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ABSTRACT

For an international law scholar who delights in the work of Norberto Bobbio, who was without contest one of the greatest legal theorists of the 20th century, Bobbio's attitud towards his discipline is downright frustrating. Admittedly, internationalists are used to theorists' hostile or reserved attitudes towards international law. Remember John Austin explaining that international law is not law "properly so called" but mere "positive morality", or Hart, who saw in international law a set of primary norms without any secondary norms, and so a very primitive system that hardly deserved to be called law at all. But Bobbio's attitud is even more frustrating. He says next to nothing of international law, not, as we shall see, that he did not make reference to it, but he (almost) never addressed it as a specific subject of reflection for the legal theorist.

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For an international law scholar who delights in the work of Norberto Bobbio, who was without contest one of the greatest legal theorists of the twentieth century, Bobbio's attitude towards his discipline is downright frustrating. Admittedly, internationalists are used to theorists' hostile or reserved attitudes towards international law. Remember John Austin explaining that international law is not law 'properly so called' but mere 'positive morality'[1], or Hart, who saw in international law a set of primary norms without any secondary norms, and so a very primitive system that hardly deserved to be called law at all[2]. But Bobbio's attitude is even more frustrating. He says next to nothing of international law, not, as we shall see, that he did not make reference to it, but he (almost) never addressed it as a specific subject of reflection for the legal theorist.

To be truthful there is one text in which Bobbio verges on such reflection. It is a lengthy critical review, published in 1951, of Mario Giuliano's, La comunità internazionale e il diritto[3].

1. J. Austin, The Province of Jurisprudence Determined (Cambridge: Cambridge University Press, 1995), p. 124.
2. H.L.A. Hart, The Concept of Law (Oxford: Oxford University Press, 1961). See Chapter X on International Law.
3. N. Bobbio, 'La comunità internazionale e il diritto' (1951) 4 Rivista trimestrale di diritto e procedura civile 1020-30. It is a long recension of M. Giuliano, La comunità internazionae e il diritto (Padua: Cedam, 1950). Giuliano was a student of R. Ago, who died prematurely. Bobbio's on-line bibliography cites another three texts under 'international law: a review of R. Ago, Scienza giuridica

Bobbio began his commentary:

> ”The preliminary and fundamental question for the science of international law is, as is known, that of the amenability to law of the international order. The thorough and highly documented study by Mario Giuliano bears mainly on the discussion of this problem, the solution to which implies the development of a general conception of law and so interests not only lay advocates of international law but also all law specialists, especially those who in their research and notably in the limited field of their discipline do not fail to return to the general theory of law[4]“.

The beginning of this text is very promising since it poses the problem of the study of international law from the perspective of a general theory of law. But what follows, even if it does contain some interesting reflections that shall be cited where appropriate, proves disappointing overall from this standpoint. The gist of Bobbio's commentary bears on Giuliano's sociological outlook, his use of the history of law, his stance on natural law, his relationship with legal positivism and legal science, the scope he gives to ideology, and so on, all of which are very interesting matters but that fail to address our query about the general nature of international law in its relationship with national laws[5].

This attitude on the part of a scholar renowned for the extent of his centres of interest and for his immense culture is completely disconcerting, and so much more so as several things might on the contrary have pushed Bobbio to tackle the theme of international law. For example, his theoretical approach to law centred on the concept of legal order might have led him to reflect on the specific features of the international legal order and the relations between national and international legal systems, as had done Santi Romano, a commentator he knew well and about whom he had written a study[6]. Yet Bobbio gives us some magnificent studies of the legal system, without ever examining either what it is that makes the international order specific or its relations with municipal systems, although there was a great Italian tradition of study of the question among legal theorists and international law scholars. And another thing: Kelsen, we know, assigned capital importance to international law in his theory and writings. Very early on in his career, he chose the relations between legal orders as one of his themes for reflection on law, as evidenced by his first lectures at the Hague Academy of International Law in 1926 on 'Les rapports de système entre le droit interne et le droit international public'[7]. Those lectures were to be followed by a substantial number of papers and books on international law. Now, Bobbio, although not a follower of Kelsen, was one of the commentators who did most to disseminate the thinking of 'the Viennese master' in Italy in the second half of the twentieth century[8].

Lastly, and if one might evoke a point about Bobbio's private life, he was the brother-in-law of Roberto Ago, one of the most eminent proponents of Italian international law theory and, what's more, an interna-

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e dritto internazionale, (Milan: Giuffrè, 1950) and two texts paying tribute to a highly critical pupil of Kelsen, Umberto Campagnolo (1993 and 1999).

4. Problema pregiudiziale e fondamentale per la scienza del diritto internazionale è, comè noto, quello della giuridicità dell'ordinamento internazionale. L'ampio e ocumentatissimo studi di Mario Giuliano è dedicato principalment alla discussione di questo problema, la cui soluzione implica la eleborazione di una concesezione genrale del diritto e quindi interessa non soltanto i cultori del diritto internazionale, ma tutti gli studiosi del diritto, in particolare coloro che dell'indagine, particolare del campi limitati delle loro disciplina non si dimenticano di risalire alla teoria generale del diritto.

5. In his study of legal orders, Bobbio contemplates the relations between different types of super-state, infra-state, collateral and anti-state orders, but goes no further than the theoretical positioning of this typology. See Teoría general del derecho, (Madrid: Debate, 1991), p. 253-70.

6. See Santi Romano, L'ordre juridique, (Paris: Dalloz, 1975 and 2002). He writes, for example: 'There is a touchstone for any definition of law that is what is called the problem of international law.' p. 39. See also N. Bobbio, 'Teoria e ideologia nella dottrina di Santi Romano', in Dalla struttura alla funzione. Nuovi studi di teoria del diritto (Milan: Edizioni di comunita, 1977) pp. 165-86.

7. 'Les rapports système entre le droit interne et le droit international public' (1926) Recueil des Cours, p. 231-331. Kelsen gave three series of lectures at the Hague Academy of International Law. In fact, his first great text on international law dates from 1920: Das Problem der Souveränität und di Theorie des Völkerrechts, (Tübingen: JCB, 1920). See also the collection of his articles in French: C. Leben (ed.), Hans Kelsen, Ecrits français de droit international (Paris: PUF, 2001).

8. See the nine articles on Kelsen collected in N. Bobbio, Diritto e potere. Saggi su Kelsen (Naples: Edizioni Scientifiche Italiane, 1992), five of which are republished in Essais de théorie du droit (Paris, Brussels: LGDJ, Bruylant, 1998), p. 207-83. See also A. Calsamiglia, 'Kelsen y Bobbio. Una lectura antikelseniana de Bobbio' in A. Llamas (ed.), La figura y el pensamiento de Norberto Bobbio (Madrid: Universidad Carlos III de Madrid. Boletin oficial des Estado, 1994), pp. 113-24.

tionalist with a fondness for theory[9]. So for all of the reasons just set out it is even harder to understand Bobbio's silence on a matter that should have been close to his centres of interest.

