THE REPUBLICAN FOUNDATIONS OF

INTERNATIONAL LAW

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ABSTRACT

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This paper suggests that republican principles embedded in international law since the seventeenth century still provide the most persuasive argument for its binding authority. Law should be obeyed when it is just; law is just when it serves the common good; and the common good emerges most clearly from free deliberation among equals. This means that there will be no justice within or between states without popular sovereignty, the rule of law, independent judges, individual human rights, and the other checks and balances of fully functioning republican government. The only just basis of international law is, has been, and always will be the settled perceptions of republican deliberation, as developed in the public sphere.

THE REPUBLICAN FOUNDATIONS OF INTERNATIONAL LAW

Republican principles provide the ultimate foundation for international law and legal doctrine in two separate ways: first, because republican principles and ideas sparked the development of modern international law in the seventeenth and eighteenth centuries; and second, because republican legal theory still best justifies and identifies the actual requirements of international law today. The second point is more important than the first, because international law should be made to be republican, and therefore more just, even if it had no republican content to begin with. But the law's republican sources make this task much easier, because the basic structure and history of international law is already substantially republican, and therefore substantially just. The best argument for the importance and binding force of international law depends on viewing the law of nations in the light of the republican ideology that has supplied and justified its fundamental principles from the start.

What I mean by "republican" in this context is the legal project that reached its greatest prominence in the European Enlightenment of the seventeenth and eighteenth centuries, seeking to realize justice through law, on the basis of truth and reason.[1] This movement was "republican" because it followed Cicero and Aristotle in equating justice with the common good of the people,[2] but also because it embraced their political insights, and those of their successors in the republican tradition, by seeking to serve the "*res publica*" through popular sovereignty, the

[1] For a short introduction to the republican legal tradition, with a brief bibliography, *see* M.N.S. Sellers, "Republican Philosophy of Law" in Christopher B. Gray, ed. *The Philosophy of Law: An Encyclopedia* (New York, 1999) vol. II, pp. 740-743.

[2] Marcus Tullius Cicero, *de officiis,* I.xxv.85; Aristotle, *Politica,* III.vii.1 and 13. Cf. Plato, *Politeia*, I.xv. 342 E.

rule of law, independent judges, representative government, and other checks and balances designed to secure just laws and government for all.[3] The basic desiderata of republican government have been well-known (as the American revolutionary John Adams put it) "since the neighing of the horse of Darius".[4] The problem for international lawyers was (and is) how best to apply these principles to a world of sovereign and independent states.[5]

The necessarily republican nature of international law has caused considerable difficulty for lawyers who believe that natural justice should play no part in legal discourse. [6] For those accustomed (as many ordinary lawyers now are) to finding the law in the dictates of sovereign power, the content of international law is deeply problematic, because there is no world sovereign. [7] International law differs from many other legal systems, as has often been observed (with relish) by its opponents, in that it lacks any single ultimate temporal power to order or create its content. The law of nations is often clarified or elaborated (and generally enforced) by

[3] On modern republicanism, *see* Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, 1997); Claude Nicolet, *L'idée républicaine en France* (Paris, 1982); Natalio Botana, *La Tradición Republicana* (Buenos Aires, 1984); Biancamaria Fontana, ed. *The Invention of the Modern Republic* (Cambridge, 1994); Maurizio Viroli, *Repubblicanesimo* (Roma, 1999); Bill Brugger, *Republican Theory in Political Thought* (Basingstoke, 1999); Iseult Honohan, *Civic Republicanism* (London, 2002); Martin van Gelderen and Quentin Skinner, eds. *Republicanism: A Shared European Heritage* (Cambridge, 2002); Ricardo Leite Pinto, *Neo-Republicanismo, Democracia e Constituiçao* (Lisbon, 2006); M.N.S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Basingstoke, 2003).

[4] John Adams, *A Defence of the Constitutions of Government of the United States of America* (London, 1787), vol. I, p.ii.

[5] On the application of republican principles to various aspects of international law, *see* Nicholas G. Onuf, *The Republican Legacy in International Thought* (Cambridge, 1998); M.N.S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (Basingstoke, 2006).

[6] *See e.g.*, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) (reissued Cambridge, 2005), p. 269.

[7] The most celebrated exponent of this view is John Austin, in *The Province of Jurisprudence Determined* (1832), edited for Cambridge University Press (1995) by Wilfred E. Rumble. See Lecture VI (p. 171) on sovereignty and international law.

opinion rather than by power, and is therefore not "law" at all ("properly so called") in the eyes of some lawyers, but rather (the most extreme sovereigntists assert) a form of "positive morality".[8]

The Statute of the International Court of Justice speaks of "conventions", "custom", "the general principles of law recognized by civilized nations", and "judicial decisions and the teachings of the most highly qualified publicists" as "evidence" of law or "means" for determining what international law requires. [9] None of these are "positive law" in the usual sense, and all of them are confusing for lawyers accustomed to positivist conceptions of the law.[10] Republican legal theory makes sense of international law by explaining why treaties, state practice, legal principles, and the teachings of scholars and judges have authority as useful evidence of law, even in the absence of an international sovereign, legislature, courts, or police force. Republican doctrine teaches how best to determine the content of international law, and why it should be obeyed.

1. *The Origins of International Law*

Standard histories of international law generally trace its modern rebirth to two events: The Peace of Westphalia in 1648 and the publication of Hugo Grotius' treatise, *De Jure Belli ac*

[8] Austin, *ibid*., Lecture V, at pp.112 and 123-4.

[9] *Statute of the International Court of Justice*, Article 38.

[10] Prime Minister Salisbury reported to Parliament in 1887 that international law is not law in any ordinary sense, because "it depends generally on the prejudices of writers of text-books" and "can be enforced by no tribunal." *See* Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, 2001), p.34.

