
The Responsibility to Protect beyond Borders in the Law of Nature and Nations

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Abstract

While histories of human rights have proliferated in recent decades, little attention has been given to the history of thinking about duties to protect these rights beyond sovereign borders. We have a good understanding of the history of duties of sovereign states to ensure the safety and well-being of their own citizens and of the right of other states to forcefully intervene when these duties are violated. But the story of the development of thinking about duties to assist and protect the vulnerable beyond borders remains to be told. This article defends the importance of excavating and examining past thinking about these duties. It then sketches key aspects of Western natural law thinking about such duties, from Francisco de Vitoria through to Immanuel Kant, claiming that such study holds the promise of exposing from where ideas that prevail in international law and politics have come and retrieving alternative ideas that have been long forgotten but that may reward renewed consideration. It concludes by briefly outlining how three such retrieved ideas might be of particular use for those seeking to push international law and politics in a more just direction today.

1 Introduction

We know a lot about the history of human rights. Recent decades have seen a proliferation of works tracing the origins and development of the concept, with some reaching far back to locate its beginnings in natural law and others insisting that it emerged

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only recently in the form that is familiar to us.¹ We are also well aware that the enjoyment of rights requires the performance of duties. As Onora O'Neill suggests, 'rights are mere pretence unless others have obligations to respect them'.² Moreover, we are told, if rights are to be conceived as universal, rather than merely civil, then, in those instances in which a sovereign state proves unwilling or unable to discharge its duty to secure the rights of its citizens, residual duties must be understood to fall upon actors beyond the state. Duties to assist and protect vulnerable people must therefore extend beyond borders.³

Recent years have seen increasing emphasis being laid on establishing duties that are owed beyond borders in order to vindicate universal human rights. This has been advanced most self-consciously in the concept of the responsibility to protect (R2P). In addition to according states a responsibility to protect their own populations from mass atrocities, R2P accords bystander states responsibilities to use appropriate diplomatic, humanitarian and other peaceful means to encourage and assist states to protect their populations and even to take collective action under Chapter VII of the UN Charter to ensure that populations are protected.⁴ R2P finds albeit limited legal support in the assertion of the International Court of Justice (ICJ) in *Bosnia v. Serbia* (2007) of an obligation to prevent genocide and in the declaration of the International Law Commission in its Articles on State Responsibility (2001) that states should cooperate to bring to an end serious breaches of the peremptory norms of international law, including genocide and crimes against humanity.⁵ However, for all the attention being paid to duties of human protection beyond borders today, we know little about their history.⁶

¹ See, among many examples, R. Tuck, *Natural Rights Theories: Their Origin and Development* (1979); B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (1997); S. Moyn, *The Last Utopia: Human Rights in History* (2010).

² O. O'Neill, *Bounds of Justice* (2000), at 126.

³ See, among many examples, S. Hoffmann, *Duties beyond Borders: On the Limits and Possibilities of Ethical International Politics* (1981); H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, 1996); S. Caney, *Justice beyond Borders: A Global Political Theory* (2005).

⁴ United Nations General Assembly, World Summit Outcome, Doc. A/60/1, 24 October 2005, at paras 138–139; see also International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001). Among an ever-growing body of legal scholarship on the responsibility to protect, see A. Orford, *International Authority and the Responsibility to Protect* (2011); Peters, 'The Security Council's Responsibility to Protect', 8 *International Organization Law Review* (2011) 1; Hakimi, 'Toward a Legal Theory on the Responsibility to Protect', 39 *Yale Journal of International Law* (2014) 247. See more broadly R. Teitel, *Humanity's Law* (2011); A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014); A. Nollkaemper and D. Jacobs (eds), *Distribution of Responsibilities in International Law* (2015).

⁵ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43 at para 425–438; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/83, 3 August 2001, Art. 41(1), at 113; commentary on Article 26, at 85, s. 5.

⁶ Moyn, 'Rights vs. Duties: Reclaiming Civic Balance', *Boston Review*, 16 May 2016, has recently noted that, while histories of rights have proliferated, past thinking about duties to vindicate these rights, both within and beyond the state, remains relatively unexplored.

Certainly, we know much about the histories of concepts and principles that closely relate to the idea of duties to assist and protect beyond borders. In addition to histories of human rights, we are well served with histories of thinking about the global community of humankind,⁷ the tensions in the relationship between this global community and the territorialized sovereign state⁸ and the development of ideas about the rights of war and peace.⁹ We also have a good understanding of the history of thinking about the duties of sovereign states to ensure the safety and well-being of their own citizens and of the right of international actors to forcefully intervene when these sovereign duties are violated.¹⁰ We even have valuable histories of the duties of states to extend hospitality to those who, fleeing persecution, cross into their territories.¹¹ But the story of the development of thinking about duties to assist and protect the vulnerable that remain beyond borders remains to be told. This story looks at ideas not only about duties of military intervention in the affairs of non-consenting states but also of duties of consensual assistance and capacity building. It considers not only tensions between sovereignty and intervention but also tensions between duties owed to strangers and duties owed to one's own citizens. And it examines a variety of contrasting 'languages' of thinking about the nature of these duties, the sources of obligation and the implications of violation.¹²

In the next section, I will defend the importance of excavating and examining this history and outline the article's particular focus on the works of theorists of the law of nature and the law of nations, from Francisco de Vitoria through to Immanuel Kant. The next five sections then sketch the development of thinking about duties to assist and protect the vulnerable beyond borders among these natural law theorists. The conclusion briefly considers three ideas about duties that the article has retrieved that might be of particular use for those who seek to push international law and politics in a more just direction today.

⁷ J. Bartelson, *Visions of World Community* (2009); Koskeniemi, "International Community" from Dante to Vattel', in V. Chetail and P. Haggemacher (eds), *Vattel's International Law from a XXIst Century Perspective* (2011) 49.

⁸ A. Linklater, *Men and Citizens in the Theory of International Relations* (1990); A.S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (2011).

⁹ R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999); S. Neff, *War and the Law of Nations: A General History* (2005).

¹⁰ B. Simms and D.J.B. Trim (eds), *Humanitarian Intervention: A History* (2011); S. Recchia and J.M. Welsh, *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill* (2013); L. Glanville, *Sovereignty and the Responsibility to Protect: A New History* (2014).

¹¹ G. Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (2002); Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel', 27 *European Journal of International Law (EJIL)* (2016) 901.

¹² For a defence of the utility of 'languages' for the study of history, see A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (1987).

2 The Need for a Pre-Kantian Story

Those who have alluded to the history of duties to assist and protect beyond borders have often misrepresented it. They have tended, in particular, to truncate it such that the notion of duties to strangers and foreigners is said to have emerged only in recent centuries. ‘It was the Enlightenment’, Anthony Pagden claims, ‘which made it possible for us ... to think beyond the narrow worlds into which we are born, to think globally. It was the Enlightenment which made it possible for anyone to imagine that any nation had any kind of responsibility for the welfare of any other.’¹³ This is a curious claim particularly given that Pagden’s earlier scholarship did so much to bring to our attention the writings of the 16th-century Spanish Thomists, who, as we will see, wrote so clearly of the responsibilities of Spaniards for the welfare of the native peoples that they encountered in the Americas.¹⁴ Similarly, Seyla Benhabib has argued that it was specifically Kant, in his 1795 essay *Toward Perpetual Peace*, who paved the way for a transition from ‘Westphalian sovereignty’ to ‘liberal international sovereignty’, in which states who were once concerned exclusively with the welfare of their own people were now bound to also give heed to the needs of vulnerable outsiders.¹⁵ Yet, as we will see, many of those who had written before Kant, including at least one of his ‘sorry comforters’, had suggested much more demanding duties to vulnerable strangers and foreigners than those articulated in *Toward Perpetual Peace*.¹⁶ Indeed, Kant’s insistence on a strict right of non-interference rendered his understanding of sovereignty not only more ‘Westphalian’ than many who had preceded him but also more ‘Westphalian’ than the provisions of the Peace of Westphalia itself, negotiated a century and a half before Kant penned his essay.¹⁷

Some scholars have looked past Kant in search of earlier champions of global duties who might be utilized as inspiration for present-day thinking. Ruti Teitel, for example, is one of many who have highlighted the Dutch jurist, Hugo Grotius, as a champion of natural rights and, in turn, of natural duties to uphold said rights across national borders.¹⁸ However, as we will see, while Grotius had much to say about duties to assist and protect the vulnerable, he was ultimately much less willing to embrace these duties than other theorists of the law of nations, and the conclusions that he drew had the effect of subordinating these duties to the interests of the state.¹⁹ Another pre-Kantian who is commonly held up as a champion of global duties, by both defenders and

¹³ A. Pagden, *The Enlightenment: And Why It Still Matters* (2013), at 344.

¹⁴ See, e.g., A. Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (1982); A. Pagden, *Spanish Imperialism and the Political Imagination* (1990).

¹⁵ S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (2004), at 40–43. Kant, ‘Toward Perpetual Peace (1795)’, in *Practical Philosophy*, edited by M.J. Gregor (1996), 311.

¹⁶ Kant, *supra* note 15, at 8.355.

¹⁷ *Ibid.*, at 8.346. On the myth of Westphalia, see Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’, 55 *International Organization* (2001) 251.

¹⁸ Teitel, *supra* note 4, at 3, 20, 73–75. For an influential earlier account of Grotius as a champion of such humanitarian ideals, see Lauterpacht, ‘The Grotian Tradition in International Law’, 23 *British Yearbook of International Law (BYIL)* (1946) 1.

