

System, Order, and International Law

*The Early History of International Legal
Thought from Machiavelli to Hegel*

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Orders in Disorder

The Question of an International State of Nature in Hobbes and Rousseau

Jonas Heller

In the political philosophy of Hobbes and Rousseau, law and order are necessarily linked concepts: *Order* denotes a political association which is founded and upheld by law; *law* (in the sense of positive law) is established by a political order which guarantees its legitimation and its enforceability. The focal point of their reflections is order, not law: Hobbes and Rousseau ask how a good political order is possible, and they are interested in law insofar as it is a means of such an order. If we want to know about law, we have to start with order.

The order Hobbes and Rousseau are primarily concerned with is not international. They both focus on the national order of the state and on the law enacted and enforced by it. A state, however, is never alone. It is surrounded by other orders and this means that, according to the perspective of Hobbes and Rousseau, it is surrounded by enemies. If the international sphere is a sphere of hostility, the question arises as to how an order can exist in such an environment: is international law and order necessary, and is it even possible? The focal point here is, again, order and not law. Hobbes and Rousseau, however, do not describe the international sphere as order but as a state of nature between sovereigns. Thus, the question about international law arises in the context of their conception of a state of nature. In the first section, (Section I) I deal with the characteristics of this international state of nature. Its specificity consists in the fact that it is neither an order nor entirely beyond order but a mixed (and hence disorderly) condition between order and disorder. Thus, the relation of order and disorder plays a major role in this chapter. I examine this relation at the point when a national order passes into disorder (Section II) and when pre-political disorder changes into national orders—which is the beginning of the international sphere (Section III). Between the orders constituting this sphere there is, as indicated, a condition of war. This condition is evaluated very differently by Hobbes and Rousseau. Whereas in Hobbes' view there is no need for international law and order, Rousseau considers an international legal framework necessary for the establishment of any good order on a national level (Section IV). This

is why Rousseau, in contrast to Hobbes, extensively reflects about the possibilities of bringing law and order into the international sphere. He is concerned with the case of Europe at that time which constituted a 'system' of violence in his eyes. The order which should replace this violent system takes shape as a (European) confederation. Such a confederation is, according to Rousseau, necessary but utopian: he considers it impossible that sovereign states could approve of an international legal framework which would restrain their competences (Section V). Rousseau, however, states that a weak form of international law already exists in his time. The reason why Rousseau observes international law where Hobbes does not, is not that they lived in different centuries but rather that they have different concepts of (international) law. I deal with these concepts (Section VI) before sketching the different lines of reception Hobbes and Rousseau have met (Section VII). The political philosophy of Hobbes and Rousseau is a philosophy about peace; for peace is the desired consequence of a good order which can only be established and perpetuated by means of law. In their opinion, such an order can never be international. As I argue in conclusion (Section VIII), this is the reason why international law and order are not full-fledged topics of their political thinking. Inevitable disorder remains marginal within a philosophy engaged with the possibilities of peace.

I. The Question of an International Disorder in Hobbes and Rousseau

When we reflect about the international sphere in Hobbes and Rousseau, we reflect about the state of nature. For it is a state of nature in which the relations of sovereign states take place.¹ In the political philosophy of both Hobbes and Rousseau, there are three different situations denominated by this term. Firstly, the state of nature is the situation before a sovereign state is founded. Secondly, the state of nature is the situation which results from the dissolution of a sovereign state. And thirdly, the state of nature is the international situation, the situation between sovereigns. What is the characteristic which allows us to describe these three situations by the same term? First of all, it is not true that they are all 'natural'. This is eminently evident with regard to the international sphere: an international situation is no natural condition as it presupposes states, and states are not naturally given but politically founded. States establish a political sphere which is, as such, beyond nature.² This

¹ Cf. Thomas Hobbes, *Leviathan*, ed. Richard Tuck (1991), p. 90; Jean-Jacques Rousseau, 'Discourse on the Origin and the Foundations of Inequality among Men', in Victor Gourevitch (ed.), *The Discourses and Other Early Political Writings* (1997), p. 174.

² It is this difference between nature and politics that Hobbes makes in the first five sentences of the introduction to his *Leviathan*. 'Nature' is here defined as the art of God whereby he has made (besides the rest of the world) 'the most excellent worke of Nature, *Man*'. The 'State' is built by imitating this work of nature, and it is nothing else than 'an Artificiall Man'. Cf. Hobbes, *Leviathan*, p. 9 (n. 1). The state (politics) is not nature because it imitates it. As an imitation it is not natural, but artificial. It is exactly the imitation (of nature) which distinguishes politics from nature.

political sphere is defined by the borders of the states. In Hobbes and Rousseau, the sphere of politics is only within states—it does not extend between them. Thus, the international sphere is beyond politics. And it is for this reason that it is a state of nature. In Hobbes and Rousseau, 'nature' first and foremost means nothing else than 'not within politics'.

Whereas a condition of politics is a condition of order, the state of nature is a condition of disorder. To reflect about the state of nature means to reflect about disorder. If we want to know about the international sphere, we have to ask what kind of disorder it is and in what respect it differs from the other two situations of a state of nature. First of all, we have to make clear how the notion of disorder is used by Hobbes and Rousseau. The specific meaning of disorder helps to understand why the state of nature (as a state of disorder) is radically distinct from the political sphere. The notion of disorder is not used to describe a (defective) aspect, part, or condition of a political situation but rather marks the point when a situation is not yet political or not any more. 'Disorder' means that a situation *as a whole* is or becomes unpolitical; and this is because the term 'disorder' denominates nothing else than a discord which is not reconcilable with the existence of a political unity, in other words: with order.³ The relation between order and disorder is one of exclusion. Between them, there is no liminal zone: Either you are within order or you are within disorder. 'Order' and 'disorder' are radically distinct concepts used to describe radically distinct situations of human coexistence.

The fact of an international sphere disrupts this distinction. The international sphere is not totally beyond order. It is a disorder formed from orders (states). The question about the international sphere is the question about this particular relation between order and disorder. It is the question how two situations which by definition exclude each other can form a situation which is neither political nor completely beyond politics.

This question is not only a problem of concepts but, as Rousseau points out, a problem of lifeworld as well. It is the problem of living at the same time in order and in disorder. The disruption in the distinction of the two concepts is experienced by all the individuals subjected to a state. Rousseau says:

The first thing I notice, in considering the condition of the human species, is an open contradiction in its constitution which causes it to vacillate incessantly. As individual men we live in a civil state subject to laws; as people we each enjoy a natural liberty: this makes our position fundamentally worse than if these distinctions were unknown. For living simultaneously in the social order [*l'ordre social* in the French text, J.H.] and in the state of nature we are subjected to the inconveniences of both, without finding security in either.⁴

³ It is in this sense that Hobbes uses the notion 'discord' when talking about the 'Intestine Discord' which is a reason for the mortality of sovereignty. Cf. Hobbes, *Leviathan*, p. 153 (n. 1). Since sovereignty is the artificial soul which gives life to the whole body politic, cf. Hobbes, *Leviathan*, p. 9 (n. 1), 'discord' (as the end of sovereignty) is the death of this body or the time before its generation. In the same sense—as irreconcilable conflict—but in regard to conflicts between states, Rousseau uses the French term 'discorde' in his writing *The State of War*. Cf. Jean-Jacques Rousseau, 'L'état de guerre', in Charles E. Vaughan (ed.), *The Political Writings of Jean Jacques Rousseau*, vol. I (1962), pp. 293–307, at p. 296.

⁴ Jean-Jacques Rousseau, 'The State of War', in Stanley Hoffmann and David P. Fidler (eds.), *Rousseau on International Relations* (1991), pp. 33–47, at p. 44.

According to Rousseau, the contradiction of the international situation is a contradiction between what individuals strive for and what they get. By founding a state, they strive for security, and what they get is the insecurity of a mixed condition between order and disorder which is worse than the disorder they left. As I will show, Hobbes evaluates the consequences for the individuals differently, but the fact of a mixed condition is the same. The contradiction Rousseau mentions can be put in another form: the international disorder contains more than itself because it *is* the relation between itself (as disorder/state of nature) and the social orders from which it is made. If we deal with the question of international disorder we thus have to deal with the question of national order as well. If we detach the international question from the domestic one, we at the same time lose track of the philosophical approach of Rousseau and Hobbes. We have to consider what Stanley Hoffmann pointed out in regard to Hobbes, Rousseau, and Kant: 'Any sharp separation between their conceptions of human nature, of the state and of the international milieu, destroys the unity of their philosophy.'⁵ As national orders are the presupposition for an international situation, I want to start with them and deal with them in the same respect which is relevant for the international situation: I will focus on the relation between order and disorder, between state and state of nature—not the international state of nature but the state of nature which is entirely beyond politics. Given the fact that on a domestic level order and disorder are in a relation of mutual exclusion, they only get 'in touch' during the shift from one to the other—from disorder to order, or from disorder to order. Hobbes and Rousseau are interested in the formation of orders. Thus, their focus is on the transition from disorder to order, from the state of nature to the political society. As the question of this chapter concerns disorder, I will focus primarily on the other transition, the transition from order to disorder. It occurs when states fail.

