Miserable Comforters: International Relations as New Natural Law

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In his 'Perpetual Peace', Kant indicts the natural law tradition (Grotius, Pufendorf, Vattel) as 'miserable comforters' whose principles and doctrines 'cannot have the slightest legal force'. The indictment emerges from Kant's critique of natural law in both its empirical and rationalist variants as unable to uphold a really 'binding' notion of cosmopolitan legality. Since the early 1990s a new literature has emerged in the International Relations field that speaks about the effectiveness and legitimacy of international law as a form of supranational 'governance'. This article argues that that literature raises precisely the same problems that Kant detected in early modern natural law. Like the latter, this literature is best seen as an attempt to appropriate the voice of international legality to a fully instrumentalist discipline dedicated to serving the interests of power.

KEY WORDS ♦ governance ♦ international law ♦ International Relations theory ♦ Kant ♦ natural law

Introduction

Words are politics. When vocabularies change, things that previously could not be said, are now spoken by everyone; what yesterday seemed obvious, no longer finds a plausible articulation. With a change of vocabularies, new speakers become authoritative. When everyone speaks English, those who do this as their native tongue will feel entitled to correct everyone else. Some vocabularies address the same aspect of the world, but in specialized ways. Ethics and economics, for example: they both speak about human life, but from different perspectives, with different consequences. Which is why their jurisdiction must be clearly demarcated: in hospitals, ethical vocabularies

rule; in shopping-malls, economics. Or so we have reason to hope. Periods of social transformation often involve clashes of vocabularies. Old languages begin to seem inadequate. They begin to ring like the voice of corruption of old elites. This is true of law as well: a new legal idiom challenges an old one; new lawyers become authoritative.

I would like to compare here two moments of international change in which legal vocabularies clashed against each other. One moment is what the Belgian historian Paul Hazard (1935) called the 'Crisis of European Conscience', the end of the 17th century, the period after the Thirty Years' War, the consolidation of the modern states-system. The other moment is that of the early 21st century, also a post-war era, namely the post-Cold War era, when the inherited language of the modern states-system, and of international law, no longer seems able to give voice to important groups and interests. The point is *not* to argue that we are now *like* they were then. What links the two moments, is the *form* the clash takes: on the one side, an anachronistic scholasticism, and an old elite clinging to its privileges; on the other side, complex technical words seeking to penetrate the tired surface of political life to give expression to the dynamic forces underneath. Modern international law was born from a defence of secular absolutism against theology and feudalism. The international world became an extension of sovereign rule. Today, political sovereignty is challenged by the new idioms of globalization and transnational governance. In both moments, the 'old' seems artificial and fragmented while the 'new' appears natural and universal. Now, as then, change is represented as a natural necessity. This is what prompted Immanuel Kant to indict the founders of modern international law — Grotius, Pufendorf and Vattel — as 'miserable comforters'. I would like to turn this indictment against the novel vocabularies of international power parading under International Relations.

The article is in three parts. I will begin by describing the vocabulary of state power and international law that emerged in the late 17th and early 18th centuries from a brand of German public law, represented by the natural lawyer Samuel Pufendorf. In the second part, I will describe the new language of transnational governance that tells, at an international level, the story early modern natural law recounted at home. The third part seeks to remind us why Kant thought that the new languages of peace, security and effective government left something unarticulated, namely what he, perhaps enigmatically, chose to call freedom.

Samuel Pufendorf: Natural Law as the Science of the Social

The crisis of the late 17th century was felt most acutely in Germany. The Thirty Years' War had done away with up to 50% of the rural and around

one-third of the urban population.[1] The cultural life of local communities was largely wiped out, their economic base destroyed. The Westphalian peace consolidated the fragmentation of the Holy Roman Empire into a patchwork of estates — larger and smaller territorial units enjoying de facto independence from the imperial centre. It located the confessions — Lutheran, Calvinist and Catholic — within particular territorial regimes, thus fostering 'doctrinal distinctiveness, distrust and misunderstanding' in a way that 'forced a search for meaning and created profound anxieties about the meaninglessness of existence' (Vierhaus, 1988: 3).[2]

Since the late 16th century, many vocabularies had offered a promise of a better future. The confessions provided hope for personal salvation though of course not stable frameworks of social life. Religious orthodoxy was challenged by various kinds of scepticism with the confessional side reacting by a return to metaphysics (Hunter, 2001: 58, referring to Althusius). But clerical rule was opposed by various offshoots of Renaissance humanism: Neo-Stoicism and Tacitism, Machiavellism and the Reason of State, *Staatsklugheit*, that projected politics as a wholly autonomous sphere of society, with its own intrinsic laws analogous to those drawn from nature.[3] The advances in natural sciences in the early 17th century — Galilei and Bacon, Newton some decades later — and in metaphysics — Descartes above all — suggested completely new ways to think about truth and superstition, public authority and private faith, that might have interesting applications in politics and law.

From such materials, Samuel Pufendorf (1934), the holder, at the University of Heidelberg, of the first chair in the Law of Nature and of Nations, developed in 1672 a first vocabulary of government by law that we recognize as modern, and as ours.[4] International law was an inextricable part of that vocabulary. For the old, Aristotelian school, 'law' participated in the search of the good that resided in the essence of things. By contrast, for Pufendorf, it spoke about social relations within and between communities sharing *different* notions of the good — the situation of the post-Westphalian Empire *par excellence*. The new legal language articulated into existence a notion of 'civil society', ruled by principles reasonably analogous to the ones natural sciences operated to govern the physical world (see e.g. Medick, 1973: 40–63).[5] It universalized the image of society composed of what Marx called bourgeois men for whom '[t]he one tie that holds them together is natural necessity, need and private interest, the conservation of their property and their egoistic person' (Marx, 1994: 46). This view of social relations was accompanied by Pufendorf with an image of the modern state — the state of the Westphalia system — as a moral person, whose ruler was expected to achieve two things: (a) *pax et tranquillitas*, peace and security; as well as (b) *conservatio status*, the protection and strengthening of government

and the accumulation of the welfare of the people.[6] In domestic as well as in international law, this would be attained by sovereign commands whose binding force was received from, and limited by, natural law.

Such a law was neither religious nor metaphysical, but a 'social' phenomenon. Its native speakers were neither theologians nor philosophers, but lawyers. But, as Pufendorf expressly underlined, these would not be experts of this or that positive law, Roman, Greek or German law. They would be experts of *universal law* (Pufendorf, 1991[1673]: 6–13). This vocabulary articulated an intellectual, political and a professional project.