Pacis, in 1625.[11] This is a vastly oversimplified description of a legal system that has deep roots in Roman law, Stoic philosophy, human nature, and the actual practice of peoples, states and governments always and everywhere,[12] but it captures the essence of modern international law. On one hand, the Peace of Westphalia diminished the power of empire, confirming the political revolutions of the Swiss cantons and the United Provinces of the Netherlands and ("in effect", as Henry Wheaton observed) the right of local independence and popular resistance against oppressive rulers.[13] At the same time, Hugo Grotius, established a theoretical basis for legal relations between these newly independent states in the natural sociability of humanity,[14] which creates a natural duty in everyone to maintain the universal social order,[15] embodied in international law.[16]

The difficulty arises in determining (in Henry Wheaton's famous words) "those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations".[17] Grotius looked to laws established by nature[18] or by agreement[19]

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[11]The standard history is Arthur Nussbaum, *A Concise History of International Law* (2nd revised edition, New York, 1954). *See also* Henry Wheaton, *History of the Law of Nations in Europe and America* (New York, 1845).

[12] *See e.g.,* David J. Bederman, *International Law in Antiquity* (Cambridge, 2001); Nicholas G. Onuf, *The Republican Legacy in International Thought* (Cambridge, 1998).

[13] Wheaton, *History of the Law of Nations*, p.70.

[14] Hugo Grotius, *De Iure Belli ac Pacis libri tres. In quibus jus Naturae et Gentium, item juris publici praecipua explicantur* (1625) (Amsterdam, revised ed., 1646), at prolegomena §6, citing the Stoics.

[15] *Ibid.*, at prolegomena §8, citing Seneca.

[16] *Ibid.*, at prolegomena §23.

[17] Henry Wheaton, *The Elements of International Law*, 8th ed. with notes by R.H. Dana, Jr. (Boston, 1866), Part I, Chapter 1 §14. He was paraphrasing James Madison, *Examination of the British Doctrine which subjects to Capture a Neutral Trade* (London ed., 1806).

[18] On the importance of the law of the law of nature *see also* note 45 below.

(since agreement is sanctified by nature).[20] Laws supported by nature are discovered by considering what is most widely held to be reasonable among all nations, or at least those nations most given to reasoning.[21] Laws established by agreement are discovered in unbroken custom, or the opinions of those who have studied and understood such customs best.[22] Wheaton followed Grotius in finding international law in text-writers of authority, treaties, the ordinances of particular states, the adjudications of international tribunals, the opinions of government jurists, and in general in the history of the public intercourse of nations.[23] The Statute of the International Court of Justice, in identifying international law today, simply repeats the methods of Grotius and Wheaton to discover the laws of nature and of nations in conventions, custom, judicial decisions, text-writers, and the general principles of law recognized by the most civilized (Grotius called them "*moratiores*") nations.[24]

With Grotius and Wheaton, the third most influential exponent of the fundamental principles of international law has been Emmerich de Vattel, in his study of the law of nations and the principles of natural law as applied to the conduct and affairs of nations and sovereigns.[25] Vattel simplified and clarified in accessible French the more elaborate doctrines previously set

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[19] Grotius, *De Iure Belli ac Pacis*, prolegomena §26. He called these two aspects of international law "ius naturae" and "ius gentium." *Ibid.*, prolegomena §40.

[20] *Ibid.*, prolegomena §8.

[21] *Ibid.*, book I, chap I §12.1: "juris naturalis esse colligitur id quod apud omnes gentes, aut moratiores omnes tale esse creditur."

[22] *Ibid.*, book I, chap I §14.2: "uso et testimonio peritorum."

[23] Wheaton, *Elements*, Part I, chap I §15.

[24] *Statute of the International Court of Justice*, Article 38.

[25] Emmerich de Vattel, *Le Droit des Gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et det Souverains* (London 1758).

out by Christian Wolff, at length and in Latin.[26] Vattel explained that international law rests ultimately on the analogy between states and persons, and the perception that just as all people deserve equal respect, despite their differing strength and abilities, so too all states deserve equality before the law,[27] despite their differing sizes and power.[28] This argument for the sovereign equality of states requires a previous commitment to the equality of individual persons before the law. Christian Wolff and Emmerich de Vattel elucidated the moral groundwork for international law out of the human right to equality before the law[29] and identified the "necessary" (essential) law of nations as those restraints and institutions to which the governments of all states would agree, if they were sensible to reason and respected the rights of others.[30]

Vattel recognized that the natural society of the human race[31] imposes duties that are just as binding on states as the are on the natural persons whose rights and interests states and their governments exist to secure.[32] International law has always regarded states as moral persons, with understanding, will, power, rights, and duties, deriving from the rights and duties of their

[26] Christian Wolff, *Jus Gentium methodo scientifica pertractatum, in quo Jus Gentium naturale ab eo, quod voluntarii, pactitii et consuetudinarii est accurate distinguitur* (Frankfurt and Leipzig, 1764), first published 1740-1748.

[27] Vattel, *Droit des Gens*, préliminaires §18 (p.11). Cf. Wolff, *Jus Gentium*, prolegomena §16 (p. 6).

[28] Vattel, *Droit des Gens, loc. cit.*: "Un Nain est aussi bien un homme qu'un Géant. "

[29] Wolff, *Jus Gentium*, prolegomena §16 (p. 6); Vattel, *Droit des Gens*, préliminaires §4 (p. 2).

[30] Wolff, *Jus Gentium*, prolegomena §21 (p. 7); Vattel, *Droit des Gens*, préface, xii-xiv.

[31] "La Société universelle du Genre-humain", Vattel, *Droit des Gens,* préliminaires §11 (p. 7).

