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Through the mist of international court jurisprudence and mandatory resolutions of the Security Council, the spirit of Vattel continues to express the reality of the Renaissance state.

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British and French) was to destroy the legitimacy of the UN. A Declaration on Joint Defence was signed between Bosnia-Herzegovina and Croatia which appealed to the right of self-defence, given the failure of the UN. Turkey declared its support for Bosnia-Herzegovina's right of self-defence with arms, as did the Organization of Islamic States (Weller, 1996: 156-7). Finally, the American initiative to bring about the Dayton Agreements left the implementation of the already mentioned UN Security Council mandates entirely in the hands of NATO to the exclusion of the UN (Weller, 1996: 165).

The conclusion of this incident is, according to Weller, that where a state's territory was to be protected and its population guarded against gross violations of humanitarian law, international organizations and states overwhelmingly rejected the challenge. He points out, with particular reference to the operation of UNPROFOR, that some of the states contributing (including especially the United Kingdom), actively undermined the UN Security Council mandate by claiming that the use of force would constitute intervention in a civil war. This led to the formal refusal of a large number of states to play regard to the UN's decision to impose an arms embargo. These states were mainly Islamic but supposedly they also included the USA as well, albeit in secret (Weller, 1996: 169-75).

Once again the euphemistic legal language of a decentralized international legal community is a cover for the absence of any international solidarity which would protect a state violated in its rights even to the point of threatening its very existence, wherever other states simply do not consider it to be in their interest, that is to say necessary for their own security, to defend the victim state. In this sense Bartelson's epistemology of the meaning of state sovereignty in terms of security and interest remains valid. The concept of legal sovereignty remains in place as a mechanism whereby states can invoke the language of interest and security under a cloak of legality, by offering to put their choice in terms of a legal interpretation of their rights.

UN, coming from rump Yugoslavia and for this reason the Security Council imposed economic sanctions on the latter. The council also reiterated the principle that boundaries could not be changed through the use of force (Weller, 1996: 80). At the same time the Security Council insisted upon maintaining as a matter of legal obligations for members of the UN, an arms embargo on all the parties to the conflict in the state under attack. The council decided that a previous embargo against the former Yugoslavia should also apply to the individual republics upon independence. A very large number of states argued that in the absence of effective international action to safeguard the rights of Bosnia-Herzegovina, her right of self-defence had to be supported rather than restricted (Weller, 1996: 88).

The Security Council formally accorded to states acting on its behalf - the UN forces composed of national armies under a joint command answerable to the UN Secretary General - the authority to take the necessary measures to facilitate the delivery of humanitarian assistance in co-ordination with the UN (Weller, 1996: 97). Furthermore, the same bodies were authorized to take all necessary measures to act in defence of so-called safe areas, where these were the subject of bombardment or incursion (Weller, 1996: 107-8). In practice, the UN forces are well known to have consistently taken the view that they should not take sides in the conflict between the warring parties in Bosnia-Herzegovina. There was always an emphasis upon the agreement of the parties and no special status was accorded to the government of the country (Weller, 1996: 124-39). With respect to Srebrenica, an official British Operations document - a British general was then in command of the UN Protection Force (UNPROFOR) - stated that "a formula needs to be found to reconcile the belligerent parties' values with the UN's and the world community's interests" (Weller, 1996: 144).

The outcome of such conduct by the UN, its Secretary General and the military forces and commanders in Bosnia-Herzegovina (primarily

survival of peoples which is at stake.

We live in a decentralized world order, in which some states are known to possess nuclear weapons but choose to remain outside of the non-proliferation treaty system; while other such non-parties have declared their intention to obtain nuclear weapons; and yet other States are believed clandestinely to possess, or to be working shortly to possess nuclear weapons.... It is not clear to me that either a pronouncement of illegality in all circumstances of the use of nuclear weapons or the answers formulated by the Court best serve to protect mankind against the unimaginable suffering which we all fear (Court, 1996: 938).