Bobbio did, however, devote numerous papers to questions with a substantial international dimension and which, consequently, could not be addressed without reference to international law. First and primarily was the problem of war and peace in the world and the question of human rights. And it should be noticed immediately that these two issues were not separate ones for him but on the contrary two sides of the same question bearing on the advent of a new world that would allow the international system to emerge from the state of nature in which it supposedly still found itself. This intention can be seen very plainly in the two collections of papers Bobbio himself collated, The Problem of War and the Roads to Peace (1979) and The Absent Third (1989), which mix studies on war and peace and others on human rights[10].

Reading the articles in these collections, supplemented by a few others, and especially those on democracy, which are articles not about international law but rather about political philosophy or even moral philosophy, it can be seen that, in dealing with these matters, Bobbio reasons with a certain idea of international law, an idea that was to evolve over time. Whereas his 1960-1970s' writings on war and peace portrayed an international law that was cast in the seventeenth to nineteenth century mould as the law of an anarchic society that left free course to the interplay between powers, the writings of the 1980-1990s opened out onto a vision of international law that was the defender of human rights and of 'international democracy'. It was thenceforth a system in which international law and the United Nations were called upon to play a fundamental role in constructing a pacified world.

1. WAR AND PEACE

The question of war and peace was one of the most important themes in Bobbio's thinking from the early 1960s onwards. It seems he had not shown any particular interest for the subject before. In his criticism of Giuliano's book, he displays a degree of 'scientific neutrality' with respect to Giuliano's denunciation of war. Bobbio writes:

> An international law scholar knows better than anyone that war, which in human terms is a terrible event, is on the contrary, in terms of legal science, a normal and inevitable phenomenon characteristic of a legal order where all are equal. In an order of equals, in which the subjects superiorem non reconoscunt, war is simply one of the ways, the most radical and so the most attractive, of settling conflicts of interest. The phenomenon of war is closely related to the phenomenon of international law, and so shall not be eliminated so long as the international legal order is based on all being equal. There is nothing to find shocking in this. Science does not find things shocking, it observes facts. Facts are facts: absolute sovereignty and war are two concomitant facts[11].

We can see Bobbio here demonstrating a degree of irony, when for example he gives an account of the solution Giuliano defends to solve the problem of war by eliminating the causes of conflict before they start, or when Giuliano expects peace to arise not from any limitation of the absolute sovereignty of states but from their good will and from the individual conversion of each to pacifism.

9. R. Ago, Scienza giuridica e diritto internazionale, (Milan: Giuffrè, 1950). Bobbio reviewed this work in (1952) Rivista trimestrale di diritto e procedura civile. I have been unable to consult this document. However, I have seen a speech by Bobbio in tribute to R. Ago. Bobbio writes: 'Tra i mille records che mi assalgono mi fisso soprattutto sulle lunghe passeggiate e sulle lunghe interminabili conversazioni intorno ai nostri studi, ai libri, non solo giuridici, letti of da leggere, alle vicende del nostro paese e alla vita internazionale' (see fn. 3 for the website).

10. Il problema della guerra e le vie della pace, (il Mulino, 1979) (Spanish translation, El problema de la guerra y las vias de la paz (Barcelona: Editorial Gedisa, 1992) 2nd edn; Il terzo assente (Milan: Edizioni Sonda, 1989) (Spanish translation, El tercero ausente (Madrid: Ediciones Catedra, 1997).

11. Bobbio, 'La comunità internazionale e il diritto', p. 1027.

And yet a few years later, Bobbio was to convert to pacifism after, as he often recalled[12], reading Günther Anders' Hiroshima is Everywhere. Diary from Hiroshima and Nagasaki, which was published in Italy in 1961[13]. It was from this time onwards that he was to reflect on the consequences of the emergence of nuclear weapons, which was to lead him to dismiss any vindication of the phenomenon of war, a position which was not perhaps very far from that of Giuliano and about which Bobbio had expressed reservations some years earlier.

From scrutinizing the main texts of the time it can be seen that they assume a certain vision of international law which, in the second half of the twentieth century, seems barely to have changed fundamentally in nature since the seventeenth century and that some commentators call the Westphalian model of international law[14].

1.1. Passive pacifism and active pacifism

Bobbio was to formulate a fairly radical pacifist philosophy from his reflections on the danger that atomic war presented. For the first time in the history of humankind, a conflict was liable to endanger the very existence of the human species. Hence the need to 'reappraise the theme of non-violence and begin to treat it as the fundamental theme of our time'. Faced with the threat of nuclear warfare, a resolutely active attitude had to be adopted, people had to be conscientious objectors. Nuclear war was the absolute evil that absolutely had to be countered, for however cruel past wars might have been none of them had endangered the survival of humanity itself[15].

Bobbio introduced at this point a distinction between 'passive pacifism' and 'active pacifism'. These were not two attitudes in the combat against war but rather two different visions of the future of war in international society. Passive pacifism presented war as a phenomenon that had supposedly outlived its role in the history of humanity and which should inevitably disappear and in a natural way as it were. And a nuclear war would produce such catastrophic effects for all involved that it had supposedly become impossible to resort to it 'merely' in order to continue politics by other means, as had been the case in the past, as Clausewitz had famously put it. The balance of terror renders any vague impulse to use atomic weapons in that way obsolete, even if it does not prevent the outbreak of limited conventional wars among the secondary players in the international system. The road to war that man had travelled since time immemorial had supposedly become impossible to follow any further, apart from conventional wars (which, to my mind, are poorly covered in Bobbio's general reasoning)[16].