II. The Beginning of Disorder

In Hobbes and Rousseau, order is established all at once. The moment when politics begins, when the state is founded and the state of nature is left, is a juridical moment, a moment of contract.⁶ Whereas it is obvious that the contractual foundation of the state takes place in a single moment (not a real moment but a juridical one), it is not as evident that the rise of disorder, the end of the state, occurs equally abruptly. It is also possible—and at a first glance it may seem even more plausible—to think of the decline of the state as a long process which leads from order to disorder and which opens up a liminal zone between them. But if we look from the perspective of Hobbes and Rousseau at the causes of disorder, we get a clear idea

⁵ Stanley Hoffmann, 'Rousseau on War and Peace', *The American Political Science Review* 57, 2 (1963), 317–33, at 317. Equally argues Jean-François Thibault, 'Les relations internationales et la crise de la pensée politique moderne selon Jean-Jacques Rousseau', *Études internationales* 37, 2 (2006), 205–22, at 208.

⁶ Cf. Hobbes, *Leviathan*, 16 (n. 1), and Jean-Jacques Rousseau, 'The Social Contract', in Victor Gourevitch (ed.), *The Social Contract and Other Later Political Writings* (1997), I, 6–8.

why according to them the failing of orders happens all at once, in a determinable moment, and does not take place in a slow process. We first have to localize this moment in the theories of Hobbes and Rousseau.

When Hobbes deals with the collapse of the commonwealth in his *Leviathan*, he distinguishes dissolution by external violence from dissolution by 'intestinal disorder'. He is interested in the latter because only the internal disorder can be prevented by means of a rational formation of order (and can thus be subject of a theory of such an order).⁷ Regarding the occurrence of internal disorder, 'the fault is not in men, as they are the *Matters*, but as they are the *Makers*, and orderers' of the commonwealth.⁸ What does it mean to see the fault in men as *makers* and *orderers*? It means to assume that men are capable to solve the problem of men as *matter* by the formation of a good order.⁹ And this means to connect disorder with the beginning of the state: internal disorder refers to the (failed) institution of order. Consequently, Hobbes reckons 'in the first place, those that arise from an Imperfect Institution, and resemble the diseases of a naturall body, which proceed from a Defectuous Procreation'¹⁰ among the infirmities of a commonwealth. If an order fails and this failing is primarily rooted in the very moment of its formation, then a real order has never been formed. If the orderers have failed in forming an order, they actually were not orderers.

Similarly, in his *Second Discourse* Rousseau explicates the inconstancy of the first political condition (*état Politique*) by referring to its wrongful institution. He argues that it 'always remained imperfect because it was almost a product of chance and because, having begun badly, time revealed its flaws and suggested remedies but could never repair the vices of the Constitution'.¹¹ Rousseau takes account of external causes of disorder as well; but like Hobbes he considers a 'healthy and strong constitution' the 'first thing to strive for', not only in order to prevent internal causes of disorder but also in order to prevent the conquest by other states.¹² He thus focuses on the 'conditions for the institution of a people',¹³ conditions which have to be given in the moment when the state is founded.¹⁴ What if they are not given? As order begins with a strong constitution, it is, again, as if order in

⁷ Hobbes, *Leviathan*, 29, p. 221 (n. 1). External causes receive attention only insofar as they can be influenced by internal factors. Cf. Hobbes, *Leviathan*, p. 118 (n. 1) where Hobbes discusses the danger of attacks, i.e. external violence, and suggests an internal solution. He does so by stressing the importance of adjusting the number of members of the own political society 'by comparison with the Enemy we feare'.

⁸ Hobbes, *Leviathan*, 29, p. 221 (n. 1).

⁹ Regarding Hobbes' confidence in this human capability cf. Leo Strauss, *Natural Right and History* (1976), p. 194.

¹⁰ Hobbes, *Leviathan*, 29, pp. 221f (n. 1).

¹¹ Rousseau, *Discourse*, II, p. 175 (n. 1). Rousseau likewise argues in the *Social Contract* that it is within men's capacity 'to prolong the State's life as far as possible by giving it the best constitution it can have'. Cf. Rousseau, *Social Contract*, III, 11, p. 109 (n. 6).

¹² Cf. Rousseau, *Social Contract*, II, 9, p. 75 (n. 6).

¹³ Rousseau, *Social Contract*, II, 10, p. 77 (n. 6).

¹⁴ Rousseau's French terms *contrat* and *constitution* are both related to the foundation of the state, but they are not synonyms. *Contrat* refers to the unification of all individual forces which together found the political society. The term *constitution* refers to the specific political form given to this society.

the narrower sense had never begun. It is exactly this scenario of a not-beginning order which Rousseau describes in the second part of his *Second Discourse*: order cannot begin because it is the opposite of what he considers as an ideal in his *Social Contract*. Firstly, the political association as he describes it lacks legitimation as it does not guarantee a free coexistence but establishes servitude.¹⁵ Secondly, the constitution is not 'healthy and strong' (*saine et forte*) but extremely 'weak' (*foible*), as there is an initial lack of conventions and a lack of authority to enforce them.¹⁶ And finally, after the appointment of magistrates, their ambition and vanity impedes the wealth of the people which is a declared purpose of the state.¹⁷ In this scenario, a wrongful contract and a deficient constitution do not so much *lead* into disorder; but rather the contract and the constitution are ever lacking force to establish what can actually be considered as order: there is no decline from order into disorder and no liminal zone between them because order has never begun.

In the *Social Contract*, however, Rousseau describes a different scenario: there is an initially well-working order (i.e. an order in the narrower sense) which changes into disorder. According to Rousseau's conception, a well-working order is composed of the following elements: there are the members of the people who on the one hand enact laws as participants in the sovereign authority and who on the other hand obey these laws as its subjects;¹⁸ and there are magistrates who govern, that is who are charged with the execution of these laws.¹⁹ Order is upheld as long as the sovereign authority, the subjects, and the magistrates fulfil their tasks. As soon as the sovereign, the magistrate or the subjects transcend their given competences, order stops and disorder follows: 'If the Sovereign wants to govern, or the magistrate to give laws, or the subjects refuse to obey, disorder replaces rule, force and will no longer act in concert, and the dissolved State thus falls into despotism or anarchy.'²⁰ In this scenario it is not appropriate either to talk of a decline in the sense of a process leading from order to disorder. Disorder is not what destroys the rule from the inside. It is not what causes the order to stop, it is what comes after it: disorder *succeeds* the rule—*le désordre succède à la règle*. When the state falls into despotism or anarchy, it is already dissolved (*dissous*). The fact of disorder means that there is no state any more. Disorder is not a messed order, it is not just misorder (as such it would still be within order), but it is rather the condition when order has gone.

These passages in the texts of Hobbes and Rousseau can give a clearer notion of the characteristics of a state of nature and its theoretical function. *Firstly*, the conception of a state of nature as a state of disorder makes clear that the coexistence of men does not necessarily have a political form. In *On Revolution*, Hannah Arendt

Cf. also the remarks of Heinrich Meier in Jean-Jacques Rousseau, *Discours sur l'inégalité*, ed. Heinrich Meier (6th edn, 2008), n. 271, pp. 224f.

¹⁵ Cf. Rousseau, *Discourse*, II, p. 173 (n. 1).

¹⁶ Cf. Rousseau, *Discourse*, II, pp. 175f (n. 1).

¹⁷ Cf. Rousseau, *Discourse*, II, pp. 181f (n. 1).

¹⁸ Cf. Rousseau, *Social Contract*, I, 6, p. 51 (n. 6).

¹⁹ cf. Rousseau, *Social Contract*, III, 1, p. 83 (n. 6).