¹⁹ See also Tuck, *supra* note 9, at 78–108.

detractors, is the Spanish theologian, Vitoria.²⁰ We will see that Vitoria did indeed offer a detailed account of demanding duties of assistance and protection beyond borders. However, we will also see that some of his Dominican colleagues in Spain responded with alternative accounts of duties that, while no less demanding, were arguably less reckless and less liable to be deployed by Spanish colonists to justify abuses in the New World. In doing so, they anticipated some of the criticisms of Vitoria made by legal scholars in recent years.²¹

Why is it important for us to rightly understand the history of theorizing about duties to assist and protect beyond borders? There are two primary reasons. First, it enables us to understand where ideas that prevail today have come from. We habitually draw on, and appeal to, concepts that were first articulated centuries or even millennia ago. When contemplating global duties, we commonly reason with and invoke principles such as the unity of humankind, the love of neighbour, the morality of 'enlightened' self-interest and the potentials and limits of sentiment, even if we usually neglect to interrogate the various ways in which they have been conceived and developed in the past. Michel Foucault encourages us to ask: 'In what is given to us as universal, necessary, obligatory, what place is occupied by whatever is singular, contingent, and the product of arbitrary constraint?'²² An appreciation of the historically contingent nature of received ideas, an awareness of the purposes for which they were originally developed and an understanding of the arguments and debates that have long been waged around them can help us as we grapple with their worth and implications for international law and politics today. Previewing the story sketched in this article, it can be useful to recognize, for example, that, while Grotius may have enthusiastically endorsed the obligatory nature of intervention against oppression when the Dutch East India Company, for whom he wrote, had political and commercial reasons for undertaking such interventions,²³ he was less willing to do so once such incentives were no longer in play.²⁴ It can likewise be instructive to realize that, while German jurist Samuel Pufendorf's influential conception of what we would today term 'enlightened' self-interest may have led him to suggest that states were bound by the law of nations to consider the needs of foreigners in some cases, it also led him to callously allow the expulsion of vulnerable foreigners from one's territory in others.²⁵

Second, an examination of history holds the promise of recovering alternative arguments or modes of reasoning that may have been too quickly discarded in the past and that may reward renewed attention today. As Quentin Skinner suggests, '[w]e may find that there are questions we have ceased to ask, or interpretations of

²⁰ For a defender, see J.B. Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (1934). For a detractor, see A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 13–31.

²¹ See, e.g., Anghie, *supra* note 20.

²² M. Foucault, *The Politics of Truth*, edited by S. Lotringer (2007), at 105.

²³ H. Grotius, *Commentary on the Law of Prize and Booty*, edited by M.J. van Ittersum (2006), at 433.

²⁴ H. Grotius, *De jure belli ac pacis libri tres*, vol. 2, edited by F.W. Kelsey (1925), at II.25.

²⁵ S. Pufendorf, *De jure naturae et gentium libri octo*, vol. 2, edited by C.H. Oldfather and W.A. Oldfather (1934), at III.3.9.

concepts we have ceased to entertain, which prove to be well worth excavating, dusting down, and reinserting into current debates'.²⁶ In the conclusion, I will briefly consider three examples of such fruitful ideas that are retrieved in this article and that may be of particular use for our thinking about international law and politics, particularly given the rising sentiments of nationalism and isolationism found in so many Western states today.

Sections 3–8 sketch the history of deliberations about duties of assistance and protection beyond borders by theorists of the law of nature and the law of nations, from Vitoria through to Kant. Within the confines of this Western natural law tradition, we find multiple and disparate languages of thinking – Thomists and humanists, moderns and perfectionists, sentimentalists and perpetual peace theorists.²⁷ Debates have been waged both within and across these languages about the source, nature and scope of duties to strangers and foreigners, the applicability of such duties to relations between states and the extent to which these duties should be conceived as legally binding and enforceable. Exploration of these debates holds the promise of exposing where some prevailing principles of law, ethics and politics have come from and retrieving alternative principles that have for too long been neglected and that can reward renewed consideration.

3 Thomists

Jurists, theologians and philosophers had long contemplated duties owed to strangers and foreigners prior to the 16th century.²⁸ Through the course of that century, however, theorists felt an urgent need to interpret and apply the ideas of earlier theorists anew given, on the one hand, the confronting discovery of the peoples of the New World and, on the other hand, the emergence of the concept of sovereignty and the increasing division of Europe into independent, territorially bounded commonwealths. The discovery of the New World challenged European assumptions about history, theology and the nature of humanity, and it impelled new thinking.²⁹ A number of Spanish Thomist theologians at the Universities of Salamanca and Alcalá, the most influential of whom was Vitoria, were unpersuaded by several of the prevailing justifications for the Spanish conquest and subjection of the Native Americans and deeply troubled by reports of the loathsome treatment of indigenous peoples at the hands of the colonists. These Catholic scholastics firmly rejected papal and imperial

²⁶ Skinner, 'On the Liberty of the Ancients and the Moderns: A Reply to My Critics', 73 *Journal of the History of Ideas* (2012) 127, at 128.

²⁷ For explanation of why the Scottish sentimentalists and Kant should be treated as natural law theorists, see Moore, 'Natural Rights in the Scottish Enlightenment', in M. Goldie and R. Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (2006) 291; Haakonssen, 'German Natural Law', in Goldie and Wokler, *ibid.*, 251.

²⁸ See, e.g., Cicero, *On Duties*, edited by M.T. Griffin and E.M. Atkins (1991); Ambrose, *De officiis*, vol. 1, edited by I.J. Davidson (2001).

²⁹ J.H. Elliott, *The Old World and the New: 1492–1650* (1970).

claims to dominion over the whole world as well as assertions of a universal right of the church to punish sins or unbelief. Instead, they envisaged a world of independent commonwealths, each with jurisdiction over their own affairs.³⁰ Nevertheless, drawing on Scripture, the writings of the church fathers and the rediscovered writings of Aristotle, read through the lens of Thomas Aquinas, they insisted that all people were united by the principle of human fellowship, the duty to love one's neighbour and the sacred demands of justice and charity.³¹ In turn, they acknowledged that, while the indigenous peoples did rightly possess dominion, the Spaniards had solemn duties to preach to them the Christian faith, to protect converts to the faith and to rescue innocents from tyrannical native rulers and their injurious rites.³²

The theologians' understanding of duties relied heavily on the formulation articulated by Aquinas in the 13th century. While Aquinas often treated duties to care for the vulnerable as matters of justice, he more commonly framed them as matters of charity.³³ However, he did not understand matters of charity to be any less binding or compulsory than those of justice. Rather, the distinction he drew between justice and charity was primarily that they directed actions towards two distinct goods. The proper object of justice was the common good, whereas the proper object of charity was the divine good. Failure to take appropriate action to succour those in need, therefore, might constitute an injustice against the common good, but, more dangerously, it could constitute a mortal sin against God.³⁴ Given the impossibility of any one individual caring for all who are in need, how should one determine who to assist? Aquinas proposed that individuals should be guided by the 'order of charity', such that they should love most those who are closely united to them.³⁵ However, he also insisted that the demands of beneficence vary according to circumstance such that in certain cases an individual should succour a stranger rather than even their own father because of the degree and urgency of the need.³⁶

It was with this understanding of duties that the Spanish theologians approached the affair of the Indies. While they tended to rely on the language of charity and love-of-neighbour rather than justice, they insisted that the Spaniards had a sacred obligation to care for vulnerable Native Americans with whom they came into contact. It was not the business of Christians to punish the Native Americans, who were outside

³⁰ D. de Soto, *Relección 'de dominio'*, edited by J.B. Prats (1964); Cano, 'De dominio Indorum', in L. Pereña (ed.), *Corpus Hispanorum de Pace*, vol. IX (1982) 555; Vitoria, 'On the American Indians', in *Political Writings*, edited by A. Pagden and J. Lawrance (1991) 231, at 239–277.

³¹ Suárez, 'On Laws and God the Lawgiver', in *Selections from Three Works*, edited by G.L. Williams, A. Brown and J. Waldron (1944) 19, at II.19.9, e.g., declared 'the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation'.

³² Vitoria, *supra* note 30, at 284–288.

³³ See T. Aquinas, *Summa Theologica*, translated by the Fathers of the Dominican Province (1981), at II-II.32.5, 58.11, 66.7, 79.1.

³⁴ *Ibid.*, at II-II.58.6, 32.5.

³⁵ *Ibid.*, at II-II.26.8.

³⁶ *Ibid.*, at II-II.31.3.

the church, merely for violating the natural law, Vitoria insisted in a lecture delivered in 1539.³⁷ However, the Spaniards ought to restrain the Native Americans from those violations that harmed innocents, specifically the sins of human sacrifice and cannibalism, and to defend the victims of these crimes.³⁸ ‘The proof’, Vitoria claimed, ‘is that God gave commandment to each man concerning his neighbour ... The barbarians are all our neighbours, and therefore anyone, and especially princes, may defend them from such tyranny and oppression.’³⁹ Further proof was said to be given by the scriptural command: ‘[D]eliver them that are drawn unto death, and forbear not to deliver those that are ready to be slain.’⁴⁰ A close associate of the theologians at Salamanca, the missionary and defender of indigenous rights, Bartolomé de Las Casas, similarly claimed that, while it was not the business of the church to pass judgment on the Native Americans:

it is the concern of the Church and the Pope, to whom the pastoral care of the whole world has been entrusted by Christ, to prevent the slaughter of such innocent persons lest their souls, whose salvation should be of special concern, should perish forever.