It may be, then, that the threat of an absolute evil might lead us to an absolute good, namely the establishment of perpetual world peace[17]. But Bobbio dismisses this hypothesis, for the balance of terror cannot lead to peace, that is, to a state of affairs where war is permanently eliminated from international relations and not just suspended. The balance of terror can only lead to a more or less long-lasting truce among the antagonists. War has not disappeared it has simply been suspended[18]. And indeed the very mechanism of the balance of terror assumes that war is indeed possible, otherwise dissuasion would have no effect[19]. Consequently this balance does not lead to the establishment of peace but to a suspen-

12. See for example Il problema della guerra e le vie della pace, p. 21.
13. G. Anders, Essere o non essere. Diario di Hiroshima e Nagasaki (Einaudi, 1961). The philosopher Günther Anders, the first husband of Hanna Arendt, with whom he fled to the United States after 1933, was on of the leading thinkers of the anti-nuclear movement in Europe in the 1950/1960s.
14. See P.M. Dupuy, 'L'identité de l'ordre juridique internationale' (2002) 297 Collected Course of The Hague, p. 399.
15. Bobbio, Il problema della guerra, p. 40. The evolution of Bobbio's thinking on war and pacifism can be traced through the prefaces to the four editions of this book, and especially the last one p.VII-XVI of June 1997, taking into account the situation arising from the end of the Soviet Union, the First Gulf War and the break-up of Yugoslavia. See also the debate among Italian intellectuals including Bobbio after the Gulf War in Una guerra giusta? (Venice: Marsilio, 1991).
16. Conversely the problem of nuclear war is the subject of just a single fairly short chapter in M. Walzer, Guerres justes et guerres injustes (Paris: Belin, 1999), p. 370-81.
17. Bobbio, Il problema della guerra, p. 53.
18. Bobbio Il problema della guerra, p. 53 ff.
19. For a first glimpse of doctrines on nuclear dissuasion see S. Sur, Relations internationales (Paris: Monchrestien, 2004) 3rd edn., pp. 459-79.

sion of hostilities. The truce will last just so long as it is in the interests of each party, and shall be broken, as the history of nations shows us, whenever it no longer satisfies one of the parties.

'Passive' pacifism, with its theory of the almost natural demise of war, does not convince Bobbio, then, for as he says in a somewhat trivial comparison, knowing that smoking is bad for you does not stop smokers. Stopping people smoking requires a whole legislative and regulatory policy, media campaigns, awareness actions in schools, and so on[20]. And likewise, in respect of war and peace, active pacifism must be promoted, 'atomic awareness' needs to be brought about to combat the risk of a nuclear war.

War is not only an institution that has supposedly exhausted its potential. It is an institution that must be denounced, fought and eliminated in the name of all human values. 'The problem of eliminating war has become the most crucial problem of our time'[21]. Peace is not an inevitable process that will come about 'naturally', it is a conquest, a battle to be waged, that can be won but just as easily lost[22]. Passive pacifism speaks in the name of a science of history of which it allegedly knows the laws; active pacifism in the name of ethics. In the view of proponents of 'atomic awareness', war has come to be absolutely unjustifiable and illegitimate.

1.2. Dismissal of all standard vindications of war

War has been justified in many ways over the course of history. Bobbio distinguishes three types of doctrine: (i) the first considers all wars are just (bellicist theories); (ii) the second that all wars are unjust (pacifist theories); (iii) the third that some wars are just and others unjust (intermediate theory of the just war)[23]. It is naturally this last attitude that raises the greatest difficulties for proponents of active pacifism, given that the attitude of bellicists is beyond debate.

Bobbio was to examine the traditional justifications presented by the supporters of just war by separating out the general arguments from the strongest arguments pertaining to wars of self-defence.

As regards the general arguments, the most common one was to present war as a means of conflict resolution among states within an anarchic legal system with no centralized judicial function, which was pretty much his attitude in his criticism of Giuliano (see above). War and armed reprisals thus become decentralized sanctions for the violation of international law. This was the type of analysis that allowed Kelsen to argue that international law was indeed true law, with sanctions, that were precisely what such war and reprisals were[24]. War in this decentralized legal order therefore takes the place, Bobbio claims, of a mechanism which in national law takes the form of judicial review of the acts of subjects of law, a process that is not to be found in the international system[25]. From that position, Bobbio was easily to show that war had none of the characteristics of judicial proceedings within a national legal order. First of all, in a national order, there are invariably criteria that are precise enough for a court having jurisdiction on the matter to adjudicate on the truth of the alleged facts, on their legal characterization, on the liabilities involved and as may be on the sanction to be inflicted on one of the parties. This presupposes both that there is an impartial third party with the authority to enforce its decisions on the parties but also that there are adequate criteria for judging, in other words clear and numerous legal rules.

It does not take a genius to know that these conditions are never met in the decentralized (anarchic) international system as Bobbio then conceived it. Each state is judex in causa sua and authorized, by international law itself, to construe the rule of law and enforce it, so that each actor is in a position to justify any of its actions[26]. It follows that war is always considered just by each of the parties. Moreover,

20. Bobbio, Il problema della guerra, p. 44 and 50.
21. This is the last sentences in his study of 'La paix perpétuelle et la conception kantienne de la fédération internationale' in L'État et la démocratie internationale, (Brussels: Editions Complexe, 1998), p. 143-57.
22. Bobbio, Il problema della guerra, p. 55-56.
23. Bobbio, Il problema della guerra, p. 57 ff.
24. See for example, Théorie pure du droit, (Paris: Dalloz, 1962), p. 420 ff.
25. Here again we see the very archaic image of international law conveyed by Bobbio. Judicial review is not entirely absent from international law, otherwise we could indeed question the nature of this law.
26. We shall not labour the point that this view fails to take account of the existence of certain international groupings such as the

the purpose of judicial proceedings is to sanction the law breaker and make good the damage done. But war comes out in favour not of the side with a just cause but the side that wins by force of arms. It is by no means the equivalent of a process of judicial review, but at most a judgment of God[27].

Besides, the just war theory allows the beneficiaries of the established order to wage what they consider a just war because they seek to restore the political and legal order threatened by rebels. And that is how it will come to be called just if the rebels are defeated. But should the rebels be victorious, the war or revolution will become a just war, a just rebellion, that, for example, has overturned an unjust social order or freed an oppressed people. In all such cases, the theory of just war is inoperative: any failure of the revolt will enable the defenders of the established order to assert the justness of their cause, whereas the justness of the revolt will only be recognized after the fact in the event of victory[28].

In point of fact, Bobbio writes, philosophers like jurists must no longer seeks what might be the justifications for war[29], they must work only to make wars impossible. There remains the hypothesis of the war of self-defence, which is in truth the more important one.

1.3. War of self-defence

In the history of humanity there have been movements advocating total pacifism and eschewing all violence. This was the case of certain groups in the first centuries of the Christian era who invoked the message of the Gospels for which all wars were unjust[30]. It was also the case, closer to our times, of the moral precepts defended by Mahatma Gandhi.