Higgins has exposed the real weakness of the so-called decentralized international legal order - that states depend, to varying degrees, for their security on a doctrine of nuclear deterrence. This is only a consequence of their legal right to make a subjective assessment that their security is threatened. It is then a certainty that they will decide for themselves how to defend themselves. In the face of these contradictory realities, the judicial imagination has, notwithstanding Kelsen's hopes, proved impotent.

Peace-keeping and peace-enforcement in Bosnia-Herzegovina, and the UN

From the immensely complex crisis in Bosnia-Herzegovina, it is only intended to highlight a small number of elements relevant to Kelsen's expectations concerning the minimum conditions for an international legal order. Where these conditions are not met, it is only to be expected that states will not conform to international law.

The Security Council identified early in 1992 that there had been aggression against the state of Bosnia-Herzegovina, a member of the

international law. The court concluded by a majority of one (seven to seven and the casting vote of the president) that while the threat or use of nuclear weapons would be generally contrary to the rules of international humanitarian law, in the view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake (Court, 1996: 80).

In her dissenting opinion the British judge, Higgins, points out that what the court did is to declare a non-liquet, that there is no legal answer to the question put. The court has not restricted itself to the inadequacy of the facts and arguments concerning the effects of particular nuclear weapons. The reference to the current state of international law is a clear statement that there is no legal answer. Higgins objects that there are general principles of international law relating to self-defence and humanitarian behaviour which could have been used by the court to develop an answer. She says: "It is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations". Perhaps the judges are concerned about the contradiction between the practice of states relying upon a doctrine of nuclear deterrence and the existing rules of humanitarian law which exclude indiscriminate and mass destruction. In that case, "the judge's role is precisely to decide which of two or more competing norms is applicable in the particular circumstances" (Court, 1996: 937).

Higgins herself located the international problem presented by the existence of nuclear weapons precisely in terms of the continuance of unrestrained state sovereignty. To resolve tensions between competing norms, it is necessary always to bear in mind that it is the physical

should we be able to say that minimum conditions for an international legal order can exist where states act as if they are organs of the international community when they defend their rights? Kelsen recognized that it was the minimum condition for the existence of a legal order that it could characterize acts of violence either as illegal or as sanctions against illegal behaviour. International law does not have an objective way, independent of states themselves, of distinguishing between delicts (wrongful use of force in violation of existing legal rights) and sanctions. Kelsen would like to say that we have to suppose that each state decides for itself whether it has been injured and whether the injuring state should incur sanctions. Yet recently a major logical defect of Kelsen's system has been highlighted.

In setting out the logical conditions for a legal order, nothing has been said about the reasons which a state has to give for considering itself injured. The feeble level of explication required of an individual state means that it is impossible for an observing third state to distinguish the "delinquent" from the "santioner". This is because it is not possible to follow a rule on one's own. The idea of a rule relies on a common explication of the existence and content of the rule. But we do not have the adjudicative process which could guarantee this. Therefore even from Kelsen's perspective, the minimum conditions for an international legal order do not exist (Pfersmann, 1993: 788-9).

In other words, we have the radical subjectivization of international law which Jouannet admits does come with Vattel's concept of sovereignty. The introduction of sovereignty as a legal concept into international law swallows up the legal character of this order. After considering this critique of international law, it remains to illustrate how it is reflected in actual difficulties of recent practice.

The case of nuclear weapons: the failure of the judiciary

The General Assembly of the UN recently asked the International Court for an advisory opinion on the question as to whether the threat or the use of nuclear weapons is in any circumstances permitted under

that there is only a difference in degree and not in nature between the creation and application of law (Tournaye, 1995: 43-4), and that in this way, the structural weakness of international law can be saved through the judiciary.

