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A SHORT HISTORY OF INTERNATIONAL LAW

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SUMMARY

This history will emphasize broad trends in international law, in both the conceptual sphere and in State practice. The discussion will move chronologically, beginning with a cursory look at the ancient world, followed by a rather fuller discussion of the great era of natural law in the European Middle Ages. The classical period (1600–1815) witnessed the emergence of a dualistic view of international law, with the law of nature and the law of nations co-existing (more or less amicably). In the nineteenth century—the least known part of international law—doctrinaire positivism was the prevailing viewpoint, though not the exclusive one. Regarding the inter-war years, developments both inside and outside the League of Nations will be considered. Since the post-1945 period will occupy most of the remainder of this book, this discussion will confine itself to a few historically-oriented comments on some of its most general features.

I. INTRODUCTION

No area of international law has been so little explored by scholars as the history of the subject. This is a remarkable state of affairs, probably without parallel in any other academic discipline (including other branches of law). Although this intellectual scandal (as it well deserves to be called) is now being remedied, we are still only in the earliest stages of the serious study of international legal history. Many blank spots exist, some of which will be identified in passing in the discussion below.

This short history—inevitably *very* short history—can give only the most general flavour of the major periods of development of international law. It will accordingly not be possible to give more than the most token attention to developments outside the Western mainstream. Both ideas and State practice will be covered. The ideas chiefly concern what international law was thought to consist of in past times. State practice is concerned

with what States actually *did*. It was the two in combination—if not always in close harmony—that made international law what it became.

II. ANCIENT WORLDS

For a vivid indication of how persons from even the most diverse cultures can relate to one another in a peaceful, predictable, and mutually beneficial fashion, it is difficult to top Herodotus's description of 'silent trading' between the Carthaginians and an unnamed North African tribe in about the sixth century BC. When the Carthaginians arrived in the tribe's area by ship, they would unload a pile of goods from their vessels, leave them on the beach and then return to their boats and send a smoke signal. The natives would then come and inspect the goods on their own, leave a pile of gold, and retire. Then the Carthaginians would return; and, if satisfied that the gold represented a fair price, they would take it and depart. If not satisfied, they would again retire to their ships; and the natives would return to leave more gold. The process would continue until both sides were content, at which point the Carthaginians would sail away with their gold, without a word exchanged between the two groups. 'There is perfect honesty on both sides', Herodotus assures us, with no problems of theft or conflict (Herodotus, *Histories*, p 336).

This silent trading arrangement may have been successful in its way, but a process of interaction so inflexibly ritualistic and so narrow in subject matter could hardly suffice for political interactions between States, even in ancient times. Most people probably have the feeling that something rather more elaborate is required to merit the grand name of 'international law'. Indeed, the ambiguity of the term 'international law' leads to various different answers to the question of when international law 'began'. If by 'international law' is meant merely the ensemble of methods or devices which give an element of predictability to international relations (as in the silent-trading illustration), then the origin may be placed virtually as far back as recorded history itself. If by 'international law' is meant a more or less comprehensive substantive code of conduct applying to nations, then the late classical period and Middle Ages was the time of its birth. If 'international law' is taken to mean a set of substantive principles applying *uniquely* to States as such, then the seventeenth century would be the starting time. If 'international law' is defined as the integration of the world at large into something like a single community under a rule of law, then the nineteenth century would be the earliest date (perhaps a trifle optimistically). If, finally, 'international law' is understood to mean the enactments and judicial decisions of a world government, then its birth lies (if at all) somewhere in the future—and, in all likelihood, the distant future at that.

If we take the most restricted of these definitions, then we could expect to find the best evidence for a nascent international law in the three areas of ancient Eurasia that were characterized by dense networks of small, independent States sharing a more or less common religious and cultural value system: Mesopotamia (by, say, the fourth or third millennium BC), northern India (in the Vedic period after about 1600 BC), and classical Greece. Each of these three State systems was characterized by a combination of political fragmentation and cultural unity. This enabled a number of fairly standard practices to emerge, which helped to place inter-State relations on at least a somewhat stable and predictable footing. Three particular areas provide evidence of this development: diplomatic

relations, treaty-making, and the conduct of war.[1] A major additional contribution of the Greek city-States was the practice of arbitration of disputes, of which there came to be a very impressive body of practice (see Ager, 1996).

It was not inordinately difficult for some of these practices to extend across deeper cultural lines as well. One of the earliest surviving treaty texts is between Egypt and the Hittite Empire, from the thirteenth century BC. The agreement concerned an imperial division of spheres of influence, but it also dealt with the extradition of fugitives. The problem of good faith and binding force was ensured by enlisting the gods of both nations (two thousand strong in all) to act as guardians (Bederman, 2001, pp 147–150).

With the advent of the great universal religions, far more broadly-based systems of world order became possible. One outstanding example was the Islamic empire of the seventh century AD and afterwards. Significantly, the body of law on relations between States within the Muslim world (the *Dar al-Islam*, or 'House of Islam') was much richer than that regarding relations with the outside world (the *Dar al-Harb*, or 'House of war'). But even with infidel States and nationals, a number of pragmatic devices evolved to permit relations to occur in predictable ways—such as 'temporary' truces (in lieu of treaties) or safe-conducts issued to individuals (sometimes on a very large scale).[2]

In Western history, the supreme exemplar of the multinational empire was Rome. But the Roman Empire was, in its formative period, a somewhat tentative and ramshackle affair, without an over-arching ethical or religious basis comparable to the Islamic religion in the later Arab empire. That began to change, however, when certain philosophical concepts were imported from Greece (from about the second century BC). The most important of these was the idea of a set of universal principles of justice: the belief that, amidst the welter of varying laws of different States, certain substantive rules of conduct were present in *all* human societies. This idea first surfaced in the writings of Aristotle (*Rhetoric*, p 1370). But it was taken much further by the philosophers of the Stoic school, who envisaged the entire world as a single 'world city-State' (or *kosmopolis*) governed by the law of nature. Cicero, writing under Stoic influence, characterized this law of nature as being 'spread through the whole human community, unchanging and eternal' (Cicero, *Republic*, pp 68–69).

This concept of a universal and eternal natural law was later adopted by two other groups, the Roman lawyers and the Christian Church, and then bequeathed by them to medieval Europe. The lawyers in particular made a distinction that would have a very long life ahead of it: between a *jus naturale* (or natural law properly speaking) and a *jus gentium* (or law of peoples). The two were distinct, but at the same time so closely interconnected that the differences between them were often very easily ignored. Natural law was the broader concept. It was something like what we would now call a body of scientific laws, applicable not just to human beings but to the whole animal kingdom as well. The *jus gentium* was the human component, or sub-category, of it. Just as the law of nature was universal in the natural world, so was the *jus gentium* universal in the *human* world.

[1] On the Middle Eastern and Greek practice, see generally Bederman, 2001. On ancient India, see Bhatia, 1977.

[2] On Islamic views of international law, see generally Khadduri, 1955.

III. THE MIDDLE AGES: THE NATURAL LAW ERA

The European Middle Ages offers an intriguing picture of dizzying variety and complexity, combined—not always very coherently—with the most sweeping universality. The variety was most apparent in the de-centralized world of feudalism, with its complex and interlocking layers of rights and duties, and its diffusion of governmental powers and jurisdictions. The universality was evident in two major spheres: philosophically and jurisprudentially, in the continued stress on natural law; and politically, in the Holy Roman Empire and in the revival of Roman law which underpinned it.

A. THE UNIVERSALIST OUTLOOK: MEDIEVAL NATURAL LAW

The European Middle Ages became the great age of natural-law thought. During this period, natural-law conceptions developed under the umbrella of the Catholic Church. But it must be remembered that the idea was not specifically Christian in its inception, but rather was a legacy of the classical Stoic and Roman legal traditions. The dominant tradition—represented outstandingly by Thomas Aquinas—was rationalist in outlook, holding the content of the natural law to be susceptible of discovery and application by means of human reason rather than of revelation.

