

## International Law and the Making of the Modern State: Reflections on a Protestant Project

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*This article explores state-making as a project of international law. International law is often understood as the law governing the external relations of states. Yet international law has also been intimately concerned with the project of creating the state as the form in which we moderns are able to declare our independence from the past and express our freedom to shape the future. International lawyers may at times see themselves as the representatives of a civilised conscience or shared sensibility that transcends the state, yet they still rely upon the state as the vehicle through which this universal law is to find expression. To the extent that international law is concerned with that relation between private conscience and public authority, it can be understood as one site in which the Protestant project of the modern state is today being worked through. In that sense, theological debates about the proper form of the state are not 'past' and immutable, but rather represent a normative tradition that modern international law inherits and with which it remains actively engaged.*

### Introduction

The writings of Martin Luther and John Calvin inaugurated a debate about the relation between the liberty of the Christian subject and the lawfulness of civil authority that has not yet ended. In the early modern period, Hobbes sought to resolve the Protestant problematic of freedom and authority, through suggesting that equals in the state of nature could covenant to create a common power. That common power would exist to procure the safety and welfare of the population. The individual was left with the freedom to determine when the conditions of the covenant had been breached. In the eighteenth century, the project of perfecting the state form and so guaranteeing the freedom of the individual was taken up in the political theory of Kant. Kant placed greater emphasis on the voluntary nature of submission to state authority, but in so doing argued for a greater limitation on the freedom of the individual to resist that authority. For Kant, the project of constraining the form of the state was linked with international and cosmopolitan right. Today, that project of perfecting the form of the modern state is at the heart of the theory and practice of internationalism.

### Hobbes, Protestantism and the modern state

The modern state is often represented as the successful realisation of a project of secularism, where secularism is understood in opposition to theology (Goldie, 1987: 200). For some, this is seen to be a good thing – the secular state offers a means for avoiding the conflict produced when people seek to ground authority and law on competing religious confessions or private beliefs. For others, it is precisely this amoral quality of the state that requires the transcendence of state law – whether through bringing into being a new cosmopolitan law that can truly represent the interests of our common humanity, or through the creation of a law that manifests Christian or Islamic faith. Yet for the early advocates of the modern state as a form of political authority, the political and the theological were not so easily separated. The work of Thomas Hobbes is emblematic of the ways in which state theory has involved the juridical working through of secularism as a protestant project.

Before looking at the ways in which Hobbes' *Leviathan* can be understood as a protestant vision of the state, it is perhaps worth noting the ways in which Hobbes did offer a challenge to ecclesiastical authority and jurisdiction. *Leviathan* is an argument for privileging the *de facto* authority of states over the claims to *de jure* authority made by, amongst others, the Catholic church. According to Hobbes, the creation of political order depended upon the establishment of a common power – a commonwealth. The authority of such an earthly power would be grounded on its capacity to guarantee protection to its subjects. In that sense, Hobbes's model opposed the arguments of a medieval jurist like Bartolus, who had sought to show that the Roman emperor was lord of all the

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world as a matter of right, even if the emperor had no control over particular territories as a matter of empirical fact (Fasolt, 2004). Hobbes resisted the idea of a universal jurisdiction in space and time that was the hallmark of ecclesiastical law. In addition, *Leviathan* represented a challenge to the idea that two masters could co-exist within the state – one representing civil and one representing ecclesiastical jurisdiction. Hobbes explicitly opposed the idea that there existed a kind of ‘ghostly authority’ that could undermine the authority of the state. Thus for Hobbes, as for many political theorists writing after Luther and Calvin, the theory of the modern state was a challenge to the claim of the church to represent the fusion of civil and ecclesiastical authority.