The *intellectual project* was in two parts. One had to do with certainty, the other with universality. The coincidence of scepticism, confessional antagonism and civil war in early 17th-century Europe made it tempting to try to use the language of natural science so as to speak confidently of human matters. Pufendorf (1931[1660]) first tried to create a universally applicable jurisprudence out of mathematical formulae — definitions, axioms and observations. Although many contemporaries were impressed, Pufendorf himself became dissatisfied with its youthful abstractions. In his mature work of 1672, abbreviated in the following year in what became the most widely used treatise of natural law in late 17th- and early 18th-century Europe, he turned in a new direction. Now he hoped to develop a distinct science that would account for what he chose to call *socialitas*, sociability. Aristotle and Grotius had written of sociability as an *innate* quality of human beings — love — reachable through metaphysical reflection. Pufendorf had read his Hobbes, however, and although he refrained from the most extreme conclusions the latter had drawn from his analysis of human nature, he had no faith in innate sociability. Whatever directives for behaviour existed, they were artificial, human creations.[7] They were not arbitrary for that reason, however, but emerged from the application of reason on empirical data. The most basic datum about human beings was their self-love, connected with an intense drive for self-preservation in the conditions of pathetic weakness. For such creatures, reason dictated one overriding rule: it commanded sociability:

> Man, then, is an animal with an intense concern for his own preservation, needy by himself, incapable of protection without the help of his fellows, and very well fitted for the mutual provision of benefits. (Pufendorf, 1991: 35)

From self-love, weakness and sociability a number of conclusions could be drawn — such as the necessity to have laws and taxes to ensure the regular functioning of society and to have a sovereign that would enforce those laws and police the boundary between behaviour that was to be regulated in order to maintain social peace and the freedom within which self-love could be directed to spontaneous pursuits within the civil society, productive work and

commerce. In this, sociability was not to undermine individual interest — on the contrary, as Adam Smith would later conclude with express reference to Pufendorf — it would make the realization of that interest possible (Hont, 2005: 164–84; Pufendorf, 1934, Bk II, Ch. III, § 16: 210–13).

The argument explained the universality of the law. For Aristotle, the good had no universal form. On the contrary, sound moral judgement needed to take good account of the character of each specific type of case. On this, scholasticism had built a complex casuistry of the different forms of good that were appropriate for particular categories. This accorded with the sceptical observation of the wide variety of human societies and human laws and questioned the possibility of norms enjoining humankind as a whole. By contrast, Pufendorf's truths were valid universally. How come? By resort to the hypothesis of the state of nature that collected what we knew of people everywhere — namely that they were motivated by self-love, characterized by weakness but in possession of reason that dictated to them the duties of sociability. There was nothing locally specific about these features; they had the same universal power as the laws of geometry or gravity. The effort to examine political states by recourse to the idea of the natural state, then, was comparable to the effort of natural scientists as they sought to understand nature by analysing it in its component parts.[8]

The *political project* was to find a technique for the maintenance of social peace on a durable basis. True, natural laws provided that 'every man ought to do as much as he can to cultivate and preserve sociability' (Pufendorf, 1991: 35). But the mere statement of this — however reasonable — was insufficient. Pufendorf came from the family of a Lutheran priest and knew that human beings were full of sin, and incapable of seeing reason clearly. Even as they accepted the need to cultivate sociability, they would still in real life understand this obligation differently, unless guided by a superior authority. A secular sovereign was needed that would enforce the commands of natural reason through positive laws to which subjects owed a duty of unconditional obedience (see Pufendorf, 1934, Bk VII, Ch. VI, § 6: 1055; 1991: 146–7).

What this entails for the relationship of universally certain natural law and locally binding positive law is important. Because positive law arose from sovereign command, it did not bind the sovereign (Pufendorf, 1991: 146). Later liberals have felt this scandalous. But Pufendorf does not think the sovereign ethically — and, what is crucial here, *legally* — unbound.[9] He is bound by natural law. 'The safety of the people is the supreme law', Pufendorf (1934, Bk VII, Ch. IX, § 3: 1118; 1991: 151–7) writes and engages in extensive discussion on the good laws and just punishments that are needed for *pax et tranquillitas* and *conservatio status*. The Prince has a natural law obligation not only to keep his own treaties but also those of his predecessors

when they concern the commonwealth as a whole (Pufendorf, 1934, Bk VIII, Ch. IX, § 8: 1337). Liberals have not been impressed. Because natural law does not have sanctions, it is not *really* binding. When Pufendorf writes that the command of a superior is obligatory when this has 'just reasons', critics from Leibniz onwards have indicted him of contradiction. Either duties are born of will, or from a justice that precedes will.[10] Not so for Pufendorf. Between the utopia of scholastic justice and the apology of arbitrary will lies the *social rationality of natural law*. Its commands are articulated by a science of government, the techniques of peace, security and welfare. If these are lost, then social power is lost; the link between protection and obedience is broken (Hunter, 2001: 156, 158–63). The sovereign ceases to be such as a simple rational conclusion from his failure to govern properly.

The critique that focuses on the absence of a superior body that would enforce natural law against the Prince overlooks the character of natural law. Its directives are not addressed to magistrates to enable them to control other branches of government. There are no two legal systems, one natural the other positive. There are moral situations, 'offices', which respond to different social needs. Positive law *is* natural law applied in a particular situation, namely that of the magistrate (see e.g. Pufendorf, 1991: 155–7). By contrast, natural law is what enjoins the Prince to govern wisely — including to rule wisely on the magistrates. The people cannot have a right to enforce natural law against the Prince for the simple reason 'that he whose peculiar task it is to care for the state, and who is most thoroughly conversant with the reasons of the Commonwealth, surely sees more clearly than private citizens what is for its benefit' (Pufendorf, 1934, Bk VIII, Ch. I, § 8: 1146). The recognition of this, after all, is the heart of the social contract.

The same principles of *socialitas* applied in the international world, now seen as an extension of the resources the Prince should use in order to advance the security and welfare of the people. The argument from self-love and weakness gave a ready portrait of Europe as a set of egoistic but interdependent sovereign entities whose interest was to cooperate, not to fight. Unlike Grotius, Pufendorf rejected the view that Princes had the authority to enforce natural law if no direct injury to them was involved (Pufendorf, 1934, Bk VIII, Ch. VI, § 2: 1293). No war was to be waged on the Native American on the basis of their alleged cannibalism — only if they actually caused injury (Pufendorf, 1934, Bk VIII, Ch. VI, § 5: 1297; see also Tuck, 1999: 159–60). Wars were not punishment — 'since they neither proceed from a superior as such, nor have their direct object the reform of the guilty party but the defence and assertion of my safety, my property, and my rights' (Pufendorf, 1934, Bk VIII, Ch. VI, § 7: 1298). And the evils we do in war must be compatible with future peace and security. International law is a matter of human relations, outside the jurisdiction of religion or conscience.

But it does not fall into the purview of secular magistrates either — for that would be to grant them the right to speak in the name of the sovereign. Magistrates rule on matters having to do with relations between citizens and citizen and sovereign under positive law, not on relations of princes under natural law (Pufendorf, 1934, Bk VIII, Ch. VI, § 10: 1301).