Natural law is one of the many parts of international law that have never received the systematic study that they merit. In the present context, only a few of its most salient features can be noted.[3] Perhaps its single most outstanding feature was its all-embracing character. It encompassed and regulated the natural and social life of the universe in all its infinite variety—from the movements of the stars in their courses to the gurgling of the four humours through the veins and arteries of the human body, from the thoughts and deeds of all of the creatures of land, sea, and air, to those of human beings and the angels in the heavens. Its strictures applied universally to all cultures and civilizations, past, present, and future.

There continued to be, as in the ancient period, a distinction between the *jus naturale* and the *jus gentium*, though still without any very sharp line between the two. The *jus gentium* was much the lesser of the two, being seen largely as an application of the broader natural law to specifically human affairs. Sometimes it was regarded as comprising universal customs of purely human creation—and therefore as a sort of supplement to natural law properly speaking. These *jus gentium* rules were sometimes referred to as 'secondary' natural-law rules. It must be stressed that this original *jus gentium* did not consist entirely, or even primarily, of what would now be called rules of international law. Instead, it was a collection of laws common to all nations, affecting individuals in all walks of life, from the highest to the lowest, and dealing with all aspects of human social affairs—contract, property, crime, and the like. It was more in the nature of an ethical system of universal or trans-cultural scope, setting out general norms of conduct, as opposed to a legal code with a list of prohibitions and punishments. One aspect of this grand intellectual scheme should be particularly stressed: the fact that there was no strong tendency to think that any body of law existed that was applicable *uniquely* to international relations as such. States,

[3] For a good short account of medieval natural-law theory, see generally Gierke, 1938.

like private persons, were permitted lawfully to wage war for such purposes as the punishment of wickedness or, generally, for the enforcement of the law—but not for vainglory or conquest or oppression.[4] This in fact was the conceptual kernel of natural law's most outstanding contribution to international law: the doctrine of the just war.

B. THE PLURALIST OUTLOOK: THE ITALIAN CITY-STATES

Even if (as the natural-law writers maintained) the whole of human society formed a single moral and ethical community, there was no denying that the world also consisted of a welter of different polities, of a bewildering variety of sorts, and of varying degrees of independence from one another—extending all the way from the great empire of Rome itself (ie, of Byzantium) to the patchwork of feudal jurisdictions which carpeted Western Europe.

Nowhere was the tension between the universalistic and the pluralistic tendencies of the period more evident, in practice, than in the debates over the legal status of the various 'independent' city-states of northern Italy. These obtained substantial *de facto* independence from the Holy Roman Empire in the late twelfth century, when the cities of the Lombard League defeated the forces of Emperor Frederick I. There was, however, considerable debate over what this 'independence' really meant. To this matter, two of the most prominent medieval lawyers—Bartolus of Sassoferato and his student Baldus of Ubaldis, who both wrote in the fourteenth century—turned their attention. Broadly speaking, the conclusion of Bartolus (largely echoed by Baldus) was that the cities were independent in the sense of being wholly self-governing and independent of *one another*, but that, in their relations *inter se*, they continued to be subject to rules of the Empire. Here we see the first glimmer, in European society, of the concept of independence of States operating in conjunction—sometimes very uneasily—with subjection to a larger set of norms governing inter-State relations (Hinsley, 1986, pp 81–82, 88–90, 167–174). For this reason, Bartolus has been called, with some justice, the first theorist of international law (Sereni, 1943, pp 58–63).

C. DEVELOPMENTS IN STATE PRACTICE

It is from the pluralist rather than the universalist side of the great medieval conceptual divide that we must look for innovations in State practice. The reason is easily seen: it is in the day-to-day relation of different States and peoples with one another that the practical problems of law are most likely to arise.

Much of the State practice in the Middle Ages consisted of traditional ways inherited from ancient times. The area of diplomatic relations is an example, with diplomats increasingly being accorded a broad (but not absolute) degree of immunity from judicial process in host States. Beginning in about the eleventh century, European (chiefly Italian) States began to conclude bilateral treaties that spelled out various reciprocal guarantees of fair treatment. These agreements, sometimes concluded with Muslim States, granted a range of privileges to the foreign merchants based in the contracting States, such as the right

[4] For a thorough exposition of medieval just-war theory, see Russell, 1975. For a shorter account, see Neff, 2005, pp 44–68.

to use their own law and courts when dealing with one another. The same process was at work in the sphere of maritime trading. The seafaring community made use of the laws of Oléron (which were actually a series of court decisions from the small island of that name in the Bay of Biscay), and also of a code of rules called the *Consolato del Mare*, compiled in about the thirteenth century for the maritime community of Barcelona. These codes governed the broad range of maritime activities, including the earliest rules on the rights of neutral traders in wartime.

Certain aspects of the conduct of war witnessed a high level of refinement in the Middle Ages—most notably the law on the ransoming of prisoners of war (a welcome step forward from the alternatives of enslavement and summary killing). 'The law of arms' (as it was known) was expounded in the fourteenth century, first by John of Legnano and later by a monk named Honoré de Bonet (or Bouvet), whose book entitled *The Tree of Battles*, of the 1380s, became very influential.[5] Accounts of medieval warfare, however, incline observers to harbour grave doubts as to whether even these practical rules exerted much real influence.

With the European explorations of Africa and, particularly, the New World from the fourteenth century onward, questions of relations with non-European societies assumed an urgent importance—while, at the same time, posing an immense practical test for the universality of natural law. The Spanish conquest of the Indian kingdoms in the New World sparked especially vigorous legal and moral debates (even if only after the fact). The Dominican scholar, Francisco de Vitoria, in a series of lectures at the University of Salamanca, concluded that the Spanish conquest was justified, on the ground that the Indians had unlawfully attempted to exclude Spanish traders from their kingdoms, contrary to natural-law rules. But he also confessed that his blood froze in his veins at the thought of the terrible atrocities committed by the Spanish in the process.[6] In 1550–51, there occurred one of the major legal confrontations of history, when two prominent figures—Juan Inés de Sepúlveda and Barolomé de las Casas—debated, at length, the lawfulness and legal bases of the Spanish conquest of the New World, under the judgeship of the theologian and philosopher Domingo de Soto. The result, alas, was inconclusive, as Soto declined to render a judgment (Pagden, 2001, pp 77–79).

In short, medieval international law was a jumble of different beliefs and practices—from the rarefied conceptions of the law of nature, to the more serviceable rules by which various communities conducted their actual day-to-day business, from warfare and diplomacy, to buying and selling.

IV. THE CLASSICAL AGE (1600–1815)

In the seventeenth and eighteenth centuries, a new spirit entered into doctrinal thought on international law. This is sometimes put in terms of a secularization of natural-law thought. That, however, is a very misleading characterization, since natural-law itself was (and had always been) primarily secular in nature. What was new in the seventeenth

[5] On medieval law on the conduct of war, see Keen, 1965.

[6] Vitoria, 'On the American Indians', in *Political Writings*, pp 231–292; Letter to Miguel de Arcos, ibid, pp 331–333.

century was a willingness to give a degree of formal recognition to State practice as a true source of law, rather than regarding it as merely illustrative of natural-law principles. The result was a kind of dualistic outlook, with natural law and State practice maintaining a wary, and rather uneasy, form of co-existence—a state of affairs much in evidence to the present day.

A. GROTIUS AND HOBBES

The principal harbinger of this new outlook was the Dutch writer Hugo Grotius, whose major work *On the Law of War and Peace* was published in Paris in 1625—a work so dense and rich that one could easily spend a lifetime studying it (as a number of scholars have).[7] As a natural-law writer, he was a conservative, writing squarely in the rationalist tradition inherited from the Middle Ages. In international law specifically, he had important forerunners, most notably the Italian writer, Alberico Gentili, who produced the first truly systematic study of the law of war at the end of the sixteenth century.[8]

Where Grotius did break important new ground—and where he fully earned the renown that still attaches to his name—was in his transformation of the old *jus gentium* into something importantly different, called the *law of nations*. The distinctive feature of this law of nations was that it was regarded as something distinct from the law of *nature*, rather than as a sub-category or means of application of natural law. Furthermore, and most significantly, this law of nations was not regarded (like the old *jus gentium*) as a body of law governing human social affairs in general. Instead, it was a set rules applying specifically to one particular and distinctive category of human beings: rulers of States. Now, for the first time in history, there was a clear conception of a systematic body of law applicable specifically to the relationship between nations. Eventually, although not until the late eighteenth century, the label 'international law' would be applied to this corpus of rules—with Jeremy Bentham as the coiner of the term (Nussbaum, 1947, pp 135–136).