[32] *Ibid.* §11 (pp. 7-8).

subjects.[33] This analogy between nations and persons is not exact, and there are obvious differences between the rights and duties of states and the rights and duties of natural persons,[34] but the force of the analogy has been strong enough to determine the central elements of the law of nations[35] and continues to permeate international law and international legal theory, even when lawyers and scholars are not fully aware of the influence.[36] The Charter of United Nations still recognizes "the equal rights of men and women and of nations large and small."[37]

The principles of the seventeenth- (Grotius), eighteenth- (Vattel) and nineteenth-century (Wheaton) masters of international law were republican because they began with the premise that international society exists for the common good of its subjects.[38] Vattel called this the first general law of nations: that each should work as much as possible for the welfare of all.[39] Vattel's second general law of nations concerned liberty: international law and society should never restrict the independence and autonomy of states except to serve the common good of the whole.[40] But states should also be equal,[41] and equally subject to the law.[42] Fraternity, liberty, and equality set the parameters of international law, as they set the parameters of all just

[33] *Ibid.* §11 (p. 8.) *Cf.* §2 (p.1).

[34] *Ibid.*, préliminaires §6 (p.3).

[35] *Ibid.* §7 (p.4).

[36] *See e.g.* John Rawls, *The Law of Peoples; with, The Idea of Public Reason Revisited* (Cambridge, Mass., 1999).

[37] *Charter of the United Nations* (1945), preamble.

[38] Vattel, *Droit des Gens*, préliminaires §12 (p.8).

[39] *Ibid.*, préliminaires §13 (p.8).

[40] *Ibid.* §15 (p.9).

[41] *Ibid.* §18 (p.11).

[42] *Ibid.* §19 (p.11).

societies.[43] These general principles help to establish justice, the final fundamental attribute of international law. Grotius, Vattel and Wheaton all took it as given that law should seek justice,[44] and that justice consists in the rules of social order that best serve the common good of society as a whole.[45]

The twentieth-century creation of the United Nations has played a similar role in elaborating the law of nations that Grotius, Vattel and Wheaton did for previous generations. The purposes and principles of the Charter of the United Nations are best understood in the light of what went before, and reflect the same basic analogy and commitments made by international lawyers through the ages. The Charter seeks to maintain international peace and security "in conformity with the principles of justice and international law" (Article 1(1)); to encourage nations to cooperate to solve international problems (Article 1(4)); to promote and encourage respect for human rights and fundamental freedoms for all (Article 1(3)); and to maintain the principle of equal rights and self-determination of peoples (Article 1(2)). These principles of justice, republicanism, liberalism and equality among nations repeat the principles of justice, republicanism, liberalism and equality that inspired the French, American and other enlightened lawyers and statesmen of the late eighteenth century.[46]

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[43] See e.g. M.N.S. Sellers, "The Value and Purpose of Law" (Regents Lecture), 33 *Baltimore Law Journal* 145 (2004).

[44] And that both sides in any international disagreement will claim to have justice on their side. *See* Vattel, *Droit des Gens*, préliminaires §21 (p.12).

[45] Eighteenth-century authors, such as Vattel, usually referred to "natural law" in this context. See *ibid.*, préface, pp. xxii-xxiii. Henry S. Maine believed that "the grandest function of the Law of Nature was discharged in giving birth to modern International Law". *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (10th ed. London, 1884), p.92.

[46] *See* M.N. S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Basingstoke, 2003). *Cf.* ibid., *The Sacred Fire of Liberty: Republicanism, Liberalism and the Law* (Basingstoke, 1998).

The Charter of the United Nations is very self-aware in making these comparisons. "We the peoples of the United Nations" speak in the Charter, as "We the People of the United States" spoke (for example) through the Constitution of the United States, "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[47] The rights of persons and the rights of peoples arise by direct comparison and mutually reinforce each other.[48] This is important, because the moral and philosophical basis of international law has suffered from inattention, and a loss of conviction.[49] States and individuals respect and observe international law, to the extent that they do so, only because they perceive it to be just (on balance) as a system for regulating international society.[50]

Reference back to the historical and philosophical foundations of international law has useful practical consequences for contemporary lawyers and statesmen, not only because history clarifies and makes explicit many areas of doctrine that have become obscure, but also because it reveals how often the rules of law accepted as *actually* in force between states, are also the laws that *ought* to be in force between states. International law began as a moral argument between practical statesmen about which rules properly govern international relations. The relics of this conversation remain embedded in the law to justify contemporary international institutions.

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[47] *Charter of the United Nations* (1945), preamble.

[48] On the ubiquity of this "domestic analogy", *see* Martti Koskenniemi, *From Apology to Utopia* (1989) (reissued Cambridge, 2005), esp. p.89, note 66.

[49] *See* Koskenniemi, *From Apology to Utopia*, (esp. pp.18 and 71), which both describes and exhibits this malaise.

[50] This fundamental reality is well expressed by Werner Levi, *Contemporary International law: A Concise Introduction* (Boulder, Colorado, 1979), p.21.

Certain basic legal principles are necessary for any just society of states. The same rules would be necessary and binding even if states did not recognize them. How fortunate then that scholars such as Hugo Grotius,[51] Emmerich de Vattel,[52] and Henry Wheaton[53] recognized these principles long ago, and developed legal doctrines to put them into practice.[54]

2. *Liberal International Law*

Scholars often speak of modern international law as "liberal",[55] despite its republican origins. This raises questions of priority and relative importance. To assert with Vattel, the United Nations Charter, and the first section of this paper that international law rests on the republican values, liberal rights and equality among nations may confuse scholars who contrast these three principles, as academic lawyers frequently do, particularly in the United States.[56]

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[51] Hugo Grotius, *De Iure Belli ac Pacis,* I. xvii (p.9): "Nam cum jus naturae ut ante diximus, sit perpetuum atque immutabile, non potuit a Deo, qui injustus numquam est, quicquam adversus id jus praecipi."