The second part of Kelsen's argument was that the judgements of such a dynamic court had to be the starting-point for the action of an international executive such as the Security Council. Kelsen himself demonstrates that this is not what we have. Superficially one might argue that the sovereignty of states is effectively limited by law because the UN Charter is a treaty and under this treaty states are bound by decisions of the Security Council. However, the charter does not tie the council in any way either to decisions of the court or even to international law. The former may decide upon the use of force wherever it considers that a situation constitutes a threat to the peace under article 39 of the UN Charter. It can also leave a decision of the court unenforced. Nor is there anything to oblige the council to consider any disputed question of fact in an impartial or quasi-judicial fashion. The charter foresees what might be called a perfect independence of the court and the council, both principal organs of the UN (Tournaye, 1995: 63).

A state is prohibited by article 2/4 of the charter from having recourse to the use of force except when its territory is physically attacked. Thus the state is deprived of any effective mechanism for the adjudication and enforcement of its legal rights wherever it considers that there has been a violation. The outcome is that the UN Charter represents a deterioration in the quality of international law in comparison to the classical law. It excludes the individualized sanction for a violation of law imposed by a state acting on its own, but does not replace it with an effective collective sanction. This means that in terms of the minimum conditions for the existence of law, one cannot assume that international law will function (Tournaye, 1995: 70, 77).

It is to be expected that in practice, therefore, states will not refrain from enforcing their rights individually whenever they consider them violated. Given that there is no compulsory international adjudication,

will provide an answer. Either states use force illegally in contravention of the status quo or they act legally by using force to defend it. However, some mechanism has still to be found to develop and adapt the law in the existing, primitive and decentralized international society. The solution for Kelsen is a system of obligatory jurisdiction which would issue judgements that an executive would be required to implement. This would overcome the obvious fictionality involved in speaking of states which decide to use force to revenge a violation of their rights, as doing anything other than taking the law into their own hands. If a court had to decide whether there had been a violation and could do so in taking a dynamic attitude to the development of the law, the weaknesses of the present system, which favours an easy return to the weaknesses of the present system, which favours an easy return to the language of unlimited sovereignty, could be overcome.

It is crucial to such a theory for the development of international law, that its corpus consists of a complete system of general principles which can be applied effectively by a judiciary to concrete situations. Hence the court will not have to say that, with respect to the issue being adjudicated, states have not consented to the development of rules which limit their sovereignty in a particular matter, with the consequence that the court has to declare that there is no law covering the dispute before it. Such an argument would carry with it the implication that one cannot look to courts to overcome the deficiencies in the corpus of rules of existing international law, so that there is no alternative to states meeting together as a quasi-legislature to formulate rules of general application to limit and guide their conduct. Kelsen does not see such meetings as a real political possibility, which is why he prefers the option of obligatory international adjudication. Hence he insists upon a strong role for the judiciary, arguing that the application of general norm to a concrete case is by its very nature an individualization of the norm. That is to say "the existing rule is a framework of several different rules. By choosing one of them the law applying organ (the judiciary) excludes the others and thus creates, for the concrete case, a new law" (Kelsen, 1957: 18). The conclusion which Kelsen and the profession generally draw from this argument is

international law, a discretion to enforce its right. In this sense war is legally objectivized. War becomes an institution created by the law to put the law into force (Kelsen, 1920/28: 265).

To claim that a state is able, at its discretion, to begin a war, apart from having suffered a legal wrong, would signify the end of the idea of international law. So Kelsen tries to affirm that a state cannot employ the use of force until there has been first a violation of the law. However, the problems of interpretation and application are linked. The lack of an independent instance which can verify objectively whether there has been a violation of law, remains. Yet somehow Kelsen believes that such an objection does not prevent a theoretical construction of war as a coercive act, as a sanction, to enforce international law. He insists upon construing the state which has suffered a legal injury and which responds to it through the use of force, as functioning as an organ of the international legal community. In pursuing this line of argument, Kelsen is determined to replace the traditional concept of sovereignty with a procedural approach to law which ensures that the possibility for initiative for states is clearly regulated (Kelsen, 1920/8: 266).

