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0521810310 - Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics

Edward Keene

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Introduction

This book is about the patterns of political and legal order that have characterized international relations since the seventeenth century. On seeing that opening statement, one might well expect a large part of the book to be devoted to explaining how the modern world came to be organized as a ‘Westphalian system’, or to the closely related idea that modern states collectively form an ‘international society’ that preserves their mutual independence and maintains a degree of peaceful coexistence in their relations with one another. It would also be perfectly reasonable to expect my analysis to go on to ask whether or not this society of states can provide for justice in the world today; or how international relations are presently being transformed as a result of the emergence of a quite different kind of ‘post-Westphalian’ order that is founded on new normative principles and embodied in new international legal rules and institutions.

But these are well-trodden paths and I do not intend to go down them again, other than to say where I think they are misleading. We already have a shelf full of excellent books on the international society of sovereign states, of which one of the best contemporary works, certainly one of the most lucid, is Hedley Bull’s hugely influential account of *The Anarchical Society*.¹ I will pay a considerable amount of attention to how Bull’s argument was put together, but it would hardly be worthwhile just to repeat what he has already said about order in the modern society of states, even with the addition of a few extra historical, philosophical or sociological flourishes to give his vision of the anarchical society a little more depth. Nor will I look to build upon the extensive literature that has been devoted to identifying what justice means in an international context, or the more recent, but already sizeable, body of scholarship on the idea that a new kind of world order is developing.² In my view, this work operates

¹ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977).

² On contemporary thinking about justice and international society, see David Mapel and Terry Nardin (eds.), *International Society: Diverse Ethical Perspectives* (Princeton University Press, 1998). It would be premature to identify coherent schools of thought on the idea of

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within excessively restricted parameters because it unthinkingly accepts conventional assumptions about the modern pattern of international political and legal order. Far too many 'critical' enquiries into contemporary world politics are conducted by asking questions about what is, or should be, happening to the same old society of states. It hardly needs saying, for instance, that the increasingly popular idea of a post-Westphalian order does not make much sense unless one begins from the proposition that the modern pattern of international order was itself Westphalian. Very few analyses of contemporary world politics have managed to break free from this conventional way of thinking about international relations in the past, and that significantly limits their capacity to think about the present and the future in a genuinely original way.

My intention is to explore these issues by taking a less travelled road, one indeed that has practically disappeared from the map in the last fifty years or so and is now in an alarming state of disrepair. My starting point will be the account of the law of nations that was developed in the early seventeenth century by the Dutch lawyer, Hugo Grotius. In view of my claim that we need to liberate ourselves from conventional wisdoms about modern international relations, that might seem like an odd place to begin, because scholars today usually see Grotius as one of the principal authors of the utterly conventional idea of a society of equal and independent, territorially sovereign states. Grotius, the argument goes, lived precisely at the time when this pattern of international order was emerging: his main work, *De Jure Belli ac Pacis*, was first published in 1625, little more than twenty years before the modern system began to take shape with the signing of the Peace of Westphalia in 1648. Commentators have therefore assumed that what is significant about his work is its anticipation of the problems that result from the decentralized nature of the Westphalian system, and that his prominence in the history of international legal thought derives from his having been one of the first to suggest how the binding force of the law of nations could be preserved in such an anarchic and pluralistic environment. Other themes in his work that do not fit in with the logic of the states-system are usually explained away as hang-overs from medieval theory and practice, which had not

an international transformation, but a few prominent and heavily cited works are David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995); Andrew Linklater, *The Transformation of Political Community* (Cambridge: Polity Press, 1998); Gene Lyons and Michael Mastanduno (eds.), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore: Johns Hopkins University Press, 1995); and John Gerard Ruggie, *Constructing the World Polity: Essays in International Institutionalization* (London: Routledge, 1998). A number of different approaches are collected in Eivind Hovden and Edward Keene (eds.), *The Globalization of Liberalism* (London: Palgrave, 2001).