But in the very great majority of cases, the defendants of peace also acknowledge the argument of self-defence, vim vi repellere licet. This is true of any legal order be it a national legal order or the international legal order, and it is expressly provided for by article 51 of the UN Charter which merely states, for that matter, a customary rule of international law[31]. Bobbio, however, argues that the use of nuclear weapons removes the distinction between defensive and offensive wars. If self-defence is defined narrowly as the immediate military riposte to military violence against one, it is made impossible in a nuclear conflict in which the first strike might annihilate the victim and/or render it incapable of riposting. And if we adopt a broader definition allowing a violent riposte against threatened violence, one is then encouraged to launch a nuclear strike without waiting for the threat to materialize since whoever incurs the first strike risks losing for good. Besides, with international society the way it is, the threat cannot remain strictly bilateral. Many states would feel threatened by several other states, and reasoning in terms of self-defence would lead to apocalypse and to universal suicide[32].

In fact, Bobbio writes, nuclear deterrence cannot be invoked to justify a war of self-defence. Its function is quite different; it is to prevent any nuclear action through the balance of terror[33]. But this balance, as said, can lead only to a suspension of war, not to its disappearance.

European Union that escape this description entirely or of specific disciplines of international law, such as the international law of human rights or the World Trade Organization law, or international investment law, which, each by different techniques, organize judicial type procedures. It must be said in Bobbio's defence that this phenomenon was only in its early stages in the 1960s.

27. Bobbio, Il problema della guerra, p. 59.
28. Bobbio, Il problema della guerra, p. 60.
29. For a contrasting view see Walzer, Guerres justes et injustes, op. cit. supra no 18.
30. It was to reply to these groups that Saint Augustine defended the theory of the just war which, developed by the theologians of the Middle Ages, was to become official Church doctrine. See The City of God, XIX, 7. See also J. Defrasne, Le Pacifisme (Paris: PUF, Que sais-je ?, 1983). See also the articles 'Guerre et paix' in P. Raynaud and S. Rials (eds) Dictionnaire de philosophie politique (Paris: PUF, 2003 and in M. Canto-Sperber, (ed.) Dictionnaire d'Éthique et de Philosophie morale (Paris: PUF, 2001).
31. Article 51 speaks of the 'inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. The International Court of Justice specified it was indeed a customary right (Military and Paramilitary Activities in and against Nicaragua, 27 June 1986, Reports 1986 p. 94 and 102). The Court again specified, in its advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons that it could not lose sight of 'the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, where its survival is at stake' (para. 96).
32. Bobbio, Il problema della guerra, p. 61.
33. On nuclear dissuasion and (limited) nuclear war see Walzer, Guerres justes et injustes, p. 363-81.

1.4. The vision of international law underlying Bobbio's analyses

Bobbio argued in the 1960s that if we apply the positivist method to the study of the international system, we inevitably come to the observation that states behave in fact as if there were no generally accepted rules for distinguishing just wars from unjust wars and that consequently war is invariably considered by international law as a lawful process of dispute settlement. This means, Bobbio goes on, that all criteria for distinguishing between just and unjust wars proposed by theologians, philosophers or moral philosophers have never reached the stage of positive international law[34].

It is true that a study of the practices of UN member states can lead as perspicacious an observer as Jean Combacau, albeit 20 years ago, to very similar conclusions to those just set out. Writing in the 1980s, Combacau said that the practice of states since 1945 might lead to the conclusion that:

> [N]either Art 51 nor Art 2(4), to which it was the conventional exception, are any longer considered by the States members of the U.N. to be valid provisions, because they are part of a system of law which was consistent but is now a dead letter; namely that of the Charter. It is not claimed here that these rules are no longer legally binding on the members of the U.N. […] but only that they all collectively behave as if they did not exist[35].

However, J. Combacau, as indicated in the text cited, does not claim that the prohibition of the use of armed force, with as its counterpart the lawfulness of self-defence, are not rules in force within the UN system[36]. They most obviously are, which means that since 1945 at least—leaving out of account instruments from before 1945 such as the 1928 Briand-Kellog Pact—war has been outlawed as a lawful instrument of state policy. A jus ad bellum does indeed exist and actual practice confirms as much[37].

Study of the countless conflicts that have marked the international scene since 1945 would show, beyond any doubt, that not once have the states that have resorted to armed force justified their actions by reliance on any right of recourse to war or more generally to armed force to settle international disputes. No one, to the best of my knowledge, has ever argued in the UN Security Council, in the General Assembly and even less before the International Court of Justice, that it was just as lawful to settle disputes by force of arms as by the peaceful means set out in the Charter (mediation, conciliation, arbitration). All, when they have had to account for their actions, have claimed the existence of some circumstance excluding unlawfulness, be it individual or collective self-defence, construed narrowly (immediate violent reaction) or more broadly (action taken to confront a threat, with a gradual blurring of the distinction between self-defence and reprisals), or a humanitarian intervention by a state or group of states (see the Kosovo case with the military intervention of NATO forces against Yugoslavia) or the protection of nationals (Entebbe case), or support for a struggle for national liberation, not to speak of the action authorized by the Security Council under Chapter VII of the Charter[38].

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34. Let us cite Bobbio exactly since his opinion here is quite radical: 'Applicato al diritto di guerra, il metodo positivistico portava alla seguente constatazione : rispetto alla guerra gli stati si comportano tra loro come se non esistesse di fatto alcuna regola comunemente accetttata per distinguere guerre giuste da guerre ingiuste. In altre parole, gli stati considerano la guerra come una procedura sempre lícita'. Il problema della guerra, p. 63.

35. J. Combacau, 'The Exception of Self-Defence', in A. Cassese (ed.), The Current Legal Regulation of the Use of Force (Dordrecht: Martinus Nijhoff, 1986), p. 9-38, at 30.

36. However, he concludes his paper: 'the international community is in fact back where it was before 1945: in the state of nature', which seems to me exaggerated to say the least (p. 32).

37. For a recent review of this law see R. Kolb, Ius contra bellum. Le droit international relatif au maintien de la paix (Munich, Brussels: Helbing [amp] Lichtenham, Bruylant, 2003), and especially the chapter on 'L'évolution historique de la limitation du recours à la force', p. 15-48. Kolb writes that from 1919 onwards, 'the unlimited and uncontrollable ius ad bellum deriving from each state being sovereign gives way to a ius contra bellum, to a prohibition to resort to war, that gradually intensifies from the dawn of the twentieth century until 1945 with the United Nations Charter' (p. 6).

38. See Kolb, Ius contra bellum, p. 178-231. The consequences to be drawn from the viewpoint of international law from the First Gulf War (1991), then from the NATO action against Yugoslavia in the Kosovo affair (1999), from the attacks of 11 September 2001, from the war in Afghanistan against the Talibans and from the Second Gulf War (2003) have been the subject of impassioned reviews that need not be discussed here. All of these events, however, do not alter the principle that law may only be conducted in limited circumstances (self-defence, humanitarian action, people's liberation movement, etc.) and not as a general right to resort to war, which all states have rejected in principle (but principles count for something). See among the many analyses P.M. Dupuy, 'L'identité de l'ordre juridique international', (2002) 297 RCADI, chapter IV in full, p. 314-353; Oriol

We shall make no pronouncement as to whether present-day international law authorizes the use of armed force apart from in self-defence under article 51 of the Charter and measures under Chapter VII. What counts is that since 1945 not a single member of the UN has supported the assertion that the recourse to war is not banished from international law either on the basis of the UN Charter or on a customary basis as the International Court of Justice has affirmed[39].