These are powerful arguments and it is no wonder that the entry on the law of nations in Diderot's *Grande encyclopaedie* observes that although Grotius had written of some aspects of the laws of war in a useful way, it was Pufendorf who ought to be seen as the father of the law of nations — international law. These were rules of natural law, of course, because they were based on the self-preservation and self-love of nations — understood as Pufendorf proposed — as moral entities the compacts between which were emanations of what was necessary for that purpose.[11]

This answers the *professional project*. Ruling is a complicated business: 'the science of government is so difficult that it requires all of men's ability' (Pufendorf, 1934, Bk VII, Ch. IX, § 2: 1118). To carry it out properly sovereigns should 'make friends of wise men and such as are skilled in human affairs, and hold at distance flatterers, useless fellows, and all who have learned nothing but folly' (Pufendorf, 1934, Bk VII, Ch. IX, § 2: 1118). Natural lawyers now emerge as the experts in the authoritative vocabulary operating the post-Westphalian, post-confessional order, marked by the extreme complexity of the imperial constitution, assisted at the universities by studies on the techniques of modern government (*Staatskunst*), sometimes based on comparative exercises: *ius publicum universale* (see e.g. Stolleis, 1988: 291–7). Natural law came to be seen as foundational to other civil sciences,[12] an indispensable technique of scientific government, the proper vernacular for a counsellor to the Prince. The qualities that such counsellors would need were received by Pufendorf from Hobbes. Government 'requires great knowledge of the dispositions of Mankind, of the rights of Government, and of the nature of Equity, Law, Justice and Honour, not to be attained without study' (Hobbes, 1981[1651]: 308). Also knowledge of the rights of all nations is needed; this is more than ordinary study — what is needed is 'intelligence and letters' but also 'all records of Treaties and other Transactions of States between them' (Hobbes, 1981: 308). And yet, as Pufendorf explains in *On the Natural State of Men*, the binding force of international law is not independent from the more fundamental objectives of *pax et tranquillitas* and *conservatio status*:

> [T]he prime obligation of leaders to seek the preservation of their own states surely forbids them to endanger their own status for another's sake, except in so far as a coincident advantage permits. Thus all treaties are understood to contain a hidden restriction: 'insofar as it will not jeopardize the safety of our state'. (Pufendorf, 1990: 131)

The natural lawyer as the Prince's counsellor is, then, not merely the magistrate reading treaties but one that has a wide knowledge of the condition and intentions of other states — achieved *inter alia* through the ambassadorial network, as well as the results of the novel forms of academic *Staatskunst* — so as to enable an accurate assessment of necessary action (for example, for distinguishing between innocuous and threatening changes in the balance of power) (Pufendorf, 1990: 131–3). The right course of action might, after all, often consist of breaching a treaty rather than following it.

At the time of finishing his main work on natural law, Pufendorf himself was employed at the Court of Sweden from where he moved to Prussia, focusing his work on a study of the statecraft of particular monarchs. Enlightened absolutism meant close cooperation between the academic adviser and the monarch — *Doctor et Princeps* (Schneiders, 1987: 36–7). For this purpose, natural law developed in the 18th century into increasingly more specialized governmental sciences such as Cameralism and *Polizeywissenschaft* — a science of politics as a technology of government, peaking in the historical and comparative studies carried out especially at the University of Göttingen, such as Gottfried Achenwall's *Statistik* that emerged in the 1760s as a technique of collecting and comparing information from all states so as to account for the reasons for their strength and weakness and to be able to develop scientific principles of government (see e.g. Brückner, 1977). In an important 1750 work that he prepared together with a younger colleague, the leading public lawyer Johann Stephan Pütter, Achenwall also laid out an ambitious justification for a universally valid science of (natural) law that included international law within an overall scheme of self-preservation and the search for common good. Here international affairs coincided with the good of each people (*Gens*), and *salus populi* and war and diplomatic relations were treated as elements of a utilitarian statecraft that sometimes (*ex ratione status extraordinarii*) authorized going against one's (legal) duty (Achenwall and Pütter, 1996[1750]: 302–3).

Pufendorf created a secular vocabulary of politics and law that sounded like natural science in its rigorous empiricism — but differed from the latter by its moral tone; and that also resembled philosophy by being rigorously rationalist — but differed from it by claiming practical applicability in government. This move into something 'in between' — it was called in Germany 'eclectic philosophy' — had important conclusions for international law. It consolidated political authority around a notion of secular sovereignty, and made official the anthropomorphic metaphor of states acting in the international world as 'moral entities' seeking self-preservation and self-fulfilment under the dictates of natural reason. This was neither the high heaven of theology nor the dark reason of Machiavellianism. It was premised on a *social concept of law* that could be used to explain any present rule as a reflection

of deeper human necessities. The international world could now be seen in terms of the government of the equilibrium of states, made official in the diplomatic language of the balance of power in the Peace of Utrecht, 1713.

The Hidden Career of Natural Law

I have taken much time with a period long ago and with an obscure person with a funny name. Moreover, the career of that person lay in the field of natural law and, as I was taught at law school in the 1970s, natural law is dead. Yet as I specialized in international law at the Finnish foreign ministry, or the United Nations, every doctrine, every legal institution would lean back on assumptions such as those articulated by Pufendorf. It was impossible to exorcise natural law because the alternative seemed always to be a wholly arbitrary scholasticism of the legal form — in particular what seemed the wholly question-begging form of 'sovereignty'. A credible law needed to express some 'deeper' logic of social life itself.

From the late 19th century onwards, international lawyers have been critics of 'sovereignty' as egoism, arbitrariness and absolute power (see Koskenniemi, 2001). The opposite of sovereignty was binding international law. But was international law really binding? The most influential response to this question was given by the Austrian public lawyer Georg Jellinek in 1880 as follows. States are bound by treaties because they will so. But this does not mean that they could discard their obligations by changing their will. For that will is not free. It is limited by what Jellinek called the *Staatszweck* — the purpose of the state, namely to provide protection and welfare to its people. This was possible only in cooperation with others. The nature of the international world — *Natur der Lebensverhältnisse* — required that states keep their word (Jellinek, 1880).