²⁰ Rousseau, *Social Contract*, III, 1, p. 83 (n. 6). Further descriptions of the end of the political entity as the beginning of 'disorder'. Cf. Rousseau, *Social Contract*, III, 6, p. 97 and III, 10, p. 108 (n. 6).

argues that exactly this insight is the reason why 'the assumption of a prepolitical state, called "state of nature"' has not lost actuality: 'Its relevance even today lies in the recognition that a political realm does not automatically come into being wherever men live together, and that there exist events which, though they may occur in a strictly historical context, are not really political and perhaps not even connected with politics.'²¹ Arendt stresses that the idea of a state of nature not only implies the fact of non-political events but of events which 'perhaps' do not even have a connection with politics. Referring to Hobbes and Rousseau, I have described the existence of such events beyond politics as 'disorder'. *Secondly*, the passages quoted above show that in Hobbes and Rousseau such events are not only disconnected from politics, but moreover they imply the absence of a political sphere. Political and non-political events cannot take place simultaneously because they belong to different phases. When one phase begins, it is because the other has ended.²² Arendt explicitly mentions this radical separation of beginning and ending as well: '[T]he hypothesis of a state of nature implies the existence of a beginning that is separated from everything following it as though by an unbridgeable chasm.'²³

The unbridgeable chasm, the border between politics and state of nature is, according to Arendt, defined as occurrence of violence. In her German translation which she published two years later (1965), Arendt writes that violence is only able to protect the borders of the political realm; wherever violence invades politics itself, politics has come to an end.²⁴ Arendt also points out what has often been noticed before and after her—and with good reason: that it is not by a coincidence that the conception of a state of nature was developed in the seventeenth century, a period characterized by the violence of civil wars. What informed the reflection about the state of nature was the threatening occurrence of a backfall from order to disorder which the above quotations describe.

However, as mentioned before, it is not this backfall that Hobbes and Rousseau were primarily interested in. And it is thus not the state of nature 'as backfall' which they primarily focused on. They were both interested in the escape of disorder by formation of orders. In this case, the state of nature is not a backfall, but an (imagined) condition before politics. Whereas the state of nature as a backfall from order shows the failing of the state (or, more precisely, that the state has failed), this pre-political state of nature is the reason for any foundation of a state. As such, the pre-political state of nature is of the greatest importance in the theories of Hobbes and Rousseau. I will deal with the change from the pre-political state of nature to

²¹ Hannah Arendt, *On Revolution* (1963), p. 10.

²² It is this separateness which Adorno and Horkheimer critically address in their *Dialectic of Enlightenment*: 'Men have always had to choose between their subjection to nature or the subjection of nature to the Self.' There was no third option between the domination of nature and the domination of men—with the result that domination is omnipresent. Cf. Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment* (1999), p. 32.

²³ Arendt, *On Revolution*, p. 10 (n. 21).

²⁴ 'Die Gewalt kann nie mehr, als die Grenzen des politischen Bereichs schützen. Wo die Gewalt in die Politik selbst eindringt, ist es um die Politik geschehen.' Hannah Arendt, *Über die Revolution* (4th edn, 2014), p. 20.

the sovereign state because the egress from this state of nature is the beginning of another state of nature, the one within the international sphere: the foundation of the sovereign state is in the same logical moment the ending and the beginning of the state of nature, and it is a question of perspective—domestic or international—how it is perceived.

III. The Social Contract as Foundation of an International State of Nature

In their political writings, Hobbes and Rousseau have a principal question in common. This question is twofold: why is the state necessary and what can make it legitimate? The state is necessary because the state of nature, a condition of coexistence beyond sovereign power, is unbearable.²⁵ In such a condition, there is no security because there is 'too much' freedom: everyone's life is threatened by everyone's unlimited freedom. The necessity of the state is the necessity to limit this original freedom. It is at this point where the question of legitimation arises. Whereas the state is necessary because the state of nature has to be left and freedom has to be limited, the question of legitimation is about *how* freedom is limited. Consequently, the (imagined) moment *when* freedom is limited takes centre stage. This moment is the entering of the political society by the formation of the state. According to both Hobbes and Rousseau, this moment—in order to be legitimate—requires a juridical form: a contract in which all future members of the political society participate. The twofold question about the necessity and the legitimacy of the state is unfolded by bringing two theoretic figures in a strong alliance: state of nature and social contract.

There are, however, important differences between Hobbes and Rousseau concerning the question of how the problems which necessitate the contract evolve and how the contract is supposed to solve them. Hobbes presupposes a stable human being which does not change either within the state of nature or within the political society. It is characterized by the core faculties of physical force, experience, reason, and passion.²⁶ Because of the competition about honour and about goods which cannot be shared, the coexistence of human beings is conflictual. Hobbes furthermore presupposes a natural 'willingness to hurt each other'.²⁷ Since he postulates that the abilities of human beings are substantially equal, especially the ability to kill each other, nobody can consider himself safe from harm while being in the state of nature. The ubiquitous danger of a violent death makes self-preservation impossible.²⁸ The political society does not eliminate this danger by changing human

²⁵ Cf. Thomas Hobbes, *On the Citizen*, ed. and trans. Richard Tuck and Michael Silverthorne (1998), I, 13, and 15; Rousseau, *Social Contract*, I, 6 (n. 6).

²⁶ Cf. Hobbes, *On the Citizen*, I, 1, p. 21 (n. 25).

²⁷ Hobbes, *On the Citizen*, I, 3, pp. 25f (n. 25).

²⁸ Cf. Hobbes, *On the Citizen*, I, 13, p. 30 and 15, p. 31 (n. 25); Hobbes, *Leviathan*, 13, p. 89 (n. 1).

nature;²⁹ it only establishes a 'power able to over-awe them all'.³⁰ The sovereign state guarantees security at the cost of the natural freedom.

Rousseau agrees that the purpose of entering the sphere of politics by the foundation of the state is to guarantee self-preservation. He also agrees that men do not naturally aspire to a life within society. But he objects that men are naturally peaceful and characterized not by a willingness to harm but by pity.³¹ Unlike Hobbes who imagines the state of nature as an unvarying state, Rousseau conceives it as changing for the worse. The drive to compare oneself with others emerges only in society which evolves—caused by many coincidences—already *within* the state of nature. In Rousseau's account of the state of nature in his *Second Discourse*, the state of war (*état de guerre*)³² results from the '[n]ascent Society',³³ and it is this conflictual society which necessitates the foundation of a political body by contract. The state of nature is not essentially unbearable but reaches a point when self-preservation becomes impossible.³⁴ Rousseau is not only a 'historical' thinker regarding the development within the state of nature. In his *Social Contract*, he claims that 'the transition from the state of nature to the civil state produces a most remarkable change in man by substituting justice for instinct in his conduct, and endowing his actions with the morality they previously lacked'; the moment of contract transforms 'a stupid and bounded animal' into 'an intelligent being and a man'.³⁵ However, the most important distinction from Hobbes' conception of the social contract consists in the fact that according to Rousseau men not only lose their natural unlimited freedom but gain a 'civil freedom' instead.³⁶ In contrast to Hobbes, Rousseau's aim is not only to develop a theory of a state which legitimately guarantees security but of a state in which security is guaranteed while its citizens who are part of the sovereign power remain as free as before (exactly because they are part of the sovereign power).³⁷ This difference has essential consequences regarding the form of social contract in Rousseau and Hobbes. Hobbes' contract has the form of authorization. Everyone agrees with everyone else to give up their right of governing themselves and to make themselves the authors of all acts of a person or an assembly in order that this person or assembly undertakes all measures which appear appropriate to maintain peace and to guarantee the common defense: 'And he that carryeth this Person, is called *Sovereigne*, and said to have *Sovereigne Power*; and every one besides, his *Subject*.'³⁸ Whereas the subjects are

²⁹ Cf. Hobbes, *On the Citizen*, I, 2, p. 25 (n. 25); Hobbes, *Leviathan*, 13, p. 89 (n. 1).

³⁰ Hobbes, *Leviathan*, 13, p. 88 (n. 1).

³¹ Rousseau formulates his objection, directly against Hobbes: 'By reasoning on the basis of the principles he establishes, this Author [Hobbes, J.H.] should have said that, since the state of Nature is the state in which the care for our own preservation is least prejudicial to the self-preservation of others, it follows that this state was the most conducive to Peace and the best suited to Mankind.' Rousseau, *Discourse*, I, p. 151 (n. 1); cf. Rousseau, *State of War*, pp. 33f and 45–7 (n. 4).

³² Rousseau, *Discours sur l'inégalité*, II, p. 212 (n. 14).

³³ Rousseau, *Discourse*, II, p. 172 (n. 1).

³⁴ Cf. Rousseau, *Discourse*, II, pp. 171–3 (n. 1) and also Rousseau, *Social Contract*, I, 6, p. 49 (n. 6).

³⁵ Rousseau, *Social Contract*, I, 8, p. 53 (n. 6).

³⁶ Cf. Rousseau, *Social Contract*, I, 8, pp. 53f (n. 6).

