particular. What spoke in the name of humanity was empire.

After 1945, as Schmitt saw, international law ceased to be a creature of Europe. But Europe, of course, did not disappear. It simply became subsumed in another of its own overseas extensions, the United States, leaving open the question: how far has international law since 1945 remained a creature, no longer of Europe, but of the West, with at its head the American superpower? Any answer to this question refers back to another. Setting aside its historical *origins*, what is the juridical *nature* of international law as such? For its first theorists in 16th and 17th century Europe, the answer was clear. The law of nations was grounded in *natural* law, that is a set of decrees ordained by God, not to be questioned by any mortal. In other words, the Christian deity was the guarantee of the objectivity of their legal propositions.

By the 19th century, the increasing secularization of European culture gradually undermined the credibility of this religious basis for international law. In its place emerged the claim that natural law still held good, but no longer as divine commandments, rather as the expressions of a universal *human nature*, which all rational human beings could and should acknowledge. This idea, however, was soon made vulnerable in its turn by the development of anthropology and comparative sociology as disciplines, which demonstrated the enormous variety of human

---

<sup>17</sup> Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin 1950, pp. 199–201, 4.

customs and beliefs across history and the world, contradicting any such easy universality. But if neither the deity nor human nature could offer any secure basis for international law, how should it then be conceived?

An answer to this question could only be sought in a prior one: what was the nature of law itself? There, the greatest political thinker of the 17th—or perhaps any—century, Thomas Hobbes, had given a clear-cut answer in the Latin version of his masterpiece *Leviathan*, which appeared in 1668: *sed auctoritas non veritas facit legem*—not truth, but authority makes the law, or as he put it elsewhere: ‘Covenants, without the Sword, are but Words’.<sup>18</sup> This would over time become known as the ‘command theory of law’. That theory was the work, two centuries later, of John Austin, a clear-minded friend and follower of Bentham, who admired Hobbes above all other thinkers, and in concurring that ‘every law is a command’ saw what this meant for international law. His conclusion was: ‘The so-called law of nations consists of opinions or sentiments current among nations generally. It therefore is *not law properly so called* . . . [for] a law set by general opinion imports the following consequences—that the party who will enforce it against any future transgressor is never determinate and assignable.’<sup>19</sup>

Crucial words: never determinate and assignable. Why was that so? Austin went on: ‘It follows that 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 the author’—but since in a world of sovereign states ‘no supreme government is in a state of subjection to another’, it followed that the law of nations ‘is not armed with a sanction, and does not impose a duty, in the proper acceptation of these expressions. For a sanction properly so called is an evil annexed to a command’.<sup>20</sup> In other words, in the absence of any determinable authority capable of either adjudicating or enforcing it, international law ceases to be law and becomes no more than opinion.

This was, and is, a conclusion deeply shocking to the liberal outlook of the overwhelming majority of today’s international jurists and lawyers. What is often forgotten is that it was shared by the greatest liberal

---

<sup>18</sup> Thomas Hobbes, *Leviathan* (Latin text), xxvi, Oxford 2012, p. 431; (English text), xvii, p. 254.

<sup>19</sup> John Austin, *The Province of Jurisprudence Determined*, London 1832, p. 148.

<sup>20</sup> *The Province of Jurisprudence Determined*, pp. 208, 148–49.

philosopher of the 19th century, John Stuart Mill himself, who reviewed and approved Austin's lectures on jurisprudence twice. Answering attacks on the foreign policy of the short-lived French Republic in 1849, which had offered assistance to an insurgent Poland, he wrote: 'What is the law of nations? Something, which to call a law at all, is a misapplication of the term. The law of nations is simply the custom of nations'. Were these, Mill asked, 'the only kind of customs which, in an age of progress, are to be subject to no improvement? Are they alone to continue fixed, while all around them is changeable?' On the contrary, he concluded robustly, in a spirit of which Marx would have approved: 'A legislature can repeal laws, but there is no Congress of nations to set aside international customs, and no common force by which to make the decisions of such a Congress binding. The improvement of international morality can only take place by a series of violations of existing rules . . . [where] there is only a custom, the sole way of altering that is to act in opposition to it.'<sup>21</sup>