Beyond the specific features of each conflict and the difficulties of accurate legal characterization of one action or another, a very large majority of jurists consider there is no denying that war and more generally the use of armed force are prohibited in international law, with the exception of, at least, self-defence and the enforcement of sanctions under Chapter VII of the UN Charter. Alone are authorized therefore, in positive international law, lawful wars that might also be called just wars, by strict positivism that conflates just with lawful. In other words there is indeed a jus ad bellum and even, as R. Kolb writes, contra bellum.

Bobbio, in his writings of the 1960s[40], dismisses this conclusion, by opposing the judgement on the legitimacy of war that pertains to the justness of the cause defended to the judgement of lawfulness that pertains to the conditions governing the conduct of war. The judgement of legitimacy is (and can only be) an ethical judgement whereas international law is interested only in the way war is conducted. He writes for example: 'As regards the cause of war, a state is not bound by legal limits (positive law) but only by moral (or natural law) limits: as regards the conduct of war, it is bound by legal limits too ...'[41]. Or elsewhere 'the problem of legitimizing war can only be a moral question and will never be a legal issue'. This seems to reflect a serious misunderstanding of the realities of international society and of its law, even in the 1960s. Bobbio does seem here to have a very archaic view of international law (is this under the influence of Raymond Aron whom he often cites?)[42] as a law that, fundamentally, he claims has gone unchanged since Grotius and the De jure belli et pacis.

It may further be noticed that Bobbio accounts for there being a jus in bello and not a jus ad bellum by the purpose pursued by the former. The law of conduct of war (jus in bello) protects people against the unbridled use of violence once it has been unleashed and in particular against the use of pointless cruelty. These rules of jus in bello can operate satisfactorily because they are based on the principle of reciprocity: 'you treat our prisoners well and we will treat yours well'. The same is not true of any rules of jus ad bellum, which are not based on any reciprocal mechanism.

At any rate, such reasoning on the rules of jus in bello was possible until the advent of atomic weapons. The conditions in which an atomic war might be waged abolish all such rules. The jus in bello contains four types of limit on the conduct of war: (i) limits as to persons (distinguishing belligerents and non-belligerents); (ii) limits as to things (distinguishing military objectives from non-military ones); (iii)

Casanovas y La Rosa, 'El principio de la prohibicion del uso de la fuerza tras el conflicto de Irak', in C. Garcia Segura and A. J. Rodrigo Hernandes (eds.), El imperio inviable. El orden internacional tras el conflicto de Irak (Madrid: Tecnos, 2004), p. 125-40; S. Sur, Le Conseil de sécuité dans l'après 11 sept. (Paris: LGDJ, 2004).

39. The Case of Military and Paramilitary Activities in and against Nicaragua (26/27 June 1986), Reports, para. 176, p. 94. It is rightly therefore, it seems to me, that P.M. Dupuy writes of the prohibition laid down by Charter article 2(4) that it cannot become obsolete through non-use 'at any rate so long as those who violate it still assert they are abiding by its principle'. P.M. Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 RCADI, p. 224. Need it be recalled, besides, that one of the charges against the Nazi leaders at Nuremberg was of crime against peace, that is 'planning, preparation, initiation or waging of war of aggression or a war in violation of international treaties, agreements or assurances...' (article 6a of the Charter of the Nuremberg Tribunal). See R. Maison, La responsabilité individuelle pour crime d'État en droit international public (Bruxelles: Bruylant, 2004), p. 29-83; F. Rigaux, 'La répression des crimes de droit international à Nuremberg et à Tokyo', Bulletin de la classe des lettres 7-12 (Académie royale de Belgique, 1998), p. 501-39.

40. By contrast, in the fourth preface to Il problema de la guerra e le vie della pace, of June 1997, (p. XII-XIII) he very accurately analyses the consequences in international law of Charter article 2.

41. 'Rispetto alla causa della guerra, ogni stato non ha limiti giuridici (di diritto positivo) ma solo morali (o di dirritto naturale; rispetto a la condotta della guerra ha limiti anche giuridici, cioè stabiliti da un diritto vigente nella comunità internazionale cui esso appartiene e che esso stesso ha contribuito a produrre.' Bobbio, Il problema della guerra, p. 64.

42. Re-reading chapter XXIII of R. Aron, Paix et guerre entre les nations (Paris: Calmann-Lévy, 1962, 1984) 8th edn, p. 691-722 on international law, there seem to be positions not too far removed from the earlier Bobbio.

limits as to the means one can resort to (by prohibiting the use of certain particularly destructive weapons) and; (iv) limits as to place (distinguishing war zones from others)[43].

Bobbio has no difficulty in showing that atomic war does not abide by any of these limits, so that we are dealing with not just a war of doubtful legitimacy, by the threat it holds for the future of humankind, but a war whose conduct cannot observe any of the accepted rules for the conduct of hostilities, or for that matter the rules as to the starting of hostilities, as it is hard to imagine one country warning another that it is going to open atomic fire.

Atomic war is therefore legibus soluta, it is uncontrolled and uncontrollable like an earthquake or a gale it cannot be contained within any rule. It cannot be considered either as a means of enforcing the law (theory of just law) nor as a situation that can be governed by law. It is an instrument of a state of nature conceived as in Hobbes, that is, it is the very antithesis of law. Now the only rule of natural law in Hobbes is the obligation to escape from the state of nature as fast as can be done so that men (for Hobbes) and states and their inhabitants (for Bobbio) can escape from the misery of a life governed by wars punctuated by truces that cannot last[44].

This general picture of international society and its law as it emerges from Bobbio's writings must be completed by his judgement of the United Nations. As seen, he had at the time a low enough opinion of it to make him overlook the role of the Charter and its prohibition of the use of armed force. It is not that the UN could not play an eminent part in bringing international relations within the ambit of law; and for Bobbio as for other legal theorists[45], law emerges when a third party is constituted to settle disputes between parties. As he writes: 'If a conflict is settled by force, one or other of the parties is eliminated. If it is to be resolved peacefully, there must be a third-party to whom the parties entrust themselves […]. Two people do not form a society. Two people alone cannot make a lasting agreement'[46]. In actual fact Bobbio adds a condition that does not hold for all the commentators cited above[47]. He asks not just that the parties confide in a third party but that the third party be able to enforce its solution on the parties: 'If it is to be resolved peacefully, there must be a third-party to whom the parties entrust themselves and before whom they bow' (emphasis added)[48].