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yet been decisively rejected in Grotius's day; or they are interpreted as well-intentioned but rather idealistic proposals about how the quality of order in the modern society of states might be improved, if only states could be persuaded to work together in the common interest of international society as a whole, pay more respect to the rights of individuals, act collectively to enforce international law and so on.³

I think that this point of view overlooks important ways in which the unorthodox elements of Grotius's account of the law of nations were relevant to modern world politics, albeit with respect to certain features of modern international order that for the most part developed outside the European society of states, and are often ignored or dismissed as 'anomalies'.⁴ In particular, I want to highlight two key propositions in Grotius's theory about the rights that public authorities and private individuals possess in the law of nations. The first is that the sovereign prerogatives of public authorities are divisible from one another, such that it would be possible for sovereignty to be divided between several institutions within a single political community, or, to put it in a more obviously international context, it would be possible for a state to acquire some of the sovereign prerogatives that had originally belonged to another and exercise them on its behalf. The second proposition is that under certain conditions individuals have a right in the law of nations to appropriate unoccupied lands; furthermore, if no established political authority acts to protect their rights, the individuals themselves may conduct a 'private war' in their defence and would be justified by the law of nations in so doing. Neither of these claims can safely be dismissed as nostalgia for medieval Christendom or as an idealistic proposal for the reform of the existing society of states. On the contrary, they have a striking proximity to the practices of colonialism and imperialism that Europeans adopted in the extra-European world. A proper account of the relationship between the Grotian theory of the law of nations and modern world politics should make an analysis of his ideas of divisible sovereignty and private

³ An important contemporary statement is Hedley Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays on the Theory of International Politics* (London: George Allen and Unwin, 1966), pp. 51–73. Of course, this interpretation of Grotius is not originally Bull's. On the contrary, it has been around for well over a hundred years, and can be found in almost any late eighteenth or nineteenth-century textbook on international law: for an example, chosen more or less at random, see William Manning, *Commentaries on International Law* (London: Sweet, 1839), pp. 20–2.

⁴ For a number of these 'anomalies', some of which speak directly to extra-European international politics (especially the British Commonwealth and the East India Company), see Bull, *The Anarchical Society*, pp. 274–5. Again, this observation does not originate with Bull. His point echoes Lassa Oppenheim, *International Law: A Treatise*, 2nd edition, 2 vols. (London: Longmans, 1912), especially vol. I, pp. 111–15.

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appropriation its central themes, and ought to include an examination of the colonial and imperial systems of governance that represented a distinctive pattern of modern international political and legal order based on these principles.⁵

Admittedly, Grotius's ideas about the divisibility of sovereignty and individuals' rights in the law of nations look rather peculiar in comparison with the conventional understanding of modern international legal thought, where sovereignty is supposed to be indivisibly packaged up in territorial bundles, and where individuals are supposed not to have any international personality at all. That might tempt some to assume that Grotius's ideas were almost immediately discarded by later scholars and practitioners of international affairs, and that my interest in them is merely archaic; but that assumption would be quite wrong. Over the last fifty years or so, we have lost sight of these notions as part of modern international legal and political discourse because experts on international relations seldom read the authors who continued to use them or pay attention to the contexts in which they were expressed. Few realize, for instance, that even in the late nineteenth century it was still perfectly reasonable for an extremely prominent and influential British international lawyer to argue that the doctrine that sovereignty is indivisible 'does not belong to international law', and that 'sovereignty has always been regarded as divisible'.⁶ And, as for individuals' private rights to property, the mere fact they were seldom explicitly mentioned in modern discussions of public international law does not imply that they were completely absent from the prevailing international legal order. On the contrary, as one international lawyer put it in the early twentieth century, the express stipulation of the principle that individuals' property rights

⁵ Richard Tuck's recent book on *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999) includes an excellent treatment of Grotian thinking about property and its relationship to colonialism, and see also L.C. Green and Olive Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989). Meanwhile, James Muldoon's equally good *Empire and Order: The Concept of Empire, 800–1800* (London: Macmillan, 2000) contains several important insights into the political theory of divided sovereignty (although not so much in the Grotian context) and its relationship to imperial governance in North America, as does Richard Koebner, *Empire* (New York: Grosset and Dunlap, 1965). To the best of my knowledge, though, no-one has put these themes together to offer a sustained analysis of the general pattern of political and legal order that developed out of the Grotian theory of the law of nations and the practices of European colonialism and imperialism. Nor has anyone yet properly analysed how such an enquiry would impact upon orthodox theories of order in modern and contemporary world politics.

⁶ Henry Sumner Maine, *International Law: The Whewell Lectures of 1887*, 2nd edition (London: John Murray, 1915), p. 58, and an 1864 minute for the British government by the same author, in Adrian Sever (ed.), *Documents and Speeches on the Indian Princely States*, 2 vols. (Delhi: B.R. Publishing, 1985), Document 65.