This duty to liberate innocents, he said, was a work of ‘piety or charity’ analogous to the obligation to give alms to the poor.⁴¹

The Thomists cautioned, however, that the duty to care for the Native Americans did not necessarily establish legal grounds for the Spaniards to wage war.⁴² They were conscious of the grave ills that tended to result from the use of force and the danger that Christian princes would unjustly seek to advance their own interests under the pretext of loving their vulnerable indigenous neighbours. Vitoria, for example, cautioned that Christian princes should act ‘only as far as is necessary to ward off injustices and secure safety for the future’.⁴³ Some of his colleagues at Salamanca and Alcalá went further, expressing clear reservations about the legality of using force in protecting the Native Americans.⁴⁴ In this, they were influenced by Las Casas, who cautioned that the Spaniards must consider the decision to resort to arms carefully lest, in trying to prevent the death of a few innocents, a multitude of people, including innocents, will be killed, and those who survive will be led to hate the Christian faith. Rather than resorting to war, he suggested, the Spaniards should encourage the Native Americans to refrain from inhumanity through ‘warnings, entreaties, or exhortations’.⁴⁵

³⁷ Vitoria, *supra* note 30, at 273–274.

³⁸ *Ibid.*, at 287–288.

³⁹ *Ibid.*, at 288.

⁴⁰ *Ibid.*, quoting Proverbs 24:11.

⁴¹ B. de Las Casas, *In Defense of the Indians*, translated by S. Poole (1992), at 186–187.

⁴² For contrasting views on Vitoria’s contribution to the establishment of legal grounds for European colonialism, see Anghie, *supra* note 20, at 13–31; G. Cavallar, *Imperfect Cosmopolis: Studies in the History of International Legal Theory and Cosmopolitan Ideas* (2011), at 17–24; Chetail, *supra* note 11, at 903–907.

⁴³ Vitoria, ‘On Dietary Laws, or Self-Restraint’, in Pagden and Lawrance, *supra* note 30, 205, at 226.

⁴⁴ Cano, *supra* note 30, at 561–563; Soto, ‘Relectio, an liceat civitates infidelium seu gentilium expugnare ob idolatriam’, in Pereña, *supra* note 30, at 592.

⁴⁵ Las Casas, *supra* note 41, at 190.

In addition to the duties of Spaniards to care for the Native Americans, Vitoria also spoke of the duties of those indigenous peoples to grant the Spaniards hospitality and freedom to travel, dwell and trade in their lands. Appealing to scriptural injunctions to love one's neighbour, he declared that 'to refuse to welcome strangers and foreigners is inherently evil' and could, under certain conditions, justify the resort to force.⁴⁶ Some of Vitoria's colleagues firmly rejected his suggestion that this duty of hospitality was enforceable, noting, for example, that the Spaniards would not think that they had a duty to allow the French to freely travel and dwell in Spanish lands, much less to enter Spanish lands as invaders as Spain had done in the Americas.⁴⁷ And, indeed, Vitoria himself was reluctant to conclude that the Native Americans had violated their duties of hospitality towards the Spaniards in a manner that gave just cause for war. Nevertheless, his troubling construction of duties would be confidently reasserted and expanded by later theorists, such as Alberico Gentili and Grotius, and by Spanish, English and Dutch courts and companies through the 16th and 17th centuries, before gradually giving way to alternative justifications for the conquest and subjection of non-European peoples.⁴⁸

4 Humanists

Through the course of the 15th and 16th centuries, a language of humanism emerged in opposition to the scholasticism of the Thomist theologians and others. Disillusioned with the supposedly obscurantist philosophizing of the scholastics and critical of their perceived enslavement to Aristotle and theological authorities, the humanists turned to the combination of eloquence and wisdom that they found in the Roman oratorical tradition and most completely in the works of Cicero. They embraced a scepticism that emphasized the contingency of political knowledge, the virtue of prudence and the art of practical judgment as essential qualities for successful political action. Princes were advised to cultivate such qualities if they wished to maintain their state in a dangerous world.⁴⁹

A key innovation of Gentili, Regius professor of civil law at Oxford University, writing towards the end of the 16th century, was to translate humanist categories of necessity (*necessitas*) and expedience (*utile*) into the language of natural jurisprudence. Most crucially, whereas renaissance humanists such as Niccolò Machiavelli and more recent *raison d'état* theorists such as Justus Lipsius had framed self-preservation as a principle that sometimes required considerations of justice to be set to one side, Gentili

⁴⁶ Vitoria, *supra* note 30, at 281.

⁴⁷ D. de Soto, *De iustitia et iure* (1553), at V.3.3; Cano, *supra* note 30, at 579.

⁴⁸ A. Gentili, *De jure belli libri tres*, vol. 2, translated by J.C. Rolfe (1933), at 79–82, 86–92; Grotius, *supra* note 24, at II.2; A. Fitzmaurice, *Sovereignty, Property and Empire: 1500–2000* (2014).

⁴⁹ On the scholastic-humanist debate, see E. Rummel, *The Humanist-Scholastic Debate in the Renaissance and Reformation* (1995). On the distinct visions of international order that these two traditions produced, see Tuck, *supra* note 9, at 16–77.

sanctified self-preservation, framing it as a fundamental aspect of justice and a primary precept of natural law.⁵⁰ Self-defence is ‘the most generally accepted of all rights’, Gentili declared in his work, *De jure belli (On the Law of War)* (1588–1589/1599), and it justifies actions that might otherwise be considered unjust: ‘There is one rule which endures for ever, to maintain one’s safety by any and every means.’⁵¹ The Spanish theologians had accepted the right of princes to resort to force in defence of the commonwealth.⁵² However, they would not have approved of the ends to which Gentili put this principle. Self-preservation for him could provide legal justification for wars not only of necessity but also of expedience, including preventive wars, wars of acquisition and even wars fought for the honour and reputation of the sovereign.⁵³

Writing in the context of the upheaval and violence that accompanied the end of ecclesial unity brought about by the Reformation and the efforts of princes to consolidate sovereign authority in their respective polities, Gentili contemplated not only the duty of princes to maintain their own state but also their duty to assist persecuted and oppressed peoples in other European states. Again, he put the language of humanism to work. He insisted that, in addition to the principles of necessity and expedience, wars could – indeed should – be justly fought for the humanist ideal of honour (*honesta*). Such wars were said to be fought for the sake of others and without concern for one’s own interests. In support of such wars, the jurist offered a Stoic-Ciceronian account of the unity of humankind and the bonds of fellowship between all people:

It remains to speak of defence for honour’s sake, which is undertaken without any fear of danger to ourselves, through no need of our own, with no eye to our advantage, but merely for the sake of others. And it rests upon the fundamental principle, that nature has established among men kinship, love, kindness, and a bond of fellowship (as Marcus Tullius [Cicero] says).⁵⁴

Gentili applied this idea of universal human fellowship to relations between sovereigns, arguing that sovereigns were particularly bound by the law of nations to come to the defence of allies, neighbours, those of common blood and those united by common religion.⁵⁵ He then suggested that, in addition to defending each other, sovereigns were bound to defend the subjects of other sovereigns from cruel and unjust treatment. While sovereigns should have some freedom in exercising authority over their own subjects, he claimed, ‘the subjects of others do not seem to me to be outside of that kinship of nature and the society formed by the whole world’, and, thus, sovereigns ought to be accountable to that society for the treatment of their subjects.⁵⁶

⁵⁰ Panizza, ‘Political Theory and Jurisprudence in Gentili’s *De Iure Belli*: The Great Debate between “Theological” and “Humanist” Perspectives from Vitoria to Grotius’, ILLJ Working Paper 2005/15 (2005); Piirimäe, ‘Alberico Gentili’s Doctrine of Defensive War and Its Impact on Seventeenth-Century Normative Views’, in B. Kingsbury and B. Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (2010) 187.

⁵¹ Gentili, *supra* note 48, at 59.

⁵² Vitoria, ‘On the Law of War’, in Pagden and Lawrance, *supra* note 30, 295, at 297.

⁵³ Gentili, *supra* note 48, at 61–66, 83–85.

⁵⁴ *Ibid.*, at 67.

⁵⁵ *Ibid.*, at 67–73.

⁵⁶ *Ibid.*, at 74.

This claim served to answer what Gentili described as ‘a burning question, namely, whether the English did right in aiding the Belgians against the Spaniards’. In justifying Queen Elizabeth I’s decision in 1585 to intervene in the Low Countries, he drew some lessons from the relationship between honour, necessity and expedience. The Spanish theologians had insisted that wars fought to defend innocents should only be waged for their benefit rather than for the benefit of Spain.⁵⁷ Gentili himself had begun his discussion by claiming that wars of honour should be fought ‘with no eye to our advantage’.⁵⁸ He now noted, however, that the defence of others would tend to coincide with reasons of necessity and expedience and insisted that this was entirely appropriate. England’s resort to arms to aid the Low Countries was justified by the need to vindicate the ‘bonds of kinship’ between the English and the Belgians and to secure their liberty, he claimed, but it was also justified on the necessary and expedient grounds of protecting England’s allies against a threatening enemy, maintaining ‘that bulwark of Europe’ that the Spaniards wished to break down and securing a favourable peace with Spain.⁵⁹

But what was to be done if the demands of honour were at variance with the requirements of necessity and expedience? What was to be done if the duty to vindicate the bonds that unite the universal society of humankind failed to complement the duty to seek the security and advantage of one’s own state? Gentili conceded that the law of nations obliged no one to attempt to rescue others if it would put their own safety at risk: ‘For no one is bound to place himself in danger; no one is bound to rush into a fire for the sake of another.’⁶⁰ However, he otherwise said little about how to resolve the tension between the need to assist vulnerable outsiders and the virtue of maintaining and strengthening the state. This was a tension with which theorists would begin to grapple in the following century.

5 Moderns

It was Grotius who ‘broke the Ice’ by explicating ‘the true fundamental Principles of the Law of Nature, and the right Method of explaining that Science’, supplanting the perverse dominance of Aristotelianism and the barbarous methods of the Scholastics, Jean Barbeyrac declared in 1709.⁶¹ The task of further illuminating the ‘true’ law of nature was said to be subsequently taken up by others such as John Selden, Thomas Hobbes and Richard Cumberland and, most successfully, by Pufendorf, who Barbeyrac praised for improving and clarifying Grotius’ account.⁶² The accuracy of the suggestion that Grotius broke from the past has been challenged by some who insist that the Dutchman drew heavily on the natural law reasoning of the Thomist theologians

⁵⁷ Vitoria, *supra* note 43, at 227–228.