³⁷ Cf. Rousseau, *Social Contract*, I, 6, and 7 (n. 6).

³⁸ Cf. Hobbes, *Leviathan*, 17, pp. 120f (n. 1).

excluded from sovereignty, this is not the case in Rousseau's account in his *Social Contract*. The form of contract in Rousseau is not authorization but alienation (*aliénation totale*): the clauses of the contract 'all come down to just one, namely the total alienation of each associate with all of his rights to the whole community'.³⁹ The public person formed by the union of all associates is called 'Republic' or 'body politic'. The individuals are both citizens (insofar as they are 'participants in the sovereign authority') and subjects (insofar as they are 'subjected to the laws of the State').⁴⁰ In contrast to Hobbes, the political entities 'subjects' and 'sovereign' do not include different individuals or groups. The fact that all associates of the body politic are part of the sovereign and involved in the sovereign competence of legislation creates the civil freedom of the individuals as citizens.⁴¹ This including character of the conception of sovereignty in Rousseau does not diminish its absoluteness. Like Hobbes, Rousseau argues that the sovereign is bound to no law because he cannot obligate himself.⁴²

Even if the figure of contract differs in many ways, the fact of the contract and its reasons open up a shared perspective. In this social contract theory perspective, the contract draws an impervious line between a non- or pre-political sphere which is before the contract and a political sphere which is after the contract. If a backfall into the state of nature occurs, it is not a backfall into an original state of nature. A civil war is not a 'natural' condition at all.

In the social contract theory perspective, the non- or pre-political sphere is of no interest in its own right: it is as if what is before the contract had never existed.⁴³ And indeed both Hobbes and Rousseau suggest that there was in fact no such time as an original state of nature. They do not locate it somewhere in history, they do not claim that it really happened.⁴⁴ The state of nature is a fiction which makes the idea of a radical beginning of politics possible—thus a beginning which is empty, not occupied by already existing social injustice which could penetrate the political form of the state.

Rousseau explicitly underscores the importance of an unburdened beginning when he deals with the question of legislation: 'What makes the work of legislation difficult is not so much what has to be established as what has to be destroyed; and what makes success so rare is the impossibility of finding the simplicity of nature linked with the needs of society. [. . .] This is one reason why one sees few

³⁹ Rousseau, *Social Contract*, I, 6, p. 50 (n. 6).

⁴⁰ Cf. Rousseau, *Social Contract*, I, 6, pp. 50f (n. 6).

⁴¹ However, not every inhabitant ranks as a citizen. Rousseau quotes the example of the republic of Geneva where there are five different orders of men whereof only two form the republic as the association of citizens. Cf. Rousseau, *Social Contract*, I, 6, p. 51 (n. 6).

⁴² Hobbes, *On the Citizen*, VI, 14 (n. 25); cf. Rousseau, *Social Contract*, I, 7, pp. 51f (n. 6); Robert Derathé has pointed out that in Rousseau's time the idea of absolute power meant the absence of any *constitutional* restraints but not of any restraints at all; the exercise of sovereignty should still be limited by the law of nature and the public good. The obvious question, then, is how operative such limitations are. Cf. Robert Derathé, *Jean-Jacques Rousseau et la science politique de son temps* (1950), pp. 339f.

⁴³ There is no 'before the contract' because, as Hans Blumenberg points out, the contract has always already been entered. Cf. Hans Blumenberg, *Die Legitimität der Neuzeit* (1996), p. 108.

⁴⁴ Hobbes, *Leviathan*, 13, p. 90 (n. 1); Rousseau, *Discourse*, I, Preface, p. 125 (n. 1).

well-constituted States.⁴⁵ Rousseau points to the following problem: men have lost the simplicity of nature which consists in a pre-social peaceful life; they have moved towards a conflictual society which makes the state necessary. In order to be built on a proper fundament, the state requires men in the 'simplicity of nature'—the very simplicity of nature which has made the state necessary because it has been lost. The institution of the state was possible when it was not needed (because men lived peacefully) and became impossible when it was needed (because men lost their peaceful nature).⁴⁶ The decisive aspect of this aporetic situation is that the disorder which makes the state necessary is *socially produced*. When Hobbes mentions that the 'Americans' of his century and other peoples of the past were living the life of a state of nature, he also assumes that they are not isolated individuals but members of a community. He speaks of them as peoples [*gentes* in the original Latin version of *On the Citizen*] and thereby acknowledges that they do not live the life of isolated individuals.⁴⁷ But this is not more than an implication, and it is the project of Rousseau to explicitly elaborate, against Hobbes as well, the social genesis of disorder (as a result of inequality) in his *Second Discourse*. In this work, Rousseau puts his assumption in an even more radical form: the disorder which makes a political sphere necessary is neither caused by nature nor produced within a pre-political society. Rather, this disorder is itself a product of the political sphere: the laws of this sphere are not just the remedy against disorder but its cause:

It has to be granted from the first that the more violent the passions, the more necessary are Laws to contain them: but quite aside from the fact that the disorders and the crimes they daily cause among us sufficiently prove the inadequacy of the Laws in this respect, it would still be worth inquiring whether these disorders did not arise together with the Laws themselves; for then, even if they could repress them, it is surely the very least to expect of them that they put a stop to an evil that would not exist without them.⁴⁸

Rousseau here suggests that disorder is *never* natural or prepolitical. Disorder is a result and not a presupposition of the political sphere. If the state of nature as disorder is never natural, it only exists as a backfall from order and as the international sphere. Whereas the former is the end of the political state,⁴⁹ the latter

⁴⁵ Rousseau, *Social Contract*, II, 10, p. 78 (n. 6). The same argument can be found in the *Second Discourse* where Rousseau praises Lycurgus who set 'aside all the old materials [...] in order afterwards to erect a good Building' in Sparta. Rousseau, *Discourse*, II, p. 175 (n. 1).

⁴⁶ In a similar way, Rousseau refers to the paradoxical situation of the foundation of a political society when he claims in the *Second Discourse* that 'the same vices that make social institutions necessary make their abuse inevitable'. Rousseau, *Discourse*, II, p. 182 (n. 1).

⁴⁷ Cf. Hobbes, *On the Citizen*, I, 13, p. 30 (n. 25); Hobbes, *Leviathan*, 13, p. 89 (n. 1).

⁴⁸ Rousseau, *Discourse*, I, p. 155 (n. 1). As it becomes clear in the second part of the *Second Discourse*, Rousseau's argument against the law is that the law established with the political society primarily serves the juridification of property which reinforces the evolving inequality. As all forms of inequality can be reduced to riches (cf. Rousseau, *Discourse*, II, pp. 183f (n. 1)) and as inequality is the reason of the collapse of the political society, the law is an essential contributory cause of the backfall into disorder. Cf. Rousseau, *Discourse*, II, pp. 166f, 169, 171–3 (n. 1).

⁴⁹ Hobbes and Rousseau both stress that any state will inevitably dissolve some day as nothing which is humanly produced can last forever. Cf. Hobbes, *Leviathan*, 17, p. 120 and 29, p. 221 (n. 1); Rousseau, *Social Contract*, III, 11, p. 109 (n. 6).

is an everyday phenomenon. It begins in the very moment when states appear. According to Rousseau, the formation of one political order is sufficient to provoke an international sphere:

As soon as the first society is formed, the formation of all the others necessarily follows. One has either to join it or to unite to resist it; to imitate it or let oneself be swallowed up by it. Thus the whole face of the earth is changed; everywhere nature has disappeared; everywhere human artifice takes its place.⁵⁰

The international sphere is a side effect of the foundation of the state. It is a state of war which goes along with the normality of the political sphere.

IV. The International State of Nature as a Condition of War

Both Hobbes and Rousseau call the state of nature a 'time of Warre'⁵¹ and an 'état de guerre', respectively.⁵² There are three important characteristics in their concept of war. Firstly, war is always bad.⁵³ Secondly, war has some extension in time; it is not the single event of a battle but a period. Thirdly, war in the proper sense is not an affair between individuals.

Hobbes distinguishes the 'actuell fighting' from 'the known disposition thereto'.⁵⁴ War is this disposition, it is the 'tract of time'⁵⁵ in which the outbreak of actual fighting is not utterly out of the question. This has never been the case between individuals, but it is the permanent situation between sovereigns:

But though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours, which is a posture of War. But because they uphold thereby, the Industry of their Subjects; there does not follow from it, that misery, which accompanies the Liberty of particular men.⁵⁶

⁵⁰ Rousseau, *State of War*, p. 36 (n. 4). Cf. also Rousseau, *Discourse*, II, pp. 173f (n. 1): 'It is easy to see how the establishment of a single Society made the establishment of all the others indispensable, and how, in order to stand up to united forces, it became necessary to unite in turn.'