It should be appreciated that Grotius's law of nations, or 'voluntary law' as it was sometimes known, was not designed to supplant or undermine traditional natural law. Far from it. The function of this law of nations was basically an interstitial one—of filling gaps where the natural-law principles were too general, or devising workable rules as pragmatic substitutes where the application of the strict natural law was, for some reason, unfeasible. The law of nature and the law of nations, in short, were seen as partners rather than as rivals. For this reason, the earliest academic chairs in the field were commonly designated as being devoted to 'the law of nature and nations', in (presumably) happy partnership. The first such chair was occupied by Samuel Pufendorf, at the University of Heidelberg in 1661. In the English-speaking world, the first one was created at the University of Edinburgh in 1707.

There were some, however, who contended that the partnership between the law of nature and the law of nations was anything but a happy one. Foremost amongst these

[7] Much of the study of Grotius has been by political scientists rather than specifically by international lawyers. Remarkably, there is no comprehensive and accessible survey of his international legal thought and influence in English. For an older work that is still of value, see Knight, 1925. For a brief overview of his legal thought, see Tuck, 1999, pp 78–108. For a more thorough study, see Haggenmacher, 1983.

[8] On Gentili, see generally Van der Molen, 1968.

dissidents was the English writer Thomas Hobbes, whose master work *Leviathan* was written in 1651, shortly after Grotius's death. In sharp contrast to Grotius, Hobbes denied that the pre-political condition of human society had been orderly and law-governed. He maintained, instead, that it was a chaotic, even violent, world, with self-preservation as the only true natural right (Hobbes, *Leviathan*, pp 80–84). Security could only be attained by the radical step of having all of the persons in a state of nature surrender their natural rights to a sovereign power of their own creation—with the result that, henceforth, the *only* law which they would live under would be the law promulgated by that sovereign. Natural law was not rejected in its entirety, but it was radically stripped-down, to the point of being reduced, in essence to two fundamental tenets: a right of self-preservation, and a duty to perform contracts or promises. It was this stripped-down version of natural law which, in the opinion of Hobbes, constituted the sole body of law between independent nation-states.

On this thesis, the only possible way in which States could construct a stable international system was through the painstaking process of entering into agreements whenever this proved feasible. The natural-law duty to perform promises was the fundamental basis of this system, with the detailed substantive rules being provided by the various agreements that were actually concluded. These agreements could take either of two forms: written or unwritten. The written form, of course, comprised treaties, of the sort of that States had been concluding for many centuries. The unwritten form was customary law, which in this period was seen predominantly as simply a tacit or unwritten treaty.

It is hardly surprising that, amongst traditional natural lawyers (ie, followers of Grotius), Hobbes's conclusions were unwelcome in the extreme, since they entailed the ruthless discarding of so much of the content of traditional natural law. But they were also not easily refuted. Some writers, such as Pufendorf, attempted to take at least some of Hobbes's ideas into account, while still adhering to the older idea of a detailed, substantive natural law. Others basically ignored the Hobbesian challenge as best they could and continued to expound natural law in a systematic manner. In fact, the seventeenth and eighteenth centuries were the great age of systematic jurisprudence, in which natural law was re-housed (it might be said) in grand logical edifices of a hypothetico-deductive nature, modelled on that most magnificent of all intellectual constructions, mathematics.

The culmination of this systematic natural-law movement came in the mid-eighteenth century, at the hands of the German philosopher Christian Wolff, who fittingly had been trained as a mathematician. Wolff's massive eight-volume encyclopaedia of natural law contained detailed discussions of practically everything under the sun and even beyond (including a discourse on the characteristics of the inhabitants of other planets)—while paying virtually no heed to State practice. It holds an honourable place on the list of the world's great unread masterpieces.[9]

The most famous and influential writer in the Grotian tradition was the Swiss diplomat Emmerich de Vattel, whose famous exposition of *The Law of Nations* was published in London in 1758. As the first systematic international-law treatise of the modern kind, it would not

[9] On Wolff's cosmological views, see Wolff, *Cosmologia*. Only the final volume of the main work on natural law concerned international law. For an English translation, see Wolff, *Law of Nations Treated According to a Scientific Method*.

look drastically out of place on a twenty-first century bookshelf, as the works of Grotius or Wolff certainly would. Instead of setting out a grand philosophical scheme, Vattel's intention was to provide a sort of handbook for lawyers and statesmen. Moreover, its graceful style ensured it a wider usage by lawyers, judges, and lay persons than any other international-law writing had previously had. It can make a good claim to being the greatest international-law textbook ever written. With it, we stand at the threshold of modern international-law writing.[10]

In a number of ways, Vattel's treatise was a popularization of Wolff's ideas, but it was written in a very different spirit. Where Wolff had been disdainful of the voluntary law, Vattel fully embraced it, cheerfully and candidly expounding it alongside the natural law whenever appropriate. He has been accused of inconsistency—of constantly being on both sides of issues—but that charge is unfair. The fact is that he had two bodies of law to expound, which sometimes provided differing solutions to practical problems. He was generally very forthright about which law he was treating at any given time. It is we who tend to misunderstand the nature of his task because the dualistic mentality of that era is so foreign to us.

The best example of the dualistic 'method' concerned war. The natural law on just wars allowed a State to resort to force in self-help to vindicate a legal right that had actually been violated (or was threatened with violation)—so that, in a given conflict, one side would be fighting justly, and the other one not. The voluntary law, however, was not concerned over which party had the stronger legal claim to use force (ie, it did not deal with the *jus ad bellum*, in legal terminology). Instead, it simply treated each side *as if* it had lawfully resorted to war. It then contented itself with regulating the conduct of wars, fixing rules for both parties to apply, on an even-handed basis, in their contention against one another (the *jus in bello*, in the common legal parlance). In effect, then, the natural law saw war in terms of law enforcement and as a sanction for wrongdoing. The voluntary law, in contrast, saw war more in terms of a duel.

B. THE LAWS OF NATURE AND NATIONS IN ACTION

The writing of Grotius and Hobbes and their followers was not done in a vacuum. Various forces were at work in this period, which served to give this new law of nations a concrete reality. One of the most important of these trends was the emergence (gradual to be sure) of strong central governments, at least in Western Europe, which increasingly gained the upper hand over the older, diffused jurisdictions of the feudal age. Particularly important for this trend was the innovation of standing armies in place of the older temporary feudal levies. In addition, these centralizing Nation-States were coming to be seen as permanently existing, corporate entities in their own right, separate from the rulers who governed them at any given time—with long-term interests and political agendas of their own.

At least some of the flavour of the medieval natural law survived, however, chiefly in the form of the idea of the existence of something that has come to be called the 'community of States'. The clearest symbol of this—if that is the right word for it—was the peace settlement arrived at in Westphalia in 1648, at the conclusion of the Thirty Years War in Germany. It is curious that something called the 'Westphalian system' is sometimes spoken of as a

[10] On Vattel, see generally Jouannet, 1998.

synonym of anarchy or of radical views of absolute State sovereignty—conceptions which actually belong (as will be seen) to the nineteenth century and not to the seventeenth.[11] In reality, the Westphalian settlement was an arrangement reached *within* the framework of the Holy Roman Empire, with certain prerogatives of the imperial government carefully preserved—ie, with the older medieval idea of 'independent' States being subject, at the same time, to certain higher norms. The Peace of Westphalia did, however, provide a sort of template for later times in the way in which it marked out a division of labour (so to speak) between national and international spheres, placing religion carefully in the realm of domestic law.

The idea of a community of a community States—distinct from, but also analogous to, a community of individual persons—was apparent in sundry other ways in the seventeenth and eighteenth centuries. One of these was in the concept of a balance of power. This was hardly an altogether new idea, but in this period it attained a formal articulation and recognition that it had never had before (most notably in the Peace of Utrecht in 1713, at the conclusion of the War of the Spanish Succession). In conjunction with this concept, the period was one of limited—though also of frequent—warfare. At least in Western Europe, war was largely conducted with trained professional forces, and for limited ends. As a result, European diplomacy bore more resemblance to a meticulous game of chess than to a lurid Hobbesian inferno of mayhem and turmoil. Even warfare often had a ritualistic air, with its emphasis on manoeuvre and siege rather than on pitched battle.