⁵⁸ Gentili, *supra* note 48, at 67.

⁵⁹ *Ibid.*, at 77–78.

⁶⁰ *Ibid.*, at 70.

⁶¹ Barbeyrac, ‘An Historical and Critical Account of the Science of Morality’, in S. Pufendorf, *Law of Nature and Nations*, translated by B. Kennett (1729), at 79.

⁶² *Ibid.*, at 80–85.

as well as the ideas of humanists such as Gentili.⁶³ Others, however, agree with Barbeyrac that Grotius succeeded in inaugurating a distinctly ‘modern’ school of natural law.⁶⁴ Benjamin Straumann rightly adjudicates that, while Grotius certainly borrowed many ideas from the theologians, he crucially departed from them by developing a system of natural law that was grounded not in an Aristotelian, eudaemonist account of the end of human activity but, rather, in fundamental principles of human nature that right reason obliges us to acknowledge. In turn, his system produced not formulations of virtues that guide action towards goods of happiness and perfection but, instead, strict rules that are to be obeyed simply because they are dictated by reason.⁶⁵ In the hands of Grotius and those ‘moderns’ who followed him, duties of charity and neighbourly love that had been said to proceed from considerations of virtue were marginalized, and what remained was a much thinner account of the law of nature and, by extension, the law of nations, which emphasized duties to preserve oneself and to refrain from injuring others.

As Richard Tuck emphasizes, a characteristic feature of the reasoning of the modern natural law theorists was their use of the concept of a ‘state of nature’, an ungoverned and culturally non-specific realm in which humans could be conceived to exist and interact prior to their entry into civil society.⁶⁶ While the ‘state of nature’ would be most famously developed by Hobbes, Grotius also made use of this concept when developing his system of natural law.⁶⁷ In *De jure belli ac pacis* (*The Law of War and Peace*), first published in 1625, Grotius built a system of law upon the Stoic–Ciceronian notion of a natural human inclination to sociability (*appetitus societatis*).⁶⁸ The desire for society, when combined with the human capacity for reason and speech, was said to provide the source of the law of nature. However, the duties that followed from sociability were remarkably minimal. Indeed, they were almost identical to those that Grotius had derived from the principle of self-preservation in an earlier unpublished work, *De jure praedae* (*Commentary on the Law of Prize and Booty*).⁶⁹ He declared:

To this sphere of the law belong the abstaining from that which is another’s, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their desserts.⁷⁰

⁶³ Tierney, *supra* note 1, at 316–342; Haggemacher, ‘Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture’, in H. Bull, B. Kingsbury and A. Roberts (eds), *Hugo Grotius and International Relations* (1990) 133.

⁶⁴ Tuck, ‘The “Modern” Theory of Natural Law’, in Pagden, *supra* note 10, 99; J.B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (1998), at 66–81.

⁶⁵ B. Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius’ Natural Law* (2015), at 83–129.

⁶⁶ Tuck, *supra* note 9, at 6.

⁶⁷ See also Straumann, *supra* note 65, at 130–156.

⁶⁸ Grotius, *supra* note 24, Prolegomena 6.

⁶⁹ Grotius, *supra* note 23, at 19–50. For key contributions to ongoing debate about the relationship between self-preservation and sociability in Grotius’ works, see Tuck, *supra* note 9, at 78–108; Straumann, *supra* note 65.

⁷⁰ Grotius, *supra* note 24, Prolegomena 8.

These negative duties to refrain from injuring others were said to be matters of 'law properly so called'.⁷¹ Their observance was compulsory. Violation involved breaching the 'legal rights' of others and was appropriately subject to punishment.⁷² In contrast, Grotius made clear that the observance of principles of charity and the provision of kindness and liberality, while praiseworthy, was not obligatory because no one could properly be said to have a 'right' to these things.⁷³ Thus, departing from the Thomists, he drew a stark distinction between justice and beneficence, insisting that liberality towards others was not rightly understood as a duty of natural law to which the word 'ought' could be applied.⁷⁴ Positive duties to care for the interests of others and offer relief in time of distress, he claimed, only arose when individuals united to form a civil society. Only once individuals transitioned from natural to civil society could they perceive a benefit and an obligation to provide for each other's protection and contribute to each other's necessities.⁷⁵

Grotius proceeded to transpose his system of natural law from natural individuals to sovereigns.⁷⁶ This system produced greater restrictions on the justifiable causes of war than Gentili had proposed.⁷⁷ These were restrictions that a war-ravaged Europe desperately needed at the time. However, as noted earlier, the Dutchman echoed Gentili in legitimizing colonial conquests beyond Europe by justifying the punishment of those who injured others by violating duties of hospitality, safe passage and trade.⁷⁸ He additionally justified a right of war to rescue people beyond borders from tyranny and oppression. However, in his published work at least, he made clear that there was no duty to engage in such acts of rescue. In his unpublished *De jure praedae*, in which he sought to justify a particular example of Dutch resort to force, Grotius momentarily abandoned the strict system of rights and duties that he was developing and argued that the Dutch had a duty to take up arms in defence of the peoples of the East Indies, particularly the Sultan of Johore, who had been harassed and injured by the Portuguese. He marshalled all of the usual authorities to which earlier theorists had appealed – Scripture, the church fathers, philosophers and jurists – in order to make the case that the Dutch had a sacred and universal duty to protect the vulnerable.⁷⁹ Indeed, he asserted, he who fails to protect one's fellow man from harm is 'no less culpable than the individual who inflicts the injury'.⁸⁰

⁷¹ *Ibid.*, Prolegomena 8.

⁷² *Ibid.*, at I.1.8.1.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at II.17.9.

⁷⁵ Grotius, *supra* note 23, at 35–37.

⁷⁶ On Grotius' contribution to the history of international law, including his mooted role as the 'father' of international law, see Lauterpacht, *supra* note 18; Lessafer, 'The Grotian Contribution Revisited: Change and Continuity in the History of International Law', 73 *BYL* (2002) 103.

⁷⁷ Grotius, *supra* note 24, at II.22.

⁷⁸ *Ibid.*, at I.2.

⁷⁹ Grotius, *supra* note 23, at 92–94, 432–435.

⁸⁰ *Ibid.*, at 433. On the context of *De jure praedae*, see M.J. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (2006).

In *De jure belli ac pacis*, however, written at a time when Grotius had no political or commercial incentives to construct demanding duties of rescue, he adhered to his strict system of rights and duties and insisted that, while there was a right to take up arms for the sake of others, the maintenance and advantage of one's own state should always take priority. The protection of the subjects of others from oppression was lawful and even praiseworthy, he observed, but it was never to be undertaken at trouble or inconvenience to oneself.⁸¹ Grotius thus made clear what had only been hinted at in the writings of Gentili: war to rescue the vulnerable beyond borders was rightly waged where possible and prudent, but it should not properly be called a duty. A sovereign prince in an international state of nature was bound to protect his own state and to refrain from unjustly injuring others, but he bore no duty to accept risks or costs for the protection of those outside his care.⁸²

In contrast to Grotius, Hobbes bluntly declared that, even if humans were naturally desirous of society, they were not capable of it. The Aristotelian notion that man was 'an animal born fit for Society', he claimed, was an error that 'proceeds from a superficial view of human nature'.⁸³ If Grotius had derived from the inclination to sociability an account of the law of nature that demanded surprisingly little in terms of positive duties to succour those in need, Hobbes now stripped the law back even further. In *Leviathan* (1651), the Englishman painted a notoriously bleak picture of the state of nature as a condition of war 'of every man, against every man' and suggested that this natural condition of war could be recognized in the posture of sovereigns to one another.⁸⁴ In such a condition, he claimed, natural individuals and, by extension, sovereign states were at liberty to do whatever was conducive to their preservation.⁸⁵

In recent years, scholars have explained that the laws of nature that Hobbes derived from this principle of self-preservation provided more substantial grounds for restraint and cooperation in relations between sovereign states than has often been recognized.⁸⁶ Nevertheless, such laws followed solely from considerations of utility. Properly speaking, Hobbes insisted, there could be no justice or injustice in a realm that lacks a common power to promulgate and enforce laws; there could only be the liberty to preserve oneself.⁸⁷ He observed that there might be occasions in which a state should extend benevolence to those in need beyond its borders. But, again, the guiding precept was to be the promotion of utility and self-preservation rather than consideration of what would be just or unjust. In *Dialogue of the Common Laws of England*, published posthumously in 1681, for example, he had the Philosopher indicate that a king should take up arms to help 'weak Neighbours' who are under attack by an invading army if he perceives that the invaders will soon pose a danger to his own

⁸¹ Grotius, *supra* note 24, at II.25.

⁸² *Ibid.*

⁸³ T. Hobbes, *On the Citizen*, edited by R. Tuck and M. Silverthorne (1997), at I.2, I.2n.

⁸⁴ T. Hobbes, *Leviathan*, edited by G.C.A. Gaskin (1996), at XIII.8, 12.

⁸⁵ *Ibid.*, at XIV.1.

⁸⁶ N. Malcolm, *Aspects of Hobbes* (2002), at 432–456; T. Christov, *Before Anarchy: Hobbes and His Critics in Modern International Thought* (2015), at 33–140.