[52] Emmerich de Vattel, *Le Droit des Gens*, préliminaires § 8 (p. 4): "Puis donc que le Droit des Gens nécessaire consiste dans l'application, que l'on fait aux États, du Droit Naturel, lequel est immuable, comme étant fondé sur la nature des choses et en particulier sur la nature de l'homme, il s'ensuit que le Droit des Gens nécessaire est immuable." *Cf.* § 9: "Dès-là que ce Droit est immuable, et l'obligation qu'il impose nécessaire et indispensable; les Nations ne peuvent y apporter aucun changement par leurs Conventions, ni s'en dispenser elles-mêmes, ou réciproquement l'une l'autre."

[53] Henry Wheaton, *Elements of International Law*, Part 1§14, p. 23, quoting from James Madison, *Examination of the British Doctrine which subjects to Capture a Neutral Trade not open in Time of Peace* (London ed. 1806), p. 41.

[54] For more recent discussions of the foundations of international law, *see* Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford, 2004) and Fernando R. Tesón, *A Philosophy of International Law* (Boulder, Colorado, 1998).

[55] *See e.g.* Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissue Cambridge, 2005) pp. 4-6; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge, 2004) pp 76-83.

[56] *See e.g.* Morton J. Horwitz, "Republicanism and Liberalism in American Constitutional Thought" in 29 *William and Mary Law Review* 57 (1987); *Symposium: The Republican Civic Tradition*, in 97 *Yale Law Journal* 1493 (1988) Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy,* trans.

This makes greater clarity in definitions and relationships particularly important. Republicanism is morally and historically prior to liberalism in international law, but the two traditions are compatible and intimately related. Both republican and liberal theories of law assume the equal value of all human beings and their equal right to worthwhile and fulfilling lives, protected by the law.[57]

Republicanism is morally and historically prior to liberalism, because the essence of republican legal and political theory is its commitment to the common good ("*res publica*") of all the people subject to its rule.[58] The essence of liberal legal and political theory is the idea that every human being has natural and inalienable rights, which must be recognized by society and the state.[59] The republican idea that every society or state should seek to maintain a political and legal order in which all its citizens can live worthwhile and fulfilling lives leads naturally to the recognition of those fundamental (liberal) rights without which such worthwhile and fulfilling lives will never be possible, or secure. The existence of the *res publica* implies a *res privata*, protected by laws and the state.[60] The same is not as obviously true in reverse. The liberal commitment to private rights originates and is best justified by the republican commitment to the

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William Rehg (Cambridge, Mass., 1996), pp. 99-100. For a clarification of the distinction, see note 105 of this chapter (below).

[57] On republicanism, liberalism, and the law, *see* M.N.S. Sellers "Republicanism, Liberalism and the Law" in 86 *Kentucky Law Journal* 1 (1997), reprinted in Tom Campbell and Adrienne Stone, eds. *Law and Democracy* (Aldershot, 2003).

[58] In addition to the famous passages cite above (note 2), *see also* Marcus Tullius Cicero, *de re publica*, I.xxv. 39.

[59] The most famous documents in this tradition are the *Declaration of Rights* of Virginia (June 12, 1776); the *Declaration of Independence of the United States of American* (July 4, 1776); the French *Déclaration des droits de l'homme et du citoyen* (August 26, 1789); the United States *Bill of Rights* (December 15, 1791); and the *Universal Declaration of Human Rights*, which is a Resolution of the General Assembly of the United Nations (December 10, 1948).

[60] Marcus Tullius Cicero, *de officiis*, I. vii. 21; I. xvi. 51.

public good,[61] but liberalism can also lead to an exaggeration of the private zone, which denies the responsibilities that citizens and societies owe to the welfare of others.[62]

The self-conscious use of the term "liberal" to describe rights-oriented politics first arose in the nineteenth century, when the excesses and eventual failure of the French Revolution discredited the concept of republican government for many Europeans.[63] Benjamin Constant expressed the views of his contemporaries when he distinguished the "liberty of the moderns", characterized by the quiet enjoyment of private rights, from the "liberty of the ancients", which emphasized political rights, and sought the collective good of the community as a whole.[64] Liberals, like republicans, valued liberty, but they feared the power of the majority, and fought primarily for the peaceful enjoyment of private independence, rather than public concern for the welfare of society as a whole.[65] Like the English after the failure of their own revolutionary commonwealth, European liberals became disillusioned with politics, but still hoped to receive private rights and personal independence as concessions from their rulers.[66]

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[61] Thus the frequent references to government for the "public good" in the writings of proto-"liberals" such as John Locke, who grounded their commitment to rights in republican ideology . John Locke, *Two Treaties of Government* (1690) ed. P. Laslett (Cambridge, 1960) at I.92 (p. 210); II 135 (p. 357); II. 165 (p 378).

[62] *See e.g.* Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (New York, 1997); Maureen Ramsey *What's Wrong with Liberalism? A Radical Critique of Liberal Political Philosophy* (London, 2004).

[63] For the earliest English uses of "liberal" and "liberalism" with relation politics, and the term's connection France, *see The Oxford English Dictionary* (second edition, 1989) volume VIII, p. 882.

[64] "The Liberty of the Ancients Compared with that of the Moderns" (1819) in Benjamin Constant, *Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge, 1988), pp. 310-312.

[65] *Ibid*, pp. 316-317.

[66] *Ibid*., p. 321: "Individual independence is the first need of the moderns: consequently one must never require from them any sacrifices to establish political liberty."