### *Doubly indeterminate*

Mill was writing in a spirit of revolutionary solidarity, at a time when international law was little more than a pious phrase invoked by governments to justify whatever actions happened to suit them—it had no institutional dimension, and international lawyers did not yet exist. In the early 1880s Salisbury could still tell Parliament bluntly: 'International law has not any existence in the sense in which the term law is usually understood. It depends generally upon the prejudices of writers of textbooks. It can be enforced by no tribunal.'<sup>22</sup> A century later, however, institutionalization was in full flow; there was the United Nations Charter, an International Court of Justice, a body of professional lawyers and an expanding academic discipline. From the 1940s onwards, a considerable literature—Hans Kelsen and Herbert Hart the most distinguished names—sought to refute Austin by pointing out all those dimensions of law, municipal or international, that cannot be described as commands.<sup>23</sup>

<sup>21</sup> J. S. Mill, *Collected Works*, Vol. xx, pp. 345–46.

<sup>22</sup> Lord Salisbury, Speech in the House of Lords, 25 July 1887.

<sup>23</sup> See Hans Kelsen, *General Theory of Law and State*, Cambridge MA 1945, pp. 30–37, also 62–64, 71–74, 77–83; H. L. A. Hart, *The Concept of Law*, Oxford 1961, pp. 18–79, and on international law, pp. 208–31; (likewise, Terry Nardin, *Law, Morality and the Relations of States*, Princeton 1983, pp. 116–86). Kelsen, as might be expected, was a more careful textual scholar than Hart, engaging with Austin in a less off-hand way; but Hart's dismissal of Austin was to be more influ-

In vain, since no writer has ever been able to show that these can exempt law of a sovereign authority capable of enforcing it on penalty of infraction, as—not an exhaustive, but—always a *necessary* condition of its existence as law. All else is, as Austin put it, mere metaphor.

In the inter-war conjuncture it was once again Carl Schmitt, the antithesis of a liberal thinker, who pointed out the continuing validity of Austin's case. In a series of scathing demolitions of the pretensions of the League of Nations and its International Court, Schmitt demonstrated that the impartial rule of law they purported to uphold was invariably indeterminate, just as Austin had predicted it must be. And doubly so: indeterminate as to its *content*—as in the completely open-ended reparations imposed on Germany at Versailles, which could be adjusted by the victor powers onto the vanquished as they sought fit, pitching it into a veritable *Abgrund der Unbestimmtheit*;<sup>24</sup> and indeterminate—'unassignable', as Austin put it—as to its *execution*, which simply depended on the decision of the powers in command of the League of Nations and its Court. The doctrine of 'non-intervention' with which England and France ensured the victory of fascism in Spain offered another classic case of such indeterminacy, in the most eloquent illustration of Talleyrand's famous dictum that 'non-intervention is a metaphysical term that means more or less the same thing as intervention'.

ential, despite the severe limitations of *The Concept of Law*, registered by his livelier colleague Brian Simpson, which were rooted in the complacent provincialism of the post-war cohort to which he belonged. Regarding himself as a philosopher, even if somewhat *manqué*, rather than a jurist, Hart lacked interest in either the history of law, the comparative study of different legal systems or even the common law of England itself, and was innocent of any experience in its enforcement. 'A lawyer who, like Hart, practised in the Chancery division, could well in the whole of his career have never seen the use of coercive violence to support the rule of law', observed Simpson. 'Consequently, Hart never gave even the simplest account of the way in which the legal order is supported by coercive force.' Human rights he ignored completely, as also Marxist or any other views of law tainted by iconoclasm—for example, that it was natural for law to 'further the interests of the dominant class, or in the global world the dominant countries, and to keep the lumpenproletariat in subjection and poverty'—when 'you have only to look around the world to see that such views cannot be rejected out of hand': A. W. Brian Simpson, *Reflections on 'The Concept of Law'*, Oxford 2004, pp. 160–64, 168, 178, 180–81. These were judgements of a friend and admirer of Hart, author of an appreciative essay about Nicola Lacey's affectionate but not uncritical life of him: 'Herbert Hart Elucidated', *Michigan Law Review*, May 2006, pp. 1437–59.

<sup>24</sup> Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar–Genf–Versailles. 1923–1939*, Berlin 1988, p. 3.