Jellinek, a friend of Max Weber's later in life, like generations of international lawyers after him, followed Pufendorf in employing a sociological vocabulary to understand international law's force: it is binding because that is socially necessary.[13] Law — as I, too, learned to say — was a 'social phenomenon', and it was only how one conceived the 'social' that explained whether one would join the ranks of the optimists or the pessimists: altruism or egoism? Grotius or Hobbes? This was Pufendorf's question, too. In the 1950s and 1960s, jurists from Yale and Columbia Law Schools, or Julius Stone from Sydney, sought to produce a robust sociological language to support international law against what they saw as the anachronism of formal diplomacy among sovereign equals.[14] Their efforts became first hostage of the Cold War controversy, and were then embraced in deceptively simple formulas such as Wolfgang Friedmann's 1963 distinction between the old law of coordination and the new law of cooperation. For Friedmann (1964),

the increasing institutionalization of the social, economic and humanitarian interests of states in treaty networks and international organizations bound them into a novel progressive Zeitgeist. In the 1970s and 1980s human rights, environmental protection and international trade began to institutionalize into an independent international social realm, to be managed in accordance with functional needs. The question of the 'binding force' of the new treaties and institutions continued to be answered by some sort of sociological generalization: interdependence and enlightened self-interest would ensure the usefulness of international law as an instrument for managing modern states. But few lawyers actually took the trouble to examine whether this was true, or what it meant. It was sufficient to work with the formal materials thus produced — treaties, reports, cases, decisions and so on — by rationalizing them as the product of something like a social contract between sovereigns, oscillating between a scientific hypothesis and a historical fact. If pressed, lawyers said that how this worked was not their task to explain but that of sociologists. Yet they could remain confident that it would be they who held the Prince's ear, not *those* people.

For — and this is the crux of my 15-year experience at the legal department of a European foreign ministry and then in the academy — despite their constant use of a vocabulary of interdependence and occasional recourse to sociological generalization about 'real interests', lawyers never took these very seriously or examined them in any depth. They were adopted as articles of faith rather than matters of argument or proof — or if not really faith, then at least as professional mannerisms reflecting the lawyers' self-deprecatory assumption that the only respectable modern vocabulary of 'theory' was some kind of sociology and that by deferring to the assumed regularities of international life they could avoid two mortal dangers: to be branded either as 'moralists' or 'formalists'. To be viewed in such terms, they would assume, would be to condemn oneself to complete marginalization.

There was, in other words, a dissonance between the proto-sociological (in fact, naturalist) vocabulary grasped at by international lawyers to demonstrate the respectability of their craft and the deeper but unarticulated sense that international law was not really a sociological project at all, that it did not have to do with functions, structures or instrumental action in search of the *pareto optimum*. Instead, it was a political project that aimed at something more important than helping the diplomats out of whatever crisis had emerged but also more difficult to describe in the canons of academic (or indeed diplomatic) respectability.[15] The only vocabularies approaching that self-understanding were those of humanitarian decency, peace and enlightenment — 'gentle civilizing' — words that connoted sentimental, perhaps 'Victorian', moralities of repressed desire sublimated by a wholly intuitive faith in human goodness (see Koskenniemi, 1997: 215–63). With

that baggage, one could not advance very far in administrative or academic environments populated by a 'realist' spirit that equated successful speech with the production of policy proposals that sounded convincing to those in high positions. International lawyers thus imposed a kind of doublespeak on themselves: superficial use of (Pufendorfian) generalizations that had little (really nothing) to do with competent legal speech about the 'validity' of treaty or customary obligations or the jurisdiction of this or that international actor.

The New Natural Law

After the end of the Cold War — 1989 and all that — the attack on the idioms of formal international law — sovereignty, diplomacy and foreign politics — was everywhere. Sovereignty had always been a problem for liberal minds. Now it seemed a positive obstacle for the natural development of social and economic life: too wide to encompass claims of human groups inside the state; too narrow to respond to global threats and opportunities. Alternative vocabularies mushroomed: trade and human rights, environment and security, the fight against impunity and terrorism, integration, migration, religion. Each with its native speakers, institutions and political project. Old law spoke the language of sovereignty, and it was off. Take the debate on humanitarian intervention. Surely sovereignty should not hinder action if thousands of lives were at stake. It was no mantra or taboo. We respect it inasmuch as it enables us to reach valuable purposes, such as *pax et tranquillitas*, happiness and security of the population. If it is the point of sovereignty to provide all this, then surely it cannot be invoked to *undermine* it. Or think of environmental problems. When addressed in the vocabulary of sovereignty, the source-state's right to undertake economic and technological activities will be simply posed against the right of the target-state to a clean environment. No solution will be available. A vocabulary *above sovereignty* is needed. Where would it come from?

The traditional response would have been to legislate new and better rules — treaties, resolutions, declarations and so on. But there is a grave problem with rules — namely their inflexibility, their failure to take into account the particular circumstances. 'Rules' will always cover cases we would not wish them to cover and fail to attach to situations to which we would have wished to apply them, had we only known of them at the moment of rule-creation. A rule on humanitarian intervention — whatever its content — will always discriminate arbitrarily between the cases that cross the atrocity threshold set up in the rule and those that fail to do so by the tiniest margin. And it will always implicitly authorize human rights violations up to that very point. A rule on 'no pollution', on the other hand, will seem reasonable if applied to

a developed state with a competitive economy, but completely off the mark if used to prevent a poor country from developing technologies others had always used.[16]

For such reasons, the effort to legislate never went very far. Diplomacy was not replaced by legalism. Treaties became 'cooperative frameworks' with flexible provisions and specialized implementation bodies were vested with a wide margin of discretion. A complex managerial vocabulary emerged that spoke neither about sovereignty nor about rules but about the 'objectives', 'values' and 'interests' behind them. It took seriously the use by international lawyers of sociology, and instrumentalist political theory. Do not remain enchanted by the legal or the institutional form, this language suggests. Look behind rules and institutions. Figure out the costs and benefits. Streamline, balance, optimize, calculate. When the social is fluid, a social concept of law — that is, a 'realist', or 'pragmatic', concept — must become fluid as well. Everything must become negotiable, revisable in view of attaining the right outcome. The bomb is ticking and torture might save lives… The new vocabulary was inaugurated in six steps.

From Institutions to 'Regimes'

The first step lies in thinking about rule-complexes not in terms of formal public law institutions but as informal 'regimes', that is norms, practices and expectations within specific 'issue-areas', defined by the distribution of available technologies of knowledge-production (see e.g. Hasenclever et al., 1997; Krasner, 1983). Where the law of international institutions focused on formal competence, representation and accountability, regime theory is thoroughly functional, comparing outputs against inputs by reference to alternative behavioural 'models' so as to 'derive testable hypotheses about what would explain co-operation under which conditions and in what circumstances' (Hurrell, 1995: 55).

'Regimes' do not come about through formal procedures but by way of converging practices and consolidating knowledge-patterns. They create redescriptions of the world through novel languages that empower novel groups. Think, for example, of the spectacular rise of 'environmental regimes' out of an outdated vocabulary of territorial sovereignty or about the characterization of certain interests or preferences as the 'human rights' of those claiming them (for the former example, see e.g. Haas, 1993: 168–201). Against the tired antics of 'public international law', vaguely associated with Cold War multilateralism and the Third World-oriented diplomacy at the UN, up-to-date expertise in 'environmental governance' or 'human rights regimes' or indeed 'trade' or 'security' regimes offer a promise of

entry into the professional avant-garde, mastery of technical idioms with global penetrating power. *Lex mercatoria* may still lack the orthodox textbook and case collection — but look inside transnational law firms and you will find an unproblematic routine of transcribing contract terms under new standard formulas to articulate the voices of dominant clients whose field of operation transcends any territorially limited system of control (Kessedjian, 2000: 237–56).