⁵¹ Hobbes, *Leviathan*, 13, p. 89 (n. 1).

⁵² Cf. Hobbes, *Leviathan*, 13, p. 89 (n. 1) and Rousseau, *Discours sur l'inégalité*, II, p. 212 (n. 14).

⁵³ Simone Goyard-Fabre points out that Hobbes rejects a non-pessimistic idea of war: he neither continues the tradition of 'just war' (Augustine, Thomas Aquinas) nor the tradition of war as art (Machiavelli). Both Hobbes and Rousseau consider war not as a mission or a skill but just as a fact which has to be averted if possible. Cf. Simone Goyard-Fabre, *Le droit et la loi dans la philosophie de Thomas Hobbes* (1975), pp. 62-5.

⁵⁴ Hobbes, *Leviathan*, 13, pp. 88f (n. 1).

⁵⁵ Hobbes, *Leviathan*, 13, p. 88 (n. 1).

⁵⁶ Hobbes, *Leviathan*, 13, p. 90 (n. 1). Cf. as well Hobbes, *On the Citizen*, XIII, 7, p. 145 (n. 25): 'For the state of commonwealths towards each other is a natural state, i.e. a state of hostility. Even when the fighting between them stops, it should not be called Peace, but an intermission during which each watches the motion and aspect of its enemy [...].'

War is possible because of the independency of the sovereigns. They have not given up their natural right and thus remain in the state of nature: not only towards other sovereigns but towards their subjects as well. But this is not enough to explain why there has never been 'a condition of warre one against another'. What is lacking between individuals is everything that is 'continuall'—and due to this lack, there is no 'condition' between them and thus no war. This correlation becomes more explicit in Rousseau. He argues that the (early) state of nature is no state of war not only because men are timid, peaceful and endowed with pity but also because there are no continuous relationships between private individuals.⁵⁷ This is the reason why there is no 'true war between individuals' but only between 'public persons', i.e. sovereigns.⁵⁸ Thus, Rousseau defines war as follows: 'I call then war between power and power⁵⁹ the effect of a constant, overt, mutual disposition to destroy the enemy state, or at least to weaken it by all the means one can. When this disposition is transformed into action it is war properly called; in so far as it remains untransformed it is only the state of war.'⁶⁰ What is properly called 'war' presupposes a constant disposition—a state of war. In Hobbes and Rousseau, this leads to the conclusion that the state of nature as a state of war has its only actual appearance in the international sphere.

Hobbes and Rousseau agree in their distinction between a hypothetical state of nature between individuals and a real state of nature in the international realm, but they fundamentally disagree in their appraisal of the international condition of war. In Hobbes' view, the international state of war does not cause major problems. Admittedly, the formation of states causes the problem of an international state of war but it is at the same time the principal part of minimizing its threats. The purpose of the state is not only to guarantee 'Peace at home' but also to enable mutual assistance against the 'enemies abroad'.⁶¹ To save the citizens from both 'foreign and civil war' is the sovereign task.⁶² Apart from this, Hobbes claims that the

⁵⁷ Cf. Rousseau, *State of War*, p. 35 (n. 4): 'War is a permanent state which presupposes constant relations; and these relations are a rare occurrence between men, for between individuals there is a continual flux which constantly changes relationships and interests. Thus a matter of dispute rises and disappears almost at the same moment; a quarrel begins and ends within a day; and one can have fights and murders, but never, or very rarely, long enmities and wars.'

⁵⁸ Rousseau, *State of War*, p. 41 (n. 4).

⁵⁹ In the *Social Contract* which appeared six years later (1762) Rousseau uses the term 'power' [*puissance*] in order to describe the body politic 'when comparing it to similar bodies'. Rousseau, *Social Contract*, I, 6, p. 51 (n. 6). 'Power' is the term for bodies politic in the international perspective, whereas 'sovereign' denominates these bodies when perceived in their internal activity.

⁶⁰ Rousseau, *State of War*, p. 40 (n. 4).

⁶¹ Cf. Hobbes, *Leviathan*, 17, pp. 120f (n. 1).

⁶² Hobbes, *On the Citizen*, XIII, 6, p. 144 (n. 25). Robinson Grover stresses that the crucial difference between individuals in a state of nature and nations in a state of nature 'is the shielding effect of national institutions which interpose themselves between the international anarchy of sovereign nations and the solitary citizen'. Robinson A. Grover, 'Hobbes and the Concept of International Law', in Timo Airaksinen and Martin A. Bertman (eds.), *Hobbes: War Among Nations* (1989), pp. 79–90, at p. 88. Grover turns this argument against Hobbes' conception of absolute sovereignty: if the states can interpose themselves between the international anarchy and the individuals, why should it not be possible to mitigate the individual state of nature by interposing other institutions between the individuals, for example the law, the church, or the family (instead of a national absolute sovereign)? In other words: if an absolute (super-national) sovereign is not needed to protect the individuals in

condition of war between sovereigns is less miserable than a state of nature between individuals, as the industry of the subjects of a state is not infringed but upheld in the international condition.

In his *Second Discourse* and his treatises about peace and war, Rousseau develops a dialectical perspective which is less conciliatory than the one of Hobbes. In contrast to Hobbes, Rousseau points to the paradoxical situation caused by the formation of the state. The unification of private individuals constitutes a new kind of individuals 'for with regard to foreigners it [the body politic, J. H.] becomes a simple being, an individual'⁶³. The unification causes a new division—and this division between public or national individuals produces a dimension of violence hitherto unknown on earth: the 'first discernible effects of the division of Mankind into different Societies' were wars between nations, battles, murders, and reprisals 'that make Nature tremble'. The trembling of nature shows how far from nature such a state of nature is, and how far it is from Rousseau's hypothesis of an original state of nature between individual men. This is because in the rising international sphere 'more murders were committed in a single day's fighting, and more horrors at the capture of a single town, than had been committed in the state of Nature for centuries together over the entire face of the earth'.⁶⁴ The foundation of states here only causes the problem of war without providing a means to prevent its outbreak. This is also the radical conclusion Rousseau draws against Hobbes in his essay about *The State of War*: 'Far from the state of war being natural to man, war springs from peace, or at least from the precautions that men have taken to ensure a lasting peace.'⁶⁵ The precautions consist in building political associations—but 'in joining a particular group of men, we have really declared ourselves the enemies of the whole race'.⁶⁶ The deadly irony lies not only in the fact that the prevention of eventual private 'wars' produces actual wars between nations but that these wars between nations are by far more disastrous than the wars one sought to prevent.

The difference between Hobbes and Rousseau is as drastic as it can be. Whereas Hobbes consequently looks at the formation of the political society from the perspective of unification and peace, Rousseau—at least in the *Second Discourse*, *The State of War*, and *The Abstract of Saint-Pierre's Project for Perpetual Peace*—looks at it

an international state of nature, why is an absolute (national) sovereign needed to protect them in an individual state of nature? Cf. Grover, 'Hobbes', in *Hobbes: War Among Nations*, p. 89 (n. 62).

⁶³ Cf. Rousseau, *Social Contract*, I, 7, p. 52 (n. 6). Georg Cavallar considers Rousseau's account of the state of nature between these public individuals as a 'structural interpretation' of Hobbes' hypothesis of a state of nature between private individuals. Cf. Georg Cavallar, 'Jean-Jacques Rousseau', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), pp. 1114–17, at p. 1115. Indeed the similarity between Rousseau's depiction of the destructive aspiration for power of the sovereigns and Hobbes' depiction of the will of private individuals is noticeable.

⁶⁴ Rousseau, *Discourse*, II, p. 174 (n. 1).

⁶⁵ Rousseau, *State of War*, p. 45 (n. 4). In the *Abstract of Saint-Pierre's Project for Perpetual Peace*, Rousseau also blames the precautions against war as the cause of war. Jean-Jacques Rousseau, 'Abstract and Judgement of Saint-Pierre's Project for Perpetual Peace', in Stanley Hoffmann and David P. Fidler (eds.), *Rousseau on International Relations* (1991), pp. 53–100, at p. 54.

⁶⁶ Rousseau, *Abstract and Judgement*, p. 54 (n. 65).

from the perspective of division and war.⁶⁷ According to Rousseau, the formation of political societies does not give an answer to the question of war. It rather makes this question relevant.⁶⁸ This could explain why Rousseau, in contrast to Hobbes, dealt extensively with the question of bringing order into the international sphere. He did so in his *Abstract and Judgement of Saint-Pierre's Project for Perpetual Peace*. I now want to outline the reasons why in Rousseau's perspective such an international order is preferable but impossible and which conclusions he draws from this insight.