The underlying motive of this approach to international law remains clear. All law must have a democratic foundation in content. If legal subjects are to be allowed within an admittedly primitive or decentralized system of law to use force, this can only be in terms which are clearly agreed in advance by the legal community. Hence, the approach which Kelsen adopts to determine whether the minimum conditions of a legal order exist has enormous resonance in the profession and can be said to be the only approach which is conceivable. At the same time, the difficulties which this approach causes are becoming clear to international lawyers in the light of the two case studies to be offered here - the UN crisis in Bosnia and the Advisory Opinion of the International Court of Justice on Nuclear Weapons.

Kelsen is able to see that a simple prohibition on the use of force is not enough to settle a conflict when states may go to war. Logically it

that treaties are binding, as are rules of general customary law, because there is a basic norm, derived from the idea of a *civitas maxima*, that confers legal validity upon the exercise of state consent which finds expression in such treaties and customs (Kelsen, 1920/28: 61).

Enforcement, war and international law

The problem is not simply the creation of rules of law, but their interpretation and their enforcement. Kelsen and Jouannet appreciate that there are problems with the very idea of a legal order where there are no institutions for the interpretation of the law independent of the states themselves, and equally no mechanisms for the enforcement of legal obligations apart from the states. Kelsen embarks upon two important further arguments, concerning the place of war in the international legal order and the place of the judiciary in the interpretation and in the creation of legal norms. The intention, at this stage, is to explain critically how Kelsen as a representative international lawyer develops his ideas. The final section of the chapter will consider two contemporary international issues which illustrate how the international legal community is not in a position to give expression to Kelsen's legal ideals.

War is a common fact of international life. If international law is to have credibility as a legal order, in Kelsen's view, it must integrate this fact into its interpretative framework. If war is to be evaluated from a juridical perspective, it can only be as a sanction that international law furnishes for the enforcement of law against violators of the law. Traditional doctrine viewed war as permissible. States could wage wars as an instrument of national policy, quite simply to seize territory and resources from other states. Anxious to eliminate such a traditional concept of sovereignty, Kelsen claims that war is regulated by international law (Kelsen, 1920/28: 264). By this Kelsen means that only where a state has suffered an aggression - a violation of its rights - has it a discretionary power to react under

The difficulty (as Kelsen was aware) remained that power structures of international society did not automatically conform to his ideal construction for the future. Every legal system must be able to say which are its subjects - those who are literally subject to it. A basic question is whether states are dependent upon an international order for their existence or whether they create themselves out of their own forces. Kelsen's response has the appearance of a play on words which is left to plague the whole structure of contemporary international law. The only way to answer the question is to suppose the existence of a legal norm which accepts the legal character of any entity which establishes itself successfully (Kelsen, 1920/28: 230-231, 39-41).

Kelsen insists that the objectivity of a legal order in the sense of its validity, has to be independent of acceptance by its subjects, just as the rule of law at a national level cannot depend upon its subjects. This leads him openly into the construction of a *civitas maxima*, a universal international law which stands over against the rules which states have consented to, and which grounds their validity. This is the same *civitas maxima* which Wolff constructed and which Vattel rejected as nonexistent.. It recognizes that the idea of law attaches to the notion of the constitutional state as such, so that the only international legal framework which can adequately encompass the modern state has to be a world constitutional state. This, in the age of modernity, is the only construct which can be a substitute for the medieval notions of a continuing Roman empire with its tradition of legal naturalism, of a *ius gentium*. Kelsen is not at all committed to claiming that such an order exists, but it is the only conceivable juridical pathway to overcome the absolutist, monarchist Machiavellian state at the international level (Kelsen, 1920/28: 239-41; 249-52, 274).