Economic relations manifested much this same combination of cooperation and competitiveness. On the competitive side, this period marked the high tide of mercantilism, with its intense rivalry for trade advantage. But there was also a high degree of cooperation, under an ever-strengthening rule of law, chiefly in the form of a network of treaties of friendship, commerce, and navigation ('FCN treaties' in the standard legal parlance), which provided a range of safeguards for merchants operating in and trading with foreign countries.

V. THE NINETEENTH CENTURY (1815–1919)

The nineteenth century, extraordinarily, is the least explored area of the history of international law. Its outstanding feature was the rise, and dominance, of the legal philosophy known as positivism. This conferred onto international law a scientific gloss—or alternatively, in the opinion of some, tied it into a narrow strait-jacket. But positivism did not, or not quite, have the century to itself. A new tendency known as the historical school of law made some important contributions; and natural law, against heavy odds, managed to survive, although in new and unexpected ways.

A. 'THE PUBLIC LAW AND SYSTEM OF EUROPE'

With the definitive defeat of revolutionary and imperial France in 1815, the victorious European powers (Britain, Prussia, Russia and Austria) crafted a new kind of peace settlement, based not merely on the balance of material power between the major States but

[11] See, for example, the discussion of the 'logic of Westphalia' in Falk, 1975, pp 59–69.

also on a set of general principles of a more substantive character. These general principles were, to be sure, of a decidedly conservative character. The goal was to craft a continent-wide set of political arrangements that would (it was hoped) keep the scourge of revolution from breaking out again.

The peace settlement was to be policed by the major powers—who were, of course, self-appointed to the task—by way of military intervention where necessary. The powers even had a grand name for their enterprise: the 'public law and system of Europe'. This legal order was based on faithful adherence to treaty commitments, together with respect for established laws and legitimate governments and property rights *within* the States of Europe. But it also included a duty on the part of rulers to 'earn' their legitimacy by providing responsible and efficient government to their peoples and also by cooperating with movements for orderly and peaceful change.

A few of these interventions by the Concert of Europe may be noted briefly. The first ones were in the cause of 'legitimacy' in the 1820s, when there were military interventions to subdue revolutions in Naples and Sardinia (by Austria) and in Spain (by France). Also in the 1820s, the intervention of Britain, France, and Russia in the Greek independence struggle led to independence for the Kingdom of Greece. Great-power involvement similarly led to Belgian independence in the 1830s. Sometimes the powers intervened diplomatically in post-war peace settlements, if the terms imposed on the losing side looked to be too destabilizing for the continent as a whole. This occurred in 1878, when the major powers stepped in to prevent Russia from exacting too harsh a peace against Turkey after a victorious war.

On at least some of these occasions, humanitarian considerations played a part, alongside the more usual political jockeying. The most common cause for concern on this front was the relief of Christian populations that were held to be victims of oppression in the Ottoman Empire. This was certainly one of the motivations for the Greek intervention in the 1820s. In 1860, the powers intervened in a communal-violence crisis in the Mount Lebanon area. The most forceful of these great-power humanitarian actions was probably the one in Crete in 1897, when the powers stepped in to stop atrocities and counter-atrocities between Greeks and Turks. In virtually none of these cases was there a pure humanitarian motive, untouched by any other consideration. But some (arguable) precedents were established for later advocates of the lawfulness of humanitarian intervention.

The Concert of Europe 'system' (if it could really be called that) was overtly hegemonic, in modern parlance. There was little sign of any principle of equality of States. Still, the Concert of Europe did at least provide an ideal—if not always the reality—of collective, orchestrated State action for the preservation of international peace. To that extent, it foreshadowed the post-1945 United Nations. International lawyers, however, never gave it much attention.[12] Instead, their ambitions were directed to another end: to unshackling international law from its natural-law heritage and making it something like a science in the modern sense of that term.

[12] For one of the few legal texts to treat this subject, see Dupuis, *Principe d'équilibre*, 1909. See also Simpson, 2004, which devotes considerable attention to policing practices of the major powers in the nineteenth century.

B. THE POSITIVIST REVOLUTION

On the conceptual front, the major feature of the nineteenth century was the dominant role of positivism. By 'positivism' is meant such a wealth of things that it may be best to avoid using the term altogether. The expression 'positive law' had been in use since the Middle Ages (since at least the fourteenth century) to refer to the man-made law of particular States, in contrast to divine law (ie, the commands of God) or natural law. What was new in the nineteenth century, however, was something called a 'positive *philosophy*,' the chief propounder of which was the French social philosopher Auguste Comte. By 'positive', Comte meant something like 'scientific' or 'objective' or 'empirical', in contrast to speculative or religious modes of thought. He maintained that the human race had gone through three great historical stages: the theological, the metaphysical, and (now) the 'positive'. In the theological stage, religious ideas had been dominant. In the metaphysical stage, legalistic and jurisprudential thinking had prevailed—meaning, in essence, natural law. But the third age—the 'positive' era (as Comte called it)—was now dawning, promising the true and final liberation of the human mind from the superstitions and dogmas of the past.

In its original form, positivism envisaged the emergence of a sort of technocratic utopia, in which the world would be governed not by clerics or politicians or lawyers (as in the past benighted ages of theology and metaphysics), but rather by engineers and industrialists and financiers. This vision had first been put forward by the eccentric French nobleman, the Comte de St-Simon, in the early nineteenth century.[13] (Auguste Comte's early career, incidentally, had been spent as St-Simon's secretary.) This early vision, taken to its logical conclusion, envisaged the obsolescence of the nation-state.

This original positivism of St-Simon and Comte was a strange amalgam of technocracy and evangelism. Indeed, positivism actually did become a religion, with the most influence, as it happened, in Brazil (whose national flag is emblazoned with the positivist motto 'Order and Progress'). Not surprisingly, lawyers turned the positive philosophy in a somewhat different direction.

1. The positive philosophy applied to international law

As noted above, there was nothing the least bit new in the nineteenth century about the idea of positive law. What was distinctive about positiv*ism* as a school of jurisprudential thought was the doctrinaire insistence that positive law is the *only* true law, ie, the wholesale and principled rejection of natural law as a valid or binding guide to conduct. On this point, nineteenth-century positivism went even further than Hobbes, who was its major progenitor. The doctrinaire positivists (as they could fairly be termed), that is to say, held fast to the voluntary law, while at the same time breaking the link between it and the natural law—that link which had been so central a feature of the Grotian tradition. The partnership between the law of nations and the law of nature, in short, was now regarded as irredeemably dissolved.

One of the most central aspects of positivism was its close attention to questions of the sources of international law—and, in particular, to the proposition that international law was, fundamentally, an outgrowth or feature of the will of the States of the world. Rules of

[13] On St-Simonism, see Manuel, 1956.

law were created by the States themselves, by consent, whether express (in written treaties) or tacit (in the form of custom). International law was therefore now seen as the sum total, or aggregation, of agreements which the States of the world happen to have arrived at, at any given time. In a phrase that became proverbial amongst positivists, international law must now be seen as a law *between* States and not as a law *above* States. International law, in other words, was now regarded as a corpus of rules arising from, as it were, the bottom up, as the conscious creation of the States themselves, rather than as a pre-existing, eternal, all-enveloping framework, in the manner of the old natural law. As a consequence, the notion of a systematic, all encompassing body of law—so striking a feature of natural law—was now discarded. International law was now seen as, so to speak, a world of fragments, an accumulation of specific, agreed rules, rather than as a single coherent picture. In any area where agreement between States happened to be lacking, international law was, perforce, silent.

Another important effect of positivism was to replace the older, medieval, teleological picture with what might be termed an instrumentalist outlook. That is to say, the law was no longer seen as having any innate goal of its own, or as reflecting any universal master plan. Instead, the law was now regarded, in technocratic terms, as a means for the attainment of goals which were decided on by political processes. Law, in short, was now seen as a servant and not as a master. It was to be a tool for practical workmen rather than a roadmap to eternal salvation.