The essence of the international law that came into being after 1918, and with whose evolution we still live today, was what Schmitt identified as its fundamentally *discriminatory* character.<sup>25</sup> Wars waged by the liberal powers dominating the system were selfless police actions upholding international law. Wars waged by anyone else were criminal enterprises violating international law. What they forbade others, the liberal powers reserved the freedom to do themselves. Historically, Schmitt pointed out, the long-standing conduct of the United States in the Caribbean and Central America had pioneered this pattern.

### *Practice*

The world in which we now live has seen a vast expansion and proliferation of what passes for international law, extending Schmitt's diagnosis in two directions. On the one hand, there has developed a category of law that is so perfect an illustration of Austin's characterization of the law of nations that he himself could scarcely have dreamt of it: the notion of a right that is not, in the technical phrase, 'justiciable'—that is, which does not even pretend to have any force of execution behind it in the real world, remaining simply a nominal aspiration—in other words, opinion pure and simple, in Austin's terms; yet which is nevertheless solemnly denominated by jurists a right. On the other hand, the number of actions taken by leading powers as they wish, either in the *name* of or in *defiance* of international law—indeterminacy without limit—has increased exponentially. Aggression is no monopoly of the hegemon. Wars of invasion have been launched without consultation, in surreptitious collusion, or outright collision, with it: England and France against Egypt, China against Vietnam, Russia against Ukraine; not to speak of lesser powers, Turkey against Cyprus, Iraq against Iran, Israel against Lebanon. None of such actions are exempt from exacting historical verdicts. That judgement, however, is necessarily political, not jural. Since 1945 wars of this order have, among the justifications alleged for them, rarely if ever (in 1956 Anglo-French attempts cut no ice in Washington) invoked international law. That is the prerogative of the hegemon and its aides in any common operation.

---

<sup>25</sup> Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff*, Berlin 1988, p. 41 *et seq.* For Schmitt, Wilson had pioneered this innovation in the First World War. Among the leading jurists he regarded as developing it in the inter-war period were Georges Scelle of France and Lauterpacht in Britain.

A few examples will suffice. At the very foundation of the highest official embodiment of international law, namely the United Nations, whose Charter enshrines the sovereignty and integrity of its members, the United States was engaged in their systematic violation. In an Army base in the old Spanish fort a few miles from the inaugural conference that created the United Nations in San Francisco in 1945, a special team of US military intelligence was intercepting all cable traffic by delegates to their home countries; the decoded messages landed on the breakfast table of American Secretary of State Stettinius the next morning. The officer in charge of this round-the-clock operation of surveillance reported that ‘the feeling in the Branch is that the success of the Conference may owe a great deal to its contribution’.<sup>26</sup> What did success mean here? The American historian who describes this systematic espionage exults that ‘Stettinius was presiding over an enterprise his nation was already dominating and moulding’—for the UN was ‘from the beginning a project of the United States, devised by the State Department, expertly guided by two hands-on Presidents, and propelled by US power . . . For a nation rightly proud of its innumerable accomplishments’—the most recent, the dropping of atomic bombs on Japan—‘this unique achievement should always be at the top of its illustrious roster’.<sup>27</sup>

Matters were no different sixty years later. The 1946 UN Convention states that ‘The premises of the UN shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.’ In 2010 it was revealed that Clinton’s wife, then Secretary of State, had directed the CIA, FBI and Secret Service to break the communication systems, appropriating passwords and encryption keys, of the Secretary-General of the UN, together with the ambassadors of all four other permanent members of the Security Council, and to secure the biometric data, credit-card numbers, email addresses and even frequent-flyer numbers of ‘key UN officials, to include undersecretaries, heads of specialized agencies and chief advisers, top secretary-general aides, heads of peace operations and political field missions’.<sup>28</sup> Naturally,

---

<sup>26</sup> Stephen Schlesinger, *Act of Creation: The Founding of the United Nations*, Boulder 2003, p. 331.

<sup>27</sup> Schlesinger, *Act of Creation*, pp. 174, xiii.

<sup>28</sup> The instruction was cabled in July 2009.

neither Mrs Clinton nor the American state paid any price for their brazen violation of an international law supposedly protecting the UN itself, the official seat of such law.