Once this legal ideal is set, the task is to reinterpret the foundations of international law accordingly and to overcome the obvious deficiencies of existing, positive international law, that is merely the legal rules to which states have consented, exposed as they are to the dangers of voluntarism. The first stage is easy. One may simply say

to be overcome. To argue that state power could look to itself rather than to a constitutional title for its competence to act is to hark back to the spirit of absolutism (Kelsen, 1928: 137). The notion that physical power as such could legitimize an action is to leave the way open to the idea of *raison d'état* in the sense in which a Renaissance disciple of Machiavelli would have understood this: as the capacity of the prince to put his concept of the public safety of the state above all considerations of law and morality. Kelsen's aim is to construct a barrier between modern constitutionalism, democracy guaranteed by positive law, and the historical origin of European states, which was in absolute monarchies (Kelsen, 198: 138-9). It is the latter who actually consolidated the power which constitutionalism is now supposed to democratize. Kelsen is a theorist of international law who recognizes that there is a danger implicit in the classical notion of the state, whereby sovereignty does create a threat for the obligatory character of international law.

A neo-Kantian epistemological perspective is an essential part of Kelsen's critique of the traditional legal thinking about the state. Power, and hence state power, as an empirical concept, has no legal significance. The notion of command has legal meaning or significance only in terms of a normative order which attributes roles: who may command and who must obey (Kelsen, 198: 82-3). In international terms, this implies a break with Vattel who took the independence and equality of states as a natural fact. As Jouannet (1993) has said, it was possible to deduce the basic rules of law from the nature of the state. For Kelsen, the coexistence of states is only legally conceivable on the basis of the existence of an exhaustive association which determines the limits of the validity of competences rather than powers which are attributed to states. Such a legal framework puts states on the same juridical plan as their own provinces and communities in their own federal law (Kelsen, 1928: 86). That is to say, on a par with constitutional-administrative law, the state should be considered not as the highest instance, but as a relatively high instance, in a scale of juridical instances - hence the metaphor of ladder, or *Lehre vom Stufenbau*.

of the international community which is the problem, but the legitimacy of the use of force which accompanies it (Jouannet, 1993: 477-8).

The first World War greatly disturbed the confidence of international lawyers in the viability of a legal order which left appreciation of violations of rights and methods of vindicating them entirely within the discretion of sovereign states. The response which is intended to highlight, as a reaction to this, comes from within it is intended to political tradition as Vattel's - democratic constitutionalism. In the first instance, it does not have to be read as a statement that international organization exists, but rather as a statement of what legal democratic theory would require at the international legal level. The fundamental epistemological condition is that law depends upon what the people express through their constitutional organs, that is through the state. At present, international lawyers are left troubled by the in-between character of an incomplete international institutional order, wherein state sovereignty keeps seeping through.

After 1918 Europeans wished to conceive of the rule of law as being capable of defining the spheres of competence of the state. In Austria the *Lehre vom Stufenbau* (legal ladder steps) approach conceived of an ideal legal structure in terms of state responsibility. Just as order within the state depended upon the capacity to determine the competences of specific state organs constitutionally, so international order depended upon the existence of an international constitution which could determine the competences of the state in international relations. State responsibility was tied to the notion of executive responsibility towards a parliamentary regime, and to reproduce this regime internationally, it was necessary to give priority to international over national law by creating international institutions which could place effective limits on the legal competences of states. Such institutions could function as parliaments supervising states (Stoitzner, 1986: 76).

The chief exponent of the ideal of an international constitutional order was Kelsen. He appreciated the historical perspective which had

Jouannet admits that Vattel keeps the principle of the subjective appreciation of each state in the application of the law (p. 472) but considers unjust to make him responsible for the increasing voluntarism of international law. Voluntarism means that the whole of international law depends upon the continuing consent of states. They can, at any time, cease to accept that a rule binds them and even cease to recognize other states as subjects of the law. Vattel is not responsible for such a view. He merely introduces the logic of Hobbesian and Lockean individualism into international law, in terms of the liberty and sovereignty of states as the foundation of international law (Jouannet, 1993: 475). A doctrine of the autonomy of states is not a doctrine of absolute or unlimited external sovereignty, but neither does it involve submission to a superior juridical order.