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were inviolable was widely seen as ‘unnecessary by reason of the universal recognition and adoption’ of the principle among all the members of the society of states.⁷

This interpretation of the Grotian theory of the law of nations and its relationship to the practices of colonialism and imperialism leads to what are really the central propositions in my argument: that there has been a long-standing division in the modern world between two different patterns of international political and legal order; and that the world we live in today is a combination of both, and an extremely awkward and unstable combination at that.⁸ The main problem with the orthodox account of modern world politics is that it describes only one of these patterns of international order: the one that was dedicated to the pursuit of peaceful coexistence between equal and mutually independent sovereigns, which developed within the Westphalian system and the European society of states. I am happy to concede that the detailed analysis of these arrangements represents a valuable contribution to our understanding of modern international politics and international law, but it is really only telling half of the story. Orthodox theorists have paid far too little attention to the other pattern of international order, which evolved during roughly the same period of time, but beyond rather than within Europe; not through relations between Europeans, but through relations

⁷ Alexander Fachiri, ‘Expropriation and International Law’, *British Year Book of International Law*, 6 (1925), 169, and see also Konstantin Katzarov, *The Theory of Nationalisation* (The Hague: Martinus Nijhoff, 1964), especially pp. 284–7. As an aside, I might add that even Bull described respect for property as an ‘elementary, primary and universal goal of social life’, and therefore (presumably) he saw this principle as part of the normative structure of modern international order (*The Anarchical Society*, p. 3). For all Bull’s attachment to a pluralist conception of international society and positivist theories of international law, the notion of ‘elementary, primary and universal’ goals looks to me suspiciously like a poorly disguised version of classical arguments from natural law. It is interesting, and not, in my view, coincidental, that this lapse into naturalism should have occurred precisely on the issue of individuals’ rights to life and property.

⁸ This is a different claim from the popular line of argument that the political and legal order of the states-system should be juxtaposed against the pattern of social relationships characterized by the capitalist world economy. I do not dispute the latter’s existence, nor do I deny that it has been an extremely significant feature of the modern world, but the trouble with the bulk of this literature is that it has continued to treat modern international politics and law in terms of the conventional idea of a society of states, asking how global capitalism represented the real sociological basis of that form of political order, or how both sprang from a shared conceptual outlook on the part of modern Europeans: see, for example, Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (London: Verso, 1994), and Kurt Burch, ‘Property’ and the Making of the International System (Boulder: Lynne Rienner, 1998). My point, by contrast, is that modern international political and legal order was *not* exclusively defined by the norms, rules and institutions of the society of states, irrespective of its relationship to modern forms of socio-economic organization.

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between Europeans and non-Europeans.⁹ Instead of being based on a states-system, this pattern of order was based on colonial and imperial systems, and its characteristic practice was not the reciprocal recognition of sovereign independence between states, but rather the division of sovereignty across territorial borders and the enforcement of individuals' rights to their persons and property.

Grotius himself can hardly be assigned all the responsibility for the different ways in which international order developed within and beyond Europe after the seventeenth century. He provided an account of the law of nations that was used by Europeans to legitimize their behaviour towards non-European peoples, but Grotius himself did not conceive of the world as divided in two, with one political and legal order for Europeans and another for non-European peoples. He tended to think of international legal order in universal and broadly non-discriminatory terms: his idea of the divisibility of sovereignty, in particular, was directed as much at public authorities within Europe as at ones outside.¹⁰ During the eighteenth and nineteenth centuries, however, Europeans began to be more discriminating in their international relations, adopting one kind of relationship, equality and mutual independence, as the norm in their dealings with each other, and another, imperial paramountcy, as normal in their relations with non-Europeans. Grotius's original scheme of the law of nations underwent a dramatic change in the process, particularly through the introduction of a new idea of civilization, which comprehensively radicalized the application of his ideas about how sovereignty should be divided and how individuals' private rights should be acquired and protected in the extra-European world.

The concept of civilization performed two roles in international legal thought: it defined the border between the two patterns of modern international order, and it described the ultimate purposes that the extra-European order was for. This vision of a bifurcated world was fully

⁹ Some paid more attention than others. There are a couple of throw-away comments from Bull that vaguely gesture in the right direction, while even more suggestive hints of the pattern of order I am describing can be found Martin Wight's writings, unsurprisingly given his early interest in British colonialism and imperialism. Among the original members of the English school, though, Adam Watson probably went furthest in his analysis of imperial systems as representing the other end of the 'spectrum' of order in world politics to states-systems, although in his study of order in modern world politics he tended to stick fairly closely to the orthodox idea of a society of states. See chapter 1 for a fuller discussion.