⁸⁷ Hobbes, *supra* note 84, at XIII.13.

people. When the Lawyer replied that the king should first consider whether the invading army had just grounds for war against the neighbouring state, the Philosopher bluntly responded that such considerations of justice had no place in an international state of nature: 'For my part I make no Question of that at all.'⁸⁸

When Pufendorf came to formulate his own system of the law of nature in *De jure naturae et gentium* (*The Law of Nature and Nations*), first published in 1672, he sought to combine Grotius' emphasis on sociability with Hobbes' emphasis on utility. Wary of the charges of anti-Aristotelianism and impiety that had been levelled at Hobbes' work, Pufendorf made sure to endorse man's capacity for sociability. However, in contrast to Grotius, he grounded his system not in a natural desire for such sociability but, rather, in the utility to be derived from sociable behaviour.⁸⁹ Pufendorf shared Hobbes' belief that life in the state of nature is unstable and dangerous, but he insisted that actors in this natural condition are able to recognize that they cannot secure their preservation without the assistance of others. This in turn gives them reason to extend assistance to others in time of need in order to gain their trust and favour and to be free from enmity and harm.⁹⁰ Rather than being a natural characteristic of man, therefore, sociability is an imperative produced by the principle of self-preservation. For this reason, it is a precept of nature:

And so it will be a fundamental law of nature, that 'Every man, so far as in him lies, should cultivate and preserve towards others a sociable attitude [*socialitatem*], which is peaceful and agreeable at all times to the nature and end of the human race' ... [B]y a sociable attitude we mean an attitude of each man towards every other man, by which each is understood to be bound to the other by kindness, peace, and love, and therefore by a mutual obligation.⁹¹

In a response to critics, published in 1686, Pufendorf insisted that his was a Stoic conception of the law of nature and that it was directly opposed to the Epicurean theories of Hobbes.⁹² Some scholars accept this claim and submit that Pufendorf's system of laws generates demanding duties of mutual assistance among actors in a state of nature that are not found in Hobbes (or in Grotius). Pagden, for example, suggests that Pufendorf's law of nations 'involves an obligation on the part of one social group not merely not to harm, but actively to promote the welfare of all others'.⁹³ But such claims are too strong. Pufendorf's efforts to distance himself from Hobbes were belated and insincere. His theory, proceeding from a basic concern for self-preservation and grounded in considerations of utility, was fundamentally much closer to the Englishman than he was prepared to admit.⁹⁴

⁸⁸ T. Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, edited by J. Cropsey (1971), at 65; see also Malcolm, *supra* note 86, at 455–456.

⁸⁹ Palladini, 'Pufendorf Disciple of Hobbes: The Nature of Man and the State of Nature: The Doctrine of *Socialitas*', 34 *History of European Ideas* (2008) 26

⁹⁰ Pufendorf, *supra* note 25, at II.2-3, especially II.3.14.

⁹¹ *Ibid.*, at II.3.15.

⁹² T.J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (2000), at 69–70.

⁹³ Pagden, 'Stoicism, Cosmopolitanism, and the Legacy of European Imperialism', 7 *Constellations* (2000) 3, at 12; see similarly Tuck, *supra* note 9, at 140–165.

⁹⁴ Palladini, *supra* note 89; Christov, *supra* note 86, at 143–210.

Certainly, in contrast to Hobbes, Pufendorf acknowledged that there was the possibility of justice and injustice in a state of nature, and he further developed Grotius' account of the rights and duties that apply to natural individuals and sovereign states.⁹⁵ He crucially developed a notion of 'imperfect' duties, which accorded the language of 'duty' to the performance of those principles of beneficence and liberality that Grotius had marginalized. While the performance of 'perfect' duties, which require refraining from injuring others, was necessary for the ongoing existence of society, he explained, the performance of 'imperfect' duties contributed merely to the improvement of society. As such, while it is always a good thing to discharge these 'imperfect' duties, their performance should always be subject to the discretion of the duty-bearer and should never be enforced.⁹⁶ In contrast to Grotius, Pufendorf indicated that duties of hospitality, trade and free passage were merely imperfect duties since their violation entailed withholding a benefit rather than doing an injury, and, thus, their violation was not rightly subject to enforcement.⁹⁷ Hence, he disposed of some particularly perverse arguments that had been developed by Europeans to justify the conquest and colonization of the Americas. But, while Pufendorf refused to provide arguments that would facilitate the unjust subjection of vulnerable peoples, he gave little indication that his system entailed positive duties requiring the assistance and the protection of the vulnerable. On the question of the resort to arms to rescue oppressed peoples, he simply referred his readers to the opinion of Grotius.⁹⁸ And, crucially, having grounded sociability in considerations of utility, he even recommended that states should be prepared to act unsociably if utility demanded it. He suggested, for example, that states could legally expel foreigners in time of famine for the sake of their own citizens.⁹⁹

6 Perfectionists

Hobbes and Pufendorf were driven by a particularly circumscribed vision of the aims and possibilities of law and politics. Responding to decades of violence and instability, both within and between states, they posited systems of the law of nature and nations that sought merely to facilitate the maintenance of peace and order. The purpose of law, for them, was to restrain and pacify a violent humanity. Other natural law theorists of the early Enlightenment, however – most prominently G.W. Leibniz and Christian Wolff – embraced the Aristotelian–Thomist claim that law and politics should aim higher and seek to facilitate the natural human inclination to 'perfection'. They offered an expansive vision of the ends of social life that required individuals to pursue the well-being, happiness and perfection not only of themselves but also of others.¹⁰⁰

⁹⁵ Pufendorf, *supra* note 25, at III.3.

⁹⁶ *Ibid.*, at I.7.7.

⁹⁷ *Ibid.*, at III.3.

⁹⁸ *Ibid.*, at VIII.6.14.

⁹⁹ *Ibid.*, at III.3.9.

¹⁰⁰ On these rival visions, see Hochstrasser, *supra* note 92; I. Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (2001); Haakonssen, *supra* note 27.

Asked for his opinion on Pufendorf's political theory, Leibniz offered a fierce critique. In a letter penned in 1706, the German philosopher declared that Pufendorf's decision to ground his system in considerations of earthly utility and to exclude metaphysical consideration of the ultimate ends of human life had forced him 'to be content with an inferior degree of natural law'. 'More sublime and perfect', he declared, 'is the theory of natural law according to Christian doctrine. ... or rather of the true philosophers, [namely] that not everything should be measured by the goods of this life.'¹⁰¹ Across numerous works, Leibniz developed a theory of the law of nature that grounded moral action not in material utility but, instead, in the lasting pleasure and perfection that individuals derive from benevolently promoting the perfection and well-being of others.¹⁰²

Over subsequent decades, Wolff elaborated and systematized Leibniz's ideas and, in *Jus gentium methodo scientifica pertractatum* (*The Law of Nations According to the Scientific Method*), published in 1749, he applied them to relations between states.¹⁰³ Rejecting 'the perverse idea ... that the mainspring of the law of nations is personal advantage', Wolff insisted that every nation ought to instead 'have the fixed and lasting desire to promote the happiness of other nations'.¹⁰⁴ Just as 'every man ought to love and cherish every other man as himself', he claimed, 'every nation too ought to love and care for every other nation as for itself'.¹⁰⁵ He acknowledged that each nation was bound to preserve and perfect itself; perfection entailing 'a sufficiency for life, tranquility and security'.¹⁰⁶ But he also maintained that 'every nation owes to every other nation that which it owes to itself', insofar as it can perform it without neglecting its duty to itself.¹⁰⁷ The following decade, the Swiss diplomat and jurist Emer de Vattel would develop these ideas further.

Vattel is often read as a disciple of the modern natural law theorists, particularly Grotius and Pufendorf.¹⁰⁸ Kant likely bears some responsibility for this, having artfully grouped the three writers together in order to dismiss them in a single stroke as 'sorry comforters'.¹⁰⁹ Certainly, Vattel knew the works of the moderns well and made use of many of their claims. From Pufendorf, in particular, he borrowed the crucial distinction between perfect and imperfect duties (as did Wolff), and he was even willing to repeat Pufendorf's appeals to the material utility to be gained by performing natural duties. However, he was at least as positively disposed to the perfectionist theories of Leibniz and Wolff. His first book, published in 1741, constituted a detailed defence of Leibniz's philosophy, and his *Essay on the Foundation of Natural Law*, published five years later, offered a distinctly Leibnizian explanation of the obligation of individuals

¹⁰¹ G.W. Leibniz, *Political Writings*, edited by P. Riley (1972), at 67.

¹⁰² *Ibid.*, at 45–84.

¹⁰³ C. Wolff, *Jus gentium methodo scientifica pertractatum*, vol. 2, edited by J.H. Drake (1934).

¹⁰⁴ *Ibid.*, at II.162–163.

¹⁰⁵ *Ibid.*, at II.161.

¹⁰⁶ *Ibid.*, at II.177.

¹⁰⁷ *Ibid.*, at II.156.

¹⁰⁸ Tuck, *supra* note 9, at 191–196; Christov, *supra* note 86, at 234–268.

¹⁰⁹ Kant, *supra* note 15, at 8.355.

to obey natural law, emphasizing the happiness and perfection that one derives from obeying the dictates of reason and conforming to the demands of justice.¹¹⁰ His most famous work, *Le Droit des gens* (*The Law of Nations*), published in 1758, echoed Wolff in grounding the law of nations in a Leibnizian concept of perfection, recommending that nations contribute to each other's perfection insofar as they are in a position to do so without neglecting their duties to preserve and perfect themselves.¹¹¹

Vattel's primary purpose in writing *Le Droit des gens* was to advance the security and well-being of the small Swiss principalities and republics in which he lived amid the large and often predatory militarist and commercial powers of Europe. While other Swiss theorists, such as Jean-Jacques Rousseau, recommended isolationism as the means of protecting Swiss liberty, Vattel argued that the freedom and welfare of vulnerable states would be better advanced by binding Europe more tightly together through the cultivation of a mutual commitment to the common good.¹¹² Nature has established society among individuals, he declared, and the 'general law' of that society is that 'each individual should do for the others every thing which their necessities require, and which he can perform without neglecting the duty that he owes to himself'.¹¹³ While groups of individuals were free to unite with each other to form states, they could not thereby liberate themselves from their duties to the rest of humankind. Rather, in so uniting, 'it thenceforth belongs to that body, that state, and its rulers, to fulfil the duties of humanity towards strangers'.¹¹⁴

These 'duties of humanity' were imperfect duties whose performance could not be compelled by other states. External compulsion would amount to a violation of the liberty and independence of the state, Vattel explained.¹¹⁵ But this did not mean that states should consider themselves morally free to act as they choose. Rather, duties of humanity were internally binding on the conscience of each state, and a state that refused to perform them, when in a position to do so, was 'guilty of a breach of duty' – something Grotius and Pufendorf had refused to concede.¹¹⁶ Vattel acknowledged that it remained for each state to weigh its duties to others against its duties to itself on a case-by-case basis, according to the dictates of its conscience.¹¹⁷ But rather than leaving it there, he proceeded to provide clear principles and guidelines as to how such cosmopolitan and statist duties should be so weighed.