Closely allied to the consent-based view of international law was the firm insistence of most positivists on the centrality of the State as the principal (or even the sole) subject of international law, ie, as the exclusive bearer of rights and duties on the international plane. States were now perceived as possessing what came to be called 'international personality'—and, crucially, as also possessing a set of fundamental rights that must be protected at all times. Foremost of these fundamental rights was the right of survival or self-preservation. This meant that, in emergency situations, States are entitled to take action that would otherwise be contrary to law. The most dramatic illustration of this point in the nineteenth century occurred in 1837, when the British government, faced with an insurgency in Canada, sent troops into the United States, in pursuit of insurgents who were using that country's territory as a safe haven. They succeeded in capturing the miscreants, killing several persons in the process and destroying a boat named the *Caroline*. The United States vigorously objected to this armed incursion into its territory. Britain justified its action as self-defence. The diplomatic correspondence between the two countries in this dispute produced the classic exposition of the principle of self-defence: action in the face of a crisis that is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[14] This remains today as the canonical statement of the criteria for the exercise by States of self-defence (although it really was a statement of the general principle of necessity rather than of self-defence *per se*).

The stress on the basic rights of States also gave to positivism a strongly pluralistic cast. Each nation-State possessed its own distinctive set of national interests, which it was striving to achieve in an inherently competitive, even hostile, environment. Each State was sovereign within its territory. And each State's domestic law could reflect that country's own particular history, values, aspirations, traditions, and so forth. It was in this period that

[14] 29 *British and Foreign State Papers* pp 1137–1138.

the principle of 'the sovereign equality of States' became the fundamental cornerstone—or even the central dogma—of international law, along with the concomitant rule of non-intervention of States into the internal affairs of one another.

A final point is in order concerning the technocratic outlook of positivism. This had the important effect of de-politicizing international law, at least in principle. International lawyers in the nineteenth century became increasingly reluctant to trespass into areas of political controversy. In this regard, they presented a sharp contrast to their natural-law forbears, who had proudly worn the mantle of the social critic. The positivist lawyers were more inclined to see themselves instead as the juridical counterparts of Comte's engineers. In particular, it came to be widely agreed that fundamental national-security interests were questions of politics and not of law—a distinction that Grotius and Vattel would have found difficult to grasp. By the same token, positivism had a strongly non-moralistic flavour. Nowhere were these features more important than on the subject of war. Positivists tended to view the rights and wrongs of a State's decision to resort to war (the *jus ad bellum*) as a political rather than a legal issue. Therefore, war was now seen as an inevitable and permanent feature of the inter-State system, in the way that friction was an inevitable and permanent feature of a mechanical system.

2. The professionalization of international law

The scientific and technocratic and a-political ethos of positivism brought a new sense of precision, a business-like character to the study and practice of international law. One consequence of this was an increasing sense of professionalism and, to a certain extent, of corporate solidarity. An important sign of this was the founding, in 1873, of two major professional bodies in the field, the International Law Association and the Institut de Droit International. This was also the period in which international law became a subject of university studies in its own right, separate from general jurisprudence—and, in particular, from the study of natural law. (This is also a subject which still awaits detailed treatment.)

The nineteenth century was also the period in which major systematic treatises began to be written in the various European languages. Where Vattel had led, many followed. In 1785, Georg Friedrich de Martens wrote an important treatise, which departed from earlier writing in being based primarily on State practice rather than on natural-law doctrine. In English, the most notable early exposition was by Henry Wheaton, an American diplomat and legal scholar, whose *Elements of International Law* was first published in 1836. Its popularity is indicated by the fact that it was translated into French, Spanish, and Italian, with new editions produced for fully a century after the first one. Wheaton was followed in Britain by Robert Phillimore, whose treatise of 1854–61 ran to four volumes (with two further editions). The first major German-language exposition was by Auguste Wilhelm Heffter in 1844 (which ran to eight editions by 1888). The first treatise to be a conscious embodiment of the positive philosophy was by an Argentinian diplomat, Carlos Calvo, in 1868.[15] This text expanded from two to six volumes over the course of five editions to 1896. The French were slightly later in the field, with a *Précis du droit des gens*, by Théophile Funck-Brentano and Albert Sorel in 1877. More influential was the *Manuel de droit international public* by Henry Bonfils in 1894 (with eight editions by the 1920s). One of the most

[15] Calvo, 1880–81. For the first edition, in Spanish, see Carlos Calvo, *Derecho internacional teórico y práctico de Europa y América* (2 vols, Paris: D'Amyot, 1868).

popular texts was that of the Swiss writer Johann Kaspar Bluntschli, whose exposition in 1870 (in French) took the form of a systematic 'code'.

A pronounced difference of style, if not of substance, emerged between the Anglo-American writers and their continental European counterparts. Doctrinaire positivism, as a systematic philosophy, was primarily the product of continental writing, the two most outstanding figures being the Italian Dionisio Anzilotti (later to be a notable World Court judge) and the German Heinrich Triepel. English-language writers, for the most part, were more empirical in outlook, concentrating more heavily on State practice, court decisions, and the like, treating international law as a sort of transnational version of English common law. This intellectual division of labour (so to speak) between the pragmatic and the doctrinal remains in evidence to the present day.

C. THE HISTORICAL AND NATURAL-LAW SCHOOLS

If positivism was by far the dominant trend in nineteenth century international law, it did fall short of having a complete monopoly. Two other schools of thought in particular should be noted. The first was a new arrival: the historical school, which was intimately connected with the romantic movement of the period. Its impact in international law has received, as yet, hardly any serious attention. The other alternative to positivism was natural law, severely reduced in prestige to be sure, but surviving rather better than has generally been appreciated.

1. The historical school

At the core of the historical school's philosophy was the thesis that each culture, or cultural unit, or nation possessed a distinctive group consciousness or ethos, which marked it off from other cultures or nations. Each of these cultural units, as a consequence, could only really be understood in its own terms. The historical school therefore rejected the universalist outlook of natural law. This opposition to universal natural law was one of the most important features that the historical school shared with the positivists.

In international law, the impact of the historical school is evident in three principal areas. The first was with regard to customary law, where its distinctive contribution was the insistence that this law was not a matter merely of consistent practice, however widespread or venerable it might be. A rule of customary law required, in addition, a mental element—a kind of group consciousness, or collective decision on the part of the actors to enact that practice into a rule of law (albeit an unwritten one). In fact, this collective mental element was seen as the most important component of custom, with material practice relegated to a clear second place. Customary law was therefore seen, on this view, as a kind of informal legislation rather than as an unwritten treaty (as the positivists tended to hold). This thesis marked the origin of the modern concept of *opinio juris* as a key component of customary international law.[16]

The second major contribution of the historical school to international law was its theory that the fundamental unit of social and historical existence was not—or not quite—the State, as it was for the positivists, but rather the *nation*-state. In this vision, the State, when properly constituted, comprised the organization of a particular culture into a political

[16] See Tasioulas, 2007. See also Thirlway, below, Ch 4.

unit. It was but a short step from this thesis to the proposition that a 'people' (ie, a cultural collectivity or nation or, in the German term, *Volk*) had a moral right to organize itself politically as a State. And it was no large step from there to the assertion that such a collectivity possesses a *legal* right so to organize itself. This 'nationality school' (as it was sometimes called) had the most impact in Italy, where its leading spokesman was Pasquale Mancini, who was a professor at the University of Turin (as well as an office-holder in the government of unified Italy). Although the nationality thesis did not attract significant support amongst international lawyers generally at the time, it did prefigure the later law of self-determination of peoples.[17]

The third area where the influence of the historical school was felt was regarding imperialism—a subject that has attracted strangely little attention from international lawyers. It need only be mentioned here that the historical school inherited from the eighteenth century a fascination with 'stages' of history. Under the impact of nineteenth-century anthropological thought, there came to be wide agreement on a three-fold categorization of States: as civilized, barbarian, and savage.[18] The Scottish lawyer James Lorimer was the most prominent international-law writer in this category. The implication was all too clear that there was a kind of entitlement—moral and historical, if not strictly legal—for the 'civilized' countries to take their 'savage' counterparts in hand and to bring them at least into contact with the blessings of modern scientific life.