The root of the confusion, in Jouannet's view, is to have made a too rapid combination of the question of the application of international law with the decentralized structure of the community of states. There is no compulsory international adjudication. States have to interpret for themselves the extent of their rights. She says that the question of the subjective appreciation of the law is not an aspect or logical consequence of voluntarism in international law, a doctrine that all law is a product of state will, but arises from the way in which the law is applied within a decentralized international legal order. Because international law is interpreted opportunistically, it functions in practice as a series of reciprocal and bilateral interpretations given to it by states.

Vattel simply marks a reflection of a change at an international level which had been occurring generally in legal culture - a movement towards individualization and subjectivization of law, combined with a realist vision of international relations where states have a mission to act to assure their security and preserve their interests. It is not Vattel who introduces this subjectivity into international law. It is simply an unavoidable fact of international law in the absence of any suprastate power. So, in the beginning and middle of the twentieth century, it is not this subjectivist decentralized appreciation inherent in the structure

entity) may be regarded as a moral person, since it has an understanding, a will and a power peculiar to itself. It is therefore obliged to live with other societies or states according to the laws of the natural society of the human race. The difficulty remains, highlighted by Bartelson, that this universal morality is not immediately binding upon the external conduct of states. He quotes Vattel: "each has the right to decide in its conscience what it must do to fulfil its duties; a perfect equality of rights among Nations". Bartelson follows up the contradiction. Without sovereignty, the state cannot be understood as a moral person, but without a wider sense of universal values, this person cannot be sovereign (Bartelson, 1995: 194-5).

The international legal order

Jouannet sees no difficulty in the Vattelian sovereign being integrated into an international legal order. The lack of difficulty is hardly surprising because this new legal order is made by states specifically for their relations with one another (Jouannet, 1993: 447). It is because states have no rights over one another that they have need of a law which recognizes that they are independent and equal (p. 448). Jouannet appears to see the entire exercise as a taxonomy of what relates or properly belongs to the rights and duties of nations rather than individuals. The idea that here should be rules specifically designed for the character of sovereign states can hardly pose problems of a legally binding character (p. 451). The aim of this taxonomic exercise is to register a break with the Roman and medieval tradition of law. Now the nation can govern itself without dependence upon what is foreign to it (pp. 454-8). The constant theme of this argument is the corporate character of the sovereign. Because sovereign nations deal only directly with one another, they can only see one another as societies of "men" of whom all the interests are held which rules them, but a law of nations derived from human nature which rules them, but a law derived from the particular nature of the state (pp. 458-9).

presupposes a subject, and this subject, for international relations, is the Hobbesian sovereign who is not named but names, not observed but observes, a mystery of whom everything must be transparent. The problem of knowledge is that of security, which is attained through rational control and analysis. Self-understanding is limited to an analysis of the extent of power of the sovereign, measured geopolitically. Other sovereigns are not unknown "others" in the anthropological sense, but simply "enemies" - opponents with conflicting interests whose behaviour can and should be calculated.

The purpose of knowledge is now not to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information with which to buttress the sovereign state whose security rests precisely upon the success with which it has displaced disorder from within its boundaries onto the international plane. Mutual recognition by sovereigns does not rest upon an awareness of sameness, of common cultural roots implying a common identity. Instead a plurality of sovereigns implies an analytical recognition of factual, territorial separation, combined with a mutual accord of reputation which, so long as it lasts, serves to guarantee some measure of security.