States, Vattel claimed, should always exercise prudence when weighing their obligations, but this in no way justified unreasonably neglecting the needs of

¹¹⁰ E. de Vattel, *The Law of Nations*, edited by B. Kapossy and R. Whatmore (2008), at 747–771.

¹¹¹ *Ibid.*, at 1–745. For discussion of Vattel's pivotal role in the development of international law, not least in the transition from natural to positive law, see Chetail and Haggemacher, *supra* note 7; E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (1998).

¹¹² See Kapossy, 'Introduction: Rival Histories of Emer de Vattel's Law of Nations', 31 *Grotiana* (2010) 5; Christov, *supra* note 86, at 211–268.

¹¹³ Vattel, *supra* note 110, Preliminaries, para. 10.

¹¹⁴ *Ibid.*, Preliminaries, para. 11.

¹¹⁵ *Ibid.*, Preliminaries, paras 16–17.

¹¹⁶ *Ibid.*, Preliminaries, para. 20.

¹¹⁷ *Ibid.*

others. By way of example, he suggested that Russia had recently carried out a 'prudent performance' of its duties in that it had 'generously assisted Sweden when threatened with a famine' but had refused to allow other nations to purchase corn that it needed for its own people.¹¹⁸ Moreover, in direct contrast to Grotius, he made clear that, while a state should give heed to its own security and material interests, it should nevertheless be willing to bear some cost and inconvenience for the sake of the vulnerable beyond its borders. While a state was under no obligation to aid another if this would require doing 'an essential injury to herself', it ought not to refuse to assist others out of fear of 'a slight loss, or any little inconvenience: humanity forbids this; and the mutual love which men owe to each other requires greater sacrifices'.¹¹⁹

Furthermore, in a significant break from earlier theorists, who had tended to focus on duties to make use of their own domain by providing hospitality, trade and free passage as well as on duties to use force beyond borders, Vattel also gave attention to duties to provide non-coercive assistance beyond borders to those afflicted with 'famine or any other calamities'. He declared that, 'if a nation is afflicted with famine, all those who have provisions to spare ought to relieve her distress, without however exposing themselves to want ... Whatever be the calamity with which a nation is afflicted, the like assistance is due to it'. By way of example, he endorsed the 'noble generosity' of England who had responded to the Lisbon earthquake of 1755 by providing a 100,000 pounds worth of assistance to the Portuguese.¹²⁰

Vattel added that a nation is bound not only to contribute to the perfection of other nations by providing for their necessities and helping them to secure peace and justice within their territories, but it is also obligated to contribute – 'occasionally, and according to its power' – to the capacities of these nations so that they are better able to procure such things for themselves.¹²¹ Duties of humanity, then, are owed not only in times of crisis. Rather, they are to be discharged whenever possible so that nations may be made more capable of preventing or dealing with such crises themselves. Furthermore, he insisted that a nation is bound not only to seek to benefit others insofar as it is presently capable. Rather, for a nation to truly perfect itself, it should endeavour to cultivate ever greater capacity to promote the perfection and happiness of others.¹²² Thus, nations are not called to weigh their duties to others against their duties to themselves as if they were mutually exclusive. Rather, just as Leibniz had argued with respect to individuals, their perfection of each other is in an important sense constitutive of the perfection of themselves.

¹¹⁸ *Ibid.*, at II.1.9.

¹¹⁹ *Ibid.*, Preliminaries, para. 14, II.10.131.

¹²⁰ *Ibid.*, at II.1.15.

¹²¹ *Ibid.*, at II.1.6.

¹²² *Ibid.*, at II.1.13.

7 Sentimentalists

In his inaugural lecture as chair of moral philosophy at Glasgow University, delivered in 1730, Francis Hutcheson considered the question: in what sense is sociability natural to man? He criticized Pufendorf's 'Epicurean' teaching that sociability springs merely from utility (implicitly rejecting Pufendorf's claim to have advanced a Stoic argument in contrast to the Epicureanism of Hobbes).¹²³ Humans are driven to sociability not 'by external advantage and dread of external evils, contrary to the nature of their hearts, contrary to all their natural desires and affections', Hutcheson claimed.¹²⁴ Rather, while human nature may be secondarily oriented to advantage and pleasure, it is 'immediately and primarily kind, unselfish, and sociable without regard to its advantage or pleasure ... [M]any feelings and passions implanted in man by nature are kindly and unselfish and first and last look directly to the felicity of others'.¹²⁵ Hutcheson observed that the awareness of another human in pain excites commiseration and a desire to remove the pain. Even stories of 'the remotest nations or centuries where no advantage of our own is involved' can generate 'heartfelt concern' for their fortune.¹²⁶ This 'natural sense of right and wrong', Hutcheson insisted, is implanted by nature in all people and constitutes a source of obligation that is universally comprehended.¹²⁷

The obligations generated by our moral sense, however, are not owed equally to all people. Drawing on the Stoic notion of concentric circles of social bonds,¹²⁸ Hutcheson suggested that nature has implanted in individuals affection first for family members, then for friends, neighbours and fellow countrymen and, finally, at least for 'men of reflection', all of humankind. This affection appropriately generates 'a tender compassion toward any that are in distress, with a desire of succouring them'.¹²⁹ But, he insisted, 'we are not to imagine that this Benevolence is equal, or in the same degree toward all'.¹³⁰ Rather, because of our incapacity as individuals to succour distant multitudes, nature directs us to prefer those closest to ourselves: '[W]e follow nature and God its author, who by these stronger bonds has made some of mankind much dearer to us than others, and recommended them more peculiarly to our care.'¹³¹

The Scotsman's sentimentalist theory of duties was soon adopted, revised and consciously applied to questions of relations across sovereign borders by two other leading

¹²³ Hutcheson, 'On the Natural Sociability of Mankind', in *Logic, Metaphysics, and the Natural Sociability of Mankind*, edited by J. Moore and M. Silverthorne (2006) 202.

¹²⁴ *Ibid.*, at 203.

¹²⁵ *Ibid.*, at 205.

¹²⁶ *Ibid.*

¹²⁷ F. Hutcheson, *Philosophiae moralis institutio compendiaria, with A Short Introduction to Moral Philosophy*, edited by L. Turco (2007), at I.5.1.

¹²⁸ *Ibid.*, drawing on Cicero, *supra* note 29, at I.42–60.

¹²⁹ Hutcheson, *supra* note 123, at I.5.1.

¹³⁰ F. Hutcheson, *An Inquiry into the Original of Our Ideas of Beauty and Virtue*, edited by W. Leidhold (2004), at II.5.1.

¹³¹ Hutcheson, *supra* note 123, at I.5.3.

Scottish Enlightenment figures, David Hume and Adam Smith.¹³² Hume criticized ‘the selfish system of morals’ promulgated by Epicureans and Hobbists, who reduced all affection to self-love and who framed benevolence as ‘mere hypocrisy’.¹³³ Morality is determined by ‘the *Feelings* of our internal *Tastes* and *Sentiments*’, he claimed, and these tastes and sentiments are excited not merely by consideration of our own utility but also by ‘the happiness and misery of others’.¹³⁴ Echoing Hutcheson, he conceded that we are more affected by the plight of those close to us. But he appears to have been troubled by these limits of sympathy. Thus, he turned to the principle of ‘humanity’, which was said to produce sentiments that relied not on contiguity but, merely, on the fact that ‘all human creatures are related to us by resemblance’.¹³⁵ The sentiments that arise from humanity, he explained, are felt by all humans, and they encompass all humans such that ‘[n]o creature can be so remote as to be, in this light, wholly indifferent to me’.¹³⁶ While we may be affected by a ‘less lively sympathy’ in our contemplation of ‘remote nations’, the principle of humanity leads us to adopt a ‘common point of view’, enabling us to ‘correct the inequalities of our internal emotions and perceptions’.¹³⁷ Hume claimed that the ‘affection of humanity ... can alone be the foundation of morals’.¹³⁸ He described it in expansive terms as ‘a tendency to promote the welfare and advantage of mankind’.¹³⁹ However, in Hume’s hands, ‘humanity’ ultimately demands very little of individuals or states in their relations with strangers and foreigners. It does not require benevolence. Rather, it establishes merely a ‘general approbation’ of that which is useful to society rather than pernicious; a ‘cool preference’ for that which is beneficial to others rather than harmful. And even this approbation and preference, which is implanted by nature, he conceded, is ‘faint’ and ‘weak’ and obtains only ‘where every thing else is equal’.¹⁴⁰

Smith’s conception of duties towards the vulnerable beyond borders was no more demanding. In *The Theory of Moral Sentiments* (1759), he echoed earlier moral sense theorists in claiming that ‘the first perceptions of right and wrong’ are derived not from reason but, rather, from ‘immediate sense and feeling’.¹⁴¹ And this sense and feeling generates not only regard for oneself but also concern for others. He acknowledged that the impulses of humans can be ‘so sordid and so selfish’ but suggested that they can nevertheless be prompted to ‘sacrifice their own interests to the greater

¹³² For overviews of the Scottish Enlightenment theorists’ engagement with the law of nature and nations, see Cavallar, *supra* note 11, at 229–284; Moore, *supra* note 27. On the relationship between sentiment and international law, see Popovski, ‘Emotions and International Law’, in Y. Ariffin, J. M. Coicaud and V. Popovski (eds), *Emotions in International Politics: Beyond Mainstream International Relations* (2016) 184.