2. The survival of natural law

The dominance of positivism, with its stern and forthright opposition to the very concept of natural law, brought that venerable body of thought to its lowest ebb so far in the history of international law. Virtually the only important legal figure explicitly to claim allegiance to that tradition was Lorimer. It should not be thought, though, that the natural-law ideals of old died out altogether. That was far from the case. If they lost the central position that they had previously held, they nevertheless maintained their hold in many ways that were not altogether obvious.

One reason that natural-law ideas were not always recognizable was that, to some extent, they were re-clothed into a materialistic and scientific garb. This was particularly so with the new science of liberal political economy. Underlying this new science was a belief, directly imported from traditional natural-law thought, in a natural harmony of interests amongst human beings across the globe. This was first enunciated in a systematic way by the French physician François Quesnay in the 1750s, and then developed into its modern form in Britain by Adam Smith, David Ricardo, and John Stuart Mill. The centrepiece of their programme was support for free trade—and, more generally, for a breaking down of barriers between individual economic actors the world over. They were, in short, the pioneers of what came to called 'globalization' (Neff, 1990, pp 28–44).

In more traditional areas of international law, the legacy of natural law is most readily discerned in the area of armed conflict—specifically concerning what came to be called measures short of war. It has been observed that positivism basically accepted the outbreak of war as an unavoidable fact of international life, and contented itself with regulating

[17] On the nationality (or Italian) School, see Sereni, 1943, pp 155–178. On the modern law of self-determination, see Craven, below, Ch 8.

[18] See Kuper, 1988, pp 76–78.

the conduct of hostilities. But that approach applied to war properly speaking. Regarding lesser measures of coercion, the legacy of just-war thought lingered on. This was the thesis that a resort to armed self-help was permissible to obtain respect for legal rights, if peaceful means proved unavailing. The most important of these forcible self-help measures were armed reprisals. These were far from an unusual occurrence. Indeed, the nineteenth century was a golden age (if that is the right word for it) of armed reprisals. The most common cause of such actions was injury to nationals that had gone unredressed by the target country. A famous illustration was Britain's action against Greece in the 'Don Pacifico' incident of 1850, in which Britain blockaded Greek ports to compel that country to pay compensation for injury inflicted by mob action against a British subject. One of the largest scale operations was a blockade of Venezuelan ports in 1902–03 by a coalition of major European powers, to induce that State to pay various debts that were owing to foreign nationals. Reprisals sometimes also included occupations of territory and even bombardments of civilian areas.

It could hardly escape the attention of observers that reprisal actions were, for obvious practical reasons, a prerogative of the major powers—and that they accordingly gave rise to some strong feelings of resentment in the developing world. In the wake of the Venezuelan incident of 1902–03, the Foreign Minister of Argentina, Luis Drago, proposed an outright ban against the use of force in cases of contract debts. That was not forthcoming. But a milder restriction was agreed, in the so-called Porter Convention of 1907 (named for the American diplomat who was its chief sponsor), adopted by the Second Hague Peace Conference. This convention merely required certain procedural steps to be taken before armed reprisals could be resorted to in debt-default cases.

It is one of history's great ironies that the natural-law tradition, which had once been so grand an expression of idealism and world brotherhood, should come to such an ignominiously blood-spattered pass. A philosophy that had once insisted so strongly on the protection of the weak against the strong was now used as a weapon of the strong against the weak. It is, of course, unfair to condemn a whole system of justice on the basis of abuses. But the abuses were many, and the power relations too naked and too ugly for the tastes of many from the developing world. Along with imperialism, forcible self-help actions left a long-lasting stain on relations between the developed and the developing worlds.

D. THE ACHIEVEMENTS OF THE NINETEENTH CENTURY

One explanation for the remarkable lack of attention by international lawyers to the nineteenth century lies perhaps in the pervasive dominance of doctrinaire positivism over international legal writing generally. There was much, admittedly, that was unattractive about nineteenth-century positivism, particularly to modern eyes—its doctrinaire quality, its narrow horizons, its lack of high ideals, the aura of superficiality raised to the pitch of dogma, its narrowly technocratic character, its ready subservience to power. But it would be wrong to judge it on these points alone because its solid achievements were many. If it lacked the breadth and idealism of natural-law thought, it also discarded the vagueness and unreality that often characterized natural-law thought at its worst. In many ways, positivism was a breath (or even a blast) of fresh air, countering the speculative excesses of natural-law thought. Even if positivism sometimes went too far in the opposite direction, we should nonetheless appreciate the valuable services that it performed in its time.

It is clear from even a cursory survey of the nineteenth century that, when the wills of States were coordinated, impressive results could follow (see generally Lyons, 1963). In the spirit of the St-Simonians, there were various forms of what would come to be called the functional cooperation of States. Progress on this front was most notable in the areas of international communication and transportation: from the international river commissions that were set up to ensure freedom of navigation on the Rhine and Danube Rivers (which had been commercial backwaters since the Middle Ages), to special arrangements for the Suez and Panama Canals, to the founding of the International Telegraphic and Universal Postal Unions (1865 and 1874 respectively). In the spirit of the liberal economists, policies of tariff reduction gathered momentum (with conclusion of the Cobden-Chevalier Treaty in 1860 between France and Britain being the seminal event). Barriers between States were assiduously broken down in other ways as well. The late nineteenth century became an age of remarkable freedom of movement of peoples, with migration on a massive scale (passports were unnecessary for much of international travel in the nineteenth century). Capital too moved with great freedom, thanks to the linking of currencies through the gold standard. The period was, in short, a great age of globalization, with the world more closely integrated economically than it would be for many decades thereafter (and in some ways more so than today) (see Neff, 1990, pp 38–71).

The positivist era was also the period in which we first see the international community 'legislating' by way of multilateral treaties, for the most part in areas relating to armed conflict. The first major example of this was the Declaration of Paris of 1856. It restricted the capture of private property at sea, by providing that 'free ships make free goods' (ie, that enemy private property could not be captured on a neutral ship). It also announced the abolition of privateering. Within five years, it attracted over 40 ratifications. In 1868, the Declaration of St Petersburg contained a ban on exploding bullets. More importantly, it denounced total-war practices, by stating that the *only* permissible objective of war is the defeat of the enemy's armed forces. Alongside the law of war—and in some ways in close partnership to it— was the full flowering of the law of neutrality, which, for the first time, emerged in the full light of juridical respectability as a sort of counterpart to the unrestricted right of States to resort to war on purely political grounds.[19]

There was 'legislation' in other fields too. On the humanitarian front, the period witnessed a concerted effort by the nations of the world to put an end to slave trading. The culmination of this effort occurred in 1890, when the General Act of the Brussels Conference established an International Maritime Office (at Zanzibar) to act against slave trading. In the less-than-humanitarian sphere of imperialism, the major powers established, by multilateral treaty, the 'rules of the game' for the imperial partitioning of Africa. This took place at the Berlin Conference of 1884–85. (Contrary to the belief of some, that conference did not actually allocate any territories; it established the criteria by which the powers would recognize one another's claims.)

The culmination of nineteenth-century international legislation—and the arrival of parliamentary-style diplomacy and treaty-drafting—came with the two Hague Peace Conferences of 1899 and 1907. The first Conference drafted two major conventions: one on the laws of war and one on the establishment of a Permanent Court of Arbitration (which was actually a roster of experts prepared to act as judges on an ad hoc basis, and not a

[19] For the most magisterial exposition of this subject, see Kleen, 1898–1900.

standing court). The Second Hague Peace Conference, in 1907, was a much larger gathering than the earlier one (and hence less Europe-dominated). It produced 13 conventions on various topics, mostly on aspects of war and neutrality.[20]

Yet another major achievement of the nineteenth century was in the area of the peaceful settlement of disputes. Although it was widely agreed that fundamental security issues were not justiciable, the nineteenth century marked a great step forward in the practice of inter-State arbitration. The trend began with the Jay Treaty of 1794, in which the United States and Britain agreed to set up two arbitration commissions (comprising nationals of each country) to resolve a range of neutrality and property-seizure issues that had arisen in the preceding years. These were followed by a number of ad hoc inter-State arbitrations in the nineteenth century, of which the most famous, again between Britain and the United States, took place in 1871–72, for the settlement of a host of neutrality-related issues arising from the American Civil War.[21]

For all the impressiveness of these achievements, though, the state of the world was well short of utopian. Economic inequality grew steadily even as growth accelerated. The subjection of much of the world to the European imperial powers, together with the 'gunboat diplomacy' that sometimes followed in the wake of legal claims, stored up a strong reservoir of ill-will between the developed and the developing worlds. Nor did the Concert of Europe prove adequate, in the longer term, to the maintenance of international peace. The Franco-Prussian War of 1870–71 proved, all too dramatically, that war between major powers, on the continent of Europe, was far from unthinkable—and the steady advance in weapons technology and armaments stockpiles promised that future wars could be far more deadly than any in the past. In due course, the Great War of 1914–18 delivered—spectacularly—on that menacing promise.