The primary definition of state interest is not a search for resemblances, affinities of religion or dynastic family. Instead, it is a matter of knowing how to conduct one's own affairs, while hindering those of others. Interest is a concept resting upon detachment and separation. Society is composed of a collection of primary, unknowable, self-defining subjects, whose powers of detached, analytical, empirical observation take absolute precedence over any place for knowledge based on passion or empathy, whether oriented towards sameness or difference (Bartelson, 1995: 137-85). Bartelson also recognizes that it is Vattel who first tries to harness the concept of sovereignty in the modern system with a very elemental doctrine of the Law of Nature. According to Vattel's work *le Droit des gens* (1758), the fact that humankind is divided into separate states does not overrule universal duty. Each nation (the equivalent for state as a corporate

legal figures continue some version of the medieval method. The main figures are Grotius himself and those who Jouannet describes as his disciples, Rachel, Zouche, Textor and Bynkershoek ((Jouannet, 1993: 141-7). The reason why international law did not become an autonomous discipline in its modern recognizable form is rather surprising. Jouannet notes how none of these jurists conceived of the state or nation, words used interchangeably, as a corporate entity distinct from the person of the government or the prince. The elements which would make up the modern state in international law, that is government, territory and a population in a patrimonial sense. Such a personalized concept of authority directs attention to individuals and favours the retention of the medieval idea of a common law of human beings applied to the leaders of nations. Grotian style erudition prevails into the eighteenth century to regulate the affairs of princes, not only in their relations with one another, but also in their domestic and even private affairs.

It is with the Vattelien popularization of Christian Wolff that one arrives at the modern conception of international law where sovereignty as a legal concept comes to play a central part. It relies on the notion of the corporate character of the state. As a legal entity, it has to be separate from both government and governed. It is the state and not the government or prince which is subject to international law. It is and can be subject to international law only if it is sovereign, that is, equally independent of all other states (Jouannet, 1993: 354-88, especially 384 onwards). Jouannet emphasizes that it is essential to the idea of the corporate character of the state that there should be no relations of individuals, for the purpose of international law, are absorbed into the corporate identity of the state, which then has legal relations with other states.. In this way it is the sovereign equality of independent states which defines the object and scope of the rules of international law.

The modern state, according to Bartelson, becomes the subject of Descartes' distinction between the immaterial subject and the material reality which it observes, classifies and analyses. Knowledge

territorial title. There had been a sacrifice of political legitimacy at the end of the Middle Ages based on the consent of the population in favour of overwhelming executive power to ensure internal public safety as a matter of constitutional theory. This was understandable in the context of the desire to prevent the repetition of bloody civil wars. However, as a consequence, order was conceived by lawyers in purely internal not international terms (Willoweit, 1975: 306-7; 349-50).

The first attempts of international lawyers to confront this break-up of the European medieval world did not treat the concept of state sovereignty as the central problem in the construction of a new international legal order. Instead, they attempted to retain some version of a medieval scholastic and classical Roman natural law of people in the sense of *lex gentium*. There seems to be agreement between historians of political theory and historians of international law on this matter. In particular, Bartelson, falling within the former category, stresses that the lawyer did not approach international conflict in the sixteenth century in terms of state sovereignty:

the over-arching legal problem is not how to solve a disagreement between competing sovereigns over the foundation of a legal order, but how to relate concentric circles of resemblant laws, ranging from divine law down to natural and positive law. In his effort to work out a coherent relationship between them, Vitoria (the Spanish theologian) relies on a lexicon of legal exempla, in which a wide variety of textual authorities are invoked (Bartelson, 1995: 128).

Bartelson provides a very illuminating account of the epistemological foundations of this perspective, a retrospective reflexivity, whereby Renaissance knowledge became - thanks to a neoplatonic revival - a knowledge of resemblance between entities whose unity had been shattered (Bartelson, 1995: 108).