What of the international justice that international law purports to uphold? The Tokyo Tribunal of 1946–48, organized by the United States to try military leaders of Japan for war crimes, excluded the Showa Emperor from the trial in order to lubricate American occupation of the country, and treated evidence with such disregard for due process that the Indian judge on the Tribunal, in a blistering 1,000-page condemnation of it, observed that the Tokyo trials amounted to little more than ‘an opportunity for the victors to retaliate’, declaring ‘only a lost war is a crime’.<sup>29</sup> The Dutch judge on the Tribunal admitted candidly: ‘Of course, in Japan we were all aware of the bombings and the burnings of Tokyo and Yokohama and other big cities. It was horrible that we went there for the purpose of vindicating the laws of war, and yet saw every day how the Allies had violated them dreadfully’<sup>30</sup>—Schmitt’s discriminatory conception of law to the letter. The successive American wars that followed in East Asia, first in Korea and then in Vietnam, were then littered, as American historians have shown, with atrocities of every kind. Naturally, no tribunal has ever held them to account.

Has anything much changed since then? In 1993 the UN Security Council set up an International Criminal Tribunal on Yugoslavia, to prosecute those guilty of war crimes in the break-up of the country. Working closely with NATO, the Canadian Chief Prosecutor made sure successful indictments for ethnic cleansing fell on Serbs, the target for US and EU hostility, but not on Croats, armed and trained by the US for their own operations of ethnic cleansing; and when NATO launched its war on Serbia in 1999, excluded any of its actions—the bombing of the Chinese Embassy in Belgrade and the rest—from her investigation of war crimes. This was perfectly logical, since as the press officer for NATO explained at the time: ‘It was the NATO countries who established the Tribunal, who fund and support it on a daily basis.’<sup>31</sup> In short, once again, the US and its allies used trials to criminalize their defeated opponents, while their own conduct remained above judicial scrutiny.

---

<sup>29</sup> Radhabinod Pal, *Dissentient Judgement*, Tokyo 1999.

<sup>30</sup> B. V. A. Röling, *The Tokyo Trial and Beyond*, Cambridge 1993, p. 87.

<sup>31</sup> James Shea, 17 May 1999.

In the latest iteration of the same pattern, the now permanent International Criminal Court set up in 2002 was urged into being by the United States, which was centrally involved in its conception and preparation, but then made sure that the US would not itself be subject to the ICC's jurisdiction. When, to the great anger of the Clinton Administration, the draft Statute was changed to make possible the prosecution of members even of a state that was not a signatory to it, rendering American soldiers, pilots, torturers and others potentially vulnerable to inclusion in the mandate of the Court, the US promptly signed over a hundred bilateral agreements with countries where its military were or had been present, excluding American personnel from any such risk. Finally, in a typical farce, on his last day in the White House, Clinton instructed the US representative to sign the Statute of the future Court, knowing full well that this gesture had no chance of ratification in Congress. Naturally enough, the ICC—staffed by pliable personnel—declined to investigate any US or European actions whatever in Iraq or Afghanistan, concentrating its zeal entirely on countries in Africa, according to the unspoken maxim: one law for the rich, another for the poor.

### *Discriminations*

As for the UN Security Council, the nominal guardian of international law, its record speaks for itself. Iraqi occupation of Kuwait in 1990 brought immediate sanctions, and a million-strong counter-invasion of Iraq. Israeli occupation of the West Bank has lasted half a century without the Security Council lifting a finger. When the US and its allies could not secure a resolution authorizing them to attack Yugoslavia in 1998–99, they used NATO instead, in patent violation of the UN Charter forbidding wars of aggression, whereupon the UN Secretary-General Kofi Annan, appointed by Washington, calmly told the world that though NATO's action might not be legal, it was legitimate—as if Schmitt had scripted his words to illustrate what he meant by the constitutive indeterminacy of international law. When, four years later, the United States and Britain launched their attack on Iraq, having had to bypass the UN Security Council under threat of a veto from France, the same Secretary-General once again blessed the operation *ex post facto*, making sure that by a unanimous vote the Security Council gave back-dated cover to Bush and Blair by voting UN assistance to their occupation of Iraq with Resolution 1483. International law may be dispensed with in

launching a war; but it can always come in handy to ratify such a war after the event.