VI. THE TWENTIETH AND TWENTY-FIRST CENTURIES (1919–)

Since much of this book will cover twentieth-century developments, no attempt will be made at comprehensive coverage here, particularly of the post-1945 period. But certain aspects of both the inter-war and the post-1945 periods which have received comparatively little attention so far will be emphasized.

A. THE INTER-WAR PERIOD

The carnage of the Great War of 1914–18 concentrated many minds, in addition to squandering many lives. Many persons now held that nothing short of a permanently existing organization dedicated to the maintenance of peace would suffice to prevent future ghastly wars. Their most prominent spokesman was American President Woodrow Wilson. The fruit of their labours was the establishment of the League of Nations, whose Covenant was set out in the Versailles Treaty of 1919. This new system of public order would be of an

[20] For an informative and lively account of these conferences, see Tuchman, 1966, pp 265–338.
[21] For a detailed and informative account, see Crook, 1975.

open, parliamentary, democratic character, in contrast to the discreet great-power dealings of the Concert of Europe. The League was, however, tainted from the outset by its close association with the Versailles peace settlement, an incubus which it never managed to shake off.

1. The League and its supplements

The League was a complex combination of conservatism and boldness. On the side of conservatism was the decision to make no fundamental change in the sovereign prerogatives of nation-States as these had developed up to that time. No attempt was made to establish the League as a world government, with sovereign powers *over* its member States. Nor did the Covenant of the League prohibit war. Instead, the resort to war was hedged about with procedural requirements—specifically that either a judicial or political dispute-settlement process must be exhausted before there could be war between League member States. On the side of boldness was the Covenant's provision for automatic enforcement action against any League member State resorting to war without observing the peaceful-settlement rules. This enforcement took the form of economic sanctions by all other League member States, a tactic inspired by the Allied blockade of Germany during the Great War. There was, however, no provision for military action against delinquent States.

In due course, two major initiatives supplemented the League's efforts to maintain peace. In 1928, the Pact of Paris was concluded, in which the States parties forswore any resort to war as a means of national policy. The practical effects of this initiative, however, were not impressive. For one thing, no sanctions were provided. It was also carefully understood by the signatories that self-defence action would be permitted—a potentially large loophole. The second initiative was the Stimson Doctrine of 1932, announced by the United States (and named for its Secretary of State at the time) in the wake of Japan's occupation of Manchuria. It held that any situation brought about by aggression would not be accorded legal recognition by the United States. Here too, the immediate material impact was not great; but it had some precedential value, since the UN General Assembly endorsed it as a general principle of international relations in 1970.

Only on one occasion was the sanctions provision of the Covenant invoked: against Italy for its invasion of Ethiopia in 1935–36. The sanctions failed to save Ethiopia, since the conquest was completed before they could have any serious effect. This failure led to a period of profound soul-searching amongst international lawyers as to what the role of law in the world should be.[22] It similarly led States into desperate searches for alternative sources of security to the League Covenant. A number of countries, such as Switzerland, Belgium, and the Scandinavian States, reverted to traditional neutrality policies. But there were also a number of imaginative proposals for informal, but coordinated, action by States against aggressors (eg, Cohn, 1939; Jessup, 1936). There was even a sort of return to ad hoc great-power management, in the form of a collective and coordinated non-intervention policy organized by the major powers at the outbreak of the Spanish Civil War in 1936. Unfortunately, this effort too was largely unsuccessful because of inadequate implementation and great-power rivalry (see Watters, 1970).

[22] See, notably, Niemeyer, 1940.

2. The achievements of the inter-war period

Although the League failed as a protector against aggressors, it would be far wrong to suppose that the inter-war period was a sterile time in international law generally. Precisely the opposite was the case. It was a time of ferment, experiment, and excitement unprecedented in the history of the discipline. A World Court (known formally, if optimistically, as the Permanent Court of International Justice) was established as a standing body, with its seat at the Hague in the Netherlands. It did not have compulsory jurisdiction over all disputes. But it decided several dozen cases, building up, for the first time, a substantial body of international judicial practice. These cases were supplemented by a large number of claims commissions and arbitrations, whose outpourings gave international lawyers a volume of case law far richer than anything that had ever existed before.

The codification of international law was one of the ambitious projects of the period. A conference was convened for that purpose by the League of Nations in 1930, but its fruits were decidedly modest (consisting mainly of clarifications of various issues relating to nationality). But there were further initiatives by the American States in a variety of fields. These included a convention on the rights and duties of States in 1933, which included what many lawyers regard as the canonical definition of a 'State' for legal purposes.[23] The American States also concluded conventions on maritime neutrality, civil wars, asylum, and extradition.

The inter-war period also witnessed the first multilateral initiatives on human rights. A number of bilateral conventions for the protection of minorities were concluded between various newly created States and the League of Nations. In the event, these proved not to be very effective; but they set the stage for later efforts to protect minority rights after 1945, as well as human rights generally. The principle of trusteeship of dependent territories was embodied in the mandates system, in which the ex-colonies of the defeated countries were to be administered by member States of the League. But this was to be a mission of stewardship—'a sacred trust of civilization'—under the oversight of the League. Finally, the League performed heroic labours for the relief of refugees, in the face of very great obstacles—in the process virtually creating what would become one of the most important components of the law of human rights.

It was a period also of innovative thinking about international law. That the doctrinaire positivism of the nineteenth century was far from dead was made apparent by the World Court in 1927, when it reaffirmed the consensual basis of international law, in the famous (or infamous) *Lotus* case.[24] But positivism also came under attack during this period, from several quarters. One set of attackers were the enthusiasts for collective security, as embodied in the League of Nations. The American scholar Quincy Wright was a notable exemplar. This group were sympathetic to the return of just-war ideas, with the Covenant's restrictions on the resort to war and the provision for collective aid to victims of unlawful war. Their single most notable contention was that neutrality must now be regarded as obsolete.

Within the positivist camp itself, a sweeping revision of nineteenth-century thought was advanced by writers of the Vienna School, led by Hans Kelsen. They discarded the State-centred, consent-based, pluralistic elements of nineteenth-century positivism, while

[23] See Craven, below, Ch 8. [24] *'Lotus', Judgment No 9, 1927, PCIJ, Ser A, No 10.*

retaining its general scientific outlook. The Vienna School then reconceived international law—and indeed the whole of law—as a grand, rationalistic, normative system.[25] The French lawyer Georges Scelle advanced a broadly similar vision, though with a sociological flavour, in contrast to the austere formalism of Kelsen.[26] There was even something of a revival of natural-law thought, most notably in the writing of the Austrian Alfred Verdross (who was something of a maverick member of the Vienna School).[27]

In short, the inter-war period did not bring an end to war or aggression. But it was the most vibrant and exciting era in the history of the discipline up to that time (and perhaps since).

B. AFTER 1945

In the immediate aftermath of the Second World War, international law entered upon a period of unprecedented confidence and prestige, for which 'euphoria' might not be too strong a word. International lawyers even found themselves in the (unaccustomed) role of heroic crusaders, with the dramatic prosecutions of German and Japanese leaders for crimes under international law at Nuremberg and Tokyo in the late 1940s (see generally Taylor, 1992; and Cryer and Boister, 2008). At the same time, great plans for the future were being laid.

1. Building a new world

The founding of the United Nations in 1945, to replace the defunct League of Nations, was a critical step in the creation of a new world order. With the UN came a new World Court (the International Court of Justice, or ICJ), though still without compulsory jurisdiction over States. The heart of the organization was the Security Council, where (it was hoped) the victorious powers from the Second World War would continue their wartime alliance in perpetuity as a collective bulwark against future aggressors. (It may be noted that 'United Nations' had been the official name for the wartime alliance.) The UN therefore marked something of a return to the old Concert of Europe approach. The special status of the five major powers (the principal victors in the Second World War, of course) was formally reflected in their possession of permanent seats on the Security Council, together with the power of veto over its decisions.