¹³³ D. Hume, *An Enquiry Concerning the Principles of Morals*, edited by T.L. Beauchamp (1998), Appendix 2.

¹³⁴ Hume, ‘A Letter from a Gentleman to his Friend in Edinburgh’, in *An Enquiry Concerning Human Understanding*, edited by E. Steinberg (1977), at VI; *ibid.*, at 5.17n19 (emphasis in original).

¹³⁵ D. Hume, *A Treatise of Human Nature*, edited by D.F. Norton and M.J. Norton (2000), at 3.3.1.14, 2.2.7.2.

¹³⁶ Hume, *supra* note 133, at 9.7.

¹³⁷ *Ibid.*, at 5.41.

¹³⁸ *Ibid.*, at 9.6.

¹³⁹ *Ibid.*, at 9.12.

¹⁴⁰ *Ibid.*, at 5.39, 9.4; Hanley, ‘David Hume and the “Politics of Humanity”’, 39 *Political Theory* (2011) 205.

¹⁴¹ A. Smith, *The Theory of Moral Sentiments*, edited by K. Haakonssen (2002), at VII.3.2.7

interests of others’, not by ‘that feeble spark of benevolence which Nature has lighted up in the human heart’, as per Hutcheson, nor by ‘the soft power of humanity’, as per Hume, but, instead, by their conscience, which plays the role of an ‘impartial spectator’ correcting ‘the natural misrepresentations of self-love’.¹⁴²

Like Hutcheson and Hume, however, Smith claimed that nature recommends that we prioritize the care of those who are close to us, invoking the Stoic notion of expanding concentric circles, from family and friends outwards to neighbours and fellow citizens.¹⁴³ Some Stoics, such as Hierocles in the second century, had suggested a duty to cultivate one’s moral sense in such a way as ‘to draw the circles together somehow towards the centre’ in order to ‘reduce the distance of the relationship with each person’.¹⁴⁴ In contrast, Smith, like Hutcheson, simply presented the concentric circles as an empirical fact that was ‘wisely ordered by Nature’.¹⁴⁵ He warned against those who, while ‘occupied in contemplating the more sublime’, neglect their more immediate duties to those close to themselves. The universal happiness of humans, he explained, is ‘the business of God and not of man’.¹⁴⁶ Concern for the fortune of others with whom we have ‘no acquaintance or connexion ... can produce only anxiety to ourselves, without any manner of advantage to them’. While those at great distance from us are ‘entitled to our good wishes’, we owe them little else.¹⁴⁷

For Smith, whereas individuals are bound by mutual love and benevolence in their relations with those close to themselves, they are rightly guided by self-interest in their relations with non-intimates. The ‘impartial spectator’ approves the pursuit of self-love in non-intimate relations so long as no injury is done.¹⁴⁸ And it is these principles of self-love and the duty to refrain from injury that were said to rightly prevail in relations between states. Certainly, Smith emphasized that a state’s pursuit of its own utility, rightly understood, could generate outcomes that might be understood to be morally desirable. He highlighted the economic foolishness of expensive wars and of colonial monopolies that fail to take advantage of the benefits of free trade. He supplemented such utility-based arguments with a notion of universal negative justice that was said to be derived from nature and that required refraining from harm and cruelty. But he made clear that positive duties to care for those in distress, produced by our moral sense, are owed only in relations among intimates and do not extend beyond sovereign borders.¹⁴⁹

¹⁴² *Ibid.*, at III.3.4.

¹⁴³ *Ibid.*, at VI.2.1–2.

¹⁴⁴ A. A. Long and D. N. Sedley, *The Hellenistic Philosophers*, vol. 1 (1987), at 349.

¹⁴⁵ Smith, *supra* note 141, at III.3.9.

¹⁴⁶ *Ibid.*, at VI.2.3.6.

¹⁴⁷ *Ibid.*, at III.3.9; F. Forman-Barzilai, *Adam Smith and the Circles of Sympathy: Cosmopolitanism and Moral Theory* (2010), at 120–131.

¹⁴⁸ Smith, *supra* note 141, at II.2.2.1.

¹⁴⁹ Forman-Barzilai, *supra* note 147, at 196–237.

8 Kant

In his *Groundwork of the Metaphysics of Morals*, published in 1785, Kant warned against efforts to ground morality in sense and feeling. After all, he explained, our sensibilities can often fail to conform to morality, such as in instances where nature has ‘put little sympathy in the heart of this or that man’ so that ‘he is by temperament cold and indifferent to the sufferings of others’.¹⁵⁰ Indeed, Kant questioned all attempts by natural law theorists to derive morality from consideration of human nature:

One need only look at attempts at morality in that popular taste. One will find now the special determination of human nature (but occasionally the idea of a rational nature as such along with it), now perfection, now happiness, here moral feeling, there fear of God, a bit of this and also a bit of that in a marvelous mixture; without its occurring to them to ask whether the principles of morality are to be sought at all in acquaintance with human nature.¹⁵¹

Kant insisted that the principles of morality are not to be drawn from experience of human nature, but, rather, they are to be found ‘altogether a priori, free from anything empirical, solely in pure rational concepts and nowhere else’.¹⁵² He proceeded to produce a ‘metaphysics of morals’ that was said to be derived from reason alone.¹⁵³ He then put these principles to work in considering the laws that should apply in relations between states. He did so most famously in his 1795 essay, *Toward Perpetual Peace*,¹⁵⁴ and most completely in his 1797 work, *The Metaphysics of Morals*.¹⁵⁵

Kant offered a Hobbesian vision of a state of nature in which ‘each has its own right to do *what seems right and good to it*’, and he echoed the Englishman’s suggestion that individuals have a duty to escape this natural condition by uniting with others to enter into ‘a civil condition’.¹⁵⁶ However, in contrast to Hobbes, who was content to stop at the level of the sovereign state, Kant insisted that states also had a duty to leave the (international) state of nature by contracting with each other to establish a condition of peace. He rebuked Grotius, Pufendorf and Vattel, describing them as ‘sorry comforters’, whose ‘code, couched philosophically or diplomatically, has not the slightest lawful force and cannot even have such force (since states as such are not subject to a common external constraint)’.¹⁵⁷ What was needed, he claimed, was ideally ‘a universal association of states’, in which ‘rights come to hold *conclusively* and a true *condition of peace* come about’.¹⁵⁸ He conceded that this ideal was ultimately unachievable but

¹⁵⁰ Kant, ‘Groundwork of The Metaphysics of Morals (1785)’, in *Practical Philosophy*, edited by M.J. Gregor (1996), 37, at 4.398.

¹⁵¹ *Ibid.*, at 4.410.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, at 4.406–445.

¹⁵⁴ Kant, *supra* note 15.

¹⁵⁵ Kant, ‘The Metaphysics of Morals (1797)’, in *Practical Philosophy*, edited by M.J. Gregor (1996), 353. For differing perspectives on Kant’s conception of international law, see E. Teson, *A Philosophy of International Law* (1998); Capps, ‘The Kantian Project in Modern International Legal Theory’, 12 *EJIL* (2001) 1003.

¹⁵⁶ Kant, *supra* note 155, at 6.312 (emphasis in original).

¹⁵⁷ Kant, *supra* note 15, at 8.355.

¹⁵⁸ Kant, *supra* note 155, at 6.350 (emphasis in original).

insisted that states nevertheless had a duty to continually seek to approximate it so as to 'bring the human race ever closer to a cosmopolitan constitution'.¹⁵⁹

However, in stark contrast to some present-day 'Kantian' scholars who purport to draw demanding international duties of assistance and protection from Kant's principles,¹⁶⁰ the German philosopher himself indicated that the obligations that were to be borne by states in their relations with each other in his ideal 'cosmopolitan constitution' were rather minimal. He made clear that morality required not the establishment of a 'friendly' community of nations but, merely, a 'peaceful' one.¹⁶¹ Whereas Vattel had recently developed demanding duties to preserve and perfect vulnerable peoples beyond borders, and Jeremy Bentham would soon suggest utilitarian duties of international law requiring states to furnish assistance to foreign nations 'visited with misfortune',¹⁶² Kant offered no such positive duties. Rather, he insisted that '[c]osmopolitan right shall be limited to conditions of universal *hospitality*'.¹⁶³ This merely entailed 'the right of a foreigner not to be treated with hostility because he has arrived on the land of another'.¹⁶⁴ Rather than offering a 'Kantian' system of positive duties of assistance and protection beyond borders, Kant prioritized negative duties to refrain from interfering in the affairs of other states, to refrain from undermining trust among states and to eventually abolish standing armies in order to secure a condition of international peace.¹⁶⁵

Those searching for positive duties to assist and protect in Kant's *Metaphysics of Morals* will find it not in his 'Doctrine of Right', which is where we find his consideration of relations between states discussed above, but, rather, in his 'Doctrine of Virtue', the focus of which is restricted to relations between individuals. The 'Doctrine of Virtue' entails a rich discussion of demanding positive duties to perfect oneself and to advance the happiness of others. Duties of virtue (or 'ethical duties'), in contrast to 'duties of right', Kant explained, are imperfect and unenforceable.¹⁶⁶ He argued that individuals ought to actively seek to enhance their capacity to contribute to the happiness of others and even to 'sacrifice a part of [their] welfare to others without hope of return'.¹⁶⁷ Crucially, in contrast to the Scottish sentimentalists, he claimed that beneficence is a 'universal duty' owed to all 'rational beings with needs' and suggested that individuals therefore ought to actively cultivate compassion not just for those close to them but also for those who are in most need of help so that they are more positively disposed to discharge their duties to them:

¹⁵⁹ Kant, *supra* note 15, at 8.358.