Weapons of mass destruction? The Nuclear Non-Proliferation Treaty is the starkest of all illustrations of the discriminatory character of the world order that has taken shape since the Cold War, reserving for just five powers the right to possess and deploy hydrogen bombs, and forbidding their possession to all others, who might need them more for their defence. Formally, the Treaty is not a binding rule of international law, but a voluntary agreement from which any signatory is free to withdraw. Factually, not only is a perfectly legal withdrawal from the Treaty treated as if it were a breach of international law, to be punished with the utmost severity, as in the case of North Korea, but even observance of the Treaty is open to restrictive interpretation, and if insufficiently monitored, subject to retribution, as in the case of draconian sanctions against Iran—indeterminacy and discrimination elegantly combined. That Israel has ignored the Treaty and has long possessed abundant nuclear weapons cannot be so much as mentioned. The powers punishing North Korea and Iran pretend the massive Israeli nuclear arsenal does not exist—perhaps the best commentary of all on the alchemies of international law.

### *Triumph of the singular*

Pyeongyang and Teheran are, of course, freely categorized as ‘rogue’ or ‘pariah’ states in the discourse of contemporary jural discrimination, echoing 19th-century classification of outlaw regimes.<sup>32</sup> Should we regard that as a stray, involuntary anachronism, like Article 38 I (c) that still sits in the Constitution of the International Court of Justice at the Hague, as reconstituted by the United Nations, continuing to announce its adherence to the principles of law that define civilized nations, in the shadow of a bust of Grotius? That would be an error. The ‘standard of civilization’ proclaimed—appropriately enough—in Brussels yesterday enjoys, on the contrary, a new lease of life today. We owe the first modern study of its past, *The Standard of ‘Civilization’ in International Society*, to an American scholar, servant of the State Department and leader of the Mormon Church, who—critical of its use to justify colonial excesses in times gone

---

<sup>32</sup> For the history and contemporary currency of these notions, see the outstanding study by Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge 2004, *passim*.

by—noted, nevertheless, the elevating role it could also play in educating non-Europeans to higher codes of moral conduct, and commended two possible successors to it: a new ‘standard of human rights’ being pioneered by Europeans, or alternatively a ‘standard of modernity’, bringing the blessings of civilization in the shape of cosmopolitan culture to all.<sup>33</sup>

That was in 1984. He was prescient. In the new century, the holder of a chair in a school named after the mentor of former Secretary of State Condoleezza Rice, explaining that ‘something like a new standard of civilization is needed to save us from the barbarity of a pristine sovereignty’, proclaims human rights—above all as practised by the European Union—as that standard; and a principal offender against it, the Palestinian Authority.<sup>34</sup> Alternatively, a leading American specialist in terrorism and cybersecurity offers a more palpable updating of the notion. Structural Adjustment Plans imposed on underdeveloped countries by the IMF are the contemporary equivalent of the enlightened capitulations of old that helped to bring Ottomans and others into the comity of acceptable states, continuing their work of ‘civilizational harmonization’, essential to international society.<sup>35</sup> More ambitiously still, an Iranian scholar from Denmark, denouncing Islam as an Oriental totalitarianism, has announced the arrival of a Global Standard of Civilization—GSC—as the lodestar of humanity’s advance to a better world, gaining momentum every day. We are living, he exclaims, a new ‘Grotian moment’, in which the two pillars of global civilization are ‘capitalism and liberalism’.<sup>36</sup> Nor have historians been found wanting. The most prominent, and prolific, contemporary historian at Harvard, Niall Ferguson, author of works on the Rothschild and Warburg banks, the First and Second World Wars and the history of money, restores the singular with unruffled aplomb in *Civilization: The West and the Rest* (2011), devoted to an explanation of all the reasons why the former triumphed over the latter.

---

<sup>33</sup> Gerrit Gong, *The Standard of ‘Civilization’ in International Society*, Oxford 1984, pp. 91–93.

<sup>34</sup> Jack Donnelly, ‘Human Rights: A New Standard of Civilization?’, *International Affairs*, vol. 74, no. 1, 1998, pp. 1–23.