What is a world of many (functional) regimes like? It is a world nervously characterized by international lawyers through the language of 'fragmentation', articulating (as that word always did) a sense of loss of the secure ground of tradition, memory of the time when everything still seemed somehow coherent (and international lawyers held the Prince's ear). By contrast, regimes act as special systems of truth and value, idiolects ready to encompass the whole world, but from their own perspective, with their own (structural) bias.[17] Should the importation of hormone meat or genetically modified organisms (GMOs) to Europe be articulated in terms of the global trade regime or the global environmental (or health) regime? Should boundary-crossing humans be thought of as a human rights problem or a security problem? To decide on such questions in some rational way, there ought to be a superior system, a regime of regimes — a 'constitution' in the legal idiom. But there is none. Which is why regimes will continue to deal with whatever they can lay their hands on. In the end, that regime will win and whose application will, for whatever reason, no longer be challenged. The world of regimes is a world of hegemony, of pure power.[18]

These vocabularies are written in the grammar of strategic action: experts use them to decide on a case-by-case basis. Hence the obsession with 'regime design' in the field, focus on variables such as membership, scope, degree of centralization, control by members and flexibility so as to bring about optimal results (see Koremenos et al., 2001: 761–99, 763). As noted by one of its fathers, it is the point of regime-theory to focus on observational behaviour so as to avoid 'slipping into formalism' (the expression is his), exemplified (for him) by the scandalous way in which instruments such as the 1927 Kellogg-Briand Pact had been thought of as 'law', 'even though they had no behavioural implications' (Keohane, 1993: 27).

From Rules to 'Regulation'

A second step collapses the distinction between law and regulation. In regimes, 'legalization' is a policy choice sometimes dictated by strategic interests, sometimes not. The new literature is full of analyses of harder and softer techniques of regulation, using variables such as 'obligation',

'precision' and 'delegation' to canvass the alternatives (see e.g. Abbott and Snidal, 2000: 434–54; Lipson, 1991: 495; Shelton, 2000b: 10–17). As targeted audiences are assumed to behave as strategic actors, the inducements must become equally strategic: sometimes sticks, sometimes carrots. Soft law alternates with hard, private constraint with public, as the idiom of legislation is replaced by what the experts call a 'new global division of regulatory labour' (Lipschutz and Vogel, 2002: 117).

Academic research on regulation is thoroughly instrumental. Its outcomes are presented as variables to strengthen the regime. As proudly exclaimed by a recent study on international institutions: 'our approach also provides an appropriate formulation for prescribing policy and evaluating existing institutions' (Koremenos et al., 2001: 767). Pufendorf would have been thrilled.

From Government to 'Governance'

A third step consists in a move from a vocabulary of formal 'government' to informal 'governance'. If 'government' connotes administration and division of powers, with the presumption of formal accountability, 'governance' refers to de facto practices and is — like those corporate enterprises in which the term originates — geared to the production of maximal value.[19] Sometimes disagreements are managed ('problems are resolved') through assistance or 'facilitation', sometimes by negotiation or administratively ordered sanctions, rarely through formal settlement. Under this vocabulary, indefinite detention may take place by administrative decree while the ability to suspend the law consecrates the ultimate victory of governance over government (see Butler, 2004).

From Responsibility to 'Compliance'

Fourth is the move away from the backward-looking obsession lawyers have with breach and illegality, declared in formal dispute settlement, courts in particular. As a mechanism of deterrence, responsibility fails in an international context where routines are few, situations idiosyncratic and interests great. But even more: invoking responsibility might be often counter-productive. It would undermine solidarity and commitment to regime objectives. Instead of 'breach', environmental and economic treaties now speak of 'non-compliance' and 'non-violation complaints' (for the former, see Koskenniemi, 1992: 123–62). Instead of courts, they set up mechanisms for reporting, discussion and assistance: informal pressure and subtle persuasion as socially embedded guarantees for conforming behaviour.[20]

From Law to 'Legitimacy'

The previous steps point from normative to empirical vocabularies that cannot distinguish between coercion and the law, the gunman and the taxman. How to make that distinction? How — to put it in a manner that Pufendorf would have understood — to accept Hobbes but sound like Grotius? Through the vocabulary of 'legitimacy'.[21]

Conceptual history tells us that the earliest uses of 'legitimacy' coincided with 'legality'. Something was legitimate if it was lawful. But the regime analyst asks for something different: why *should* law be obeyed? When Western experts claimed that the intervention in Kosovo in 1999 might have been illegal, but was quite legitimate, their point was precisely to find a normative vocabulary overriding formal validity. This was not so as to move back into the pre-modern notion of the political 'good', however. As Thomas Franck rhetorically asks in a leading work on international legitimacy: 'When different belief systems contend, what can one say about the justice of rules?' (Franck, 1990: 210–11). Regimes, governance and compliance are needed precisely between morally disagreeing agents. In his later work, Franck speaks of legitimacy as procedural 'fairness' (Franck, 1995).

'Fairness' and 'legitimacy' are mediate words, rhetorically successful only so long as they cannot be pinned down either to formal rules or moral principles. Ian Hurd (1999: 383–9) writes in a Weberian tone of legitimacy as 'a kind of feeling' about authority and 'a sense of moral obligation'.[22] As such — as a psychological 'feeling' — it opens itself to empirical study. The political scientist only describes the 'operative process' whereby this 'feeling' emerges though 'internalization by the author of an external standard' (Hurd, 1999: 388). As such, legitimacy is indifferent to the conditions of its existence: fear, desire, manipulation, whatever.

Legitimacy is not about normative substance. Its point is to *avoid* such substance but nonetheless to uphold a *semblance* of substance. Therefore, it is suitable for production within the communications industry, including the academic publication industry. Listen to how Chayes and Chayes (1995: 41) put it in their widely used book on compliance with international agreements:

> The American people have not always understood that even when the United States has the military or economic power to act alone, the effectiveness of its actions might be undermined if it did not seek and achieve a degree of international consensus to give its actions legitimacy.

The perspective is control. The normative framework is in place. Action has been decided. The only remaining question is how to reach the target with

minimal cost. This is where *legitimacy* is needed — to ensure a warm feeling in the audience.

From Lawyers to International Relations Experts

The sixth, final move is a shift in the authoritative speaker. In the 1990s lawyers began to hear an invitation to collaboration with international relations experts at US universities (see e.g. Slaughter et al., 1998: 367–97). Only little collaboration took place, probably because it remained unclear what place would be left to notions such as 'sovereignty' or 'law'. If, as regime experts argue, 'governments will negotiate agreements and establish institutional rules that they intend to follow in any case', then law becomes fully epiphenomenal (Kahler, 2000: 673). Why should anyone care?