¹⁶⁰ Bagnoli, 'Humanitarian Intervention as a Perfect Duty', in T. Nardin and M.S. Williams (eds), *Humanitarian Intervention* (2006) 117; H.M. Roff, *Global Justice, Kant and the Responsibility to Protect: A Provisional Duty* (2013).

¹⁶¹ Kant, *supra* note 155, at 6.532.

¹⁶² J. Bentham, *The Works of Jeremy Bentham*, vol. 2 (1843), at 538.

¹⁶³ Kant, *supra* note 15, at 8.357 (emphasis added).

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, at 8.343–347.

¹⁶⁶ Kant, *supra* note 155, at 6.390.

¹⁶⁷ *Ibid.*, at 6.392–93.

But while it is not in itself a duty to share the sufferings (as well as the joys) of others, it is a duty to sympathize actively in their fate, and to this end it is therefore an indirect duty to cultivate the compassionate natural (aesthetic) feeling in us ... It is therefore a duty not to avoid the places where the poor who lack the most basic necessities are to be found but rather to seek them out, and not to shun sickrooms or debtors' prisons and so forth in order to avoid sharing painful feelings one may not be able to resist. For this is still one of the impulses that nature has implanted in us to do what the representation of duty alone might not accomplish.¹⁶⁸

Nevertheless, while individuals were obliged to cultivate compassion for, and seek to contribute to the happiness of, all humankind, Kant gave no indication that states should also be so concerned. He offered no principle of 'cosmopolitan virtue' to complement his principle of 'cosmopolitan right'. There does not seem to have been any obligation to care for the vulnerable beyond borders in his ideal international legal order. We ought not to attribute this absence of positive duties of mutual assistance among states to the idea that such concepts were not known to Kant. After all, as we have seen, such duties had been examined in detail in previous centuries by theorists whose works he knew well. Rather, it would seem that, given his overriding concern with establishing the conditions for 'peace' between states rather than for 'friendship', he consciously chose not to impute to states duties of assistance and protection beyond borders.¹⁶⁹

9 Conclusion

'By the end of the eighteenth century', T.J. Hochstrasser tells us:

the options open to those wishing to finesse the 'modern' natural law tradition had narrowed: the incongruities and contradictions of the writers associated with both Leibniz and Pufendorf – despite their differences – led eventually either to a hard-nosed legal positivism (as embodied by Bentham) or to the Kantian transcendence of the whole debate.¹⁷⁰

It might be added that, at least with respect to relations between states, Kant himself recommended a hard-nosed legal positivist solution via the establishment of a federation of states. And, yet, as Steven Ratner rightly emphasizes, positivist international law cannot escape the kinds of questions of justice and morality that exercised the natural law theorists. The choices involved in 'prescribing, interpreting, and enforcing international law' remain unavoidably '*ethical choices*'.¹⁷¹

Ratner laments what he sees as the separation of international legal positivism from moral philosophy, and he contemplates how the law might be variously rewritten, reinterpreted or enforced in new ways that better conform to the demands of global justice.¹⁷² As reviewers of his work have observed, this separation between international

¹⁶⁸ *Ibid.*, at 6.453, 457; N. Sherman, *Making a Necessity of Virtue: Aristotle and Kant on Virtue* (1997), at 121–186.

¹⁶⁹ Kant, *supra* note 155, at 6.532.

¹⁷⁰ Hochstrasser, *supra* note 92, at 5.

¹⁷¹ S.R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (2015), at 2 (emphasis in original).

¹⁷² *Ibid.*

law and morality is ‘a comparably recent phenomenon’.¹⁷³ While many of the theorists of the law of nature and nations perceived important distinctions between international law and morality (or between the law of nations and the law of nature), they were all deeply concerned with working out how international law might be constructed in ways that would help to generate international behaviours and practices that would best conform to the requirements of morality – of justice and of benevolence – as they understood them. As we have seen, this led them to offer detailed consideration of the duties that states owe to the vulnerable beyond their borders under the law of nations. They explicated a range of duties of neighbourly love and moral sentiment, self-perfection and the perfection of others and the cultivation of material capacities and emotional sensibilities.

Confronted as we are today not only with ongoing mass atrocities and civil wars that have cost the lives of hundreds of thousands of civilians, but also with rising nationalist and isolationist sentiments within many states and growing calls for governments to eschew global duties and attend solely to the needs of citizens, the writings of the theorists of the law of nature and nations demand renewed attention. Their ideas about duties of assistance and protection beyond borders offer rich resources for those seeking to restrain tendencies towards national selfishness and to bring the prescription, interpretation and enforcement of international law more in line with the demands of global justice.

From the various treatments of duties that have been retrieved in this article, we might briefly highlight three ideas that could be of particular use today. The first idea is Vattel’s suggestion that states should be willing to bear a measure of sacrifice for the sake of vulnerable outsiders. In its *Bosnia v. Serbia* decision, the ICJ found that bystander states have an obligation ‘to employ all means reasonably available to them, so as to prevent genocide so far as possible’.¹⁷⁴ However, it offered little guidance as to the costs or risks that states might be reasonably expected to assume when discharging ‘all means reasonably available’. Vattel offered a yardstick to be deployed on a case-by-case basis in this regard: states should be willing to sacrifice their interests to a degree for the sake of vulnerable outsiders, so long as in discharging their duties to others they did not do an ‘essential injury’ to themselves.¹⁷⁵ While acknowledging the need for prudence, he insisted that the care of one’s own interests should be in proportion to the needs of others, and a state should not hesitate to sacrifice its interests a little in order to help others a lot.¹⁷⁶ This yardstick seems consistent with spirit of the ICJ’s decision and also with the broader duties entailed in R2P. Certainly, it leaves much room for interpretation, as is appropriate. But it may be read as a fruitful guideline for future law-making or at least a starting point for a debate that needs to be had if the responsibility to protect the vulnerable beyond borders is to emerge as a coherent and stable principle of international law.

¹⁷³ Roth-Isigkeit, ‘Steven R. Ratner: The Thin Justice of International Law: A Moral Reckoning of the Law of Nations’, 27 *EJIL* (2016) 1169, at 1169.

¹⁷⁴ *Bosnia*, *supra* note 5, para. 430.

¹⁷⁵ Vattel, *supra* note 110, Preliminaries, para. 14.

¹⁷⁶ *Ibid.*, at II.10.131.

The second idea also comes from Vattel, though Pufendorf had offered a similar idea that he applied not to states but to individuals.¹⁷⁷ The idea is that states are bound not only to make use of their existing capacities for the benefit of vulnerable outsiders but also to build their capacities so that they may benefit the vulnerable beyond their borders to an even greater extent.¹⁷⁸ This duty holds the promise of overcoming potential injustices with respect to burden sharing and free-riding implied in the *Bosnia v. Serbia* judgment. In establishing parameters for deciding which states should act to prevent genocide in a given instance, the ICJ emphasized that a guiding principle should be 'the capacity to influence effectively the action of persons likely to commit, or already committing, genocide'.¹⁷⁹ The Court highlighted the unique position of influence that Serbia wielded over the Bosnian Serbs, but its reasoning suggested that, in a given case, responsibility might fall on a variety of states on grounds of financial, diplomatic or military capacity.¹⁸⁰ Some commentators have expressed concern that allocating duties according to capacity generates unfair burdens on those who have diligently developed capacities for human protection and creates disincentives for others to do the same.¹⁸¹ This problem might be fruitfully addressed by carefully grafting Vattel's duty of capacity building onto existing duties to use one's capacities to assist and protect the vulnerable.

The third idea particularly worth highlighting goes to the motivations of states to discharge their obligations rather than the content of those obligations. It combines Leibniz's suggestion that actors should recognize the emotional benefits they can derive from promoting the well-being of others with Kant's claim that actors have a duty to consciously cultivate emotions of sympathy and compassion towards vulnerable strangers so that they become more positively disposed to discharge their duties to care for their well-being.¹⁸² Theorists increasingly recognize that emotions can be collectively felt and that they can drive the behaviour of states, no less than individuals.¹⁸³ They also increasingly recognize that emotions play an important role in the construction of international law.¹⁸⁴ At a time in which collective emotions of fear and resentment of outsiders are being cultivated by populist leaders and channelled towards troubling ends, those who wish to encourage the performance of duties towards the vulnerable beyond borders, and to push for their further establishment in law, could do worse than to strive to cultivate and channel collective emotions in such a way that people feel renewed keenness for caring for strangers in need.

¹⁷⁷ Pufendorf, *supra* note 25, at III.3.2.

¹⁷⁸ Vattel, *supra* note 110, at II.1.13.

¹⁷⁹ *Bosnia*, *supra* note 5, para 430.

¹⁸⁰ Milanovic, 'State Responsibility for Genocide: A Follow-Up', 18 *EJIL* (2007) 669, at 686.

¹⁸¹ Tan, 'Humanitarian Intervention as a Duty', 7 *Global Responsibility to Protect* (2015) 121, at 137.

¹⁸² Leibniz, *supra* note 101, at 45–84; Kant, *supra* note 155, at 6.453, 457. For some further discussion, see Glanville, 'Self-Interest and the Distant Vulnerable', 30 *Ethics & International Affairs* (2016) 335.

¹⁸³ See the forum on 'Emotions and World Politics', 6 *International Theory* (2014) 490.

¹⁸⁴ See Popovski, *supra* note 132.