Liberals did not so much reject political rights as wearily surrender them, with regret. Constant and his successors understood that political liberty protects individual liberty,[67] but were willing consign political responsibilities to "stewards", who would take care of politics on their behalf.[68] Applied to international law, this liberal sensibility encouraged a drift in the nineteenth-century from the universalist and rationalist foundations of international law towards a greater emphasis on state sovereignty and local power, particularly in Europe.[69] In a sea of strong and illiberal European states, liberal governments asserted their national independence as a shield to protect the individual rights and liberties of their citizens.[70] The liberal first principle of sovereign independence at the international level, like the liberal first principle of private rights in national politics, had the paradoxical effect of undermining the political liberty of states in their international relations, as powerful states asserted their hegemony in the course of the nineteenth century.[71]

This predatory attitude towards international law reflected the influence of Thomas Hobbes, whose innovative conceptions of law and sovereignty crept into international legal

[67] *Ibid*. p. 323.

[68] *Ibid*. pp. 325-326. *Cf.* Alexander Pope, *An Essay on Man: In Four Epistles to Henry St. John, Lord Bolingbroke* (London, 1733-1734), *Epistle* III (1733) at I. 303: "For forms of government let fools contest, whate'er is best administer'd is best."

[69] See e.g. Jean Louis Klüber*, Droits des gens modernes de l'Europe* (Stuttgart, 1819). On this phenomenon, see Emmanuelle Jouannet and Hélène Ruiz Fabri (eds.) *Impérialisme et droit internationale en Europe et aux États-Unis* (Paris, 2007), pp. 17-18.

[70] See e.g. Emmerich de Vattel, *Droit des Gens*, ch. III §36.

[71] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge, 2004), pp. 93-110.

vocabulary after the Congress of Vienna.[72] Champions of autocratic governments[73] followed Hobbes in identifying law with the dictates of power[74] and liberty with the license to do as one pleases.[75] This undermined the moral authority of both concepts and made it much harder to control the actions of governments, which is the primary purpose of international law.[76] Liberal international law, which begins with universal human rights, should be distinguished from what might more accurately be viewed as "libertarian" or "positivist" theories, which privilege the independence or "autonomy" of states.[77] Hobbes and his followers promoted the conception of a state of nature (or "war") between sovereigns,[78] which precludes the possibility of law, by denying the reality of justice.[79]

More contemporary liberals, such as John Rawls, have tried to imagine a liberal world order by applying the same theories they developed for a liberal society of individuals,[80] to a

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[72] Hobbes self-consciously set out to counter the republican ideas of Cicero and Aristotle, which had dominated European public law until then. Thomas Hobbes, *Leviathan* (1651), ed. R. Tuck (Cambridge, 1991) at 21.110-111 (pp. 149-150).

[73] This "German" school of political science is still very much alive. Its influence can be seen in the work of twentieth-century authors such as Hans Kelsen, *Principles of International Law* (New York, 1952). For a succinct criticism, *see* J.L. Brierly, *The Law of Nations* (6th ed. Oxford, 1963), pp. 53-4.

[74] Hobbes, *Leviathan* at 15.80 (p. 111); 26.137-8 (pp. 183-4); 46.376 (p. 469).

[75] *Ibid*. at 14. 64 (p. 91); 21.107-08 (pp. 145-6).

[76] Hobbes set out explicitly to overcome the republican doctrine of controlling governments through law. In addition to *Leviathan* at 2.111 (p. 150), *see* 46. 377-78 (pp. 470-71).

[77] Gerry Simpson, in his study of *Great Powers and Outlaw States* (Cambridge, 2004), pp. 79-82, distinguishes what he calls "liberal pluralism" from what he calls "liberal anti-pluralism". Liberal pluralism values the autonomy of national governments, but disparages the rights of individuals. Liberal anti-pluralism values the rights of individuals and disparages illiberal governments. The first is a positivist and the second a liberal viewpoint.

[78] Hobbes, *Leviathan* I. xiii. 63 (p. 90).

[79] *Ibid*.: "The notions of Right and Wrong, Justice and Injustice, have there no place. Where there is no common Power, there is no Law."

[80] John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971).

liberal society of states.[81] The effort fails, both because states are not persons,[82] and because even if they were, individual justice will always depend on maintaining a just system of politics to support it.[83] Liberalism emerged to escape the complications of politics, but law requires a just and balanced politics to recognize and maintain its provisions. Claims for the liberal equality and equal rights of states are parasitic on the liberal equality and equal rights of real human beings. This imbeds liberal values at the heart of republican international law, but does not supplant the republican foundations that will always be needed to support the liberal conception of justice.

Liberal democracy within states is a necessary corollary to liberal democracy between states (and vice versa). Governments properly gain (or lose) legitimacy as they are more (or less) liberal and democratic, and the international legal system as a whole gains (or loses) its legitimacy as it makes use of the democratically determined perceptions of different groups within the international community. To the extent that international laws and institutions conform to the interests of non-democratic and illiberal governments, to the detriment of equal justice for all, then to that same extent will international laws and institutions properly lose legitimacy in the eyes of those who might otherwise be expected to obey them. The republican checks and balances of liberal democracy are an essential element in upholding the legitimacy of international law.

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[81] John Rawls, *The Law of People* (Cambridge, Mass., 1999).

[82] *See* M.N.S. Sellers, *Republican Principles in International Law* (Basingstoke, 2006), pp. 104-115.

[83] John Rawls himself came to see this, *Political Liberalism* (New York, 1993).

3. *Republican Deliberation in International Law*

Republican *principles* of government, as embedded in international law, have always required "a decent respect to the opinions of mankind".[84] The republican *form* of government yields the most valuable expression of national opinion by securing democratic deliberation among equals.[85] Balanced deliberation *between* peoples has been harder to secure, but becomes increasingly important, as international laws grows in influence and coercive power to do harm.[86] The principles and many of the doctrines of international law are well settled, but its institutions are weak. This raises problems that the republican legal tradition can illuminate, but has yet to solve, concerning the constitution of international relations, and the power to determine, adjudicate and enforce the content of international law.