As a historian of international law, Jouannet demonstrates the continuity of the medieval legal method throughout the seventeenth and early eighteenth centuries from Grotius to Vattel. All the major

more radical notion of the supreme power (*potestas suprema*), in effect, in constitutional terms, of an unconstrained executive. This sovereignty made its appearance as a concept in constitutional theory, or in the theory of the state. A fatal development, from the international perspective, was that among public lawyers and political theorists of the state, all interest in justification of the historical legal little to territory which individual states might have, was abandoned. Instead, attention was devoted simply to the capacity of the prince to exercise power over subjects. This had the effect of weakening the international system. If vertical state authority (prince-subjects) depended so completely on power, then horizontal state authority (princes in relation to one another) could only be affected as well. Yet, at the international level, for this power to have sought or found justification would have meant looking to a law of the Holy Roman Empire or of the papacy, as this was the traditional sense given to a higher authority existing above states. The authority of the prince, but only at the national level, was provided with a rationale by political theorists such as Bodin (Willoweit, 1975: 123-6).

Where sovereignty meant separating power from any argument of legitimacy of ruler to ruled, practical lawyers still had to look to some benchmark with which to distinguish the limits of one sovereign authority from another. The concept of frontier came to serve as the means of delimiting the territorial scope of the prince's power (Willoweit, 1975: 275-6). At the same time the concept of territory was defined merely as the area of command of the prince, with a supposedly unquestioning duty of the subject to owe submission to such a prince. However, this territory was only protected by the frontier on a day to day basis in peace time. The frontier was not founded on any international principle of legitimacy. The difficulty was that from the sixteenth century until at least the time of the League of Nations, if not the United Nations Charter itself, the territories of princes of Europe did not have a convincing legal foundation.

As a result, there were ever harsher territorial conflicts, as the notion of the need for princely authority in political theory was not matched by an international / European consensus on the basis of

conclusion of a treaty is an exercise of and not an abandonment of sovereignty (Court, 1923: 25).

For the international lawyer, then, sovereignty equals independence and consists of the bundle of competences which have not already been transferred through the exercise of independent consent to an international legal order. Such a legal order may signify a regional or international organization, or it may mean simply the material rules of international law, such as additional rules regulating the use of force in armed combat. For the lawyer, sovereignty has come to mean simply that the entity to which the label is attributed has become a full subject of international law. A nonsovereign entity, such as a member of a federation, for example Quebec, is an entity to which rules of international law do not directly apply. Such an entity could not act directly upon the international legal order and would need a sovereign entity such as Canada to do so for it. However, Canada could easily exercise its sovereignty by agreeing formally that Quebec should have partial or full sovereign independence.

Such a remarkably logical and lucid legal approach to the problem of sovereignty, which has otherwise mystified political theorists for centuries, is based upon an attempted professionalization of our discipline which simply excludes the political dimension. The purpose of this short study will be to attempt to show how this exercise in closure has been undertaken historically in the last 200 years, stressing, by way of conclusion, that the exercise has been unsuccessful and has merely served to trivialize and marginalize the discipline.

Frontiers, resemblances and corporate entities

In the period of transition from the medieval-feudal system of public authority over land and population to the modern absolutist state in the course of the sixteenth and early seventeenth centuries, the focus of the attention of public lawyers was on the terms of submission of subjects to rulers. The tradition that the central legal concept should be jurisdiction (of a lord over his vassals in his court) gave way to the

SOVEREIGNTY IN INTERNATIONAL LAW: A CONCEPT OF ETERNAL RETRUN

ANTHONY CARTY *

Introduction

The concept of sovereignty does not, as a rule, trouble international lawyers. From a non-lawyer's perspective perhaps the most important absence of argument surrounds the undertaking of international obligations. A state can, in law, agree to any restriction of its sovereignty, in the sense of independence, provided that it has given its free consent to the restriction. There are supposed to be no limits which lawyers will recognize in terms of the vital interests or national security exigencies of states which could be used to impugn a consent once given.

Thus in the standard case cited, *The Wimbledon*, the interwar Permanent Court of International Justice heard a German argument that the Versailles Treaty which it had signed, with the effect of opening the Kiel Canal to international traffic, had to be suspended in the event of a war, so that Germany could apply the law of neutrality to vessels passing through the canal. The court held against Germany: the

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