In a book published five years ago, Jack Goldsmith (2004: 367) — the author of a memo on transferring prisoners from Afghanistan to locations where they can be tortured, but now Professor at Harvard Law School — and Eric Posner from Chicago argue that the traditional defence of international law — that most states abide by most international law rules most of the time — is true only because of the way lawyers dress actual behaviour as law. But this provides no explanation for *why* states behave as they do. If, as they argue, state behaviour is caused by, and should be explained by reference to, 'coincidence of interest and coercion', then to say that it is 'law' is an irrelevant decoration.

For these analysts, like for Pufendorf, treaties are bargains between rational egoists seeking to resolve coordination or cooperation problems so as to minimize transaction costs resulting from unclear communication of their expectations under customary law (Goldsmith and Posner, 2005: 84–5). States do not comply because treaties have 'binding force' but 'because they fear retaliation from the other state or some kind of reputational loss, or because they fear a failure of coordination' (Goldsmith and Posner, 2005: 90). Treaties are surfaces over which parties exercise pressure against each other. For example, the provisions on the use of force in the UN Charter constitute a bargain states once made to have protection. That bargain is now undermined by the possession of weapons of mass destruction by terrorists of 'rogue states'. Hence, for states as rational egoists, the 'costs of strict adherence to the UN Charter in a world of new security threats' has just become too great (Yoo and Trachman, 2005: 384).

The vocabularies of 'consent', 'validity' or 'dispute settlement' are replaced by the social science vocabularies of 'explaining' behaviour and attaining 'compliance'. And because achieving compliance is all that counts, the interdisciplinary call is not really about cooperation but conquest. Let me quote from Goldsmith and Posner (2005: 15): 'There is a more sophisticated

international law literature in the international relations subfield of political science'.

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Words are politics — and in the past 20 years or so, new words have emerged to articulate the reality of international life. Technical expressions such as 'regulation', 'compliance', 'governance' and so on hark back to new political and legal sensitivities and priorities, lifting new experts into positions of authority. I have wanted to analyse this change in language by drawing a parallel to an analogous moment in the late 17th century. Then as now, a new empirically oriented 'realist' language (natural law/international relations) emerged to give voice to new preferences, forms of authority and hierarchy of influence. The new vocabulary — a new natural law — gives voice to special interests in functionally diversified regimes of global governance and control. This feeds on the habit of international lawyers to articulate the founding certainties of the profession in sociological, instrumental terms. The new orientation takes these articulations seriously and, like 17th-century *ius naturae et gentium*, builds on a state of nature that it abstracts from observation of human beings as they are now. In the most sophisticated form available, the state of nature is articulated today in the anarchy of autonomous functional systems: trade, human rights, environment, security, diplomacy and so on. Because there is no truth superior to that provided by each such system or vocabulary, each will recreate within itself the sovereignty lost from the nation-state. Hence managerialism turns into absolutism: the absolutism of this or that regime, this or that system of preferences.[23] The lawyer becomes a counsel for the functional power-holder speaking the new natural law: from formal institutions to regimes, learning the idiolect of 'regulation', talking of 'governance' instead of 'government' and 'compliance' instead of 'responsibility'. The normative optic is received from a 'legitimacy', measured by international relations — the Supreme Tribunal of a managerial world.

Kant and International Law Today

International lawyers have always been surprised to find that in the middle of his *Zum ewigen Frieden* (1795) Kant dismissed the fathers of international law — Grotius, Pufendorf and Vattel — as *leidige Tröster*, miserable comforters (Kant, 1991b: 103). Why would Kant wish to attack their attempt to humanize the relations between nations at war and to construct what Pufendorf called 'universal jurisprudence'? Surely Kant did not quite mean what he was saying…

But Kant's critique of early modern natural and international law resonates with themes in today's world. For Kant, unlike for Pufendorf, law is not yet

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another vocabulary of governmental skill. It is a project, or better, the object of a *political* project to bring about what Kant — perhaps somewhat obscurely — called the 'Kingdom of Ends'. True, there is an instrumental aspect in law, as there is in economics or in technologies of security. But unlike those other disciplines, law is not *only or even predominantly* instrumental. Instead, it is a surface over which we carry out our projects and assess and criticize those of others. It is the platform over which, Kant would say, we make reality of our freedom.[24] For Pufendorf, the relevant legal relation was always between the sovereign and the subject; for Kant it is between citizens.

Here is Pufendorf (1991: 139–40), writing in 1673, about the purpose of the state and the law of the state:

> The over-riding purpose of states is that, by mutual cooperation and assistance, men may be safe from the losses and injuries which they may and do inflict on each other. To obtain from those with whom we are united in one society, it is not enough that we make agreement with each other not to inflict injuries on each other, nor even that the bare will of a superior be made known to citizens; fear of punishment is needed and the capacity to inflict it immediately. To achieve its purpose, the penalty must be nicely judged, so that it clearly costs more to break the law than to observe it; the severity of the penalty must outweigh the pleasure or profit won or expected from wrongdoing. For men cannot help choosing the lesser of two evils.

Everything about this language was objectionable to Kant: the reduction of states into mechanisms for avoiding 'losses and injuries'; the view of obedience to law based on a calculation of costs and benefits; and the image of human beings as passive slaves to their pleasures. Kant seems to be saying that natural law offered security and well-being at too high a price, human freedom. This, I think, applies to the new language of legitimate governance as well.

The gist of the managerial critique of international law is that it is unable to bring about security and happiness in the conditions of globalization. A new language is needed that will translate the interest in happiness and security into globally effective policies. But if that vocabulary aims directly at security and happiness, then it must be less than universal, and hopelessly speculative. What access do we have to the fears and hopes of others? And more importantly: what guarantee have we got that it would not be precisely the happiness of some that is the cause of the insecurity or the unhappiness of others? Or vice-versa? Is humanitarian intervention allowed under the UN Charter? Well, yes and no, the lawyer would respond. The Charter speaks both of peace and human rights. Beyond that, there is only speculation about what should be a useful, good, way to apply it. Not that this question could not be decided. Of course it can. But it cannot be decided by the vocabularies of peace or human rights themselves *without assuming that we*

have already made a choice. The same goes for all the other new vocabularies: trade and environment, security and rights, and so on. If the conflicts of the world are articulated in terms of a clash of functional languages, then those languages cannot be used to solve those conflicts — that is, they cannot be so used without at the same time doing away with what Kant thought of in terms of human freedom.

Like the late 17th century, the present moment is one of clashing vocabularies — trade against human rights, technology against environment, security against liberty, governance against diplomacy.[25] The managerial intuition would go for 'balancing'. But what items would go into the 'balance'? How would they be measured? Would future benefits count the same as present — and what about the benefits of those who are absent? This is the world of regimes not of law but of truths, each computing compliance in accordance with its special logic, outside political contestation: the hubris of instrumental knowledge. In the end, which language will prevail is simply a question of power: which experts think they can get away with it?