The UN Charter went further than the League Covenant in restricting violence. It did this by prohibiting not only war as such, but also 'the use of force' in general—thereby encompassing measures short of war, such as armed reprisals. An express exception was made for self-defence. Regarding action against aggressors, the UN was both bolder and more timid than the League had been. It was bolder in that the Charter provided not only for economic sanctions but also for armed action against aggressors. The UN Charter was more timid than the League, however, in that sanctions (whether economic or military) were not mandatory and automatic, as in the League Covenant. The Security Council—dominated by the major powers—was to decide on an ad hoc basis when, or whether, to

[25] On the Vienna School, see Kunz, 1934. For a clear and succinct account, see Friedmann, 1949, pp 105–117. See also Nijman, 2004, pp 149–192.

[26] See Scelle, 1932–34. See also Dupuy, 1990; Nijman, 2004, pp 192–242.

[27] See Verdross, 1927.

impose sanctions. The result was to make the UN a more overtly political body than the League had been.

Parallel to this security programme was another one for the promotion of global economic prosperity. The economic-integration effort of the nineteenth century, shattered by the Great War and by the Great Depression of the 1930s, was to be restructured and given institutional embodiments. The International Monetary Fund was founded to ensure currency stability, and the World Bank to protect and promote foreign investment and (in due course) economic development. Trade liberalization would be overseen by a body to be called the International Trade Organization (ITO).

In a host of other areas as well, the aftermath of World War II witnessed a huge increase in international cooperation. There scarcely seemed any walk of life that was not being energetically 'internationalized' after 1945—from monetary policy to civil aviation, from human rights to environmental protection, from atomic energy to economic development, from deep sea-bed mining to the exploration of outer space, from democracy and governance to transnational crime-fighting. The cumulative effect was to weld the States of the world in general—and international lawyers in particular—into a tighter global community than ever before. It is easy to understand that, amidst all this hubbub of activity, a certain triumphalist spirit could pervade the ranks of international lawyers.

The euphoric atmosphere proved, alas, to be very short-lived. Scarcely had the UN begun to function than it became paralysed by Cold-War rivalry between the major power blocs—with the notable exception of the action in Korea in 1950–53 (only made possible by an ill-advised Soviet boycott of the Security Council at the relevant time). Nor did the new World Court find much effective use in its early decades. The ITO never came into being (because of a loss of interest by the United States). Plans for the establishment of a permanent international criminal court were also quietly dropped. Nor did the UN Charter's general ban against force have much apparent effect, beyond a cruelly ironic one: of propelling self-defence from a comparative legal backwater into the very forefront of international legal consciousness. Since self-defence was now the only clearly lawful category of unilateral use of force, the UN era became littered with self-defence claims of varying degrees of credibility, from the obvious to the risible. In particular, actions that previously would have been unashamedly presented as reprisals now tended to be deftly re-labelled as self-defence.[28]

All was not gloom, though, by any stretch of the imagination. In non-political spheres, lawyers fared a great deal better, very much in the technocratic spirit of nineteenth-century positivism. The codification of international law, for example, made some major strides, in large part from the activity of a UN body of technical experts called the International Law Commission. The principal areas of law that received a high degree of codification included the law of the sea (with four related conventions on the subject in 1958, replaced in 1982 by a single, broader convention), diplomatic and consular relations (in the early 1960s), human rights (with two international covenants in 1966), and the law of treaties (in 1969).

At the same time, though, it was not so clear that the fundamentals of the subject had changed very much. The basic positivist outlook continued to have great staying power. Some of the most important political and intellectual upheavals of the twentieth century

[28] See Gray, below, Ch 21.

left strangely little mark on international law. Socialism, for example, far from being a major challenge to lawyers, was actually a conservative force. Socialist theorists tended to write more dogmatically in the positivist vein than their Western counterparts did, insisting with particular strength on the upholding of respect for State sovereignty (see Tunkin, 1974). Nor did the massive influx of developing States onto the world scene bring about any fundamental conceptual upheaval. For the most part, the developing countries readily accepted established ways, although they made some concrete contributions in specific areas. One was the establishment of self-determination as a fundamental, collective human right. Another was in the area of succession to treaties by newly independent States, with the States being given an option of choosing which colonial treaties to retain.

2. New challenges

Around the 1980s, a certain change of atmosphere in international law became evident, as something like the idealism of the early post-war years began, very cautiously, to return. There were a number of signs of this. One was a sharp upturn in the judicial business of the World Court. This included a number of cases of high political profile, from American policy in Central America to the Tehran hostages crisis to the Yugoslavian conflicts of the 1990s.[29] In the 1990s, the ITO project was revived, this time with success, in the form of the creation of the World Trade Organization (WTO), which gave a significant impetus to what soon became widely, if controversially, known as 'globalization'.[30] Human rights began to assume a higher profile, as a result of several factors, such as the global campaign against South African apartheid and the huge increase in activity of non-governmental organizations.[31] The end of the Cold War led to tangible hopes that the original vision of the UN as an effective collective-security agency might, at last, be realized. The expulsion of Iraq from Kuwait in 1991 lent strong support to this hope. Perhaps most remarkable of all was the rebirth of plans for an international criminal court, after a half-century of dormancy. A statute for a permanent International Criminal Court was drafted in 1998, entering into force in 2002 (with the first trial commencing in 2009).[32]

In this second round of optimism, there was less in the way of euphoria than there had been in the first one, and more of a feeling that international law might be entering an age of new—and dangerous—challenge. International lawyers were now promising, or threatening, to bring international norms to bear upon States in an increasingly intrusive manner. A striking demonstration of this occurred in 1994, when the UN Security Council authorized the use of force to overthrow an unconstitutional government in Haiti. In 1999, the UN Security Council acquiesced in (although it did not actually authorize) a humanitarian intervention in Kosovo by a coalition of Western powers. It was far from clear how the world would respond to this new-found activism—in particular, whether the world would really be content to entrust its security, in perpetuity, to a Concert-of-Europe style directorate of major powers.

International legal claims were being asserted on a wide range of other fronts as well, and frequently in controversial ways and generally with results that were unwelcome to some. For example, lawyers who pressed for self-determination rights for various minority groups and indigenous peoples were accused of encouraging secession

[29] See Thirlway, below, Ch 20.
[30] See Loibl, below, Ch 24.
[31] See Steiner, below, Ch 26.
[32] See Cryer, below, Ch 25.

movements. Some human-rights lawyers were loudly demanding changes in the traditional practices of non-Western peoples. And newly found (or newly rejuvenated) concerns over democracy, governance, and corruption posed, potentially, a large threat to governments all over the world. Some environmental lawyers were insisting that, in the interest of protecting a fragile planet, countries should deliberately curb economic growth. (But which countries? And by how much?) Economic globalization also became intensely controversial, as the IMF's policy of 'surveillance' (a somewhat ominous term to some) became increasingly detailed and intrusive, and as 'structural adjustment' was seen to have potentially far-reaching consequences in volatile societies. Fears were also increasingly voiced that the globalization process was bringing an increase in economic inequality.

VII. CONCLUSION

How well these new challenges will be met remains to be seen. At the beginning of the twenty-first century, it is hard to see the UN 'failing' in the way that the League of Nations did and being completely wound up. No one foresees a reversion to the rudimentary ways of Herodotus's silent traders. But it is not impossible to foresee nationalist or populist backlashes within various countries against what is seen to be excessive international activism and against the élitist, technocratic culture of international law and organization. If there is one lesson that the history of international law teaches, it is that the world at large—the 'outside world' if you will—has done far more to mould international law than *vice versa*. By the beginning of the twenty-first century, international lawyers were changing the world to a greater extent than they ever had before. But it is (or should be) sobering to think that the great forces of history—religious, economic, political, psychological, scientific—have never before been successfully 'managed' or tamed. And only a rash gambler would wager that success was now at hand. Perhaps the most interesting chapters of our history remain to be written.

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