Bobbio considers that a stable, sustainable and peaceful system is one in which the settlement of disputes has moved from the intervention of a third party between the parties to the third party above the parties[49]. It is not enough for there to be a third party, that third party must have greater power than the parties so as to impose its decision, by force if need be. That third party tasked with settling international conflicts could have been the United Nations if the Security Council had had the military resources that were to be made available to it under articles 43 and 45 of the Charter and the Military Staff Committee provided for by article 47, which, as is known, never came to be[50]. And consequently while the UN may act as a mediator (that is, a third party acting between the parties) it does not have the compelling force over states that would make it a tertium super partes. Instead, Bobbio writes, we have an organization

43. Bobbio, Il problema della guerra, p. 65.
44. Bobbio made several studies of Hobbes. See in French, L'État et la démocratie internationale (Brussels: Editions Complexe, 1998), p. 79-122.
45. H. Kantorowicz, The Definition of Law (Cambridge: Cambridge University Press, 1958), p. 79 ff; A. Kojève, Esquisse d'une phénoménologie du droit (Paris: Gallimard, 1981); Hart, The Concept of Law, p. 97 (the necessity of rules of adjudication in a legal system); J. Carbonnier, Sociologie juridique (Paris: A. Colin, 1994), p. 320. Locke wrote: 'And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries, that may happen to any member of the commonwealth', Two Treatises of Government (1698) (London: Everyman, 1993) 2nd Treatise, ch. 7, §89, p. 159.
46. N. Bobbio, El tercero ausente, (Madrid: Ediciones Catedra, 1997), p. 11 and 291. (I was unable to consult the original Il terzo assente (Milan: Edizioni Sonda, 1989).
47. See Kantorowicz, The Definition of Law, p. 74 and Carbonnier, Sociologie juridique, p. 320. The third party required for the existence and operation of rules of law in a society is not necessarily a judge in the contemporary meaning of the term, and his/her decisions do not necessarily form res judicata as understood in developed systems of law.
48. Bobbio, El tercero ausente, p. 291.
49. Bobio, El tercero ausente, p. 11.
50. On the development of collective security under the UN see Sur, Relations internationales, pp. 429-57 and Sur, Le Conseil de sécurité dans l'après 11 sept.

that the great powers, who have reserved for themselves a privileged status in the Security Council, scorn and use to their own ends[51].

And so it is a very dismal picture of international law and of international society that emerges from reading Bobbio's articles from the 1960s. By contrast, his writings of the 1980-1990s give us a markedly different vision of the international legal order in general and of the UN in particular. How and why did this change come about?

2. HUMAN RIGHTS AND 'INTERNATIONAL DEMOCRACY': THE ONLY MEANS TO ACHIEVE PERPETUAL PEACE

To understand the evolution of Bobbio's positions on his conception of the international system and its law we must begin with the question of human rights. It was because from the outset he included the defence of human rights in his thinking that he came to conceive of an international system emerging from a state of nature and moving nearer to a legal order guaranteeing the rights of individuals. But this could not happen unless the international legal order abandoned its indifference to the constitutional regimes of its member states and promoted compliance with certain constitutional forms in the international arena. Only an 'international democracy' made it possible to imagine the establishment of perpetual peace in the world.

2.1. A new international society (the advent of the individual)

From the testimony of Bobbio himself, the first essay he published on the question of human rights dated from 1951[52], but it was above all from the 1960s onwards that he was to devote a good part of his writing to this subject. As said, his two collections of articles on war and peace both contained chapters on human rights[53]. A reading of those texts provides insight into the connection Bobbio wove between peace, the observance of human rights and the advent of a new international society.

Even in his earliest essays Bobbio was to defend the idea that no lasting peace between nations is possible unless human rights are observed. There is therefore a very strong tie between the fostering of peace and the defence of human rights. Bobbio writes :

> "The two themes, that of war and peace, and that of the international protection of human rights, are more closely connected than might appear at first sight. Both war and the difficulty in protecting human rights internationally are two characteristic expression of the near absolute sovereignty of states in their mutual relations and so are inherent in the structure of the international community, made up of mutually independent entities…[54]."

He devoted a complete study to the subject in 1982 under the title 'Peace and human rights'[55] in which he asserted, to begin with, that the most fundamental question of our age is the relationship between human rights and peace because 'our own survival depends on solving the problem of peace and genuine civil progress on solving the problem of human rights'[56].

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51. Bobbio, El tercero ausente, p. 291. See also N. Bobbio, 'Democarzia e sistema internazionale' in Il future della democrazia (Turin: Einaudi, 1984) (and several re-issues), p. 195-220, p. 201-3. See also Mario Telo's introduction to the collection L'État et la démocratie internationale, p. 41-42. The topic of the necessity of constituting a third party to ensure peace recurs in many of Bobbio's writings that do not need to be catalogued in this short paper.
52. This was the text for a conference on the Universal Declaration of Human Rights. See the preface to L'Eta dei diritti (Turin: Einaudi, 1990 and 1992), p. VIII.
53. These two collections must be supplemented by the texts published in L'Eta dei diritti and in Il futuro della democrazia.
54. This passage is found in the preface to the Spanish version El problema de la guerra y las vias de la paz, p. 17, but not in the original preface to the Italian version.
55. This article is found in Il terzo assente, which I was only able to consult in the Spanish translation of El tercero ausente, p. 127-33. It is republished in Teoria generale de la politica, p. 453-66, and in the Spanish translation, Teoria general de la politica, p. 533-8. See also A.E. Perez Luno, 'Los derechos humanos en la obra de Norberto Bobbio', in Llamas (ed.), La figura y el pensamiento de Norberto Bobbio, pp. 153-68, and in the same book, 'Bobbio y los derechos humanos', pp. 169-185.
56. Bobbio, Teoria generale de la politica, p. 453-4.

He showed this by citing first of all (and very significantly) three international law texts[57]: the UN Charter and its Preamble in which the Peoples of the United Nations determined 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind' and immediately after 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, etc.'.

The second text cited is the Universal Declaration of Human Rights, which in its Preamble proclaims 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. The third text is the seventh principle of the 'Decalogue' set out in the Final Act of the Conference on Cooperation in Europe (Helsinki, 1975): 'The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States' (Principle VII, para. 5)[58].