So understood, the clash of instrumental languages under globalization repeats the clash of sovereignties in traditional diplomacy. As political realists from Moses Mendelssohn (Kant's target) and Hans Morgenthau (1946) to Robert Kagan (2003) have seen it, the world is pure immanence — the eternal recurrence of the same: struggle for power. From Thucydides to Rumsfeld, nothing has changed. The iron cage of human nature: rulers change, but the character of rule does not.

Against this, Kant puts the famous condition of right. It is a condition of indeterminacy. As Kant (1991a: 140–1) insists, rules do not spell out the conditions of their application. Judgement is needed. It is this fact that is so difficult for natural lawyers to come to terms with — indeed, against which that vocabulary once was conceived. Judgement is replaced by the fiction that the technical vocabularies are controlling — a fiction intended to ensure that the novel vocabularies will hold the Prince's ear. This was precisely the target of the critique of pure reason. The point of Kant's attack on rationalist utopia (the Leibnitz-Wolff school) and the apology of empirical civil philosophy (Pufendorf, Vattel) was to privilege practical over theoretical reason, judgement over instrumental calculation. When truth vocabularies run out, one judges only particulars. Let me finish by looking at what this might mean.

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In the Appendix to 'Perpetual Peace', Kant makes a distinction between the 'political moralist' and the 'moral politician' (for this link, see Tosel, 1990: 19–21). The former, he writes 'makes the principles subordinate to the end' (Kant, 1991b: 118–21). The political moralist is the manager of functional

systems, speaking in the instrumental idiom. But because these idioms are indeterminate and they conflict with each other, recourse to them turns out to be, in Kantian language, *Schwärmerei.* Choices have to be made, judgement has to be exercised. But the use of the instrumentalist vocabulary hides this, turning political judgement into an exercise of technical skill. As a result, nobody seems to rule. While power remains, responsibility disappears. This is the 'realism' of what Foucault called 'governmentality', the exercise of power by technical discourses that appear justified owing to their ability to bring about the security and welfare of the population. In Kantian language, again, this is to put 'man into the same class as other living machines which only need to realise consciously that they are not free beings for them to become in their own eyes the most wretched of all earthly creatures' (Kant, 1991b: 123).

Kant did not think that the fidelity to law meant fidelity to any particular substance but irrespective of such substance. Everything was left up to the judgement of the law-applier. Yet he proposed no legal hermeneutics, no model vocabulary in which the judgement should be voiced. Kant has nothing to say about technical lawyers — apart from dismissing some of them as 'miserable comforters'. But he has much to say about the 'moral politicians' whose task it would be to employ language so as to respect the ideal of the 'Kingdom of Ends', translated into practical politics as a scheme of Perpetual Peace. Law is the language that holds both of these as standards of individual judgement and political contestation.[26]

Judgement is located in the institutional act of applying the law in one way rather than another, choosing one among many alternative meanings offered by the available vocabulary. Kant has this moment in mind when he endorses the mindset of the moral politician, conscious that the right judgement cannot be derived from instrumental reason and who, in judging, aims to act as a 'genuine republican', encompassing the perspective of the whole.[27] As is well known, Kant's political theory is complemented by his analysis of the faculty of imagination operative in aesthetic judgement (Kant, 2000).[28] The nature of the aesthetic judgement — neither rational subsumption under a rule, nor fully subjective expression of emotion — captures also the plight of the moral politician as the law-applier, approaching a particular situation in a way which, though undetermined by any rule, still claims general assent — the difference between saying 'this is good' and 'this is valid law', the distance between nature and freedom, a closed particular and a horizon of universality.

Liberal jurisprudence has tried to articulate the rules for the use of that imagination in a series of hermeneutic techniques. Yet Kant suggests something different — to expand towards universality, one must penetrate deeper into subjectivity, law not in opposition to, but as a crystallization of, personal

virtue. This suggestion cannot be detached from Enlightenment notions such as *Bildung* and the public sphere, the vocabulary of law as also the language of self-improvement, spiritual maturity and all the virtues of the 'inner morality of law': honesty, fairness, concern for others, avoidance of deceit, injury and coercion.[29] If the lawyer persists in using words such as the 'perfect civil constitution', 'perpetual peace' — or indeed the UN Charter — it is not because they constitute a positive programme, even less a set of ideal institutions, but because they invoke a shared standard of criticism.[30] The legal judgement may of course go wrong. Kant's view of the imaginative ability of lawyers was not too flattering (Kant, 1991b: 140–1).[31] But this does nothing to undermine the *cultural* and *political* significance of law as a language about what standards of criticism a community ought to have, and then using them.

But legal vocabularies do not just frame the professional world of lawyers. They inform political struggles. International law has increasingly begun to appear in slogans and public speeches as that which is not yet another technique of global governance. Look at recent debates about the Iraqi war, or on torture, or on trade and environment. International lawyers are not expected to engage in hair-splitting technical analyses. Instead, they are called upon to soothe anxious souls, to give voice to frustration and anger. The vocabularies of moral pathos or religion find limited audiences. Institutional politics connotes party rule. For such reasons, I think, international law has suddenly become almost the only public vocabulary connected with a horizon of transcendence, the expression of a kind of secular faith. When transnational companies wreak havoc on the environment, powerful states engage in imperial wars or globalization dislocates communities I often hear an appeal to international law. Astonishingly — and somewhat embarrassingly — philosophers such as Jürgen Habermas and Jacques Derrida or globalization critics such as Joseph Stiglitz appeal to international law. Not for this or that rule or institution but as a place-holder for the languages of goodness and justice, solidarity and responsibility. I think this is Kant's cosmopolitan project rightly understood: not an end-state or party programme but the methodological use of critical reason that measures today's state of affairs from the perspective of an ideal of universality that cannot itself be reformulated into an institution, a technique of rule, without destroying it. It is a project of freedom in at least two senses. First it holds political judgement open to different, even opposing, alternatives, highlighting the (legal) accountability of the one who makes the judgement. Second, its concept of legal expertise is not that of instrumental skill but a mindset — a 'constitutional mindset' — that is constantly measuring any judgement or institutional alternative against the ideal of universality embedded in the very idea of rule by law (instead of by expert decision).[32] Kant's abstract

universality may no longer seem an attractive way to think about the world's varied cultural vocabularies. Nothing, however, has undermined the need for translating between them, and learning through such translation. This is never simply about functional needs of collaboration between vocabularies but — in true translation — about, to put it perhaps contentiously, the meaning of life.