<sup>35</sup> David Fidler, ‘A Kinder, Gentler System or Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal, Globalized Civilization’, *Texas International Law Journal*, vol. 35, January 2000, pp. 387–414.

<sup>36</sup> Mehdi Mozaffari, ‘The Transformationalist Perspective and the Rise of a Global Standard of Civilization’, *International Relations of the Asia–Pacific*, vol. 1, no. 2, 2001, pp. 259, 262.

Writing at the turn of the sixties, Braudel reiterated Febvre's conviction that Valéry was wrong: 'Civilizations are a reality of very long duration. They are not "mortal", above all—despite Valéry's too famous phrase—as measured by our individual lives. Lethal accidents . . . occur to them far less often than we think. In many cases, they are merely sent to sleep.' Customarily, it is only 'their most exquisite flowers, their rarest achievements, that perish, but their deep roots survive many a rupture, many a winter.'<sup>37</sup> There might be 'an inflation of civilization in the singular', but 'it would be puerile to imagine this, beyond its triumph, doing away with the different civilizations that are the real personages who still confront us'. Characteristically, however, Braudel's conclusions oscillated. In one register, the singular and plural collaborate fruitfully: 'Plural and singular form a dialogue, complementing each other and differentiating themselves from one another, sometimes visible to the naked eye, almost without requiring attention.' On the next page, a very different note is struck: 'A blind, ferocious struggle is at work under various names, and on various fronts, between civilizations and civilization. The task is to tame, to channel it, to impose a new humanism on it', and 'in that battle without precedent many cultural structures can crack and all of them at once'.<sup>38</sup> Half a century later, we may ask, has civilization in the singular been subdued by civilizations in the plural, as he hoped it would be?

The spectacle of international law suggests otherwise. Braudel had a wide and deep comparative grasp of the material and cultural dynamics of human history, giving him an unrivalled sense of the differences between civilizations. Much less interested in their political and ideological dimensions, he identified civilization in the singular—*scilicet* Western civilization—too simply with just that of 'the machine': essentially, technology, which he rightly thought could be adapted by any of the civilizations of the world that had survived to the present. Of the power of the intellectual and institutional order of the West, not to speak of its military predominance, he took less account.

### *The force of opinion*

None of this, of course, means that international law is without any substance that can for practical purposes be regarded as universal. It

---

<sup>37</sup> Fernand Braudel, 'L'Apport de l'histoire des civilisations', in Gaston Berger, ed., *Encyclopédie française*, Vol. XX, *Le Monde en devenir*, Paris 1959, 12: 10.

<sup>38</sup> Braudel, 'L'Apport de l'histoire des civilisations', 12: 12–13.

is enough to consider the fact that no state in the world dispenses with appeals to it, if only because all benefit from at least one convention associated with it: the diplomatic immunity of their embassies abroad, respected even after war has been declared by the host country against the state they represent—what might be called the Minimum Content of International Law, by analogy with Hart's reduction to the same of Natural Law. Needless to say, every embassy of a major state, and most of lesser ones, is crammed with personnel engaged full-time in espionage, with no legal warrant in international law. Little comfort for its theorists is to be found in such incongruities.

To conclude: on any realistic assessment, international law is neither truthfully international nor genuinely law. That, however, does not mean it is not a force to be reckoned with. It is a major one. But its reality is as Austin described it: what in the vocabulary which he inherited from Hobbes he termed opinion, and today we would call ideology. There, as an ideological force in the world at the service of the hegemon and its allies, it is a formidable instrument of power. For Hobbes, opinion was the key to the political stability or instability of a kingdom. As he wrote: 'The actions of men proceed from their opinions, and in the well governing of opinions consisteth the well governing of men's actions'—thus 'the power of the mighty hath no foundation but in the opinion and belief of the people'.<sup>39</sup> It was seditious opinions, he believed, that triggered the Civil War in England, and it was to instill correct opinions that he wrote *Leviathan*, which he hoped would be taught in the universities that were 'the fountains of civil and moral doctrine', to bring 'public tranquility' back to the land.<sup>40</sup> We do not have to share the extent of Hobbes's respect for the power of opinion, or indeed his preferences among the opinions of his day, to acknowledge the validity of the importance he attached to them. International law may be a mystification. It is not a trifle.