The future of international law depends on developing better structures of republican deliberation at the international level, to match the republican principles that justify the international legal order.[87] Vattel's analogy is illuminating. Most states now stand with respect to one another in something very like the famous "state of nature" sometimes posited for

[84] *The unanimous Declaration of the thirteen United States of America* (July 4, 1776).

[85] M.N.S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Basingstoke, 2003).

[86] M.N.S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (Basingstoke, 2006).

[87] For some efforts to address this problem, *see* Gregory H., Fox and Brad R. Roth, eds. *Democratic Governance and International Law* (Cambridge, 2000); Harold H. Koh and Ronald C. Slye, *Deliberative Democracy and Human Rights* (New Haven, 1999); James Bohman and William Rehg, *Deliberative Democracy: Essays on Raason and Politics* (Cambridge, Massachusetts, 1997); and Joseph A. Camilleri, Kamal Malhotra, and Majid Tehranian, *Reimagining the Future: A Report of the Global Governance Reform Project* (Victoria, 2000).

prepolitical human societies,[88] in which all have equal right, or no right, or no better right than others, to determine, adjudicate or enforce the law which reason and the common good impose upon them all.[89] The great republican question for international lawyers, as for constitutional lawyers in the various states, has always been: "What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance?"[90]

The republican principles at the foundation of international law have been supported in republican states by a republican form of government, characterized by popular sovereignty, representative democracy, the separation of powers, political checks and balances, an independent judiciary and other institutions designed to determine, adjudicate and enforce the law impartially for the benefit of all citizens.[91] Gradually and partially, international treaties, alliances and federations, such as the United Nations, the Organization for Security and Cooperation in Europe, the European Union, and the United States of America have tried to extend the structures of republican government to govern relations between their member states, with varying degrees of success.[92] Republican institutions do not yet fully exist with jurisdiction

[88] *See e.g.* John Locke, *Two Treatises of Government* (1698) ed. Peter Laslett, (Cambridge, 1970), at II. II. 4-15 "Of the State of Nature".

[89] *Ibid.* at II.II.7. "[A]nd all this only for the Publick Good." (II.I.3).

[90] John Adams, *Defence of the Constitutions of Government of the United States of America* (London 1787-8) at I. 128.

[91] M.N.S. Sellers, *Republican Legal Theory* (Basingstoke, 2004) Ricardo Leite Pinto, *Neo-Republicanismo, Democracia et Constituição* (Lisbon, 2006).

[92] The Treaty of European Union declares that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the member States (Article 6 (1)). The Constitution of the United States guarantees every state in the union a "republican form of

to implement international law. Instead, as in the United Nations, international institutions declare a commitment to the republican principles of international law, while implementing them (if at all) through unequal and imbalanced institutional arrangements.[93]

The structural imperfections of international institutions such as the United Nations undermine their moral authority, while also often limiting their power to act, (as in the case of the permanent member veto),[94] so that the actual implementation of international law frequently takes place without the assistance, input, or even the influence of formal international organizations.[95] This has made the strict correspondence between prevailing doctrine and actual justice more important in international law, which relies above all on public opinion and self-regulation to secure its compliance, than it is in domestic legal systems, which often resort to much more robust and coercive techniques of enforcement. Powerful states will not and should not defer to prevailing doctrines of international law unless international law itself is just, and perceived to be just by those in a position to make public policy. No international institutions enjoy the decisive authority exercised by many national governments in their own domestic affairs, or the physical power to compel widespread compliance.[96]

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government" (Article IV (4)). The Copenhagen Document of the Organization for Security and Cooperation in Europe (1990) recognized the fundamental common commitment of all the signatories to human rights, democracy, justice, free elections, representative government, constitutionalism, equality before the law, and an independent judiciary.

[93] Such as the Security Council, *Charter of the United Nations* (1945), Chapters V-VII.

[94] *Ibid.*, Article 27.

[95] The United Nations was incapacitated throughout the Cold War by the conflict between the Soviet Union and the United States. On the enforcement of international law through non-forcible measures, *see* Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures.* In *Recueil des Cours de l'Académie de Droit International de la Haye,* vol. 269 (The Hague, 1997).

[96] For an attempt to develop a system that might move effectively "enter in the minds" of its subjects, see Philip Allott, *Eunomia: New Order for a New World* (Oxford, 1990, reissued 2004).

The lack of a strong coercive enforcement mechanism in international law may appear as a weakness to those unaccustomed to obey the law without compulsion,[97] but in fact most people obey the law because they respect the justice and usefulness of law's prescriptions. The greater difficulty lies in understanding precisely what it is that the law requires, when people of good will have differing perceptions. To say that there is such a thing as justice and therefore a necessary international law to control the will and practice of states does not reveal which laws and practices are just in fact, and therefore required but the actual law of nations. Generations of political experience have identified the civic institutions best suited to advance and protect justice and the common good within the political confines of states, but there is not now and probably never should be a single universal state to regulate the world.[98] Those of good faith will aspire, with Immanuel Kant, towards a "*foedus pacificum*" and a "*weltbürgerlich Verfassung*",[99] but in the meantime they must make use of such opportunities for republican deliberation and consensus as are already at hand, which is to say the "*rechtliche Verfassung*" of existing republican states.[100]

The republican historical and philosophical foundations of international law make it very difficult for illiberal doctrines to establish themselves in practice, but they do not guarantee the

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[97] The most famous example of this attitude was captured in John Austin's statement that international law is not law at all, because it cannot be properly enforced. John Austin, *The Providence of Jurisprudence Determined* (London, 1832), pp.146-8; 207-8.