However, rather than understand Hobbes as a thinker who inaugurates the jurisdictional *separation* of civil and ecclesiastical authority, he is better understood as giving expression to an egalitarian universalisation of the notion that there can be a worldly representative of Godly authority. Hobbes accepted the argument made by Protestant reformists – that ‘the kingdom of God is not yet come’ in this world and that as a result there is no worldly representative of God in the form of an individual or an institution (Hobbes, 1651: 405). His model of the commonwealth gave expression to that vision. Yet while Hobbes was concerned to develop the idea of the secular commonwealth, secularisation here should be understood as a protestant project. As Mark Goldie argues:

... secularisation was an evangelical pursuit, it was the working out of a central idea in the thought of the Reformers, the “priesthood of all believers”. Where the medieval church hypostatized priesthood in a particular class, the Reformers universalised it. Where the “false religion” of medieval popery invested the means of sanctification in particular persons, practices and material objects, “true religion” discovered sanctification in the conduct of ordinary human relations (Goldie, 1987: 200).

The model developed by Hobbes can thus be understood as a response to the challenge posed by the Protestant reformists to worldly authority. Protestants challenged papal authority with the argument that there was no “*humanly available presence of the authorizing deity*” (Strong, 1993: 157). God could be known only through Scripture – not through the Pope or through priests, but through the written word that was available to the priesthood of all believers. Just as for the Protestant reformists there was no “*humanly available presence of the authorizing deity*”, so too for Hobbes there was no humanly available presence of the authorising creator(s) of the commonwealth. The intentions of the authors of the Commonwealth could be known only through their representative, the sovereign. How then to recognise the representative of the sovereign?

According to Hobbes, the sovereign is the one who achieves protection in the broad sense of bringing into being a condition in which the safety of the people is procured as obliged by natural law.

The office of the sovereign, (be it a monarch or an assembly,) consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people*, to which he is obliged by the law of nature ... [B]y safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself (Hobbes, 1651: 222).

The sovereign, in other words, is the one procuring the safety of the people in conformity with the terms of the covenant, that is, as sovereign by right. For Hobbes, the sovereign will be recognisable as such only to the extent that it governs in accordance with the covenant (Dyzenhaus, 2008).

Hobbes’ choice of the covenant as the vehicle through which subjects would bring a common power into being was central to this sense that sovereign authority was constrained. The political crisis of the civil war had brought into ‘explosive contact’ the covenant theology of Protestants such as John Preston, and the voluntarist or contractualist accounts of natural law such as that developed by Grotius in his *De jure belli ac pacis* (Kahn, 2004). The result was a widespread debate about political obligation couched in the twinned languages of covenant and contract. For the inhabitants of seventeenth-century England, and for Europe more generally, “the subject’s duty when two or more legitimate authorities were competing to claim his allegiances at the sword’s point” had become a live question (Pocock, 1992: xiv). Ideas drawn from covenant theology and from natural law theories were relevant to the resolution of this question. The Engagement controversy of 1650 gives a good example of this. In the aftermath of the execution of Charles I, the abolition of the monarchy and the

House of Lords and the creation of the Commonwealth of England, the Parliament passed an act on 2 January 1650 requiring all adult men to “declare and promise” that they would be “true and faithful to the Commonwealth of England, as it is now established, without a King or House of Lords” (Gardiner, 1906: 391). For many Englishmen, the question of whether to take this Engagement required them both to make a judgment about the legitimacy of *de facto* authority and to resolve whether in good conscience they could swear an oath which seemed to violate previous obligations (Vallance, 2001: 59). The Engagement controversy thus raised a question of private conscience for those who had sworn oaths to earlier rulers. For Anglicans, it raised the question of whether the Engagement was compatible with the oath of allegiance, by which they had promised to defend the king and his successors “to the uttermost of my power against all conspiracies and attempts whatsoever” (Burgess, 1986: 516). For Presbyterians the issue was whether this new oath was compatible with the Solemn League and Covenant of September 1643, by which they had promised to defend “the King’s Majesty’s person and authority, in the preservation and defence of the true religion and liberties of the kingdoms” (Vallance, 2001: 66). The practice of requiring oaths or covenants of obedience was a well-established one during the wars of religion, and had led to the growth of an accompanying tradition of moral theology that sought to explain how and why such oaths might be conditional. This tradition was mobilised in England during the Engagement controversy. Pamphleteers and divines argued that it was possible to subscribe to the Engagement and swear an oath to the commonwealth, meaning by the commonwealth not existing authority but rather the English nation (Burgess, 1986: 516). Or perhaps, as one pamphleteer argued, the earlier Solemn League and Covenant was no longer binding, because it had been conditional upon the King’s continued “preservation and defence of the true religion and liberties of the kingdoms”? (Vallance, 2001: 66)