Notice the importance accorded to international instruments, even if not officially binding ones, like the Helsinki Declaration, compared with Bobbio's earlier view of an archaic international law of no great scope compared with the sovereign freedom of states. Here on the contrary Bobbio 'takes international law seriously' so to speak. And he emphasizes that these three texts mark important stages in the evolution of the international community insofar as all three establish a strong bond between observing human rights and securing and maintaining peace.

Going into more detail on the different rights, Bobbio gives a few illustrations of the relations between human rights and situations of war or peace.

Thus, as concerns the right to life, one of the most fundamental rights (art. 3 of the Universal Declaration, article 2 of the European Convention on Human Rights), this right is only fully meaningful in a situation of peace. And it is because this right is not respected in the state of nature, which is a situation of permanent war of all against all that, for Hobbes, the social contract was concluded giving power to an authority above the parties to ensure internal peace. Now, war calls into question this right to life and requires the sacrifice of human lives in the conflict.

War thus contributes to weakening the other rights since, as article 15 of the European Convention on Human Rights says, states may derogate from certain rights in the event of war or other threats to the life of the nation. In actual fact it is the foreign policy of states that are constantly looking for alliances in a situation of permanent international tension that leads to human rights being sacrificed. We see democratic states that are respectful of rights in their legal order supporting despotic regimes that flaunt human rights provided that it gives them, at least as they see it, a strategic or tactical advantage over their adversaries.

Bobbio further emphasizes that the principle of international law that makes it difficult to protect human rights is the same as the one that prevents any decisive progress in the establishment of international peace. In both instances it is respect for state sovereignty that is the impediment to any substantial advance or development. And it can be seen that it is in Europe, where there is a limit on sovereign rights through the setting up of supra-national organs, that individuals are best protected, even to the extent that they may bring actions against states in supra-national courts. This is only possible because of the peace established among European states, and which, vice-versa, is strengthened by the protection of the fundamental rights of individuals.

But, Bobbio further specifies, peace must not be just the absence of military operations. It must also ensure minimum economic and social protection otherwise the legitimate struggle of any individual or

57. Notice that two most important of these texts were already in existence in the 1960s. Bobbio therefore changed his analysis of their scope.

58. See V.-Y. Ghebali, 'L'Acte final de la conférence sur la sécurité et la coopération en Europe et les Nations unies' (1975) AFDI, 73-127 at 108.

any state for a better distribution of wealth will result one way or another in armed conflicts. So one must 'make the social question a question of planetary dimension'[59].

What comes out of all this presentation is a very marked change, it appears, in Bobbio's perception of international law. Where in his early writings he saw only an archaic law of a society that was very close to the state of nature, he now saw the essential instrument for the promotion of peace and human rights. And indeed the defence of such rights is in fact international by nature. One cannot be content to ensure the protection of rights in a limited number of states and disregard the rest of the world, when 'a violation of right in one part of the world is felt all over it', as Kant wrote not yesterday nor the day before but more than two centuries ago[60].

Human rights are of interest to the whole of international society, they are necessarily 'cosmopolitan' Bobbio tells us, taking up (and changing a little) a concept of Kant's, that is, rights that are intended to affect the whole of the international community[61]. What is more, these rights, when guaranteed by international instruments (treaties intended to be universal or regional treaties), are accompanied by mechanisms that allow individuals, by various means, to obtain redress in the international courts that are to adjudicate on the observance of the treaty obligations of any state party to such treaties.

Bobbio, like a number of commentators (he refers here to Cassese), saw in this capacity granted to individuals against states the sign that individuals, at least as far as human rights are concerned, were henceforth subjects of international law. International law was no longer a law of nations, a ius publicum, but had become a law of nations and of individuals. Any individual was henceforth raised to the rank of potential subject of the international community, whose only subjects it had been considered until then had been sovereign states[62]. It was in part for this reason, one might think, that Bobbio was to revise his assessment of international law.

And it should not be thought that the theme of human rights interests only one very specific branch of international law to which it is relegated in some sense without having any effect on the remainder of international law. In actual fact, and Bobbio was very insightful here about the evolution of the international system in the late twentieth century, the defence of human rights is one of the themes towards which 'peoples and leaders are irresistibly drawn, whether they like it or not'[63].

2.2. International democracy and emergence from the state of nature

Kant posited as a condition for the establishment of perpetual peace among nations that the civil constitution of each state should be a republican one[64]. Bobbio explained that one should understand by that that government must not be despotic, a certain separation of powers had to be ensured (especially for the independence of judicial authority) for the freedom of individuals and the equality of all before the law to be guaranteed. As M. Telo points out 'it was not a matter of republican democracy but rather of liberal constitutionalism', that is the establishment of a liberal rule of law[65].

Just as Kant saw in the republican constitution a brake on the freedom of despots to wage war regardless of the will of peoples, likewise Bobbio supported the idea that democracy must be the regime

59. Bobbio, Teoria generale de la politica, p. 458.
60. Cited by N. Bobbio, 'La paix perpétuelle et la conception kantienne de la fédération internationale', in L'État et la démocratie internationale, p. 137; Kant, Vers la paix perpétuelle, et autres essais (Paris: Garnier-Flammarion, 1991), p. 97.
61. Bobbio, 'La Révolution française et les droits de l'homme', in L'État et la démocratie internationale, p.137.
62. Bobbio, 'La Révolution française et les droits de l'homme', p. 136.
63. Bobbio, 'La Révolution française et les droits de l'homme', p. 137. See P.M. Dupuy, 'L'identité de l'ordre juridique international', p. 417: 'the shock wave of the human rights revolution in the international system is propagating inexorably, eventually extending to all of the international legal norms'.
64. 'The only constitution which has its origin in the idea of the original contract, upon which the lawful legislation of every nation must be based, is the republican', Kant, Perpetual Peace: A Philosophical Essay, 2nd section, first definitive article. See also Kolb, Ius contra bellum, pp. 10-11.
65. See Telo's introduction to L'État et la démocratie internationale, p. 26: 'The establishment of republic constitutional regimes means for Kant the three-way division of powers, political representation, "negative' freedom, the equality of citizens in law, and their submission to one and the same legislation inspired by contract. So it was not a matter of republican democracy but rather of liberal constitutionalism', p. 26.

of all states (or at any rate of most of them) if lasting peace in the world is to be ensured. This is what he termed 'international democracy', which does not relate for him (or at least not principally) to an egalitarian conception of relations among states all participating 'democratically' in an international 'government' along the lines of what is found within each state[66]. He calls 'international democracy' all states having a non-despotic constitution, that is, as for Kant, a state must not be subject to the arbitrary decisions of a despot (whatever aspect despotism may take on), powers within it must be separated, and there must be formal equality among members of the society[67].