[98] *See e.g.*, Immanuel Kant, *Zum ewigen Frieden* (Königsberg, 1795, reprinted Stuttgart, 1984) on the undesirability of such an empire.

[99] *Ibid.*

[100] *Ibid.*

continued vitality of international law. Not all statesmen, judges and scholars take an equal interest in international justice or deserve equal deference as authorities on international law, or participants in public deliberation about justice. The domestic legal institutions of most national governments have well-established institutions for creating, recognizing, interpreting and enforcing the law. This clarifies which groups or individuals deserve deference in determining the requirements of domestic law and which do not. Looked at from the outside, these institutions and constitutional arrangements may seem less than ideal, but the internal perspective of each legal system's own rules usually makes it clear whose views on such questions will have decisive force. International law lacks the same institutional clarity, because it lacks the comprehensive constitutional machinery that is present in most ordinary states. Governments, diplomats, judges, and scholars only have authority to influence other actors' understanding of international law to the extent that they *deserve* such authority (or seem to). This depends on the likely accuracy of their views.

The institutional weakness at the heart of international law can best be remedied or ameliorated by recurrence to the same republican principles that first justified international law to its subjects. If, as Wolff and Vattel so persuasively explained, states deserve equal sovereignty and independence by virtue of the citizens they serve and represent, then the equality, sovereignty and independence of national governments should also depend on their actually serving and representing their citizens, and should diminish when governments do not. Recall the basic principles recognizing that law should be just, that justice serves the common good, that every person (or state) should be free, and that each person (or state) deserves equal concern and respect. Embodied in the basic doctrines of international law, these principles give

law its binding force. The dignity and independence of states reflect the dignity and independence of individuals and imply an attitude toward individuals and states that requires certain constitutional arrangements, both within states and in the structure of international society as a whole.

This last step is the most important, and requires some explanation. Republican deliberation and the enjoyment of fundamental human rights advance the search for truth about justice, and clarify the evidence of international law, because republican deliberation and fundamental human rights take the separate views and interests of individual human beings equally into account, or at least attempt to do so, and actually do so better and more accurately than any other available institutional arrangements.[101] Republican deliberation and fundamental human rights are themselves very closely related concepts. Fundamental human rights are those rights without which people cannot think or act freely as rational human beings. Republican deliberation is the discussion through which rights and duties are clarified and discovered. To exclude any person from the public discussion of truth about justice would falsify the results of public deliberation, by denying the larger group as a whole a true understanding of the separate rights and duties of those who could not speak.[102]

Republican forms of democratic deliberation should not be confused with pure democracy, or simple majority rule. To speak of "democratic" deliberation in this context may be misleading. The moral, republican, liberal and egalitarian principles of international law all

[101] On the mechanisms and importance of democratic deliberation, see James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, Mass., 1996); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, 1997).

[102] M.N.S. Sellers "Republican Impartiality" in 11 *Oxford Journal of Legal Studies* 273 (1991).

require that no sincere voices be excluded from the search for the common good (hence "democratic"), but they also require that the discussion itself be conducted in sincere pursuit of justice (hence "deliberation"). Domestic political arrangements within states have sought since antiquity to determine which forms of popular sovereignty will secure the common good best.[103] The French and American revolutions reflected a new science of politics, applying the balance of powers, bills of rights, representation, bicameralism, and other institutional arrangements to secure sincere and reasonable deliberation in pursuit of justice.[104] International law cannot exploit such mechanisms, because international society lacks any authoritative (or democratically legitimated) legislature, executive, or courts. Those who seek evidence of international law must approximate the benefits of republican deliberation by referring to the scattered institutions of imperfect international society.

The authority of governments, diplomats, scholars and courts to clarify the content of international law, or contribute evidence of what law is, depends upon their value in advancing republican deliberation, their actual links to deliberative institutions, and their respect for universal human rights.[105] The ideal structure of international relations, like the ideal state,

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[103] M.N.S. Sellers, *The Sacred Fire of Liberty: Republicanism, Liberalism and the Law* (Basingstoke, 1998).

[104] Philip Pettit, in his book on *Republicanism: A Theory of Freedom and Government* (Oxford, 1997), has set out some more contemporary thoughts about the mechanisms of republican government, and how to secure the common good in practice.

[105] It is not uncommon to hear scholars contrast republicanism with liberalism, and republican deliberation with universal human rights. In addition to the scholars mentioned in note 56 of this chapter (above), *see also* Jürgen Habermas, *Time of Transitions,* edited and translated by Ciaran Cronin and Max Pensky (Cambridge, 2006), pp. 113-114. This represents a fundamental misunderstanding of the republican project. Republicanism is not synonymous with democracy. Democracy requires that the majority should govern all public decisions. Republicanism requires that all public decisions should serve the common good. Republican deliberation clarifies and discovers the requirements of universal human rights, but the recognition and protection of human rights is also a necessary element in the maintenance of any just society, and the enjoyment of certain fundamental rights is a necessary precondition to any successful republican deliberation. Well-constructed representative democracy is (like the enjoyment of certain fundamental human rights) also a necessary element in any successful structure of

would take the interests of all individuals equally into account in maintaining social rules that secure worthwhile and fulfilling lives for all. No such structure yet exists, so persons and states who would respect international law must consult the opinions of those people and institutions who derive their views most directly from republican deliberation, wherever and howsoever these may be found. Democratically elected governments, constrained by bicameralism and the separation of powers, will express insights into law that are more worthy of being taken into account than the declarations of self-appointed governments or untrammeled autocracies. Judges selected by republican governments and constrained by the rule of law will be more worthy of attention than judges who can be influenced or removed by arbitrary power. Diplomats voicing the deliberate consensus of republican institutions deserve greater consideration than the spokesmen of despots. Scholars who build from the theoretical foundations of republican deliberation and universal human rights have more authority than those who disregard these principles.