It is that sense of a conditional authority that Hobbes invokes in his use of the covenant in *Leviathan*. According to Hobbes, “[t]he obligation of subjects to the sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them” (Hobbes, 1651: 147). The frightening power of *Leviathan*, “that *Mortal God*” (Hobbes, 1651: 114), is constrained by the telos of the covenant. The sovereign represents the unified will of the people, but that will is constrained by the terms for which the sovereign was created – its representatives cannot act in their own private interest or declare war against the people. Nonetheless, the power of the sovereign is absolute, and the subject has no right to resist that which he has covenanted to create – “in the act of our *submission*, consisteth both our *obligation*, and our *liberty*” (Hobbes, 1651: 144). It is through the claim to represent a general interest or a common wealth that the state will continue to confront the individual “as a priority and as a *demand*” – in particular, as a demand for obedience (Marcuse, 1936: 43). Hobbes makes very clear the tension between authority and freedom that is embodied in the form of the state.

### **Kant and the state as a global project**

Kant is often represented as a thinker who rejects the absolutist power of the state and champions individual freedom and cosmopolitan right. Yet in many ways Kant’s state theory is more absolutist than that articulated in *Leviathan*. Like Hobbes, Kant sees the state as existing to protect individuals from the state of war or state of nature. Like Hobbes, Kant argues that property and security are only possible in the civil state. Like Hobbes, Kant sees the collective or general nature of the state as the source of its legitimate right to limit the freedom of the individual. Kant appears to be more troubled by the tension between state authority and individual freedom than was Hobbes. Kant’s way of dealing with this is to argue for the voluntary nature of the limitations on freedom. We should act as if certain things were true if to do so would help to move towards a desirable state. One of the things we should treat as if true is that “all authority comes from God” (Kant, 1797: 143). To treat authority otherwise would run the risk of war. For Kant, like Hobbes, a fundamental principle of ‘moral-practical reason’ is: “*There shall be no war*, either between individual human beings in the state of nature, or between separate states” (Kant, 1797: 174).

Thus it is no longer a question of whether perpetual peace is really possible or not, or whether we are not perhaps mistaken in our theoretical judgment if we assume that it is. On the contrary, we must simply act as if it really could come about (which is perhaps impossible), and turn our efforts towards realizing it and towards establishing that constitution which seems most suitable for this purpose (Kant, 1797: 174).

As this passage illustrates, where Kant differs from Hobbes is through his turn to internal reason rather than to words and covenants as the foundation of the state of right. The treatment of law as if it were sacred and came from a supreme legislator is not conditional upon that legislator acting within the terms of a covenant by which it was created. Rather, this relation of sovereign and citizen is “an *idea* of reason” (Kant, 1792: 79). With this move, we can see “a marked shift in the weight of authority towards its free recognition by the autonomous individual, and this means that the structure of authority has become rational” (Marcuse, 1936: 40). Yet precisely because Kant understood subjection as voluntarily assumed and the structure of authority as rational, he set up “correspondingly stronger” prohibitions “within the legal order itself against the destruction of the authority relationship” (Marcuse, 1936: 40). Kant was very clear that the citizen owed total obedience to the state. The supreme power was constituted in order to secure “*the rightful state*, especially against external enemies of the people” (Kant, 1792: 80). In contrast to Hobbes, Kant argued that if the supreme power “makes laws which are primarily directed towards happiness (the affluence of the citizens, increased population etc.)”, that should not be mistaken as “the end for which a civil constitution was established” (Kant, 1792: 80). “The aim is not, as it were, to make the people happy against its will, but only to ensure its continued existence as a commonwealth” (Kant, 1792: 80). It follows from this counter-revolutionary reasoning that “all resistance against the supreme legislative power, all incitement of the subjects to violent expressions of discontent, all defiance which breaks out into rebellion, is the greatest and most punishable crime in a commonwealth, for it destroys its very foundations” (Kant, 1792: 81). It is the general interest which justifies the overriding of individual freedom: there can “be no rightful resistance on the part of the people”, because “a state of right becomes possible only through submission” to the “universal general will” (Kant, 1797: 144).