¹⁰ One important qualification to this claim is that, as we will see in chapter 2, he did say that the indigenous inhabitants of America lived in a condition of natural simplicity, a claim of great significance for the future development of theories about colonial appropriation. Otherwise, however, Grotius was fairly even-handed in his depiction of non-European peoples and rulers, and, aside from property, he only made a clear distinction between the law of nations in Christendom and the law of nations beyond on a few rather marginal issues, such as postliminium.

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developed by the middle of the nineteenth century, and one can see in international legal texts from that period a widely accepted distinction between the family of civilized nations and the backward or uncivilized world beyond (although that is not to say that such distinctions had never been made before then).¹¹ In the family of civilized nations, the main point of international political and legal order was understood as being to encourage respect for the equality and independent sovereignty of individual states or nations; its ultimate purpose, simply put, was to promote the toleration of cultural and political differences between civilized peoples so as to allow them to live together in peace. Outside the family of civilized nations, however, other forms of international political organization and different legal rules were deemed appropriate, in keeping with the belief that here the central purpose of international order was to promote the civilization of decadent, backward, savage or barbaric peoples.¹² Non-European rulers were very seldom denied sovereignty altogether, but they were usually permitted to retain only those prerogatives which they were deemed competent to exercise, and certain specific prerogatives were nearly always vested with a European (or, in the United States, the federal) government in order to ensure the promotion of commerce, technology and good government, as well as the establishment and protection of individuals' rights, especially to property; civilization, in other words.¹³ While, say, a nineteenth-century British diplomat would have found it inconceivable that he might claim a right to exercise any sovereign prerogatives over the French, his counterpart in the colonial service would have thought it perfectly appropriate to take over some of the sovereign prerogatives that an Indian prince possessed, even ones guaranteed by prior treaties, if that was what it took to facilitate progress or to stamp out corruption and barbarism.

By the mid to late nineteenth century, then, the world was clearly divided in two for the purposes of international political and legal order: an order promoting toleration within Europe, and an order promoting civilization beyond. Very quickly, however, the distinction began to break

¹¹ This distinction was endemic to nineteenth-century international law, but an exemplary statement is James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jurid Relations of Separate Political Communities*, 2 vols. (reprint of the 1883 Edinburgh Edition by Scientia Verlag Aalen, 1980).

¹² These terms and others like them were so important to the intellectual framework of modern international law that I will be using them a lot, and it would clutter up the text if I were to put them in inverted commas all the time. My unqualified use of this language should not be understood as an endorsement of this way of discriminating between European and non-European peoples.

¹³ A classic treatise, which captures these various dimensions of the concept, is John Stuart Mill, 'Civilization', in *Collected Works, Volume 18: Essays on Politics and Society* (London: Routledge, 1977), pp. 119–47, especially p. 120. (First published in 1836.)

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down, and one of the hallmarks of world politics in the twentieth century has been a prolonged effort to merge the two patterns of modern international order into a single, all-encompassing world order, despite the profound differences in their normative principles, legal rules and institutional arrangements. Most of the scholarship on how this ‘universal international society’ was created has concentrated on the expansion of the society of states, which is hardly surprising given that most scholars concentrate exclusively on the society of states the rest of the time. The construction of a global international order is therefore usually conceived solely in terms of the spreading practice of the reciprocal recognition of sovereignty and the entry of new states into what had previously been a European club. Occasionally, since attention is now, often for the first time, focused on the geographical margins of the European society of states, theorists have glimpsed the importance of the concept of civilization as a standard that had to be attained before recognition would be granted.¹⁴ But because they still insist on thinking about modern international order in terms of the society of states, this insight has not been developed into a detailed analysis of where the concept came from; or of how it had been structuring relations between European and non-European peoples for at least fifty years before the latter’s entry into international society really became an issue; or of the particular legal and institutional arrangements, such as divided sovereignty in systems of imperial paramountcy, that had been developed in the extra-European world to promote civilization.

Furthermore, because they do not realize that a distinct pattern of international order already existed in the extra-European world before the expansion of the society of states, orthodox theorists cannot grasp the crucial fact that the construction of a global political and legal order was a two-way process. Of course, the extension of recognition to non-European peoples was very important, but it was not the only factor at work. At the same time, the principle of civilization that had previously structured international relations beyond Europe began to creep into the European political system itself. While the toleration of political and cultural difference was becoming a more important aspect of relations between European and non-European peoples, the promotion of civilized values was becoming a more important feature of relations between European states. A defining moment in this latter process

¹⁴ This is often where ideas about ‘Western values’ and the ‘culture of modernity’ creep into the picture, but the most detailed analysis is Gerrit Gong, *The Standard of Civilization in International Society* (Oxford: Clarendon Press, 1984); one of the first statements of the orthodox position here is Oppenheim, *International Law*, pp. 32–3.