Now, supposing despotism can be interpreted as a form of war within the state (it is by force that the despot dominates) and democracy in contradistinction as a regime that ensures peace within the national legal order, it can be seen that Bobbio's thinking on political philosophy within states around the theme of despotism and democracy joins up with his thinking on the international system around the theme of war and peace among nations. And indeed if despotism is the continuation of war within the state, democracy in the international system may be considered a means to extend and ensure peace beyond the borders of each state.

One might say that Bobbio thinks through the transition from an anarchical international society to the rule of law, that is, the emergence from the state of nature, as in the model expounded by Kant in his essay on perpetual peace. Thus Bobbio wrote 'Kant's pacifism is above all legal pacifism, because he sees the main cause of wars in the state of international anarchy and consequently entrusts their elimination to the setting up of a legal community among states'[68]. That is how Bobbio himself sees things.

This legal community that alone is able to establish lasting peace among nations presupposes the conclusion of two pacts according to the Hobbesian model: a pactum societatis by which subjects renounce settling their disputes by force, and a pactum subjectionis, by which associated subjects 'submit to a common power capable of taking binding decisions for the whole community and of enforcing them'[69]. The first type of pact corresponds to the establishment of a peace treaty among nations putting an end to warfare. But this peace treaty (pactum pacis) puts an end to the hostilities going on but not to the state of war. To achieve this requires a peace alliance (fœdus pacificum) which permanently excludes war as an alternative to peace and puts an end to all wars.

Bobbio also gives a slightly different presentation of the two pacts that allow the transition from the state of nature (state of war of each against all) to the civil state, the state of peace. The first pact is a non-aggression agreement by which the parties undertake to exclude the use of violence from their mutual relations. Such a pact is the pactum societatis which is the foundation of any civil society; it is this act that brings about the qualitative leap allowing society to emerge from the state of nature. The second pact is that by which parties undertake to resolve their future disputes by peaceful means[70]. This then goes along with the instauration of a third party, first inter partes, that is, without the power to compel the parties to abide by its decisions, and then super partes, being authorized to intervene to find and enforce, so by constraint if need be, its solution on the parties in dispute[71]. This can only be done by concluding a pactum subjectionis by which the parties submit to an authority that henceforth alone holds legitimate force.

On several occasions Bobbio emphasizes that the decisive feature in escaping the state of nature is the pact of non-aggression, even if the ultimate stage of the process is the possibility of enforcing the

66. However, this meaning is also to be found in certain passages. See the discussion below on the General Assembly of the United Nations.
67. For a review of Bobbio's position on international democracy see L. Bonanate, 'La democrazia nella concezione internazionalistica di Norberto Bobbio', in L. Ferrajoli and P. Di Lucia (eds), Diritto e democrazia nella filosofia di Norberto Bobbio (Turin: Giappichelli, 1999), p. 177-87.
68. Bobbio, 'La paix perpétuelle et la conception kantienne de la fédération internationale' in L'État et la démocratie internationale, pp. 143-158 at 151.
69. Bobbio, 'La paix perpétuelle et la conception kantienne de la fédération internationale', p. 148.
70. Bobbio, 'Democrazia e sistema internazionale' in Il futuro della democrazia, pp. 200-01.
71. Bobbio, 'Democrazia e sistema internazionale', pp. 202-03.

third party's decision and the defence of law[72]. This enables him to look afresh at the United Nations (and even the League of Nations). Where once, in the 1960s, he saw only a powerless institution trailing behind the great powers, he recognized the schema for the emergence from the state of nature the principle of which Kant had already described. Thus he wrote: 'The two international institutions [League of Nations and UN] were the outcome of a true and specific pactum societatis, although it has not yet been followed by a pactum subjectionis, that is, by the various parties submitting to a common power upon which exclusive coercive power has been bestowed'[73]. This is undeniable if it is understood, and apparently Bobbio had now come to understand, that in effect at least since the UN Charter, the right to use armed force has been taken away from states, save the exceptions pointed out above.

But it is not enough to set up a third-party alongside or above the parties; that third party must have the necessary qualities of independence and impartiality if it is a court, and a democratic form of operation if it is a political organ. As regards this second condition, which is required if the revolts prompted by any despotic instance are to be avoided, Bobbio notes the democratic inspiration of the United Nations that has a General Assembly, 'the institution that characterizes a democratic society, the assembly where all of the contracting parties are represented on an equal footing and decide by majority vote'[74]. He further considers that the defence of human rights universally is also one of the aspects of democratic inspiration of the UN. Admittedly it is as yet only a democratic inspiration and not a fully-fledged democracy. Everyone is aware of the position occupied by the Security Council in the UN decision-making process, and as for the defence of human rights, everyone knows that 'the international system stops, except for a few timid exceptions, on the threshold of the sovereign power of each state because of the principle of non-intervention'[75].

But Bobbio asserts, perhaps more by way of an act of faith than as a true projection, that there is a connection between the advancement of the democratic regime within states and its being set up internationally, perhaps even by the setting up of a federal world state. He acknowledges that from a rational standpoint we are caught in a vicious circle: 'states will only be able to become fully democratic in an international society that is fully democratized. But a fully democratized international society presupposes that all the states making it up are democratic'[76].

Here we shall end our walk in Bobbio's company. The evolution of his thinking on the place of international law in the international system seems quite remarkable. And how could it be otherwise if we refuse to adopt a cynical or simply sceptical attitude about law and moral values; an attitude we know was always a world away from the Italian scholar's thinking. We shall end with one of those enlightening formulas he had a knack for: 'Human rights are born as universal natural rights, develop as individual positive rights, and eventually come to be fully achieved as universal positive rights'[77]. Now this final stage can only be attained, as Bobbio understood in the final part of is work, through international law, which thus has a far more important place in the Italian master's doctrine than might have been thought at first sight.

72. Bobbio, 'Democrazia e sistema internazionale', pp. 202-03. Bobbio further indicates that the process thus described in a rational reconstitution that does not necessarily correspond to a real historical evolution (p. 205).
73. Bobbio, 'Democrazia e sistema internazionale', p. 207. See also the address very significantly titled 'In praise of the UN' ('Albanza de la ONU') in El tercero ausente, p. 301-04.
74. Bobbio, 'Democrazia e sistema internazionale', p. 207.
75. Bobbio, 'Democrazia e sistema internazionale', p. 208.
76. Bobbio, 'Democrazia e sistema internazionale', p. 218.
77. 'i diritti dell'uomo nascono come diritte naturali universali, si svolgono come diritti positivi particolari, per poi trovare la loro piena attuazione come diritti positivi universali', Bobbio, L'Eta dei diritti (The Age of Rights), p. 24.