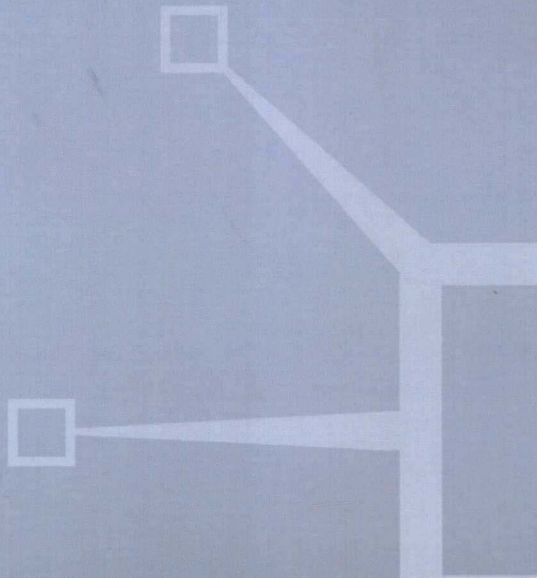
Charles Covell

HOBBES, REALISM AND THE TRADITION OF INTERNATIONAL LAW



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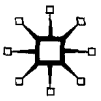

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Preface

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

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September 2003

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1

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

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

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

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

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

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

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

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

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

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