Treaties, customs, text writers, the ordinances of particular states, the adjudications of international tribunals and the history of international relations all provide useful evidence of the content of international law, and of the proper application of the republican, liberal, and egalitarian principles of justice, only to the extent that they also reflect republican deliberation and respect for universal human rights. This does not mean that the governments, diplomats and judges of non-democratic or illiberal states deserve no consideration at all. Sometimes even autocratic and oppressive governments speak, to some extent, for their victims, because they share their victims' interests, in some limited respect. The world has seen enlightened despots,

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republican deliberation, but not to the detriment of maintaining equal concern and respect for all members of society. *See* M.N.S. Sellers, "Republican Impartiality" in 11 *Oxford Journal of Legal Studies* 273 (1991).

and even unenlightened despots may wish to preserve national interests, which benefit their subjects. Such voices should be weighed for what they are worth, but not allowed to overwhelm the sincere deliberation of real representatives of the people, speaking in pursuit of justice, and genuine concern for the common good.

4. *Conclusion*

The history of international law reveals a commitment to republican principles of liberty, equality and the common good that justify the law's authority against even the most powerful states. This has strong implications for international institutions, which will gain legitimacy and authority as they conform to well-known standards of republican government already embedded in many national and federal constitutions. The opposite is also true: international law will lose legitimacy and authority if it strays from its justifying principles or disregards the deliberative procedures of the republican form of government. Recurrence to first principles will clarify *both* whose voices should be heard, *and* the details of particular doctrinal questions. Lawyers and statesmen must always examine *both* the substantive contributions that supposed laws make to the common good of humanity, *and* deliberative procedures that confirm (or refute) the doctrines in question.

Nor can statesmen shrink from identifying the "*moratiores*" among states, governments, judges and scholars, who presume to elucidate "the general principles of law recognized by civilized nations" or "the teachings of the most highly qualified publicists". The standards that identify governments as "civilized" and publicists as "qualified" are the same standards that

distinguish republican from non-republican states. Governments, judges, and scholars who do not accept the common good of all people and peoples as the purpose of international law and society do not deserve a voice in identifying the rules that govern international relations. Those who deny the liberty and equality of all persons before the law, reveal themselves as fundamentally unreliable about the law's content. Institutions that disregard the republican safeguards of representation, popular sovereignty, governmental checks and balances, an independent judiciary, and the rule of law, reveal themselves as in need of reform before they can be trusted to guide public deliberations about justice.

Commitment to the fundamental doctrines of republican justice has been present from the beginning in international law, because republican doctrines are necessary to justify the enterprise. Without this plausible claim of justice, international law would have no legitimate influence or authority over powerful states and nations. Even armed with such authority, international law does not always govern their actions. There is often a sharp disconnect between international law and international relations, as actually practiced by states. This is true even of well-established international institutions such as the United Nations. The first responsibility of the United Nations is to international peace and security,[106] not to law, although the Organisation holds out hope of establishing "conditions under which justice and… international law can be maintained."[107] This gap between law and institutions may be justifiable in a world in which powerful governments most be accommodated and contained, but it should not obscure the actual nature and content of the law.

[106] *Charter of the United Nations* (1945), Art 1(1).

[107] *Ibid.*, preamble.

Thus while the Security Council has the authority under the Charter of the United Nations to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security",[108] this action will not be legitimate if it violates international law. The same would be true of Security Council inaction, due to permanent member veto.[109] Inaction should not preclude other measures provided for by international law. Incompletely republican international institutions may serve a worthwhile purpose in bringing non-republics to obey the law, but they cannot alter or evade the law, without the concurrence or approval of substantially republican procedures.

Republican principles of justice and the republican form of government both have a long history, arising with the first reasoned reflections about politics in Greece and Rome.[110] Whenever sincere deliberation turns in good faith to justice, it yields the same commitment to the common good of all persons. As societies seek these ends in practice, they gradually turn to popular sovereignty, checks and balances, independent judges, elected legislatures, and other well-known guarantees of good and honest government. The purpose of reviewing this history here has not been to demonstrate the necessity of republican principles or the efficacy of republican government, as has been done many times in the past,[111] but rather to recall the value

[108] *Ibid.*, Art. 42.

[109] *Ibid.*, Art 27.

[110] M.N.S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Basingstoke, 2003), chapters 2 and 3.

[111] Some recent examples include Philip Pettit, *Republicanism: A Theory of Freedom and Government*; M.N.S. Sellers, *The Sacred Fire of Liberty: Republicanism, Liberalism and the Law* (Basingstoke, 1998), and the other authors cited in footnote 3 of this chapter. Famous older examples can be seen in the works (for example) of

of republican theory to the development of international law, and its continued importance in the justification of international institutions.

The globalisation of international trade, the facility of international travel, and the ubiquity of international communications technology have brought people everywhere into closer contact with, and greater dependence upon, their fellows in the wider world. This vastly increases the influence of international law. As international law penetrates domestic legal systems to regulate trade, human rights, and other areas of international concern, it becomes increasingly important that international law should be balanced, just, and well-understood. Republican *principles* of justice have been present in international law from the beginning, but international institutions' realization of the republican *form* of government has been underdeveloped and radically incomplete. The time has come to repair this disadvantage. Without a greater attention to the checks and balances of republican government, international law runs a growing risk of oppression, exploitation, and procedural injustice. Powerful states will make dangerous mistakes, so long as they lack the guidance of just international institutions to constrain them. The republican foundations of international law provide a constitution of justice for the world. Lawyers and scholars should be more attentive to its requirements.

Aristotle, Polybius, Marcus Tullius Cicero, James Harrington and John Adams. *See* the authorities collected in M.N.S. Sellers *American Republicanism* (Basingstoke, 1994) and footnotes 2 and 57 of this chapter (above).