V. Rousseau and the Question of Perpetual Peace

In his *Abstract of Saint-Pierre's Project for Perpetual Peace*, Rousseau only deals with the international situation within Europe. The question of perpetual peace is a European question. The vision of peace has its borders at the borders of Europe. The relation between Europe and the rest of the world remains in a state of nature. According to the *Abstract*, the European situation of war is more disastrous than anywhere else—not because there is unbridled disorder but because there is some order in disorder. A balance [*équilibre*] of forces stabilizes the European condition of war and makes it impossible to arrive at a decision which brings violence to an end: 'The present balance of Europe is just firm enough to remain in perpetual oscillation without losing itself altogether; and, if our troubles cannot increase, still less can we put an end to them, seeing that any sweeping revolution is henceforth an impossibility.'⁶⁹ In the French original text, Rousseau uses the term 'système de l'Europe' which has a certain 'degré de solidité'.⁷⁰ The European states do not build an order as order implies a situation of non-violent coexistence.⁷¹ But neither are they in mere disorder: although they are in a state of war, European sovereigns are juridically, ethically, and religiously connected. These ties make it possible to talk of a *système*: 'C'est ainsi que toutes les Puissances de l'Europe forment entre elles une sorte de système qui les unit par une même religion, par un même droit des gens, par les moeurs, par les lettres, par le commerce, et par une sorte d'équilibre qui est l'effet nécessaire de tout cela [. . .]'.⁷² The social bond which constitutes this system

⁶⁷ Regarding this difference between Hobbes and Rousseau cf. also Thibault, 'Les relations internationales', in *Études internationales*, pp. 217–20 (n. 5).

⁶⁸ The question of foreign affairs is explicitly excluded from the reflections in the *Social Contract*. Cf. Rousseau, *Social Contract*, IV, 9, p. 152 (n. 6).

⁶⁹ Rousseau, *Abstract and Judgement*, pp. 61f (n. 65).

⁷⁰ Rousseau, 'Extrait de la Paix perpétuelle', in *The Political Writings of Jean Jacques Rousseau*, pp. 364–87, at p. 370 (n. 3).

⁷¹ It is in this sense of non-violent, i.e. peaceful coexistence Rousseau uses the term 'order' in the first sentence of the first book of his *Social Contract* when he speaks of the 'civil order' [*l'ordre civil*]. Cf. Rousseau, *Social Contract*, Introduction, p. 41 (n. 6).

⁷² Rousseau, 'Extrait de la Paix perpétuelle', in *The Political Writings of Jean Jacques Rousseau*, p. 366 (n. 3). 'Thus the powers of Europe constitute a kind of a whole [in the French original: 'système', J.H.], united by identity of religion, of moral standard, of international law; by letters, by commerce, and finally by a species of balance which is the inevitable result of all these ties [. . .]'; Rousseau, *Abstract and Judgement*, pp. 55f (n. 65).

remains imperfect but it is still tighter than the general knots of humanity, i.e. the knots existing in a state of nature. Imperfect bonds, however, are worse than no bonds at all—a 'system' is worse than mere disorder.⁷³

Whereas living in any state is bad because it combines the inconveniences of the state of nature and of society, living in a European state is worse because the European state of nature has a societal structure. The imperfection of this *société*⁷⁴ causes a miserable situation. But it is exactly the existence of such imperfect social bonds which could facilitate a European society in the form of a *Confédération* which he calls *République européenne*.⁷⁵ Only in this form of a real confederation (*Confédération réelle*) would the European society be a true body politic (*un vrai Corps politique*).⁷⁶

The condition of a true body politic is a legal framework. First of all, the European sovereigns would have to be willing to sign a treaty which declares their 'perpetual and irrevocable alliance'.⁷⁷ At the heart of the confederation would be a *tribunal judiciaire*⁷⁸ which should establish the laws and regulations obliging all sovereign members. Armed with a coercive power, the confederation would be able to enforce its laws.⁷⁹ According to Rousseau, it is this enforceability which is essential for law to be law. In order to be legitimate, the law has to be enacted by an assembly of the sovereign states which will be bound to this law. The question of an international body politic—which is, according to Rousseau, the only possibility of an international order—and the question of legitimate law are intertwined: a body politic needs enforceable law, and enforceable law needs the approval of the members of the political body. Rousseau argues that the common tribunal does not affect the rights of sovereignty; sovereigns do not become less absolute, but instead their crown will rather be assured.⁸⁰

According to Rousseau, firstly there is no doubt that the confederation, once established, would achieve its purpose to guarantee a lasting peace within Europe. This peace would be peace in the strict sense (and not just a temporary truce which is still a condition of war)⁸¹ as the eventuality of war would be out of the question: 'Let no one threaten us with a sudden invasion. It is perfectly obvious that Europe has no invader to fear, and that the "first comer" will never come. The day of those barbarian irruptions, which seemed to fall from the clouds, is gone forever.'⁸² Secondly, there is no doubt that the established confederation would be in the

⁷³ Cf. Rousseau, *Abstract and Judgement*, p. 67 (n. 65).

⁷⁴ Rousseau, 'Extrait de la Paix perpétuelle', in *The Political Writings of Jean Jacques Rousseau*, p. 374 (n. 70).

⁷⁵ Cf. Rousseau, 'Extrait de la Paix perpétuelle', in *The Political Writings of Jean Jacques Rousseau*, pp. 375f (n. 70).

⁷⁶ Cf. Rousseau, *Abstract and Judgement*, p. 67 (n. 65).

⁷⁷ Cf. Rousseau, *Abstract and Judgement*, p. 69 (n. 65).

⁷⁸ Rousseau, 'Extrait de la Paix perpétuelle', in *The Political Writings of Jean Jacques Rousseau*, p. 374 (n. 70).

⁷⁹ Cf. Rousseau, *Abstract and Judgement*, p. 68 (n. 65).

⁸⁰ Cf. Rousseau, *Abstract and Judgement*, pp. 80f (n. 65).

⁸¹ Cf. Rousseau, *Abstract and Judgement*, p. 60 (n. 65).

⁸² Rousseau, *Abstract and Judgement*, p. 84 (n. 65).

interest of all sovereign states.⁸³ At the end of his *Abstract*, Rousseau radicalizes this second claim. He argues that an international peace is not only in the interest of the states but that beyond such peace there is a total impossibility to establish a good government.⁸⁴ Rousseau, however, adds for consideration that there is one right that sovereign states have to waive when entering the confederation: it is their right to take measures against one of the members, i.e. their right to decide on war.⁸⁵

In Rousseau's perspective, this deprivation is the reason why a perpetual peace within Europe is not achievable. This is his argument in his *Judgement of Saint-Pierre's Project for Perpetual Peace*. The kings and those who serve them only aim at two objects: 'to extend their rule beyond their frontiers and to make it more absolute within them'.⁸⁶ Rousseau assumes that sovereign states are governed by individuals who follow more their private than the public interest.⁸⁷ And he makes clear that the princes governing the states are not aware about what is best for them. Deluded by appearances, they do not realize that their own interest (being rich and powerful) is pursued by acting in the public interest.⁸⁸ Instead of entering a federation, they continue to conduct war. This is the reason why the project of perpetual peace in Europe is desirable but will not be carried out without violent means: 'No federation could ever be established except by a revolution. That being so, which of us would dare to say whether the league of Europe is a thing more to be desired or feared? It would perhaps do more harm in a moment than it would guard against for ages.'⁸⁹

In contrast to the Abbé de Saint-Pierre, Rousseau is not a proponent of an international (European) order. International order would require an obliging legal framework. As Rousseau considered such a framework as beyond reach, he could only think of international order and peace as a wishful dream.⁹⁰ But still, he admits that there is *some kind* of international law. In a last step, I want to clarify why such an international law is possible in Rousseau's theory and why it is impossible in Hobbes' approach.

VI. Can International Law Be Possible?

If we now deal with the question of international law, it is no longer a question about international order (in the strict sense of order as implied by Hobbes and

⁸³ Cf. Rousseau, *Abstract and Judgement*, pp. 71–82 (n. 65).

⁸⁴ Cf. Rousseau, *Abstract and Judgement*, p. 86 (n. 65).

⁸⁵ Rousseau, *Abstract and Judgement*, pp. 69f and 76 (n. 65).

⁸⁶ Rousseau, *Abstract and Judgement*, p. 90 (n. 65).

⁸⁷ Cf. Rousseau, *Abstract and Judgement*, p. 97 (n. 65).