Kant does perceive some limits on the capacity of the state. These arise from the principles of international and cosmopolitan right. The limits on the authority of the state that for Hobbes arose out of the covenant, for Kant arise out of the society in which the state exists. We can see that these principles of international and cosmopolitan right begin to embody the constraints on state action. According to Kant, the state exists as one of three interrelated forms of public right. The first form of public right is the state or the commonwealth, which is the name given to the “condition in which the individual members of a people” each having abandoned “the state of nature” agree “to live in a state of right under a unifying will” (Kant, 1797: 137). The second form of right is international right, which Kant envisaged as the “right of *states* in relation to one another” (Kant, 1797: 164-5). International right is directed towards regulating resort to war, the conduct of war, and peacemaking, with the aim of making it possible for states to abandon the state of nature in their external relations. The third form of right for Kant was cosmopolitan right, which derived from the fact that “the earth’s surface is not infinite but limited” (Kant, 1797: 137). Just as the common interest precedes individual property in the context of the state, so too all nations should be understood as “*originally* members of a community of the land” (Kant, 1797: 172). This is a community premised upon “reciprocal action (*commercium*)” (Kant, 1797: 172). It follows from this common interest that States must not limit the capacity of people to “have commerce with the rest” (Kant, 1797: 172). This right to commerce was enshrined as one of Kant’s principles of perpetual peace: “the right of a stranger not to be treated with hostility when he arrives on someone else’s territory” (Kant, 1795: 105). According to Kant, these three forms of right depend upon each other for their existence: “if even only one of these three possible forms of rightful state lacks a principle which limits external freedom by means of laws, the structure of all the rest must inevitably be undermined and finally collapse” (Kant, 1797: 137). It is international and cosmopolitan right (rather than the form of the covenant) that impose constraints on the will of the state. The goal of the system of intersecting forms of political, international and cosmopolitan right is to preserve and secure the freedom of each state (Kant, 1795: 104).

In turn, Europe must perfect the form of the state through the “regular process of improvement in the political constitutions of our continent”; indeed, Europe “will probably legislate eventually for all other continents” (Kant, 1784: 52). Yet despite commenting upon the probability that Europe would come to legislate for the rest of the world, Kant remained uneasy about the possibility of one world sovereign being created. He recognised the undesirability of centralising power in such a way. According to Kant:

The idea of international right presupposes the separate existence of many independent adjoining states. And such a state of affairs is essentially a state of war, unless there is a federal union to prevent hostilities breaking out. But in the light of the idea of reason, this state is still to be preferred to an amalgamation of the separate nations under a single

power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy (Kant, 1795: 113).

It is these two aspects of Kant's political theory – the role of international and cosmopolitan right in limiting the will of the state, and the possibility that Europeans may become the reluctant legislators for all humanity – that will be taken up more broadly in nineteenth-century international law.

### **International law and the state**

It was in the nineteenth-century, with the emergence of the international legal profession, that the determination of the proper ends and limits of protection, or the constraint of the will of the state, began to be treated as an international project. Already for Hobbes, the will of the state was limited by its purpose – to guarantee protection and safety for its people. In the writings of nineteenth-century international lawyers, the constraint of the will of the state became a function of international law and the condition of a society of states (Koskenniemi, 2007). From that period onwards, international lawyers would see it as their task to criticise and limit the absolutism of state power. Much of international law since the beginning of the twentieth-century has been concerned with constraining and perfecting the state. States have negotiated treaties, charters and covenants that seek to regulate the use of force by states externally and internally, to impose constraints on the uses of territory to harbour terrorist activity or pollute the environment, and to specify policy settings that states can adopt in areas ranging from intellectual property protection through to health and safety regulations. In addition, the perfection of the Third World state through peace-building and international administration in the aftermath of civil war has formed a major part of the work of the United Nations. Yet while international lawyers may at times see themselves as the representatives of a civilised conscience or shared sensibility that transcends the state, they still rely upon the state as the vehicle through which this universal law is to find expression. The international order brought into being through international law still depends upon state power. States are the authors of international law, whether as negotiators of treaties or as generators of customary practice. States are the agents of coercion, whether through collective security mechanisms or resort to force in self-defence or as counter-measures. States are the creators of courts and the implementers of international obligations domestically.