How then should it be conceived? For the most formidable of international jurists today, the Finnish scholar Martti Koskenniemi, international law is best termed a hegemonic technique, in the Gramscian sense. For Gramsci, he notes, the exercise of hegemony always involved the successful representation of a particular interest as a universal value. That, certainly, the standard of civilization attempted, and in its heyday achieved, as the vocabulary of the 'international community' has

---

<sup>39</sup> Hobbes, *Leviathan* (English text), XVIII, p. 272; *Behemoth*, p. 16.

<sup>40</sup> Hobbes, *Leviathan*, 'A Review and Conclusion', p. 1140.

typically done since. International law in that sense had never ceased to be an instrument of Euro-American power. But just because it offered an ostensibly universal discourse, it was open to appropriation and reversal, claiming it for other, wider and more humane interests.<sup>41</sup> Even at the height of imperial hubris in the 19th century, after all, eloquent voices had resisted the standard of civilization: ‘The argument employed in our time . . . to justify and disguise the spoliation of weaker races is no longer the call of religion, but of civilization: modern peoples have a civilizing mission to fulfill they cannot decline’, wrote a modest lawyer from Bordeaux, Charles Salomon in 1889. More radical even than Braudel, he went on: ‘There is talk of civilization as if there were an absolute of just one: those who do so all believe they are entitled to the first rank of it. Changing Joseph de Maistre’s well-known dictum slightly, we might well say: I know of civilizations, I know nothing of civilization.’<sup>42</sup>

Modern international law is thus, as Koskenniemi observes, intrinsically threaded with contestation, and as its contemporary instrumentation for the will of today’s hegemon and its satellites has grown ever more brazen, so the number of critical legal minds not only questioning but seeking to reverse its imperial use has grown too. The most lucid do so without attributing more strength to its claims than they can bear. In the *mot* of a distinguished French jurist, international law is ‘performative’. That is, such pronouncements in its name seek to bring into being what they invoke, rather than refer to any existent reality, however laudable.<sup>43</sup>

The same dialectic, of course, has more famously been true of municipal law, invoked in Europe at least since the 17th century in defence of the weak against the strong, who created it. But there Austin’s axiom makes the difference. Within the nation-states, as they became, of Europe, there was always a determinable sovereign authorized to enforce the law, and as this authority passed from crowns to peoples, not coincidentally came also the legitimate power to change it. In relations between states, unlike relations among citizens, neither condition holds. So while hegemony

---

<sup>41</sup> Martti Koskenniemi, ‘International Law and Hegemony: a Reconfiguration’, in *The Politics of International Law*, Oxford 2011, pp. 221–22 *et seq.*

<sup>42</sup> Charles Salomon, *L’Occupation des territoires sans maître: Étude de droit international*, Paris 1889, pp. 193, 195.

<sup>43</sup> The adjective, and what it designates, was regarded by Hart as happiest of all the *trouvailles* of J. L. Austin, the analytic philosopher of whom he was an adept in Oxford.

functions in both national and international arenas, and by definition always combines coercion and consent, on the international plane coercion is for the most part *legibus solutus* and what consent is secured inevitably weaker and more precarious. International law operates to hide that gap. Koskenniemi began his career with a brilliant demonstration of the two poles between which the structure of international legal argument had historically moved, entitled *From Apology to Utopia*: either international law supplied servile pretexts for whatever actions states wished to take, or it purveyed a lofty moral vision of itself as, in Hooker's words, 'her voice the harmony of the world', with no relation to any empirical reality. What Koskenniemi failed to see was the interlocking of the two: not utopia or apology, but utopia as apology: responsibility to protect as charter for the destruction of Libya, preservation of peace for the strangulation of Iran, and the rest.

Still, defenders of international law can argue that its existence, however often it is abused by states in practice, is at least better than would be its absence, invoking in their aid La Rochefoucauld's well-known maxim: *L'hypocrisie est un hommage que le vice rend à la vertu*. Yet critics can equally reply that here it should be reversed. Ought it not rather to read: hypocrisy is the counterfeit of virtue by vice, the better to conceal vicious ends: the arbitrary exercise of power by the strong over the weak, the ruthless prosecution or provocation of war in the philanthropic name of peace?