⁸⁸ Cf. Rousseau, *Abstract and Judgement*, pp. 92f and as well p. 82 (n. 65).

⁸⁹ Rousseau, *Abstract and Judgement*, p. 100 (n. 65).

⁹⁰ Olaf Asbach plausibly argues that there is also a structural reason why Rousseau does not advocate an international order: it would necessarily curtail the autarky and independence of the political entities, and it is exactly the autarky and independence of small republics which is in the center of his political philosophy. Cf. Olaf Asbach, 'Staatsrecht und Völkerrecht bei Jean-Jacques Rousseau. Zur Frage der völkerrechtlichen Vollendung des *Contrat social*', in Reinhard Brandt and Karlfried Herb (eds.), *Vom Gesellschaftsvertrag oder Prinzipien des Staatsrechts* (2nd edn, 2012), pp. 243–71.

Rousseau). Rousseau's probably most dismissive reference to international law can be found in *The State of War*: 'As for what is commonly called international law, because its laws lack any sanction, they are unquestionably mere illusions.'⁹¹

Because it lacks sanctions, the law of nations is not assured. In the case of conflict, it is not this law which is enforced but the 'law' of the stronger.⁹² This is the principal deficiency of the existing international situation. Rousseau puts it first in the summary at the end of his *Abstract*: 'Nul droit assuré que celui du plus fort.'⁹³ No assured law except that of the stronger. Rousseau points out in the *Social Contract* that the law of the stronger actually is no law.⁹⁴ Pure enforceability (the fact of sanction) does not create law. Law always needs legitimation and the criterion of legitimation, according to Rousseau, is the same in the international sphere as in the domestic one: those obliged by the law have to approve it, in other words, they have to participate in the legislation process. Regarding the international law of his time, Rousseau not only criticizes a lack of enforceability but also a lack of legitimation. He does so when considering the public law of Europe (*le Droit public de l'Europe*): it has not been established or authorized in concert ('n'étant point établi ou autorisé de concert').⁹⁵ This is the second deficiency. The third deficiency is that the law of nations is not based on general principles and that it varies ceaselessly in the course of time and from place to place. It is therefore riddled with contradictions which, again, are only solved by the force and in favour of the stronger.⁹⁶ Due to these deficiencies, the law of nations which takes shape as a public law of Europe lacks legal character. This is why Rousseau states that the laws of what is called 'law of nations' (*Droit des gens*) are only illusions. And still it is this common law of nations which, lacking systematicity in itself, contributes to the cohesion of Europe as an (imperfect) *système*.⁹⁷ Together with religion, morals, and commerce it establishes interstate relations which are beyond a political federation. Rousseau describes the efficacy of these relations as less apparent but not less real.⁹⁸ The formation of the law of nations takes place silently and it only consists in 'a few tacit conventions'.⁹⁹ We can conceive the term 'tacit' as 'not explicitly approved within a legislation process'. As such, the law of nations is not part of the political sphere—and consequently not part of Rousseau's political philosophy in the narrower sense.

⁹¹ Rousseau, *State of War*, p. 44 (n. 4); Rousseau, 'L'état de guerre', in *The Political Writings of Jean Jacques Rousseau*, p. 304 (n. 3): 'Quant à ce qu'on appelle communément le droit des gens, il est certain que, faute de sanction, ses lois ne sont que des chimères plus faibles encore que la loi de nature.'

⁹² The term that Rousseau uses for the law of nations is *Droit/droit des gens* (cf. n. 91 and Rousseau, *Discourse*, II, p. 174 (n. 1)). This *droit des gens* is powerless against the *droit du plus fort*, the law/right of the stronger.

⁹³ Rousseau, 'Extrait de la Paix perpétuelle', in *The Political Writings of Jean Jacques Rousseau*, p. 385 (n. 70).

⁹⁴ Cf. Rousseau, *Social Contract*, I, 3, p. 44 (n. 6).

⁹⁵ Cf. Rousseau, 'Extrait de la Paix perpétuelle', in *The Political Writings of Jean Jacques Rousseau*, p. 369 (n. 70); for the English translation cf. Rousseau, *Abstract and Judgement*, p. 60 (n. 65).

⁹⁶ Cf. Rousseau, *Abstract and Judgement*, p. 60 (n. 65).

⁹⁷ Cf. Rousseau, *Abstract and Judgement*, pp. 55f (n. 65).

⁹⁸ Cf. Rousseau, *Abstract and Judgement*, p. 55 (n. 65).

⁹⁹ Rousseau, *Discourse*, II, p. 174 (n. 1).

In Hobbes, there is no such weak form of international law. In his account, the international sphere (which is beyond all kind of system and cohesion) is an empty space from a legal point of view. This is due to the strict concept of law that Hobbes establishes when dealing with 'civil laws' or 'laws of the commonwealth': '*Civil laws* (to define them) are nothing other than commands about the citizens' future actions from the one who is endowed with *sovereign authority* [*summa potestás*].'¹⁰⁰ Sovereignty is the presupposition for law; as only sovereigns can enact laws, there is no law beyond sovereignty.¹⁰¹ This is the reason why there is only (domestic) civil law and no international law. As long as there is no overarching sovereign in the international sphere, that is to say as long as there is a plurality of sovereign states, there is no possibility of international law. In contrast to Rousseau, the idea of international law and the idea of sovereign states exclude each other in a Hobbesian conception of law. The relations between sovereigns are only characterized by an unrestrained natural right. Without any restraint of this right (which can only be achieved by the enactment of laws) 'there cannot possibly be any Peace'.¹⁰² But when Hobbes claims that the law 'which is commonly called the *Law of Nations*' is 'the same thing' as the law of nature, he does not claim that sovereigns are exempt of all duties.¹⁰³ The law of nature demands to seek peace. This applies to individuals and to 'Sovereign Princes, and Sovereign Assemblies' alike—even though there is no other 'Court of Natural Justice', but the conscience and the legal character of such a court is doubtful.¹⁰⁴

Whereas in the final analysis Hobbes and Rousseau agree that there is no effectual international law, they disagree about the value of an eventual international

¹⁰⁰ Hobbes, *On the Citizen*, VI, 9, p. 79 (n. 25). Cf. as well Hobbes, *Leviathan*, 26, pp. 183 and 200 (n. 1). M. M. Goldsmith classifies Hobbes not only as 'a command theorist' but also as a 'legal positivist'. Hobbes fulfils two conditions of legal positivism: on the one hand, the validity of law is not attached to general principles of morality, justice, or rationality; on the other hand, laws and authorities are organized hierarchically and integrated in a system which is closed by a supreme authority. Cf. M.M. Goldsmith, 'Hobbes on Law', in Tom Sorell (ed.), *The Cambridge Companion to Hobbes* (1996), pp. 274–304, at p. 275 and p. 278.

¹⁰¹ This is also the basis of Hedley Bull's assumption of an international anarchy: according to Hobbes, what is called the law of nations is not law in the proper sense (not positive law) but just the law of nature (prudential rules of self-preservation). Insofar as there is no central authority, the international sphere remains anarchic—which is, Bull argues, not only true for Hobbes' time but for the time of Bull's own article as well. On the other hand, Bull points out that Hobbes' account neglects all the legal and non-legal relations and cooperations between states which already existed in Hobbes' time and which are extended today. Cf. Hedley Bull, 'Hobbes and the International Anarchy', *Social Research* 48, 4 (1981), 717–38, at 723 and 736f.

¹⁰² Hobbes, *Leviathan*, 26, p. 185 (n. 1).

¹⁰³ Noel Malcolm insists that Hobbes considers international law to be law *precisely because* he identifies it with the law of nature: as distinct from civil law, international law qualifies as law not by being positive law but by being 'directly derived from (or identical with) natural law'. It is for this reason that Malcolm refuses to align Hobbes with the tradition of legal positivism. Cf. Noel Malcolm, *Aspects of Hobbes* (2004), pp. 439f. For a critique of Malcolm's argument cf. Benedict Kingsbury and Benjamin Straumann, 'State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes and Pufendorf', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (2010), pp. 33–51, at pp. 44f.

¹⁰⁴ Hobbes, *Leviathan*, 30, p. 244 (n. 1).

order and a forceful international law. As I will show in the next step, the agreement and the disagreement of Hobbes and Rousseau are reflected in their reception: concerning their descriptive account, they have mainly been received as representatives of the same direction; concerning their normative claims, they have been sorted in different traditions.

VII. Remarks about the History of Reception

Considering the history of the reception of Hobbes and Rousseau, we can distinguish between two questions: how have Hobbes and Rousseau been classified regarding their appraisal of international law? How have they influenced important normative positions regarding the question of international law?