The centrality of the state to international law presents a particular paradox in those areas of international law concerned to constrain the will of the state in its treatment of individuals. For example, those lawyers who espouse the importance of treaties dealing with human rights, refugee protection or genocide prevention do so in the language of a modern positivism that accepts the authority of the state as a sociological fact. Underpinning the legal recognition of the modern state as the *de facto* authority in the international system is the question of why this fact has a normative value. That question is no longer addressed in most accounts of the validity of international law. It is as if positive international law, like other forms of modern law, can no longer give an account of its own authority or even “articulate the terms of its own existence” (Dorsett and McVeigh, 2007: 3). Instead, international law becomes caught up in the practice of statecraft (Orford, 2006). The aim of modern treaties dealing with human rights or refugee protection is to find a way to reconcile the authority of the state and the autonomy of the individual. In the end, the reports of human rights or refugee lawyers shadow the state and adopt its language and perspectives. Rights as declared in treaties and international covenants are not absolute, but can be limited to the extent necessary in a democratic society to protect other values or interests such as public morals or security. Christian activists and humanitarian NGOs join with politicians in using the language of human rights to persuade the publics of Europe or the US to support the use of military force against African, Asian or Middle Eastern states. The language of rights both promises the energy and moral authority of resistance to power, and explains why those exercising such power are in fact guaranteeing the freedom of those they control and manage (Orford, 2003).

### **The work of history**

The question of the limits and ends of state authority and the lawfulness of resistance return in contemporary international legal debates about the lawfulness of the interminable war on terror, in the embrace of the responsibility to protect at the United Nations, in the integration of development and

security, and in the practices of state-building and international administration. In light of those developments, and at a time when the conflict in Darfur can be described on an activist website as 'the passion of the present', it seems useful to reconsider the Protestant origins of the state-making project. The European jurisprudence of protection that emerged out of the wars of religion may still have something to offer for thinking about the proper limits of authority in desecralised states. As the articles in this Special Issue show, the questions that faced European jurists of the seventeenth century remain persistent questions today. The article by Marijana Sevo analyses the involvement of international law in the Hobbesian task of determining what political form might bring an end to divisive civil war, and in distinguishing the representatives of lawful authority from illegal occupiers or insurgents (Sevo, 2008). The article by Gavin Bailey points to the relevance of questions about the limits and ends of protection to the conduct of the war on terror (Bailey, 2008), and explores the ways in which the Hobbesian-inflected policy of 'shoot to kill to protect' serves to justify police killing as risk management. Police science always involved a dual orientation towards the past (punishing offenders for their actions) and the future (shaping society to ensure the greatest happiness of the greatest number). The current use in security policy of risk management frameworks aimed at preventing future harm further exacerbates the authoritarian tendencies of such an all-embracing protective function for the state (Kessler and Werner, 2008). Together, these articles illustrate the continued oscillation in the project of state-making between justifying the need for individuals to submit to 'external unfreedom' in the form of state authority, and championing the private conscience of the individual (Marcuse, 1936). That oscillation manifests in liberal internationalism as the movement between apology and utopia (Koskeniemi, 2006). It is in this sense that international law represents the working through of the Protestant project of modern statehood. With this in mind, the Protestant texts of the Renaissance and early modern Europe might be understood as part of a normative tradition that modern international law inherits, and with which it remains actively engaged.

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