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was the first world war. Many wars had previously been fought for the purpose of civilizing the indigenous peoples of America, Asia and Africa, but the 'Great War for Civilization' was principally fought against other Europeans. During the first half of the twentieth century, Europeans gradually became accustomed to the idea that they should be more respectful of the very different political and cultural systems of non-European peoples, while becoming increasingly open to the possibility that their fellow Europeans could be guilty of barbarism and might need to be civilized themselves. The struggle against Nazism was the high point of this development, since now not only were other Europeans seen as the single greatest threat to civilization, but also civilization was being defended against a version of the racist ideology that had previously given it much of its legitimacy as a way of demarcating the boundary between the two modern patterns of international order.

By 1945, the capacity of European states to maintain their imperial and colonial systems had evaporated, and the intellectual framework within which diplomats and international lawyers operated had undergone a transformative change; these developments resulted in a number of crucial legal and institutional developments that took place over the next fifteen to twenty years. The practice of recognizing non-European peoples as equal and independent members of the society of states became much more open and inclusive, as the old standard of civilization, in the sense of a certain level of economic, political and judicial advancement, was largely abandoned in favour of a broader idea that every nation has a right to self-determination.¹⁵ The toleration of different ways of life has thus become an absolutely central principle in the new global political and legal order. But the old idea that one of the purposes of order in world politics is to promote civilization has by no means been abandoned. As well as encouraging respect for the equality and independence of all sovereign states, the United Nations is also supposed to facilitate economic and social progress, and it is intended to protect the fundamental human rights of individuals, as Article 55 of the Charter makes clear. In contemporary phenomena such as international agencies for economic development, international humanitarian law, the articulation of a code of peremptory and non-derogable principles of *jus cogens*, pressure to democratize domestic political systems and the increasing centralization of decision-making processes through supranational organizations, the lingering influence of eighteenth and nineteenth-century thinking about how the world should be organized so as to promote civilization can still be seen at work in

¹⁵ For example, John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987), especially p. 78.

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international relations today. We thus live in a world which is supposed to have a single, global political and legal order for everyone, but one that is dedicated to two very different, indeed often contradictory, purposes.

Therein lie the horns of the principal dilemma that we are struggling with at the moment. It is incorrect to describe our problem in terms of the difficulty that the society of states has in providing for justice in world politics, or that we are witnessing a painful and confusing process of transformation as a new kind of 'post-Westphalian' order gradually emerges to supplant the old Westphalian one. Our central problem is that we still think in the same dualistic way as nineteenth-century international lawyers and diplomats about the purposes of order in world politics, but we have abandoned the discriminatory method that they used to resolve the resulting contradictions. The central question for international political and legal theorists today, then, is whether it is possible to sustain both of those purposes and still have a coherent pattern of international order, without recourse to the old method of discriminating between advanced and backward peoples. We are stuck, in other words, with the fundamental modern problem of having to choose between toleration and civilization as purposes of international order, but we now have to work out a completely different way of deciding how that choice ought to be made. Can we maintain the modern dualism about the goals of international order through the adoption of a new 'post-modern' way of reconciling them? Or do we have to abandon at least one (and possibly both) of the long-standing modern beliefs about what international order is for if we are to have a consistent and non-contradictory order in world politics today, albeit one that will probably be unsatisfactory to many of the people who live in it? Before anyone wades through the details of my argument, I ought to admit that I do not have any clear answers to these questions, but I think that the orthodox way of thinking about order in modern world politics in terms of the Westphalian system and the society of states is so misleading that it obscures their real nature. A necessary first step to working out the right answer is to pose the right question, and I hope that my analysis will at least make a small step towards that goal.

As a jumping-off point for my argument, in chapter 1 I will begin by asking why so many scholars today think of order in modern world politics in terms of the existence of an international society of mutually independent sovereign states. Although this point of view has enjoyed great popularity for around two hundred years, I will concentrate on a group of theorists who have been extremely influential in presenting the idea of the society of states to contemporary audiences. These scholars are often known as the 'English school', and their main focus was the British Committee for the Theory of International Politics (which was originally