Concerning the question of classification, both Hobbes and Rousseau have predominantly been considered as precursors of 'realism' because they both characterize the international sphere as a condition of war.¹⁰⁵ In other words, they have been considered 'realists' because they did not advocate a legal framework which makes international cooperation possible.¹⁰⁶ The objections against this 'realist' interpretation (regarding Hobbes) are based on an understanding of natural law as a law 'in its own right', a law which is binding despite the lack of enforceability¹⁰⁷ and (regarding Rousseau) on the emphasis that Rousseau developed elements and fragments of an ideal theory of supranational organization which he, however, never elaborated in a book.¹⁰⁸ Even though both Hobbes and Rousseau have mainly been classified as precursors of 'realism', their influence on later positions has been very different. I only want to mention two positions—one drawing on Hobbes and one on Rousseau—in order to illustrate the different directions of reception.

Hobbes' conception of war as a disposition to fight together with the Hobbesian relation of protection and obedience are the core of Carl Schmitt's *The Concept of the Political*.¹⁰⁹ This book (published in 1932) is prominent in the debate until today. Schmitt argues that 'the real possibility of war' is the condition of the existence of states. If there is no disposition to fight, there is no longer any friend and enemy

¹⁰⁵ Regarding Hobbes cf. the list of authors classifying Hobbes as 'realist' in Malcolm, *Aspects of Hobbes*, pp. 432–5 (n. 103); regarding Rousseau cf. Cavallar, 'Jean-Jacques Rousseau', in *The Oxford Handbook of the History of International Law*, p. 1116 (n. 63).

¹⁰⁶ Simone Goyard-Fabre has called this the 'silence' of Rousseau and Hobbes. Cf. Simone Goyard-Fabre, 'Les Silences de Hobbes et de Rousseau devant le droit international', *Archives de philosophie du droit* 32 (1987), 59–69, and Simone Goyard-Fabre, 'La guerre et le droit international dans la philosophie de Rousseau', *Études Jean-Jacques Rousseau* 7 (1995), 45–78.

¹⁰⁷ This is, as mentioned, also the prominent argument in Malcolm, *Aspects of Hobbes*, pp. 439f (n. 103).

¹⁰⁸ Francis Cheneval calls this Rousseau's 'unfinished' or 'unwritten' doctrine. Cf. Francis Cheneval, *Philosophie in weltbürgerlicher Bedeutung. Über die Entstehung und die philosophischen Grundlagen des supranationalen und kosmopolitischen Denkens der Moderne* (2002), pp. 365 and 390. Rousseau outlines the structure of such a book about the relations between political societies in *Emile or On Education*, trans. by Allan Bloom (1979), pp. 466f.

¹⁰⁹ Cf. Carl Schmitt, *The Concept of the Political*, trans. by George Schwab (2007), p. 52.

grouping, which means, according to Schmitt, that there is no state any more. A global organization of states which could preclude the possibility of war is tantamount to the nonexistence of states. The realization of a league of nations is thus, according to Schmitt, the end of the political sphere.¹¹⁰

This question of a league of nations is the most important starting point of one of the most prominent receptions of Rousseau. In the seventh proposition of his *Idea for a Universal History from a Cosmopolitan Perspective*, Kant remarks that 'Rousseau's preference of the state of savages was not all that far off the mark, that is, if one leaves out this last stage, which our species has yet to surmount.'¹¹¹ What Kant calls 'this last stage' is the federation of states (*Staatenverbindung*). Kant tackles exactly the problem which Rousseau had in mind: 'The problem of establishing a perfect civil constitution is dependent upon the problem of a law-governed external relation between states and cannot be solved without having first solved the latter.'¹¹² Rousseau noticed this problem and made it explicit but yet focused on a strong national constitution as the first thing to strive for. In *Toward Perpetual Peace*, Kant stresses the importance of an 'internal legal constitution'¹¹³ as well. For without a juridical condition (i.e. without states), there is no public law and thus no possibility for a federation which, like in Rousseau, can only exist in an international legal framework.¹¹⁴ The only aim of such a federation is to guarantee peace since any other purpose would restrain the freedom of its members.¹¹⁵ The crucial difference between Rousseau and Kant is not that Kant considers such an ideal federation as attainable whereas Rousseau does not, but that Kant focuses on the federation and on perpetual peace as a condition which cannot be fully achieved in a single moment of contract but which has to be pursued 'in the form of an endlessly progressing approximation'.¹¹⁶ It is not surprising that regarding the normative question of how an international legal order should look like, the reference to Rousseau and Kant has been much more frequent than the reference to Hobbes—even though Kant's position in *Toward Perpetual Peace* shares many of Hobbes' premises.¹¹⁷

¹¹⁰ Cf. Schmitt, *Concept*, p. 55 (n. 109).

¹¹¹ Immanuel Kant, 'Idea for a Universal History from a Cosmopolitan Perspective', in Pauline Kleingeld (ed.) and David L. Colclasure (trans.), *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (2006), pp. 3–16, at p. 12. Cf. as well in this volume the contribution by Vischer.

¹¹² Kant, *Idea for a Universal History*, p. 9 (n. 111).

¹¹³ Cf. Kant, 'Toward Perpetual Peace: A Philosophical Sketch', in *Toward Perpetual Peace*, pp. 67–109, at p. 80 (n. 111).

¹¹⁴ Kant, *Toward Perpetual Peace*, p. 107 (n. 113).

¹¹⁵ Cf. Kant, *Toward Perpetual Peace*, pp. 107f (n. 113). Regarding Kant's reception of Rousseau's idea of a necessary nexus of freedom on the one hand and legal condition on the other cf. Ernst Cassirer, *Das Problem Jean Jacques Rousseau* (1970), pp. 18f.

¹¹⁶ Cf. Kant, *Toward Perpetual Peace*, p. 109 (n. 113). It is because of his ideal of a federation and his idea of an endless approximation that Kant has been classified as 'anti-realist'. Cf. Pauline Kleingeld, 'Immanuel Kant', in *The Oxford Handbook of the History of International Law*, pp. 1122–6, at p. 1124 (n. 63).

¹¹⁷ Two important premises are a) the crucial difference between war as a single event of a battle and war as a lasting condition, and b) the relation of protection and obedience within the state. Cf. Kant, *Toward Perpetual Peace*, pp. 79 and 105f (n. 113).

VIII. Conclusion: National Orders in International Disorder

Peace in the sense of a condition in which the eventuality of war is excluded is not possible within the international sphere, neither in the theory of Hobbes nor in the theory of Rousseau. In both Hobbes and Rousseau, the condition of peace presupposes a political order established and maintained by means of law. 'Order', 'peace', and 'law' are necessarily linked concepts. Whereas these concepts are pivotal in Hobbes' and Rousseau's philosophy of the state, there is no reference point for these concepts in their understanding of the international sphere. In their perspective, the international sphere cannot be peacefully handled and it is for this reason that it does not play a major role in their political philosophy. In his *Judgement*, Rousseau criticizes Saint-Pierre for having chosen the wrong means: international peace cannot be 'set up by a book'.¹¹⁸ The peaceful federation could only be founded 'by the violent means from which humanity must needs shrink'.¹¹⁹ The political philosophy of Hobbes and Rousseau is about the necessity and legitimation of the foundation of a national political order. According to Rousseau, the foundation of an international political order cannot have a legitimate form; according to Hobbes, the foundation of an international political order is not necessary. Thus, such an order is for Hobbes as well as for Rousseau—for different reasons but in equal measure—out of the question. As a result, the international sphere remains in a state of disorder. To deal with this disorder is not an international task but the task of national orders. The task of political philosophy, as Hobbes and Rousseau understand it, is to elaborate the preconditions and fundamentals of an order which is able to accomplish this task: as there is no international politics, international peace is a national responsibility.

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¹¹⁸ This conviction (and not modesty) may be the reason why Rousseau explicitly refused to choose a title for his *Abstract* and *Judgement* which would have connected his person directly with the project of a perpetual peace within Europe: 'À l'égard du titre, je ne puis consentir qu'il soit changé contre un autre qui m'approprieroit davantage un Projet qui ne m'appartient point.' Jean-Jacques Rousseau, *Friedensschriften*, trans. and ed. Michael Köhler (2009), p. 8. The full title of the *Abstract* is: 'Extrait du projet de paix perpétuelle de Monsieur l'Abbé de Saint-Pierre. Par J.J. Rousseau, Citoyen de Genève'. Cf. Rousseau, *Friedensschriften*, p. 2 (n. 118).

¹¹⁹ Rousseau, *Abstract and Judgement*, p. 100 (n. 65).

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