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Words are politics, and vocabularies are manifestos. In the late 17th century, the poetry of sovereignty joined the grammar of secular statehood to produce a new type of authoritative speech and a class of competent speakers. The language of natural law possessed a reality effect against which the old idioms of love and piety appeared as nostalgia, or cynicism or both. Kant was a good reader of the new poetry, but he was not enthusiastic about the pretence that reality itself spoke in it. He wanted to celebrate the creative voice instead of the Saxon romance that Pufendorf delivered by it. It was not enough to sound *true*. One would also need to sound *right*. This was more ambitious, of course, and it was perhaps impossible to express it directly as a blueprint, or architecture. This, I think, is why Kant wrote 'Perpetual Peace' as an ironic commentary on the sign of a Dutch innkeeper. The double meaning of Perpetual Peace was employed to acknowledge that one is writing — as present-day theorists would have it — under erasure.

The best argument for international law is like that. It speaks neither of empirical nor analytical truths. It signals commitment to work in a setting of competing vocabularies with full knowledge of their indeterminacy and a sense of accountability for the choices one makes. And it sets up a standard of universality and peace — a standard felt always as a lack in present institutions but still irreducible to a project of institutional reform. Kant was not a poet; far from it. But a delightful passage in the *Metaphysics of Morals* expresses this objective well:

> So the question is no longer whether perpetual peace is something real or a fiction, and whether we are not deceiving ourselves in our theoretical judgment when we assume that it is real. Instead, we must act as if it is something real, though perhaps it is not; we must work for establishing perpetual peace and the kind of constitution that seems to us most conducive to it … And even if the complete realization of this objective always remains a pious wish, we still are not deceiving ourselves in adopting the maxim of working incessantly towards it. For this is our duty, and to admit that the moral law within us is deceptive would call forth in us the wish, which arouses our abhorrence, rather than to be rid of all reason and to regard ourselves as thrown by one's principles into the same mechanism of nature as all the other species of animals. (Kant, 1996: 123)

Notes

1. The number of inhabitants in Germany declined from 15–16 million in 1620 to 10 million in 1650 (Vierhaus, 1988: 3). It took until the 1720s for the population levels to reach pre-war status (p. 14).
2. The importance of this background for the understanding of Pufendorf's project is highlighted in Seidler (1990: 3–12).
3. For the variety of political vocabularies in 16th-century Germany, with influence extending into the formation of public law in the 17th, see Stolleis (1988: 88–125). For the situation at German universities, see Meier (1966: 59–116; see also Tuck, 1993).
4. This is not to say that Pufendorf would not in many ways have continued older traditions of political thought. See Goyard-Fabre (1994: 43–4). The point about his modernity focuses on the technique whereby he was able to explain the origin and functioning of society from principles immanent in society itself.
5. Pufendorf did not (unlike Hobbes) think that human affairs were governed by the *same* laws as the natural world. The opening section of *On the Law of Nations* creates alongside the world of natural entities that of 'moral entities' — a distinction foreshadowing that between natural and human sciences, creating space for 'freedom' in the latter. Nevertheless, Pufendorf's 'resolutive-composite' method provided for 'certainty' in moral science at the price of often collapsing that space into 'sovereignty'.
6. On these two tasks, see further Simon (2004: 218).
7. Although, as he says, some of these precepts are so plain that we can easily mistake them for being innate, Pufendorf (1991: 37).
8. Pufendorf (1990: 109; see also 1934, Bk II, Ch II: 154–78) and commentary in Goyard-Fabre (1994: 63–88).
9. The definition of supreme authority (sovereignty) in terms of not being bound by one's own commands comes from Roman law and was expressed in a modern form in Jean Bodin's *Six livres de la republique*. This provides for absolutist rule but a kind of 'constitutional' absolutism, the King ruling in the interests of the people. See further Hinsley (1988: 111–16).
10. For on overview of the debate, see e.g. Hochstrasser (2000: 79–83).
11. The entry 'The Law of Nature', in *La Grande encyclopaedie raisonné...*; http://diderot.alembert.free.fr.
12. As Hunter (2001: 150) states, *De jure naturae* 'functions as a clearing-house for the other civil sciences — Lipsian political philosophy, Helmstedt political Aristotelianism, Hobbesian anti-clericalism, Bodinian sovereignty theory, positive Staasrecht.'
13. Behind a few generalities about *ubi societas, ibi jus*, most international lawyers have persisted in speaking in formal terms about treaties, customary laws and

general principles law — the three legal sources referred to as applicable positive law in Article 38 (1) of the Statute of the International Court of Justice.

14. See McDougal (1953: 133–259) and Stone (1954: 37–49), with many further references to calls for sociological studies in international law.
15. I have also discussed this in Koskenniemi (2007c: 1–30).
16. I have discussed the difficulties of universal rules in Koskenniemi (2005: 61). The best legal theory account of the problems with rules is Schauer (1991).
17. The best discussion of this is Fischer-Lescano and Teubner (2006); see also Koskenniemi (2006).
18. I have argued this at much greater length in e.g. Koskenniemi (2004: 197–218) as well as in Koskenniemi (2007b: 1–18).
19. The literature on global governance is too wide to be reflected here. Nevertheless, it might be useful to note that lawyers have sometimes reacted to this change of vocabulary, for example, by re-imagining governance in terms of an international administrative law, see Kingsbury et al. (2005: 1–377).
20. A study on informal norms in the international system in 2000 received the title 'commitment and compliance' — the functional equivalents to 'law' and 'responsibility', see Shelton (2000a).
21. The following text is in part from Koskenniemi (2003: 349–74).
22. Note the difference between the political philosophy question about 'moral obligation' and the empirical question about the 'sense' of moral obligation.
23. This parallel is further discussed in Koskenniemi (2007c: 25–7).
24. For a discussion of the instrumental and intrinsic aspects of freedom in Kant's work, see Guyer (2000: 96–125).
25. International lawyers address this in terms of the fragmentation of international law. See Koskenniemi (2006).
26. The view of Kant as seeking internal moral regeneration and thus prolonging the tradition of school metaphysics against the externally oriented civil philosophy of Pufendorf and Thomaisus is interestingly, though perhaps one-sidedly (there are practically no references to Kant's openly political writings), discussed in Hunter (2001: 274–376).
27. See the Appendix to Kant (1991b: 116–25, especially 122).
28. For the suggestion that the Third Critique forms the core of Kant's political theory, see especially Arendt (1982). But see also Renaut (1997: 405–15).
29. For an alternative formulation of this 'inner morality' see famously Fuller (1964) and e.g. Schneewind (1992: 320–1) and O'Neill (2000: 65–79).
30. On this, see especially Goyard-Fabre (2004: 68–70, 79–84).
31. The exercise of judgement, Kant notes, requires 'mother wit' for which there are no rules and 'the want of which no schooling can compensate'. Although Kant here says in a footnote (n1, p. 140), that '[d]eficiency in judgment is properly that which is called stupidity', in later writings, especially in the Third Critique, his assessment is less harsh.
32. I have discussed this also in Koskenniemi (2007a: 9–36).

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